



# 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. 2688/2015\*, \*\*

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| <i>Communication submitted by:</i>        | Bakhytzhan Toregozhina (not represented by counsel)   |
| <i>Alleged victim:</i>                    | The author  |
| <i>State party:</i>                       | Kazakhstan  |
| <i>Date of communication:</i>             | 13 December 2013 (initial submission)   |
| <i>Document references:</i>               | Decisions taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 2 November 2015, and rule 93 of the Committee's rules of procedure, transmitted to the State party on 24 November 2015 (not issued in document form) |
| <i>Date of adoption of Views:</i>         | 25 March 2021   |
| <i>Subject matter:</i>                    | Preventing the author from expressing her views by laying flowers in front of a monument  |
| <i>Procedural issues:</i>                 | Exhaustion of domestic remedies; lack of substantiation   |
| <i>Substantive issues:</i>                | Right to a fair trial; right to freedom of expression   |
| <i>Articles of the Covenant:</i>          | 14 (1)–(2) and (3) (e) and 19   |
| <i>Articles of the Optional Protocol:</i> | 2–3 and 5 (2) (b)   |

1.1 The author of the communication is Bakhytzhan Toregozhina, a national of Kazakhstan born in 1962. She claims that the State party has violated her rights under articles 14 (1)–(2) and (3) (e) and 19 of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is not represented by counsel.

1.2 On 16 March 2016, pursuant to rule 93 (1) of its rules of procedure, 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.

\* 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: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobayah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



**Facts as presented by the author**

2.1 The author submits that 16 December is Kazakhstan independence day and one of the main national holidays in the country, a day when numerous cultural and political events and rallies are held. On that day in 2011, oil workers from the city of Zhanaozen gathered in a square in order to reclaim their rights, which they said were being violated by the authorities. The authorities dispersed the demonstration by force, using weapons and live ammunition against peaceful protesters, and some of the participants were injured and some were killed.

2.2 The author was deeply moved by these events. She adds that she leads the non-governmental organization Ar.Rukh.Khak, which defends human rights and freedoms. The author is also a member of a Facebook group concerned about the Government's use of live ammunition against protesters and she decided to organize a commemoration for the victims. The group planned to place flowers and hold a minute of silence in numerous locations throughout Kazakhstan. The author filed a request for permission to conduct this public event.

2.3 On 20 November 2012, the author received a response from the mayor indicating that she was not required to ask permission to place flowers at independence monuments on 16 December 2012. She also received another letter from the police department of the city of Almaty, dated 13 December 2012, informing her that her request had been reviewed and that there would be additional security measures on that day to prevent "violations of the public order". The author started a campaign on social media to invite social activists to come and commemorate the deceased victims of the Zhanaozen protests.

2.4 At around 11 a.m. on 15 December 2012, as the author was leaving her home, she was detained by the police. She subsequently learned that her actions were interpreted as organizing a demonstration. She was brought before a court on the same day and convicted of an administrative violation under article 373 (3)<sup>1</sup> of the Code of Administrative Offences of Kazakhstan and, as a result, she was sentenced to 15 days of administrative arrest. The author submits that she had received permission and had notified the authorities of her intention to place flowers in front of a monument. However, she was arrested before she was able to do so. The author submits that she was not planning to organize a demonstration, only to lay flowers in front of a monument in a public place.

2.5 The author submits that her conviction was based on the written statement of a witness, S.S., who stated that she saw the author distributing leaflets calling everyone to come to a demonstration. The author denied ever distributing anything. Since the witness statement was simply read into the record, without the witness being present, the author could not cross-examine or challenge the statement. The author maintains that the court concluded that she was guilty well before the hearing and that it pronounced the verdict without studying the evidence and without leaving the courtroom to conduct deliberations.

2.6 The author appealed the verdict before the Almaty city court, claiming, inter alia, that her rights under articles 14 and 19 of the Covenant had been violated by the court of first instance. The author argued that she had received permission to hold the event and that she had not called for a public demonstration. Moreover, she complained that, while in detention, she was held in extremely cold cells, the "sanitary requirements" were not observed and the food was of a very low quality. The court rejected her appeal on 21 December 2012, stating that the author had only been permitted to lay flowers and had been warned to keep to the declared purpose of the event.

2.7 The author maintains that those participating in the event she was organizing had complied with the terms of the permission granted by the mayor – in other words, to place flowers in front of the independence monument between noon and 1 p.m. on 16 December 2012 and observe a moment of silence. Nevertheless, the court convicted her of organizing an unauthorized demonstration. The court came to this conclusion based on fabricated evidence. The author requested a review of the verdict to the Office of the Prosecutor General of Kazakhstan, which rejected her complaint on 7 February 2013. The author contends that she has exhausted all available and effective domestic remedies.

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<sup>1</sup> According to the author, article 373 (3) of the Code reads as follows: "Violation of order on organizing and holding of peaceful gatherings, meetings, protests, pickets and demonstrations".

## Complaint

3.1 The author claims that the State party has violated her right to a fair hearing by an independent tribunal, protected under article 14 (1) of the Covenant. The author also claims that in her case the presumption of innocence, guaranteed by article 14 (2) of the Covenant, has been violated, because the court had predetermined the outcome of the case, convicted her without listening to her arguments to the end and pronounced a decision without even leaving the courtroom to conduct deliberations. She argues that her rights under article 14 (3) (e) have also been violated, because the person who testified against her was not invited to the trial and the author did not therefore have a chance to question her.

3.2 The author maintains that when she was detained she was not committing any unlawful actions, that neither the police nor the courts provided any justification for limiting her freedom of expression and that the above constitute a violation of her rights under article 19. She notes that the courts, in their decisions, made no mention of the provisions of the Covenant.

## State party's observations on admissibility

4.1 On 22 January 2016, the State party challenged the admissibility of the communication. Although the author was allowed to lay flowers on 16 December 2012, she started inviting other people, through the Internet, to participate in an unauthorized activity. The municipal police of Almaty received a statement from S.S. claiming that she had seen the author handing out leaflets inviting people to participate in the event.

4.2 A communication submitted to the Committee can be considered as inadmissible if the claims do not fall under the purview of the Covenant. The author submits that her rights under article 14 of the Covenant were violated but does not specify which rights. Moreover, the author has failed to substantiate, for the purposes of admissibility, her claims under articles 14 and 19 of the Covenant. As it transpires from the Committee's established jurisprudence,<sup>2</sup> there have been cases in which the Committee has concluded that an author's claims under article 14 (1) and (3) (d)–(e) were not sufficiently substantiated, and the cases were considered inadmissible.

4.3 The State party argues that the author has failed to exhaust all available domestic remedies. It notes that its legislation provides for the possibility of supervisory review of judgments in administrative cases: the Prosecutor General or his or her deputies must file a request for such a review with the Supreme Court. The State party submits that the judicial acts mentioned in the communication have not been challenged before the Supreme Court. The author did file a complaint to the prosecutor's office but the response she received was issued by the deputy Prosecutor General. She therefore has the right to petition the Prosecutor General himself for additional review. "Mere doubts" about the ineffectiveness of a remedy does not absolve the author from exhausting that remedy.<sup>3</sup> The State party reports that action has been taken by the supervisory review court, such as its decisions of 29 April 2015. The supervisory panel of the Supreme Court has also decided to consider as unlawful the decision issued by the Almaty city court on 14 March 2014 and the decision of the court of cassation of 20 May 2014. In the latter decision, the Supreme Court stated that the hunger strike that had been organized by two persons in their apartment was not unlawful and had asked the mayor of Almaty to remedy the violations that had occurred. The State party considers that the communication is inadmissible under article 5 (2) (b) of the Optional Protocol for the non-exhaustion of available domestic remedies.

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

5.1 In her comments of 1 February 2016, the author submits that the event held on 16 December 2012 to lay flowers in front of a monument, for which she had received permission, was planned as a peaceful action. However, she was arrested well before the event had started and the authorities claimed that she was planning to hold an unauthorized event without any

<sup>2</sup> The State party refers to *E.Z. v. Kazakhstan* (CCPR/C/113/D/2021/2010).

<sup>3</sup> The State party refers to *T.K. v. France*, communication No. 220/1987.

evidence. The author was sentenced to 15 days of administrative arrest. Meanwhile, friends of the author were able to lay flowers that day without any problems.

5.2 The State party insists that permission is required to hold public events. The author refers to the Committee's jurisprudence, according to which such a requirement violates the Covenant.<sup>4</sup> In its response, the State party fails to explain why it is refusing to implement obligations that it has adopted and that are based on international human rights standards.

5.3 The mayor of Almaty restricts the right to hold peaceful assemblies. For example, government agencies are allowed to hold official events in the Square of the Republic but non-governmental organizations are asked to hold their events at the square behind the "Sary-Arka" cinema. The courts always support the Government's position and do not engage in analysis according to international human rights law.

5.4 The State party's argument that the author could have filed additional appeals to the Office of the Prosecutor General is equally unpersuasive. The fact is, and the jurisprudence of the Committee confirms this, that appeals made to that office are ineffective. The author has nevertheless filed supervisory review appeals both to the prosecutor's office in Almaty and to the Office of the Prosecutor General of Kazakhstan; both requests have been rejected. The author requests the Committee to consider her complaint as admissible and find violations of the relevant articles.

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

6.1 In its observations of 19 July 2016, the State party reiterates its previously stated position. The author was charged and convicted of an administrative offence and sentenced to 15 days of administrative arrest. While the author requested permission from the authorities to lay flowers, she invited others, using the Internet, to participate in an unauthorized event. Some of the messages she disseminated read as follows: "Please come to the Square of the Republic in Almaty at noon on 16 December."; "We remember the heroes of Zheltoksan, we remember those who died in Zhanaozen."; "Do you have ideas for how to mobilize people for the event?"; "Moreover, a witness, S.S., submitted a written statement according to which she observed the author handing out leaflets that invited people to participate in the event on 16 December 2012.

6.2 The State party submits that such public events require that the organizers file a request for permission. Such requests must be filed with the local authorities no later than 10 days before the actual event. In their request, the organizers must indicate the purpose, the time, the place, the number of participants, the names of the organizers and the names of those responsible for security during the event. The author, however, failed to file such a request and her actions were correctly deemed a violation of article 373 (3) of the Code of Administrative Offences, which regulates the holding and organization of public events.

6.3 Furthermore, the State party submits that the author failed to substantiate her claims under article 14 of the Covenant. It is clear from the records that the State party provided her with all the rights as foreseen by the laws and regulations. The courts correctly decided that there was no need to summon the witness, S.S., to testify in court.

6.4 The author further failed to substantiate her claims under articles 19 and 21 of the Covenant. The regulations in place, such as the 10-day rule for requesting authorization to hold a public event, protect the public order, including the life and health of the organizers and those participating in the planned event. The local authorities have adopted more than 200 regulations that identify more than 500 locations for such events and more than 340 routes for peaceful demonstrations. If it is impossible, for various reasons, to hold an event at the requested date and time, the local authorities offer alternative solutions.

6.5 Article 19 of the Covenant also provides for permissible restrictions. The State party submits that it has studied the practice of several other countries and has found that the restrictions on public events in some countries are more stringent than in Kazakhstan. In the city of New York, for example, it is necessary to request permission 45 days before the planned event, and to indicate the exact itinerary of the event. The city authorities have the

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<sup>4</sup> The author refers to *Toregozhina v. Kazakhstan* (CCPR/C/112/D/2137/2012).

right to move the location of the event, if the requested location is not acceptable. Other authorities, such as those of Sweden, have a blacklist of previously banned organizations. In France, the local authorities have the right to prohibit any demonstrations and in the United Kingdom of Great Britain and Northern Ireland the authorities have the right to introduce temporary bans and street events are allowed only after receiving permission from the police. In Germany, any “mass event, meeting, or a demonstration” inside or outside must be permitted by authorities. At its meeting on 16 and 17 March 2012, the European Commission for Democracy through Law (Venice Commission) agreed that “certain issues” on regulating public events must be left to the discretion of local authorities.

6.6 The State party therefore submits that it has adopted laws and regulations regarding peaceful assemblies that are consistent with international standards and the practices of other countries. Its citizens exercise the right of peaceful assembly freely and widely. During the period from 2012 to 2015, 130 public events were held on various social, economic and political issues. The author was prosecuted not for expressing her opinion, but for organizing an illegal demonstration, for which she did not obtain permission. The State party requests the Committee to find the communication inadmissible and unsubstantiated pursuant to articles 2–3 and 5 of the Optional Protocol.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

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

7.3 The Committee takes note of the State party’s claim that the author failed to exhaust domestic remedies by not availing herself of the remaining possibility of the supervisory review before the Supreme Court and the possibility of revision of judicial decisions. The Committee recalls its jurisprudence, according to which a petition to a prosecutor’s office requesting a review of court decisions that have entered into force depends on the discretionary power of a prosecutor and constitutes an extraordinary remedy. The State party must therefore show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.<sup>5</sup> The Committee notes that the author lodged petitions for supervisory review of her administrative detention to the prosecutor’s office in Almaty and to the Office of the Prosecutor General of Kazakhstan and that those petitions were dismissed. The Committee considers that the State party has not sufficiently demonstrated that further supervisory review appeals to prosecutorial authorities would have been an effective remedy in the author’s case. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication.

7.4 The Committee takes note of the author’s claims under article 14 (1)–(2) and 3 (e) of the Covenant that the State party has violated her right to a fair hearing by an independent tribunal, her right to be presumed innocent and her right to examine, or have examined, the witnesses against her and to obtain the attendance and examination of witnesses on her behalf under the same conditions as witnesses against her. However, the Committee considers that the author has not sufficiently substantiated those claims for the purposes of admissibility and, based on the submissions from the parties, the author failed to bring her claims under articles 14 (1)–(2) and 3 (e) in her appeal before the Almaty city court. The Committee considers therefore that these claims are inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

<sup>5</sup> *Suleymenova v. Kazakhstan* (CCPR/C/126/D/2416/2014), para. 8.3; *Toregozhina v. Kazakhstan* (CCPR/C/126/D/2311/2013), para. 7.3; and *Insenova v. Kazakhstan* (CCPR/C/126/D/2542/2015-CCPR/C/126/D/2543/2015), para. 8.3.

7.5 The Committee takes note of the State party's submission that the communication is inadmissible under article 3 of the Optional Protocol, since the author failed to substantiate sufficiently her claims under article 19 of the Covenant. In the absence of any other material before it, however, the Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, her claim of a violation of article 19 of the Covenant. Accordingly, it declares that part of the communication admissible and proceeds with its consideration of the merits.

*Consideration of the merits*

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

8.2 The Committee notes the author's claim that her arrest and subsequent 15-day administrative detention amounted to a restriction of her right to impart information and ideas that is incompatible with article 19 (3) of the Covenant. The Committee also notes the author's claims that such a restriction cannot be considered lawful for the purposes of the Covenant owing to the fact that the courts never explained why she had been arrested and prevented from laying flowers in front of the monument. The Committee further notes the State party's claims that the sanctions were imposed in accordance with municipal regulations and that the provisions of its laws on public events are compatible with article 19 (3) of the Covenant. The Committee must therefore determine whether the author's administrative arrest, which constituted a restriction on the author's right to freedom of expression, can be justified under article 19 (3) of the Covenant.

8.3 The Committee refers to paragraph 2 of its general comment No. 34 (2011), in which it stated that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society. According to article 19 (3) of the Covenant, freedom of expression can be subject to certain restrictions but only those which are provided by law and are necessary for: (a) respect of the rights or reputations of others; and (b) the protection of national security or of public order or of public health or morals.<sup>6</sup> All restrictions imposed on freedom of expression must be "provided by law", they may only be imposed for one of the grounds set out in article 19 (3) and they must conform to the strict tests of necessity and proportionality. The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.<sup>7</sup> When a State party invokes a legitimate ground for restricting freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat to any of the enumerated grounds listed in article 19 (3) that has caused it to restrict freedom of expression, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>8</sup>

8.4 The Committee notes that, while claiming in a general manner that the restrictions on the freedom of expression authorized by its laws are consistent with the wording of article 19 (3) of the Covenant, and that the sanctions imposed on the author were provided by national law, the State party has not advanced any arguments as to the compatibility of the legal provisions, which served as a basis for restricting the author's freedom of expression, with the criteria of necessity and proportionality set out in article 19 (3) of the Covenant.<sup>9</sup> Nor does the State party explain how these criteria were taken into account by the administrative and judicial authorities in the case at hand. Therefore, the Committee finds that the State party has failed to justify that the author's 15-day administrative detention was necessary and proportionate to the legitimate aim pursued, as set out in article 19 (3) of the Covenant. The Committee concludes that the author's rights under article 19 of the Covenant have been violated.

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<sup>6</sup> See also general comment No. 34 (2011), paras. 28–29.

<sup>7</sup> Ibid., para. 34, quoting from general comment No. 27 (1999), para. 14.

<sup>8</sup> General comment No. 34 (2011), paras. 35–36.

<sup>9</sup> See also *Mavlonov and Sa'di v. Uzbekistan* (CCPR/C/95/D/1334/2004), para. 8.4.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under article 19 of the Covenant.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide the author with adequate compensation, including reimbursement for any legal costs incurred by her. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective 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.

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