United Nations CCPR/C/130/D/2551/2015

International Covenant on Civil and Political Rights

Distr.: General
19 April 2021

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2551/2015*, **, ***

Communication submitted by:	Dmitriy Vladimirovich Tikhonov (represented by the non-governmental organization Ar.Rukh.Khak)
Alleged victim:	The author
State party:	Kazakhstan
Date of communication:	2 September 2014 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 23 January 2015 (not issued in document form)
Date of adoption of Views:	5 November 2020
Subject matter:	Right of peaceful assembly and freedom of expression
Procedural issues:	Non-exhaustion of domestic remedies; insufficient substantiation of claims
Substantive issues:	Right of peaceful assembly; freedom of expression; right to a fair trial
Articles of the Covenant:	14 (3) (d) and (g), 19 (2) and 21
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication, dated 2 September 2014, is Dmitriy Vladimirovich Tikhonov, a national of Kazakhstan, born on 12 June 1987. He claims to be a victim of violation by Kazakhstan of his rights under articles 14 (3) (d) and (g), 19 (2) and 21 of the Covenant. The first Optional Protocol to the Covenant entered into force for Kazakhstan on 30 June 2009. The author is represented by the non-governmental organization Ar.Rukh.Khak.

* Adopted by the Committee at its 130th session (12 October–6 November 2020).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Duncan Laki Muhumuza, David Moore, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja and Gentian Zyberi.

*** An individual opinion (partly concurring, partly dissenting) by Committee member Christof Heyns is annexed to the present Views.

Facts as submitted by the author

2.1 The author is a journalist on the Internet newspaper *Civil Defence* (*Grazhdanskaya Oborona*). On 15 February 2014, in his capacity as a journalist, the author was requested by the editor of the newspaper to report on a spontaneous peaceful demonstration in front of the national parliament building. When he was stopped by the police, he showed his journalist identification document and the police let him go. After the demonstration was over, the police came to the author's home and took him to the specialized interdistrict administrative court of Almaty.

2.2 On the same day (15 February 2014), the specialized interdistrict administrative court of Almaty found the author guilty of an administrative offence under article 373 (1) of the Code of Administrative Offences for a violation of the Law on the Organization and Conduct of Peaceful Assemblies, Meetings, Processions, Gatherings and Demonstrations (Assembly Law) and imposed a fine of 5,556 tenge (around 24 euros). The Court did not take into account that the author was carrying out his professional activities at the demonstration and that he did not join the protest.

2.3 On 24 February 2014, the author submitted an appeal to the judicial college on civil and administrative matters of the Almaty city court, relying on article 21 of the Covenant. His appeal was rejected on 4 March 2014.

2.4 On 31 March 2014, the author submitted a request for revision of the trial court decision to the City Prosecutor of Almaty, although he did not consider such an appeal as representing an effective remedy. His request for revision was rejected on 11 April 2014.[1] On 5 May 2014, the author requested the Office of the Prosecutor General of Kazakhstan to submit a request for a supervisory review of the trial court decision, which was rejected on 17 July 2014. The author claims to have exhausted all available domestic remedies.

2.5 The same matter has not been and is not being examined under another procedure of international investigation or settlement.

Complaint

3.1 The author claims to be a victim of violation by the State party of his rights under articles 19 (2) and 21 of the Covenant due to the sanctions imposed on him as he was carrying out his professional duties as a journalist reporting on a peaceful protest. He submits that the restriction of his right to freedom of expression and the right of peaceful assembly was neither lawful nor necessary.

3.2 The author further claims that his rights under article 14 (3) (d) of the Covenant were violated because the explanations he presented to the Court were refuted. He could not be represented by a legal counsel during the proceedings concerning his administrative offence and the trial. Furthermore, his representatives, supporters and other journalists were denied access to the hearing at the first instance court, although it was otherwise public. He claims a violation of article 14 (3) (g) of the Covenant because the court treated him as a person who had breached the law, forcing him to make statements against his interests and disregarding the fact that he was carrying out his professional duties in covering the protest.

3.3 The author requests the Committee to recommend that the State party (a) bring to justice those responsible for the alleged violations; (b) compensate him for the moral and material damage caused to him (in the amount of the fine imposed on him and the legal costs incurred); (c) adopt measures to eliminate the existing limitations to freedom of expression and to stop persecuting journalists for carrying out their professional duties; (d) review the legislation limiting the exercise of the right to peaceful assembly; (e) prevent violations of the right to a fair trial under article 14 (3) (d) and (g) of the Covenant; and (f) urge the State party to guarantee that peaceful protests are not followed by unjustified interference by State authorities and prosecution of the participants.

[1] The City Prosecutor indicated that in administrative cases, there is no possibility to appeal to the Supreme Court based on a request for review.

State party's observations on admissibility and the merits

4.1 On 24 April 2015, the State party submitted its observations on admissibility and the merits of the communication.

4.2 The State party claims that on 15 February 2014, between 2 p.m. and 3 p.m., the author took part with others in an unauthorized assembly, held in the centre of Almaty, to protest against the devaluation of the national currency, the tenge. The participants obstructed the traffic and called on passers-by to join them. During the meeting, the author shouted out: "To the nation. Long live Kazakhstan. Freedom of expression. Freedom of movement." The police informed the participants that the assembly was not authorized, however they refused to put an end to the protest.

4.3 On 15 February 2014, a protocol on the commission of an administrative offence by the author, under article 373 (1) of the Code of Administrative Offences was established, based on information provided by the author and other participants of the assembly. On the same date, the administrative court of Almaty found the author liable for an administrative offence due to a breach of article 373 of the Code and sentenced him to a fine of 5,556 tenge. When the protocol on the commission of an administrative offence was issued and during his trial, the author did not ask to be represented by a legal counsel, nor did he request that his representatives or supporters be given access to observe the trial. The author appealed the decision of the administrative court of Almaty, which was upheld by the Almaty municipal court on 4 March 2014. In accordance with article 674 (2) of the Code of Administrative Offences, the author requested that the City Prosecutor of Almaty or the Prosecutor General of Kazakhstan review his sentence for an administrative offence. His requests were rejected without a supervisory appeal being issued.

4.4 The State party submits that the author's communication should be considered inadmissible as manifestly unfounded or without merits. It asserts that the author took part in an unauthorized political protest on Dostyk Prospect and Satpaeva Street, as established by the evidence and not contested by the author. In the author's view, he did not violate any norms as the assembly was peaceful and spontaneous, but the organizers did not obtain authorization from the Mayor's office. The author maintained that the assembly did not threaten national or public security, claiming that he participated in a meeting out of professional interest, since he was a journalist on the Internet newspaper *Civil Defence* and planned to provide coverage of the event. In addition, the author claims to have realized his rights to peaceful assembly and freedom of expression, as guaranteed by international law and the laws of Kazakhstan.

4.5 The State party argues that the right to freedom of expression and the right of peaceful assembly impose special duties and responsibilities, as foreseen in articles 19 (3) and 21 of the Covenant. Both rights may be subject to restrictions that are in conformity with the law and are 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. Article 32 of the Constitution sets out the right of peaceful assembly and the restrictions thereon. Assembly Law No. 2126 of 17 March 1995 requires that a peaceful assembly be authorized by the local executive organs. Those who carry out an assembly without authorization are held liable for an offence (part 9 of the Law).

4.6 The State party recalls that peaceful assembly is not prohibited and that political assemblies in public places are guaranteed. However, they cannot violate the permissible restrictions and the rights of others. The State party also refers to the economic losses suffered in recent years by many Western European countries as a result of the holding of peaceful assemblies in their societies, which have obstructed manufacturing, transport etc. Since the organizers did not obtain the appropriate authorization from the local authorities to carry out an assembly on 15 February 2014, the author's participation was considered unlawful and the assembly was in fact perceived as posing risks to freedom of movement, the functioning of infrastructure and public order. In that context, the author and other participants were not prohibited from assembling, but were held accountable, as they did not meet the obligations and responsibilities for organizing a peaceful assembly. The police managed to detect such violations at the outset of the protest, thus limiting major damage.

4.7 In order to secure peaceful coexistence, civil and political assemblies organized by private actors should be held in specifically designated and adapted areas, as foreseen under article 10 of the Assembly Law. Such a requirement does not contravene any obligations under international law. The specific places for assemblies are designated and published by the local authorities in the respective parts of Kazakhstan. In order to liberalize the relevant legislation, the Prosecutor General has undertaken a study of the laws and practices governing the right to peaceful assembly in several countries. One of the findings is that in most developed countries, freedom of assembly is governed by the constitution or ordinary laws setting out the relevant conditions. In some countries, the legislative or policy requirements for organizing a demonstration or procession are much stricter than in Kazakhstan. For example, in New York in order to organize a procession an application must be submitted 45 days in advance indicating its route. The authorities have the right to change the place of assembly if the proposed location is not deemed suitable. Other requirements include a longer period for consideration of applications in large cities (United States of America); the existence of blacklists of organizers or previously banned or dissolved demonstrations (Sweden); the right to prohibit any demonstrations at the discretion of the local authorities (France); the practice of temporary moratoriums and allowing for public assemblies only after authorization has been granted by the authorities (United Kingdom of Great Britain and Northern Ireland and Germany). The State party holds that the right to peaceful assembly has been effectively guaranteed in its national legislation, which is in line with international law and the practices of other countries with developed systems of democracy.

4.8 The form and organization of assemblies to express views and opinions are regulated by the Assembly Law. Pursuant to its article 2, the application should be submitted to the municipal executive authority. Based on the evidence in the present case, the Almaty city office did not issue a permit for the assembly of 15 February 2014 and a corresponding application from organizers of the assembly was not received. The author's allegations that he did not commit an offence by participating in an unauthorized assembly was subject to a repeated review by the first and appeals instances, which dismissed the claims as unfounded. The author has been held accountable not for expressing his opinion, but for violating the law governing the organization and conduct of a privately organized political assembly, in the course of which he expressed his opinion.

4.9 The allegations of a violation of the author's right to a fair trial, because he was not represented by legal counsel and his representatives and observers were not allowed to participate during his court trial, were also examined and dismissed as unfounded. The State party argues that during both the administrative and judicial procedures, the author was informed about his right to be legally represented but did not avail himself of this right (art. 584 of the Code of Administrative Offences). This is a fact that was not contested in the review of his case by the higher instance court. Moreover, the participation of a lawyer was not mandatory during the proceedings concerning the author's administrative offence (article 589 of the Code). In addition, requests for the participation of representatives or observers in court proceedings can be made by the participants in the administrative procedure concerning the administrative offence in question. However, the court files do not contain any requests addressed to the court for the participation of representatives, observers or journalists during the author's trial. No evidence to support the author's claims in that regard has been submitted.

4.10 As regards the arguments of unlawful arrest of the author and other participants in the protest by the police, the State party considers such allegations as unfounded, submitting that all the participants were treated in accordance with order No. 665 on the rules of pursuing security during public meetings, issued by the Ministry of the Interior on 6 December 2000. Since the participants had infringed public order by committing an administrative offence, they were subject to administrative detention (articles 618 and 69 of the Code of Administrative Offences) in order to prevent unlawful participation in an unauthorized assembly and procession. The State party recalls that the court found the participants guilty of an administrative offence. As the Code of Administrative Offences takes precedence over an order of the Minister, the detention of the participants was considered lawful. In addition, the author was not detained at the assembly but only afterwards. The State party states that its laws do not enable spontaneous meeting or gathering, refuting the allegation that the author was covering the events as journalist. The procedure for organizing and hosting a peaceful assembly is governed by the Assembly Law, including the liability for infringement

of its provisions in article 373 of the Code. In accordance with the Law on Mass Information (art. 20 (4)), journalists do have a right to attend events and public meetings during which opinions or protests are expressed. However, the author was not merely monitoring an unauthorized political assembly but took an active part in it, shouting slogans.

4.11 In conclusion, the State party submits that the communication is inadmissible since the author has not exhausted all available domestic remedies. As stated in the decision of the Deputy Prosecutor General, the author could request a supervisory review of the final court decision by the Prosecutor General of Kazakhstan. The State party holds that the law enforcement and judicial authorities fulfilled their obligations under the Covenant when determining the administrative liability of the author. The present communication should therefore be considered inadmissible, owing to a lack of substantiation and non-exhaustion of available remedies, or without merit.

Author's comments on the State party's observations

5.1 On 6 August 2015, the author submitted that he considered the State party's observations as misleading, in view of the fact that he did not actively participate in an unauthorized assembly but was present during the meeting as a journalist.

5.2 Together with other journalists, the author stood apart from the main gathering, did not take part in the protest and was not shouting any slogans, as evidenced by his own video filming of the entire event and operational filming by the law enforcement authorities. The absence of any fault is also evidenced by the fact that following his unlawful detention, the police could not establish the author's unlawful behaviour when reviewing the operational filming, which is why he was released. However, he was detained again later and found guilty of an administrative offence owing to his participation in an unauthorized assembly. As regards the State party's assertion that the requirements of the Assembly Law were explained by the police to the participants of the unauthorized assembly, who did not interrupt the protest as requested, the author claims that none of the journalists standing by received any warnings or clarifications from the police. That can be demonstrated by video recordings made at the event on closed-circuit television and by other journalists.

5.3 The State party bases its argument of the author's liability on the fact that he was found guilty by the administrative court of Almaty on 15 February 2014 of an administrative offence under article 373 (1) of the Code of Administrative Offences and sanctioned by a fine of 5,556 tenge. That argument cannot be taken into account as the author appealed both his sentence and the sanction to a higher court.

5.4 The author also argues that the State party's allegations, according to which he did not request in writing to be represented by legal counsel during the administrative proceedings or to allow for his representatives or observers to attend his court trial are not credible as he and other detainees were informed only generally about the possibility of making written and other requests, without being clearly notified of the right to be legally represented. Since the court proceedings were held outside working hours, as requested by the police, legal counsel could not be appointed and was not able to participate. During the process, the author presented motions and arguments that were ignored by the court and his right to a fair trial was thus violated. The author also objects to the State party's assertion that his fault had been proven by his statements and other evidence reflected in the protocol on the commission of an administrative offence of 15 February 2014. During the trial, the prosecutor did not present any evidence as to the active participation of the author in the "unauthorized meeting and procession" and hence his fault was not established. Moreover, the court ignored the author's request to review the video coverage of the assembly, which would have proved that he was not involved in the alleged offence. The court equally ignored the author's request to take into account a copy of his journalist's pass, which was attached to the protocol on his detention, as well as the instruction from the author's employer to monitor and report on the assembly. It shows that the court did not fully assess all the documents on file, in violation of article 20 (4) of the Law on Mass Information, which guarantees press freedom, including the freedom to seek and obtain information on the ground.

5.5 Furthermore, the argument that the author did not cover the events in question and took an active part in the protest is not valid, as evidenced by the coverage of the assembly, which is available on the website of the organization that sent him to report on the meeting.

5.6 The author argues that the right to peaceful assembly and the right to freedom of expression are guaranteed by article 32 of the Constitution of Kazakhstan and articles 19 and 21 of the Covenant. Their enjoyment can be restricted in accordance with the law and when necessary. However, the applicable restrictions on freedom of expression have not been justified or explained, nor have the State party's authorities clarified how they assessed that the meeting had turned into a procession that had to be dissolved. The use of force and the detention of participants have violated both domestic and international law.

5.7 The author considers unfounded the State party's arguments of non-exhaustion of available domestic remedies, since the request for a supervisory review by the Prosecutor General does not appear to be effective in Kazakhstan. Moreover, the author submitted applications to the City Prosecutor of Almaty and brought them to the attention of the Prosecutor General.[2] The fact that the latter application was answered by the Deputy Prosecutor General means that it did represent the position of the Office of the Prosecutor General. In that context, all available domestic remedies have been exhausted. The author also considers that the State party is not interested in considering the substance of the alleged violations of the author's rights under articles 21, 19 (2) and 14 of the Covenant.

5.8 The author finally submits, in support of his claims, the Committee's decision in *Toregozhina v. Kazakhstan*,[3] in which it dealt with similar claims and made recommendations that were not implemented. The Office of the Prosecutor General has not undertaken any review or other remedial measures in that case. One of the recommendations of the Committee was to prevent similar violations in the future and to review the State party's legislation, in particular the Assembly Law, so that individuals could enjoy their rights under articles 19 and 21 of the Covenant. Unfortunately, the State party has not reviewed the Assembly Law and continues to violate the right to peaceful assembly, including the aggressive policy of arrests and fines of the organizers of and participants in such assemblies, journalists and passers-by. In that regard, the author recommends that the State party adopt a new law on peaceful assembly, which would remove article 10 of the current Assembly Law.

Additional observations by the State party

6.1 On 8 January 2016, the State party reiterated its observations of 24 April 2015, arguing that the author was sentenced by a court for an administrative offence owing to a violation of article 373 (1) of the Code of Administrative Offences, based on witness testimonies and video recordings. The ground for the author's administrative liability was not the fact that he had exercised his freedom of expression or his role as a journalist, but that he had participated in an unlawful procession, which was not authorized.

6.2 The State party also argues that the Committee cannot review the findings of the national authorities concerning the administrative or criminal liability of individuals and that the author has not sufficiently substantiated the allegations of a violation of his right to a fair trial under article 14 of the Covenant. Those claims should therefore be declared inadmissible.[4]

6.3 Based on the response of the Deputy Prosecutor General, the author could have also applied to the Prosecutor General to submit a request to the Supreme Court for a supervisory review of the final court decision. The author has therefore failed to exhaust all available domestic remedies, without substantiating why the request for supervisory review should be deemed ineffective. The State party recalls that the author's doubts about the effectiveness of domestic remedies do not absolve the author from the duty to exhaust them.[5]

[2] Copies of the submissions have been attached.

[3] See *Toregozhina v. Kazakhstan* (CCPR/C/112/D/2137/2012).

[4] See *E.Z. v. Kazakhstan* (CCPR/C/113/D/2021/2010).

[5] See Human Rights Committee, *T.K. v. France*, communication No. 220/1987.

6.4 In conclusion, the State party reiterates its request that this communication be considered inadmissible or without merit.

Author's further comments

7.1 On 31 January 2016, the author submitted again that he took part in a spontaneous peaceful assembly on 15 February 2014 as a journalist, at the request of his editor, and that his right to participate in a peaceful assembly is guaranteed by article 21 of the Covenant.

7.2 The author considers himself an independent journalist who follows the assemblies and protests of the opposition. He has been repeatedly detained administratively during such events, following which journalists and other participants have been administratively sanctioned. The author's sentence for an administrative offence under article 373 of the Code of Administrative Offences amounts to a violation of the author's press freedoms and of his rights to freedom of expression and to peaceful assembly. He recalls the Committee's decision in *Toregozhina v. Kazakhstan* and considers the State party's references to other decisions of the Committee as misleading.

State party's further submission

8. On 28 March 2016, the State party indicated, among other things, that the dissolution of the unlawful assembly of 15 February 2014 was justified by the risks posed to public security and the rights of others. It also contests the author's allegations that the available domestic remedies have been exhausted, since the last response received was signed by the Office of the Prosecutor General. The State party recalls its request that this communication be considered inadmissible or without merit.

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

9.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[6] The Committee notes that the State party has contested the admissibility of the communication owing to non-exhaustion of available domestic remedies because the author has not applied to the Prosecutor General to request a supervisory review of the final decision by the Supreme Court. The Committee recalls its jurisprudence, according to which a petition for a supervisory review to a prosecutor's office that is dependent on the discretionary power of the prosecutor, requesting a review of court decisions that have taken effect, does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[7] In the present case, the Committee notes the author's argument that the request for a supervisory review by the Prosecutor General was not effective and that the author has already submitted applications for review to the City Prosecutor of Almaty, which rejected his application while stating that in administrative cases there is no possibility to appeal to the Supreme Court based on a request

[6] *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4, and *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5.

[7] See *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; *Poplavny and Sudalenko v. Belarus* (CCPR/C/118/D/2139/2012), para. 7.3; and *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), para. 12.3.

for review.[8] That request was also brought to the attention of the Prosecutor General but was denied by the Deputy Prosecutor General. The Committee considers that the State party has not demonstrated that a request for a supervisory review to the Supreme Court through the Office of the General Prosecutor would have been an effective remedy in the present case. Accordingly, the Committee finds that it is not precluded from examining the communication by the requirements of article 5 (2) (b) of the Optional Protocol.

9.4 As regards the alleged violations of the author's rights under article 14 (3) (d) of the Covenant, the Committee notes the State party's argument that during both the administrative and judicial procedures, the author was informed of his right to be represented by a legal counsel, that the author did not make such a written request, which fact was not contested, and that legal representation was not mandatory during the proceedings concerning the author's administrative offence under article 373 of the Code of Administrative Offences. It also notes that the author objected to the State party's claim that he was properly informed about his rights under article 14 (3) (d), since it was not made clear to him that he had a right to be legally represented. The Committee further notes that the court proceedings were held outside working hours, which prevented the author from being represented, and that his rights under article 14 (3) (g) of the Covenant were violated as the statements he had made were used against his interests by the court while disregarding the fact that he was carrying out his professional duties as a journalist in covering the protest. Furthermore, the Committee notes the State party's assertion that the author did not submit a request addressed to the court for the participation of his representatives, supporters and other journalists during the hearing at the first instance court. The Committee recalls that the right to equality before courts and tribunals encompasses the principles of equal access and of equality of arms.[9] While noting that the fair trial issues remain disputed, with inconsistencies from both parties, and taking into account the absence of further information and supporting evidence, the Committee considers that the author has failed to sufficiently substantiate both claims for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.5 The Committee considers that the author has sufficiently substantiated his claims under articles 19 (2) and 21 of the Covenant for the purposes of admissibility, owing to the sanctions imposed on him for performing his professional duties as a journalist during a peaceful protest. Accordingly, it declares those claims admissible and proceeds to their examination on the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

10.2 The Committee notes the author's allegations that the authorities violated his rights under article 19 of the Covenant. From the material before the Committee, it appears that the author was arrested following the peaceful assembly he was requested to monitor as a journalist and was convicted and fined for participating in an unauthorized assembly. The author's conviction was based on the fact that he shouted slogans during an unauthorized assembly, while the author contended that he was present as a journalist and was merely performing his professional duties, as evidenced by his journalist's identification card and the written request by the editor of his newspaper to cover the meeting. Whether the author was present as a journalist or participant, his conviction and fine constitute limitations on the freedom of expression. On the factual question of his status, the Committee observes that the State party has failed to explain why the authorities did not believe that the author was monitoring the assembly as a journalist without using and relying on the video footage he proposed as evidence. The Committee is of the view that the actions of the authorities set out above, including the fact that the authorities dismissed the video footage of the event, which could prove the author's lack of involvement in the protest, interfere with the author's right

[8] The City Prosecutor indicated that the administrative proceedings were not subject to a supervisory review.

[9] General comment No. 32 (2007), para. 8.

to freedom of expression and to impart information and ideas of all kinds, as protected under article 19 (2) of the Covenant.

10.3 The Committee also 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 essential for any society and a foundation stone for every free and democratic society.[10] 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 for by law and only if they are necessary (a) for respect for the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. Finally, any restriction on freedom of expression must not be overbroad in nature, namely that it must be the least intrusive among the measures that might achieve the relevant protective function and be proportionate to the interest for which protection is sought.[11]

10.4 The Committee observes that the State party has to explain whether, in the present case, the administrative detention and the fine imposed on the author were necessary and proportionate restrictions on the author's rights. Even if it is accepted that the author actively participated in an unauthorized protest, the Committee observes that the State party has merely argued that the right to freedom of expression, as guaranteed by article 19 (2) of the Covenant, may be subject to limitations as provided for by law. The Committee observes in this respect that the State party has failed to justify specific grounds to support the necessity of the restrictions imposed on the author, as required under article 19 (3) of the Covenant.[12] Moreover, the State party has not demonstrated that the measures selected were the least intrusive in nature or proportionate to the interest for which protection was sought. The Committee recalls that the role of journalists, human rights defenders, election monitors and others involved in monitoring or reporting on assemblies is of particular importance for the full enjoyment of the right of peaceful assembly. Those persons are entitled to protection under the Covenant.[13] Even if an assembly is declared unlawful or is dispersed, that does not terminate the right to monitor.[14] 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 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.[15]

10.5 Regarding the author's claim under article 21 of the Covenant, 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.[16] That right entails the possibility of organizing and participating in a peaceful assembly 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[17] and no restriction on this right is permissible unless it is (a) imposed in conformity with the law and (b) necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right of 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.[18] Restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in

[10] Paragraph 2.
[11] Ibid., para. 34.
[12] See, for example, *Zalesskaya v. Belarus* (CCPR/C/101/D/1604/2007), para. 10.5.
[13] *Zhagiparov v. Kazakhstan*, paras. 13.2–13.5.
[14] General comment No. 37 (2020), para. 30.
[15] *Svetik v. Belarus* (CCPR/C/81/D/927/2000), para. 7.3; and *Shchetko v. Belarus* (CCPR/C/87/D/1009/2001), para. 7.5.
[16] General comment No. 37 (2020), para. 1.
[17] Ibid., para. 22. See also *Strizhak v. Belarus*, (CCPR/C/124/D/2260/2013), para. 6.5.
[18] *Turchenyak and others v. Belarus* (CCPR/C/108/D/1948/2010 and Corr.1), para. 7.4.

assemblies or causing a chilling effect.[19] The State party is thus under an obligation to justify the limitation of the right protected by article 21 of the Covenant.[20]

10.6 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 administrative detention and imposition of a fine for taking part in a spontaneous and peaceful assembly held on 15 February 2014 without a permit in a non-designated area 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. Accordingly, the Committee concludes that the facts before it resulted also in a violation of the author's rights under article 21 of the Covenant.[21]

11. The Committee, acting under article 5 (4), of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of the author's rights under articles 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 with an effective remedy. This requires it to make full reparation to individuals whose rights under the Covenant have been violated. Accordingly, the State party is obligated to, inter alia, take measures to provide the author with adequate compensation, including reimbursement of the amount of the fine rendered and legal costs incurred. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, including by reviewing its domestic legislation, as it has been applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party, including with respect to the protection of journalists and their ability to perform their work.

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 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 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 disseminate them widely in the official languages of the State party.

[19] General comment No. 37, (2020), para. 36.
[20] *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.
[21] *Zalesskaya v. Belarus*, para. 10.6.

Annex

Individual opinion of Committee member Christof Heyns (partly concurring, partly dissenting)

1. I agree with the majority that there was a violation of article 19 (2), but not that there was a violation of article 21.

2. This case raises the question as to whether article 21 of the Covenant protects only "participants" in peaceful assemblies, or whether the scope of the right also extends to independent journalists (and other monitors), who should be treated like participants. In my view, the scope of article 21 extends only to those with the status of "participants" in peaceful assemblies.

3. According to paragraph 11 of general comment No. 37 (2020), the scope of the right extends to "participation in a 'peaceful assembly'". "Participation" is defined as "organizing or taking part in a gathering of persons for a purpose such as expressing oneself" (para. 12, see also para. 33). Journalists are thus clearly not participants, but are they protected non-participants?

4. According to paragraph 30 of general comment No. 37, journalists "are entitled to protection under the Covenant". During the drafting of the general comment, the Committee deliberately decided not to say that journalists were entitled to protection specifically under article 21. The Committee thus leaned in the direction of regarding participation as an essential element of the scope of the right.

5. It may be argued that the power of assemblies often depends on media coverage and journalists must thus be protected like participants under article 21 for the right to be fully protected.

6. In general comment No. 37, the Committee recognizes the important role of journalists in assemblies (para. 30), but it does not say that they fall within the scope of article 21 – for good reasons.

7. Journalists serve as guardians for many rights and are thus protected under article 19, but not necessarily by the other rights. For example, while covering events such as elections they are not automatically also protected under article 25. The same applies in respect of articles 6 and 7 when reporting on excessive use of force.

8. Moreover, to hold that journalists who are covering assemblies should be treated like participants means they are not regarded as independent observers, which puts freedom of expression at risk. Also, to recognize that someone falls under the protection of a particular right means that the restrictions applicable to that right also potentially apply. For example, where an assembly has turned violent and is legitimately dispersed, the authorities are entitled to send the participants home. If journalists are treated like participants, the same applies to them. States have a duty not to treat journalists like participants. The well-intended but counterproductive use of the right of peaceful assembly could place press freedom in danger.

9. It may be argued (see para 10.6 above) that whether journalists fall within the scope of article 21 depends on whether they were charged with a violation of a domestic assembly law. However, whether conduct falls within the scope of article 21 is an objective question, to be determined by the Committee, and is not subject to arbitrary determination by States.

10. Consider the situation where everyone in a square is arrested on the basis of having violated a local law on assemblies. An uninvolved coffee drinker in the square can under no scenario have been exercising the right of freedom of assembly. The same applies to a single demonstrator holding a poster, who is not covered by article 21.

11. The European Court of Human Rights has in cases such as the one under discussion found an interference with the right of freedom of expression and not of the right of peaceful assembly.[1]

12. That brings us to the question of how to view the majority decision of the Committee in the present case. First, the majority admits the claims concerning articles 19 and 21 on the basis that the author was "performing his professional duties as a journalist during a peaceful protest" (para. 9.5 above). The implication is that journalists fall within the scope of the right.

13. In my view the claim should at this stage of the proceedings have been found to be non-admissible, *ratione materiae*, because journalists do not fall within the scope of the right. There are no protected non-participants.

14. Secondly, there is the consideration of the merits. Here the factual finding of the majority on the status of the author is less clear: "Whether the author was present as a journalist or participant, his conviction and fine constitute limitations on the freedom of expression." (para. 10.2 above). The Views proceed: "Even if it is accepted that the author actively participated in an unauthorized protest …", the limitations were not justified. There was thus a violation of article 19 (2) (para. 10.4 above).

15. This ambivalent approach does not create a problem in the context of article 19. Whether the author acted as a journalist or a participant does not matter as far as the scope of this particular right is concerned. The second step should then indeed be taken, namely to determine whether the limitation was justified, and the State fails on that level. I therefore agree with the majority on the finding of a violation of article 19 (2).

16. However, the status of the author is decisive when article 21 comes into play, because of the scope of requirements of article 21. However, here also the majority argues that whether the author was a participant or a journalist, there was a violation, because the State party has not justified the restrictions (para. 10.6 above).

17. This, however, skips a step. Before the question can be asked as to whether the restrictions were justified, it must first be established whether the author fell within the scope of the right and if he was a journalist he did not. It can thus not be concluded that either way there would have been a violation. I therefore do not agree that a violation of article 21 has been established.

[1] See for example *Pentikäinen v. Finland*, (Application no. 11882/10, Judgment of 20 October 2015), *Butkevich v. Russia* (Application No. 5865/07, Judgment of 13 February 2018) and *Najafli v. Azerbaijan* (Application No. 2594/07, Judgment of 2 October 2012).