



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. 2676/2015*, **, ***

<i>Communication submitted by:</i>	Andrey Tsukanov, not represented by counsel
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	19 May 2015 (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 12 November 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	18 March 2021
<i>Subject matter:</i>	Sanction for participating in a peaceful assembly
<i>Procedural issues:</i>	Incompatibility with the Covenant; exhaustion of domestic remedies; non-substantiation of the claims
<i>Substantive issues:</i>	Freedom of expression; freedom of assembly; fair trial guarantees
<i>Articles of the Covenant:</i>	14 (3) (d) and (e), 19 and 21
<i>Articles of the Optional Protocol:</i>	2, 3 and 5

1. The author of the communication is Andrey Tsukanov, a national of Kazakhstan born in 1982. He claims that the State party has violated his rights under articles 14 (3) (d) and (e), 19 and 21 of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is not represented by counsel.

Facts as submitted by the author

2.1 The author is a journalist and has been repeatedly subjected to beatings, arrests and fines for his professional work, political views and participation in peaceful protests. On 7

* Adopted by the Committee at its 131st session (1–26 March 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** An individual opinion by Committee member Gentian Zyberi (partly dissenting) is annexed to the present Views.



July 2014, he was contacted by a group of women who wished to protest against police interference with their business activities. The author went to cover the protest on behalf of a local television channel. He arrived at the site of the protest at around 10 p.m., interviewed several of the participants and then filmed the protest. Soon after, several police vehicles arrived at the scene and police officers started detaining participants and taking their identification documents. As the author kept filming, he was approached by several police officers who demanded that he show his ID and delete the video recording. As the author refused, the officers took away his camera, damaging it in the process, twisted his arms behind his back and escorted him, along with several protesters, to a police station.

2.2 The author notes that there were no violations of public order or conflicts during the protest. He was charged with an administrative offence under article 355 (2) of the Code of Administrative Offences (refusal to obey lawful orders of a law enforcement officer). According to the author, since 2013 the State party has often sanctioned participants of peaceful protests with offences like hooliganism, violation of traffic regulations, or refusal to obey lawful orders of the police, in order to prevent them from submitting further individual complaints to the Committee under articles 19 and 21 of the Covenant. The detained individuals were released from custody a few hours later; however, the author's ID and video camera were unlawfully confiscated by the police. Since he sustained some injuries during his arrest, on the day after his release, the author underwent a medical examination, which confirmed that he had received bruises to his face and shoulder upon arrest.

2.3 On 11 July 2014, the Specialized Inter-District Administrative Court of Almaty found the author guilty of refusal to obey lawful orders of the police and sentenced him to 15 days of administrative arrest. According to the author, the court was not impartial as the judge ignored his arguments and the fact that he was a journalist covering a protest. The court also did not allow defence witnesses to testify during the hearing, even though all witnesses called by the prosecutor were allowed to do so.

2.4 On an unspecified date, the author appealed the decision to the Almaty City Court, arguing that the decision of the first-instance court violated, among others, his right to freedom of expression and right to peaceful assembly. The Almaty City Court rejected his appeal on 17 July 2014.

2.5 On 8 August 2014, the author filed a request for a supervisory review to the Almaty city Prosecutor's Office, which was denied on 25 August 2014. On an unspecified date, he submitted a request for a supervisory review to the Office of the Prosecutor General, which was denied by the Deputy Prosecutor General on 11 November 2014.

2.6 On 8 and 9 July 2014, respectively, the author filed complaints against unlawful actions of the police officers during the protest to the Almalinsky District Prosecutor's Office and to the Internal Investigations Directorate of the Department of Internal Affairs of Almaty. In the complaints, he stated that he was subjected to an unlawful arrest, beating and strangling by the police officers and that his video camera sustained damage. The Almalinsky District Prosecutor's Office forwarded the author's complaint to the Internal Investigations Directorate of the Department of Internal Affairs of Almaty. On 23 November 2014, the latter refused to initiate an investigation into the actions of the police officers owing to lack of corpus delicti.

Complaint

3.1 The author claims that the actions of the police violated his rights under articles 19 and 21 of the Covenant. He notes that he was covering a peaceful protest as a journalist; however, the police did not want the video footage of the protest and the subsequent arrests to be aired on television, and for that reason, they arrested him, damaged his camera and deleted all video recordings.

3.2 The author also claims that the State party violated his rights under article 14 (3) (d) and (e) of the Covenant because the trial court refused to allow mass media to attend the hearing, ignored his legal arguments and did not allow defence witnesses to testify in court, even though all witnesses called by the prosecutor were able to do so.

3.3 The author requests that the Committee oblige the State party to: bring to justice those who are responsible for the violation of his rights; take measures that would lift the existing restrictions on the freedom of expression, right of peaceful assembly and right to fair trial in the legislation of Kazakhstan contrary to articles 19, 21 and 14 of the Covenant, respectively; and ensure that conducting peaceful protests does not entail unwarranted interference by authorities or persecution of organizers and participants.

State party's observations on admissibility

4.1 In a note verbale dated 28 December 2015, the State party submitted its observations on admissibility. It notes that at 10.10 p.m. on 7 July 2014, an Almaty city police patrol car saw a group of people on Abylaikhan-Tole-bi street who were occupying part of the road and creating an accident-prone situation. They refused to obey the police officers' demand to clear the road, while the author, who was within the group, obstructed the passing traffic. The author was arrested after he refused to obey lawful orders of the police and caused light bodily injuries to one of the officers, which was confirmed by a medical examination on 8 July 2014.

4.2 The State party argues that the communication is incompatible with the provisions of the Covenant and therefore inadmissible under article 3 of the Optional Protocol. It notes that the Committee is not generally in a position to review decisions regarding the administrative, civil or criminal responsibility of individuals, nor can it review the question of innocence or guilt.

4.3 The State party notes that while asking for remedies in his communication, the author requests that those responsible for the violation of his rights be brought to justice. The State party refers to the Committee's Views in *H.C.M.A. v. Netherlands*, in which it was held that the Covenant does not provide for the right to see another person criminally prosecuted.¹ In the State party's view, this makes the communication incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol. Similarly, the State party argues that the remaining remedies requested by the author are also incompatible with the provisions of the Covenant. According to the State party, the remedies requested are not only incompatible with the provisions of the Covenant, but also require the Committee to exceed its competencies and to amend domestic laws of the State party, thus interfering in the internal affairs of a sovereign State.

4.4 The State party also submits that the author has failed to substantiate how the domestic legislation violates his rights under articles 14, 19 and 21 of the Covenant. The State party refers to the Committee's Views in *E.Z. v. Kazakhstan*, in which the Committee found the communication inadmissible because the author had not substantiated his claims under article 14.² The State party argues that the author was provided with all of the rights and means of defence to achieve a fair trial.

4.5 The State party notes that the author was sanctioned not for participating in the protest but rather for refusal to obey lawful orders of the police. Since he was obstructing the passing traffic and did not move away when asked by the police, his actions at that moment posed a threat to public safety. The author not only failed to obey lawful orders of the police, but also bit the finger of officer O., which was later qualified as a light bodily injury by a medical examination. Therefore, the State party argues that the author's claims do not fall under the protection of articles 19 and 21, and should be inadmissible in accordance with article 3 of the Optional Protocol, rule 96 (d) of the rules of procedure and the Committee's jurisprudence.

4.6 Finally, the State party challenges the admissibility of the communication owing to non-exhaustion of the available domestic legal remedies. The State party notes that after the author's request for a supervisory review was rejected by the Deputy Prosecutor General of Kazakhstan on 11 November 2014, he was entitled to a request for a supervisory review addressed to the Prosecutor General. The State party refers to the Committee's Views in *T.K. v. France*, in which the Committee held that mere doubts about the effectiveness of domestic remedies do not absolve an author from pursuing them. The State party gives an example of a domestic case, *Filatova and Kuzmintsev*, where the *akimat* of Almaty had unlawfully

¹ *H.C.M.A. v. Netherlands* (CCPR/C/35/D/213/1986), para. 11.6.

² *E.Z. v. Kazakhstan* (CCPR/C/113/D/2021/2010), para. 7.5.

denied permission for two individuals to carry out a hunger strike in their apartment. A request for a supervisory review to the General Prosecutor resulted in a new court decision in favour of the defendants and full restoration of their rights and freedoms. Therefore, the State party argues that the author's communication should be inadmissible in accordance with articles 2 and 5 of the Optional Protocol, rule 96 (f) of the rules of procedure and the Committee's jurisprudence.

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

5.1 In a letter dated 31 January 2016, the author submitted his comments to the State party's observations on admissibility. He maintains that his rights under article 14 (d) and (e), 19 and 21 of the Covenant were violated. He reiterates that he was charged with refusal to obey lawful orders of a law enforcement officer in order to prevent him from complaining further to the United Nations. He argues that his actions did not cause any threat to public safety, that he did not bite anyone or that he did not obstruct passing traffic. He was at the scene as a journalist, carried a valid press ID and had a video camera in his hands.

5.2 With regard to the exhaustion of domestic remedies, he notes that a request to the Prosecutor General for a supervisory review cannot be considered an effective remedy. In *Filatova and Kuzmintsev*, mentioned by the State party in its submission, Filatova's rights have not been restored and she has not been paid legal costs. The new ruling by a domestic court did not provide for a mechanism to restore the plaintiffs' rights. In addition, the *akimat* of Almaty city refused to pay moral and material damages to the plaintiffs, or to punish the employee responsible for the unlawful ban on a hunger strike by the plaintiffs in the case. Therefore, the author submits that the State party's use of the above-mentioned case as an example is inappropriate.

State party's observations on the merits

6.1 In a note verbale dated 19 May 2016, the State party submitted its observations on the merits of the communication. It reiterates that the author's claims are unsubstantiated and have been thoroughly examined by the domestic courts.

6.2 With regard to the author's claim of a violation of his rights under article 14 of the Covenant, the State party submits that the author's claim that the first instance court supported the prosecution's position and ignored his arguments are not substantiated with any facts. According to the State party, in his communication the author notes that the judge of the first instance court followed only the Constitution and domestic laws, which, the State party emphasizes, proves that the judicial proceedings were lawful since a court in any democratic country must follow the country's Constitution and laws. The State party notes that the ruling of the Specialized Inter-District Administrative Court of Almaty was based on testimony of several witnesses and the decision contains references to that testimony.

6.3 The State party further notes that the author's claim of a violation of his rights under articles 19 and 21 of the Covenant, and the allegations that he has been subjected to sanctions and beatings for his professional work and political views, are not substantiated. The State party argues that since in his communication the author states that by carrying out a spontaneous protest he and other participants wanted to demonstrate to mass media how the police obstructs their activities, he cannot claim that he was exercising his right to peaceful assembly or freedom of expression. It also points to a contradiction in the author's communication, as on one occasion the author submits that he was approached by a group of women, after which he decided to film the protest, while later he claims that he received an assignment from the editors of television channel A24 to cover the protest.

6.4 The State party asserts that while at the protest, the author refused to show his ID to a police officer who was wearing a uniform and who showed his own ID. Moreover, he became aggressive towards the police officer injuring him and damaging his uniform. The State party suggests that if the author was covering the protest as a journalist, as a law-obedient citizen, he should have obeyed the lawful orders of the police and shown his ID. Therefore, it considers that the author's actions were of unlawful and provocative character and did not have anything to do with his work as a journalist.

6.5 The State party disputes the author's description of the events that led to his arrest on 7 July 2014 and notes that his allegations have been disproved during the court hearing by the testimony of police officers and other witnesses, which are reflected in the court decision. It maintains that the police did not prevent the author from doing his work as a journalist, did not damage or confiscate his video camera or used violence against him. The State party notes that both the Almalinsky District Prosecutor's Office and the Internal Investigations Directorate of the Department of Internal Affairs of Almaty have examined the author's allegations and determined that there was no violation of law by the police.

6.6 According to the State party, the author is trying to falsely present his administrative violation as a restriction of his rights under articles 19 and 21 of the Covenant. It submits that with his actions during the protest, the author violated public order. At the same time, the Covenant allows for a restriction of the rights protected under articles 19 and 21, if they are imposed to protect public order.

6.7 The State party notes that sanctioning the author for his actions under article 355 (2) of the Code of Administrative Offences was the least restrictive and proportionate measure considering the gravity of the crime committed by him. Causing bodily injury to a police officer could have been classified as violence against a government official, which carries a sentence of up to 5 years in prison under article 321 (1) of the Criminal Code.

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

7.1 In a letter dated 4 August 2020, the author responded to the State party's observations on the merits of the communication. The author notes that in accordance with the normative decision No. 1 of the Supreme Court dated 10 July 2008, on the application of international agreements in Kazakhstan, the courts, when necessary, must use provisions of the Covenant to ensure the State party's compliance with its obligations under the agreement. In practice, neither courts nor government officials use provisions of the Covenant or other international documents that regulate peaceful assemblies, despite the fact that the Constitution establishes supremacy of international norms over domestic law. The author notes that journalists are not subjects of peaceful assemblies but are rather observers whose role is to disseminate information of public interest. Thus, authorities must guarantee journalists access to any public event instead of causing obstructions to their professional work. The author notes that according to article 35 of the Code of Administrative Offences, if a person commits an administrative violation in self-defence, he or she is exempt from liability. He argues that it was the police who were the aggressors and he was using his right to self-defence to protect his freedom and his property. Therefore, the author considers that the domestic courts have not thoroughly examined all circumstances of his case and wrongfully found him guilty of using force against the police who in fact were the aggressors.

7.2 The author further notes that according to article 20 of the Law on Mass Media, irrespective of how he received information about the protest of 7 July 2014, he had a right to cover the event. In accordance with the said article, a journalist has a right to seek, request, receive and impart information; to carry out audio, video and photo recording, except in cases prohibited by the law; and to attend peaceful assemblies and other forms of public events when carrying a valid press ID.

7.3 With regard to the State party's argument that citizens must obey lawful orders of the police, the author notes that any restriction on the rights protected by article 19 of the Covenant must be provided by law and must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. They should never be used to silence those who defend multiparty-based democracy, democratic principles and human rights. According to the author, journalists are often subjected to such restrictions, threats and aggression for their professional work; therefore, any such allegations must be thoroughly and promptly investigated and those responsible must be punished in accordance with the law.

7.4 The author rejects the State party's affirmation that sanctioning him under article 355 (2) of the Code of Administrative Offences constituted the least restrictive and proportionate measure considering the gravity of the crime committed. He notes that violation of article 355 (2) can

be sanctioned with a fine or an administrative arrest of up to 15 days. Therefore, the courts have handed the author the maximum sentence allowed by the domestic law. According to the author, his sentence shows the State party's intention to silence and intimidate those who practise free thinking, so that everyone submits to the authoritarian rule.

State party's additional observations on the merits

8.1 In a note verbale dated 6 October 2020, the State party submitted additional observations on the merits. It submits that article 14 of the Covenant is fully reflected in the Constitution of Kazakhstan, which guarantees equality of everyone before courts and the law. The State party argues that the author was afforded all rights and legal means for a fair trial, including the right to defence and to invite his own witnesses. This is evidenced by the fact that the judge of the Specialized Inter-District Administrative Court of Almaty, at the author's request, included in the hearing record the written testimony of three witnesses, which was retained in the court decision.

8.2 The State party notes that article 20 of the Law on Mass Media provides journalists with a right to attend protests and demonstrations and other events at which public and individual interests are expressed, but only when carrying a valid press ID. However, during the trial it was established that during the events of 7 July 2014, the author refused to produce any identification documents when asked by a uniformed police officer on duty. Moreover, he ignored the police officer's request and continued to behave aggressively, causing an injury to the officer and damaging his uniform. The State party reiterates that it considers that the author's actions were of unlawful and provocative character and were not related to his work as a journalist.

8.3 The State party further notes that public events are regulated in all countries, including in Kazakhstan. Article 19 (2) of the Covenant guarantees freedom of expression, which includes the freedom to seek, receive and impart information. At the same time, paragraph 3 allows for certain restrictions as provided by law and necessary for respect of the rights and reputation of others and for the protection of national security or of public order or of public health or morals. Similarly, article 21 of the Covenant includes the right to a peaceful assembly, which cannot be restricted unless imposed in conformity with the law and necessary in a democratic society, in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. The State party submits that the provisions of article 19 and 21 of the Covenant are fully reflected in the domestic legislation of Kazakhstan. The right to peaceful assembly is guaranteed by article 32 of the Constitution, and restrictions may only be placed on that right in the interests of national security, public order, the protection of public health or the protection of the rights and freedoms of others.

8.4 The State party notes that in accordance with article 9 of the Law on the procedure for organizing and holding peaceful assemblies, meetings, marches, pickets and demonstrations, persons who violate the law bear responsibility under the law. The State party also notes that the European Commission for Democracy through Law has agreed with the Constitutional Court of the Russian Federation that the latter's Law on gatherings, meetings, demonstrations, marches and protests could leave some discretion to the executive authorities.³ The State party therefore concludes that its regulation of peaceful assemblies is in line with international law and practice of other democratic countries.

8.5 Finally, the State party submits that on 6 June 2020, a new law on organizing and holding peaceful assemblies will enter into force in Kazakhstan, which provides for a simplified notification procedure. In accordance with articles 10 and 11 of the new law, organizers of peaceful assemblies will have to submit a notification, in electronic or paper format, five working days before the event. It will be processed within three days. If no response is received within three days, organizers may proceed with their events. For demonstrations and marches, organizers will still need to obtain permissions, for which

³ European Commission for Democracy through Law, Opinion No. 659/2011 of 20 March 2012, para. 25.

applications must be submitted to local authorities at least 10 working days before events, and permission must be issued within 7 working days.

Issues and proceedings before the Committee

Consideration of admissibility

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

9.2 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.

9.3 The Committee takes note of the State party's argument that the remedies requested by the author require the Committee to exceed its competencies and to amend domestic laws of the State party, thus interfering in the internal affairs of a sovereign State, which makes the communication incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol. In addition, the State party argues that the author's actions were of an unlawful and provocative nature, and that therefore, he could not claim that he was exercising his right to peaceful assembly or freedom of expression. However, the Committee points out that under the procedure established by the Optional Protocol, when it finds violations of the Covenant, it is competent to determine the reparation measures that the State party should take in order to remedy the harm caused and prevent future violations. Thus, there is nothing to prevent the authors of communications from requesting or proposing measures of redress, although the Committee is not bound by any such requests.⁴ Furthermore, the Committee considers that the determination of whether the author can claim protection of his right to peaceful assembly or freedom of expression owing to the nature of his actions is closely related to the merits of the case. The Committee therefore considers that it is not precluded under article 3 of the Optional Protocol from examining the communication.

9.4 The Committee takes note of the State party's argument that the author has failed to file a request for supervisory review to the Prosecutor General. The Committee recalls its jurisprudence, according to which a request for supervisory review to a prosecutor's office requesting a review of court decisions that have taken effect – a request that is dependent on the discretionary power of the prosecutor – does not constitute a remedy that must be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.⁵ In the present case, the Committee also takes note of the State party's reference to a case in which a request to the Office of the Prosecutor General resulted in a submission of protest by the Prosecutor General to the Supreme Court and a subsequent finding that the *akimat* of Almaty had unlawfully denied permission for two individuals to carry out a hunger strike in their apartment. The Committee further takes note of the author's claim that, on an unknown date, he petitioned the Office of the Prosecutor General for a supervisory review of his administrative case. The request was denied, however, by a Deputy Prosecutor General on 11 November 2014. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

9.5 Before considering the author's claim under article 14 (3) (e), the Committee must first decide whether the sanctions in the author's case concerned "any criminal charge" within the meaning of the Covenant. In this regard, the Committee recalls that, in its jurisprudence,⁶ the Committee has referred to paragraph 15 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it referred to sanctions for acts that are criminal in nature that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity. In the present case, the

⁴ *Delgado Burgoa v. Bolivia* (CCPR/C/122/D/2628/2015), para. 10.3.

⁵ *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3; and *Poplavny and Sudalenko v. Belarus* (CCPR/C/118/D/2139/2012), para. 7.3.

⁶ *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), paras. 7.3–7.4.

author was punished for an administrative offence and sanctioned with 15 days' administrative arrest. The Committee considers that such a penalty had the aims of sanctioning the author for his actions and serving as a deterrent for future similar offences – objectives analogous to the general goal of the criminal law.⁷ The Committee therefore finds that the author's claims fall under the protection of article 14 of the Covenant.

9.6 The Committee notes the author's claim that the State party violated his rights under article 14 (3) (d) of the Covenant. It observes, from the information in the file, that the author was represented by a lawyer during all court proceedings. Accordingly, 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.

9.7 The Committee considers that the author has sufficiently substantiated his remaining claims raising issues under articles 14 (3) (e), 19 and 21 of the Covenant for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

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

10.2 The Committee notes the author's claim that he was sentenced to 15 days of administrative arrest for having performed his work as a journalist during a protest on 7 July 2014 in Almaty. The Committee also takes note of the State party's submission that the author was sanctioned not for covering the protest as a journalist but for refusing to obey lawful orders of the police. Although the author disputes that he refused to obey lawful orders of the police and submits that he only refused to produce his identification documents and to delete video recordings of the protest, the Committee finds it unnecessary to evaluate these factual allegations, because the author's claims can be decided on the assumption that the challenged restrictions were motivated by concern for public safety and public order as submitted by the State party.

10.3 The Committee first has to consider whether the restrictions imposed on the author's freedom to impart information and ideas are justified under any of the criteria set out in article 19 (3) of the Covenant. The Committee recalls in this respect, its general comment No. 34 (2011), in which it stated, inter alia, that freedom of expression is indispensable for any society and a foundation stone for every free and democratic society.⁸ It notes that article 19 (3) allows restrictions on the freedom of expression, including the freedom to impart information and ideas, only to the extent that they are provided by law and only if they are necessary for respect of the rights or reputations of others; or for the protection of national security or of public order, or of public health or morals. Finally, any restriction on the freedom of expression must not be overbroad in nature, that is, it must be the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest whose protection is sought.⁹

10.4 The Committee observes that the State party has to explain whether, in the present case, the author's arrest was a necessary and proportionate restriction on his rights. The Committee notes that the author's allegation that according to article 20 of the Law on Mass Media of the State party, a journalist has a right to seek, request, receive and impart information; to carry out audio, video and photo recording, except in cases prohibited by the law; and to attend peaceful assemblies and other forms of public events when carrying a valid press ID (para. 7.2). However, it also notes that the State party argues that the author refused to produce any identification documents when asked by a uniformed police officer on duty. This fact was not refuted by the author. In the light of the fact that the protest in question was held spontaneously at around 10 p.m., it does not seem to be unreasonable for police officers to request that the author show his ID card in the context of maintaining public safety and

⁷ *Volchek v. Belarus* (CCPR/C/129/D/2337/2014), para. 6.5.

⁸ Human Rights Committee general comment No. 34 (2011), para. 2.

⁹ *Ibid.*, para. 34.

order and for purposes of ascertaining his status as a journalist. In this respect, a request by police officers to the author to show his ID may be deemed necessary. On the other hand, the State party fails to explain why the confiscation of his camera, the deletion of video recordings and, above all, 15 days of administration arrest of the author were necessary for the maintenance of public safety and order. The Committee considers that, in the circumstances of the case, the limitations on the author, although imposed on the basis of domestic law, were not shown to be both justified and proportionate pursuant to the conditions set out in article 19 (3) of the Covenant. It therefore concludes that the author's rights under article 19 (2) of the Covenant have been violated.¹⁰

10.5 With regard to the author's claim under article 21, the Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for public expression of an individual's views and opinions and is indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly, including a stationary assembly (such as a picket) in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience, and no restriction to this right is permissible, unless it is imposed in conformity with the law; and is necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under an obligation to justify the limitation of the right protected by article 21 of the Covenant.¹¹

10.6 In the present case, the Committee notes the disagreement between the parties as to whether or not the author attended the protest as a journalist or as a participant. However, even if it is accepted that the author actively participated in an unauthorized protest, the Committee considers in this respect that the State party, which treated the author as a participant, has failed to demonstrate that the restrictions imposed on the author's rights, namely, the 15 days administrative arrest for taking part in a spontaneous and peaceful assembly held on 7 July 2014, were proportionate and necessary in the interest of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The Committee observes that the State party submits in its observations on admissibility of the communication that the author's alleged actions – obstructing traffic and refusal to produce identification documents – caused threat to public safety (para. 4.5). In its observations on the merits of the communication, the State party argues that with his actions, the author violated public order (para. 6.6). The Committee recalls that for the protection of “public safety” to be invoked as a ground for restrictions on the right of peaceful assembly, it must be established that the assembly creates a real and significant risk to the safety of persons (to life or security of person) or a similar risk of serious damage to property. In this regard, the Committee notes that the scale or nature of peaceful assemblies can sometimes cause disruption, for example of vehicular or pedestrian movement; however, such disruptions or risks must be managed within the framework of the Covenant. Similarly, States parties should not rely on a vague definition of “public order” to justify overbroad restrictions on the right of peaceful assembly, despite the fact that peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of tolerance. Furthermore, the prohibition of “public disorder” in domestic law should not be used unduly to restrict peaceful assemblies.¹² In the present case, the State party has not provided the Committee with any information to support the claim that the author's actions created a risk to the life or safety of persons or to property, except to submit that he was obstructing passing traffic. In these circumstances and in the absence of any additional information, the Committee finds the State party has not met the onus to justify the

¹⁰ *Tikhonov v. Kazakhstan* (CCPR/C/130/D/2551/2015), para. 10.4.

¹¹ Human Rights Committee, general comment No. 37 (2020), para. 55. See also *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.

¹² Human Rights Committee, general comment No. 37, paras. 43–44.

restrictions on the author's rights under article 21. Accordingly, it concludes that the author's rights under article 21 of the Covenant have been violated.

10.7 The Committee notes the author's claim that he was unable to call any witnesses in his defence, contrary to article 14 (3) (e) of the Covenant. The author submits that, at the same time, all the witnesses put forward by the prosecution were able to provide their testimony in court. From the materials provided by the author, the Committee observes that despite the author's request to call several witnesses who were present at the scene on 7 July 2014, the first instance court judge refused to allow them to testify because they were among owners of flats who attended the protest and thus, they would not be objective in their testimony. However, the judge allowed their written testimonies, taken earlier by the police, to be included in the court records of the hearing. The Committee also notes the State party's submission that the author was afforded all rights and legal means for a fair trial, including right to defence and to invite his own witnesses since the judge of the Specialized Inter-District Administrative Court of Almaty, at the author's request, allowed written testimonies of three witnesses to be read into the court records.

10.8 The Committee recalls its general comment No. 32, according to which article 14 (3) (e) guarantees the right of the accused person to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. While this right is not unlimited, it includes a right to have witnesses admitted that are relevant for the defence.¹³ The Committee considers that a State party cannot discharge this obligation merely by stating that witness statements were read into a hearing protocol. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.¹⁴ In these circumstances, the Committee finds that the author's rights under article 14 (3) (e) of the Covenant have been violated.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under articles 14 (3) (e), 19 (2) and 21 of the Covenant.

12. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author and the victims with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide the author with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, in particular by reviewing its national legislation and the implementation thereof in order to make it compatible with its obligations to adopt measures able to give effect to the rights recognized by articles 19 and 21 of the Covenant.

13. 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.

¹³ *Saidov v. Tajikistan* (CCPR/C/122/D/2680/2015), para. 9.6.

¹⁴ Human Rights Committee, general comment No. 32, para. 39.

Annex

Individual opinion of Committee member Gentian Zyberi (partially dissenting)

1. While I agree with the Committee that there has been a violation of articles 19 and 21 of the Covenant in the present case, I do not agree that there has been a violation of article 14 (3) (e).

2. As the author explains, he was charged with an administrative offence under article 355 (2) of the Code of Administrative Offences for refusal to obey lawful orders of a law enforcement officer (para. 2.2). The Specialized Inter-District Administrative Court of Almaty found the author guilty of refusal to obey lawful orders of the police and sentenced him to 15 days of administrative arrest. The author claims that the court did not allow defence witnesses to testify during the hearing, while all witnesses called by the prosecutor were allowed to do so (para. 2.3). The State party responds that the ruling of the Specialized Inter-District Administrative Court of Almaty was based on the testimony of several witnesses and the decision contains references to that testimony (para. 6.2). According to the State party, the judge of the court, at the author's request, included in the hearing record the written testimony of three witnesses, which was retained in the court decision (para. 8.1).

3. As noted by the Committee, and accepted by the author and the State party, while all witnesses put forward by the prosecution were able to provide their testimony in court, only the written testimony of three witnesses for the author, taken earlier by the police, was included in the court records of the hearing (para. 10.7). Therefore, at issue here is whether the decision by the Specialized Inter-District Administrative Court of Almaty not to allow witnesses for the author to appear in person to give evidence, despite the author's request to that effect, constitutes a violation of article 14 (3) (e).

Admissibility

4. In its reasoning concerning admissibility of claims under article 14 (3) (e), the Committee refers to its decision in *Volchek v. Belarus*.¹ However, the paragraph cited by the Committee concerns the admissibility of claims under article 9 (3) aimed at protecting the liberty and security of the person and not under article 14 (3) aimed at ensuring a number of fair trial guarantees in criminal proceedings (para. 6.5). Moreover, in that same case, the Committee found a similarly phrased claim for a violation of article 14 as insufficiently substantiated and inadmissible (para. 6.6).² First, I have my doubts about applying a broad analogy of fair trial guarantees from criminal trials in a mutatis mutandis manner to the context of administrative proceedings. Furthermore, as far as I am concerned, the author has not substantiated the admissibility of his claim under article 14 (3) (e), because that claim is framed as an absolute right to have his witnesses heard by the court, while raising this in the context of administrative proceedings. I would have agreed that the author's claim was admissible, if he had shown the prejudice or disadvantage caused to him because the witnesses he wanted to be heard could not directly testify in court, or if he was prevented from questioning the witnesses for the public prosecutor.

Merits

5. In assessing whether there has been a violation, the next step of the Committee departs from its usual approach. The Committee's established position is that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that

¹ *Volchek v. Belarus* (CCPR/C/129/D/2337/2014).

² The author's claim in this case concerned a lack of independence of the court and its assessment of evidence in his case, namely the fact that the court decision was based solely on the statements of the two arresting officers.

the court failed in its duty of independence and impartiality.³ In paragraph 34 of its general comment No. 32, the Committee stated that it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it. In this case, the Committee, sitting as a fourth instance, found that a State party could not discharge its obligation to have witnesses admitted that were relevant for the defence by merely stating that witness statements had been read into a hearing protocol, as this goes against the principle of equality of arms (para. 10.8). The case cited by the Committee as a basis for supporting this broad finding bears little if any similarity with the case at hand, the former being a criminal case concerning extremely serious criminal charges and serious violations of the right to a fair trial under article 14,⁴ whereas the case at hand concerns administrative proceedings. Importantly, the Committee does not explicitly state whether this purported violation was an instance of arbitrariness, denial of justice or biased courts.

6. In my view, on the basis of the information before us in the present case, the author has failed to demonstrate that the alleged “bias” or “lack of equality of arms” reached the threshold for arbitrariness in the evaluation of the evidence, or amounted to a denial of justice. The Committee should have found the claim under article 14 (3) (e) as not sufficiently substantiated, or alternatively that there was no violation of article 14 (3) (e).

³ Human Rights Committee, general comment No. 32 (2007), para. 26.

⁴ *Saidov v. Tajikistan* (CCPR/C/122/D/2680/2015).