



# 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. 2829/2016\*, \*\*

<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>	16 September 2014 (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 14 October 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	1 July 2022
<i>Subject matter:</i>	Arrest to prevent attendance at a public meeting
<i>Procedural issues:</i>	Incompatibility with the Covenant; exhaustion of domestic remedies; non-substantiation of the claims
<i>Substantive issues:</i>	Legal assistance; freedom of opinion and expression
<i>Articles of the Covenant:</i>	14 (3) (b) and 19 (2)
<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) (b) and 19 (2) 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 blogger. He was planning to attend a public meeting of the Almaty *akim* (mayor) with city residents that had been scheduled at 10 a.m. on 20 February 2014. He wanted to ask the *akim*, who was the nephew of the President of

\* Adopted by the Committee at its 135th session (27 June–27 July 2022).

\*\* 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, 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.



Kazakhstan, several questions that were of concern to the general public. The author had not been able to attend any previous meetings with the Almaty *akim* because the latter was the only head of an *akimat* (mayor's office) in the country who did not have formally allocated time in his weekly or monthly schedule for meetings with the public.

2.2 At 7.30 a.m. on 20 February 2014, when the author was still at home, he was visited by two police officers, who informed him that the police had received a complaint against him. He was handed a summons to appear at the police station at 8.30 a.m. on the same day. The complaint against the author had allegedly been submitted on 19 February 2014 by U., who was under arrest at that time, accused of a highly publicized car accident as a result of which one person died and five persons suffered various injuries. The police informed the author that U. had accused him of spreading false information about him on the Internet. The author was surprised about the accusation, because he knew that inmates had no access to the Internet while in detention, and he explained to the police officers that he was scheduled to attend an important meeting with the *akim* at 10 a.m. He offered to come to the police station immediately after the meeting. Initially, the officers did not want to issue a new summons and insisted on the author coming to the police station with them; however, following the author's explanation, the officers agreed to his suggestion and corrected the time on the summons from 8.30 a.m. to 4.30 p.m. The author recorded the entire conversation with the police officers on his video camera, including the issuance and signing of the summons, and uploaded it to his YouTube channel when they left.<sup>1</sup>

2.3 When the author left his home, at 9.30 a.m., to attend the meeting with the *akim*, four police officers were waiting for him outside. Two of them immediately grabbed his arms and stated that he should go with them. He tried to take a video camera from his pocket to film the arrest but the officers did not allow him to do that and forced him into their vehicle. The officers told the author that they were taking him to the Zhetysus District Police Department to question him in relation to U's complaint. They ignored his arguments that their actions were illegal. While in the police vehicle, the author was threatened and subjected to psychological pressure. At the Zhetysus District Police Department, he was not allowed to make any telephone calls, nor was he provided with a lawyer. He was not registered in the journal of detained persons as required by the law. The author was searched and his personal items were examined in the absence of a layperson witness, which was also unlawful. In an attempt to provoke a reaction from him, the officers handled him roughly, as a result of which he sustained multiple bruises and a head injury. The author asked for a medical examination to document his injuries, but the police officers ignored his request.

2.4 After being held at the Zhetysus District Police Department for seven hours, the author was taken to the Almaty Inter-District Administrative Court, where he was charged with disobeying lawful orders of the police under article 355 (2) of the Code on Administrative Offences. He was not given any food or water for the entire day. During the court hearing, the author complained about the way he had been treated and requested contact with a lawyer and a medical examination. However, the judge ignored his requests and openly sided with the prosecutor during the hearing. Despite his explanations that he was a journalist and needed to attend a meeting with the *akim* and that he had already been issued a summons to appear at the police station at 4.30 p.m., the Court found the author guilty of disobeying lawful police orders and sentenced him to 15 days of administrative arrest. The author was so frustrated with the ruling that he shouted "Shame on the court!". The presiding judge immediately sentenced him to an additional three days of arrest for contempt of court. The judge also ordered that the administrative arrest should be counted as starting from 5 p.m. instead of 9.30 a.m. The author notes that, according to article 55 (4) of the Code of Administrative Offences, any arrest must be counted from the moment that a person is physically detained. Although the author had the right to appeal the judgment, he was immediately transferred to a specialized administrative detention centre to start serving his sentence.

2.5 Despite not being provided with copies of any court documents, the author submitted an appeal on 20 February 2014. On 21 February 2014, the Appellate Collegium of the Almaty

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<sup>1</sup> See <https://www.youtube.com/watch?v=rk3TKSyg2n0>. According to the date marker, it was uploaded on 20 February 2014.

City Court upheld the ruling of the Almaty Inter-District Administrative Court. With regard to the author's claim that he had already received a summons for 4.30 p.m. on that day, the Court stated that the text in the summons contained corrections and could therefore not be accepted as evidence.<sup>2</sup>

2.6 On 9 April 2014, the author submitted a petition to the Almaty Prosecutor's Office for a supervisory review of the courts' decision. The author notes that he does not consider it to be an effective remedy. On 15 April 2014, his petition was denied.

2.7 On 5 May 2014, the author submitted a similar petition to the Office of the General Prosecutor; however, on 14 July 2014, his petition was again denied.

2.8 The author submits that he has exhausted all effective domestic remedies.

### **Complaint**

3.1 The author submits that his arrest and subsequent sentence violated his rights under article 19 (2) of the Covenant, as he was prevented from attending a meeting with the *akim* and expressing his opinion on a number of issues. He claims that the restriction of his rights was not justified under any of the conditions listed in article 19 (3) of the Covenant.

3.2 The author also claims that, once arrested, he was not granted prompt access to counsel, in violation of his rights under article 14 (3) (b) of the Covenant.

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

4.1 On 15 March 2017, the State party submitted its observations on the admissibility and merits of the communication. The State party argues that the communication is incompatible with the provisions of the Covenant and is 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.

4.2 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 did not provide for the right to see another person criminally prosecuted.<sup>3</sup> 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 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.

4.3 The State party submits that the author has failed to substantiate how the domestic legislation violates his rights under articles 14 and 19 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.<sup>4</sup> Therefore, the State party argues that the author's communication should be declared inadmissible in accordance with article 3 of the Optional Protocol, rule 99 (d) of the rules of procedure and the Committee's jurisprudence.

4.4 Finally, the State party challenges the admissibility of the communication owing to the 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 14 July 2014, he was entitled to submit a request to the Prosecutor General for a supervisory review. 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

<sup>2</sup> On the video uploaded by the author to YouTube, it can be seen that one of the police officers corrects the time of appearance at the police station from 8.30 a.m. to 4.30 p.m. at the request of the author.

<sup>3</sup> Communication No. 213/1986, para. 11.6.

<sup>4</sup> CCPR/C/113/D/2021/2010, para. 7.5.

did not absolve an author from pursuing them.<sup>5</sup> The State party gives the example of a domestic case, *Filatova and Kuzmintsev*, in which the *akimat* of Almaty had unlawfully denied permission for two individuals to carry out a hunger strike in their apartment. A request for a supervisory review to the Prosecutor General resulted in a new court decision in favour of the defendants and full restoration of their rights and freedoms. Similarly, in another domestic case, *Amirbekova R.B.*, the Supreme Court, following an appeal by the Office of the Prosecutor General, quashed a court decision against the defendant, who had been found guilty of disobeying lawful orders of the police. Therefore, the State party argues that the author's communication should be declared inadmissible in accordance with articles 2 and 5 of the Optional Protocol, rule 99 (f) of the rules of procedure and the Committee's jurisprudence.

4.5 With regard to the merits of the complaint, the State party submits that, on 20 February 2014, the author was outside building number 659 on Suyunbai Street when he ignored the lawful orders of police officers to follow them to the Zhetysus District Police Department for questioning about a complaint received earlier. He showed active resistance. While resisting, the author damaged the inside panels and bumper of a police vehicle, after which he was taken to the Zhetysus District Police Department and charged with disobeying lawful orders of the police. The State party notes that, during the court hearing, the author interrupted the prosecutor while the latter was giving his concluding remarks, and shouted "Shame on the court!" while the presiding judge read the court's decision. For showing disrespect to the court, the author was charged under article 513 of the Code on Administrative Offences and received an additional sentence of three days of administrative arrest. The State party asserts that the author's claim of a violation of his rights under article 19 of the Covenant is not substantiated. It notes that the author was not able to provide the court or the Committee with evidence that he had been served with a summons for a later time.

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

5.1 In a letter dated 5 June 2017, the author responded to the State party's observations on the admissibility and merits of the communication. The author reiterates that the State party has violated his rights under article 14 (3) (b) and 19 (2) of the Covenant and that his attempts to obtain remedy through national courts and the prosecutor's office have been unsuccessful. He notes that the police have recently started to crack down on peaceful protests by arresting participants for offences such as "petty hooliganism", rather than charging them with violations of laws on organizing peaceful assemblies. However, despite the nature of the charges, he maintains that the police officers' goal was to prevent him from attending the public meeting with the *akim* and asking inconvenient questions. The author notes that, at the time of his arrest, he was carrying his press identification card.

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, the rights of one of the plaintiffs 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.

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

##### *Consideration of admissibility*

6.1 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.

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<sup>5</sup> Communication No. 220/1987.

6.2 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.

6.3 The Committee notes 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. 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.<sup>6</sup> The Committee therefore considers that it is not precluded under article 3 of the Optional Protocol from examining the communication.

6.4 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.<sup>7</sup> In the present case, the Committee notes the State party's reference to two cases in which requests to the Office of the Prosecutor General resulted in a reversal of the lower courts' decisions. The Committee also notes the author's claim that, on 5 May 2014, he petitioned the Office of the Prosecutor General for a supervisory review of his administrative case, but that his request was denied by the Deputy Prosecutor General on 14 July 2014. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.5 The Committee notes the author's claim that the State party violated his rights under article 14 (3) (b) of the Covenant because he was not granted prompt access to counsel after his arrest. However, there is no evidence in the file that the author has raised this claim in domestic proceedings. In the absence of any other information or explanation of pertinence on file, the Committee considers that the author has not exhausted all available domestic remedies concerning his claim under article 14 (3) (b) of the Covenant and finds it inadmissible under article 5 (2) (b) of the Optional Protocol.

6.6 The Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, his claims under article 19 (2) of the Covenant. The Committee therefore declares them admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

7.1 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.

7.2 The Committee notes the author's claim that he was sentenced to 15 days of administrative arrest to prevent him from performing his work as a journalist and attending a public meeting with the Almaty *akim* on 20 February 2014 at 10 a.m. According to the author, at 7.30 a.m., he was initially served with a summons to appear at the Zhetysus District Police Department at 8.30 a.m. to answer some questions about a complaint received by the police, but after he explained to the police officers that, as a journalist, he needed to attend an important public meeting with the *akim* at 10 a.m., they adjusted the hour to 4.30 p.m. However, as soon as he left his apartment, at 9.30 a.m., to attend the meeting, he was detained by four police officers who were waiting for him outside his home.

<sup>6</sup> *Delgado Burgoa v. Plurinational State of Bolivia* (CCPR/C/122/D/2628/2015), para. 10.3.

<sup>7</sup> *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.

7.3 The Committee observes that, while the State party asserts that the author was not able to provide the court or the Committee with evidence that he had been served with a summons for a later time, it does not refute the author's claim that two police officers visited him at 7.30 a.m. on the day of his arrest to serve him with a summons. Furthermore, the State party does not refute the author's claim that he was on his way to attend an important public meeting as a journalist with the Almaty *akim* when he was arrested, which raises issues under article 19 (2) of the Covenant

7.4 The Committee takes note of the State party's submission that the author was sanctioned not for trying to attend a public meeting as a journalist but for refusing to obey lawful police orders. Nevertheless, the described sequence of events and actions of the authorities against the author, namely, first adjusting the time on the summons from 8.30 a.m. to 4.30 p.m. (para. 2.2 above) and then arresting the author at 9.30 a.m., despite him carrying a press identification card and stating that he was a journalist heading to a public meeting with the city *akim* (paras. 2.3 and 5.1 above) without providing any reason that would justify the urgency of sending four police officers to bring in the author in order to question him about an alleged complaint that had been received only one day earlier, amounts to a de facto restriction of the author's rights under article 19 (2) of the Covenant. The Committee now has to consider whether the restrictions imposed on the author's freedom of expression 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 the foundation stone for every free and democratic society.<sup>8</sup> It notes that article 19 (3) of the Covenant 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.<sup>9</sup>

7.5 In the absence of the State party's explanations as to how the imposed restriction represented a proportionate measure necessary to serve a legitimate purpose identified in article 19 (3) of the Covenant, the Committee considers that the restriction of the author's right to freedom of expression constituted a violation under article 19 (2) of the Covenant. Accordingly, the Committee concludes that by detaining and sentencing the author to 15 days of administrative arrest, the State party violated his rights under article 19 (2) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of article 19 (2) of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to, inter alia, take appropriate steps 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, including by reviewing its domestic legislation, regulations and/or practices with a view to ensuring that the rights under the Covenant may be fully enjoyed in the State party.

10. 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

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<sup>8</sup> Para. 2.

<sup>9</sup> Human Rights Committee, general comment No. 34 (2011), para. 34.

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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