



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2137/2012

Views adopted by the Committee at its 112th session (7-31 October 2014)

<i>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>	30 June 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 14 March 2012 (not issued in document form)
<i>Date of adoption of decision:</i>	21 October 2014
<i>Subject matter:</i>	Arrest and conviction for an administrative violation and sentencing to a fine for conducting an art-mob
<i>Procedural issues:</i>	Substantiation
<i>Substantive issues:</i>	Arbitrary detention; freedom of movement; freedom of expression; freedom of association
<i>Articles of the Covenant:</i>	9; 12; 19 and 21
<i>Articles of the Optional Protocol:</i>	2 and 5

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Annex

Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights (112th session)

concerning

Communication No. 2137/2012*

Submitted by: Bakhytzhan Toregozhina (not represented by counsel)

Alleged victim: The author

State party: Kazakhstan

Date of communication: 30 June 2010 (initial submission)

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

Meeting on 21 October 2014,

Having concluded its consideration of communication No. 2137/2012, submitted to the Human Rights Committee by Bakhytzhan Toregozhina, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views pursuant to article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Bakhytzhan Amangalivna Toregozhina, born on 23 March 1962, a Kazakhstan national. The author claims to be a victim of violations by Kazakhstan of her rights under articles 9, paragraph 1; 12, paragraph 1; 19 and 21 of the International Covenant on Civil and Political Rights.¹ The author is unrepresented.

The facts as presented by the author

2.1 The author is Head of the non-governmental organization “Ar. Rukh. Khak”. On 11 March 2010, to commemorate Civil Disobedience Day, the organization held an art-mob event at the monument of Mahatma Gandhi, the purpose of which was to draw the attention of the public to the issue of moral leadership, in order to demonstrate such qualities as

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Christine Chanet, Ahmed Amin Fathalla, Yuji Iwasawa, Cornelis Flinterman, Zonke Zanele Majodina, Gerald Neuman, Victor Manuel Rodríguez-Rescia, Margo Waterval, Konstantine Vardzelashvili, Yuval Shany, Fabián Omar Salvioli, Anja Seibert-Fohr, Andrei Paul Zlatescu, Lazhari Bouzid and Dheerujlall Seetulsingh.

¹ The Optional Protocol entered into force for Kazakhstan on 30 September 2009.

humanism, democracy, social justice and morality. During the event, the authorities did not intervene, but, on 16 March 2010 at noon, 20 police officers entered the author's office and arrested her. She was informed that she would be detained for 48 hours in accordance with article 620 of the Code of Administrative Procedure, which allows administrative detention with the aim of ceasing an administrative violation. The author maintains that her arrest was illegal, since she was not carrying out any violations in her office when she was arrested. She submits that, on 2 April 2010, she sent a complaint regarding the legality of her arrest to the office of the General Prosecutor, which forwarded the complaint to the Department of Security Services of the Ministry of Internal Affairs.

2.2 On 16 March 2010, by a ruling of the Specialized Interregional Administrative Court of Almaty, the author was found guilty of the unauthorized organization of a public event and ordered to pay a fine of 56,520 tenge. The author submits that, according to the court decision, she conducted an unauthorized meeting of citizens and maintains that, since the art-mob event was not mentioned in article 2 of the Law on the Order of Organization and Conduct of Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations in the Republic of Kazakhstan, she did not need to seek permission from the authorities to hold it.

2.3 On 26 March 2010, the author appealed the first instance decision before the Appellate Court of Almaty, which rejected her appeal on 6 April 2010. On 17 May 2010, the author filed a petition to the Office of the General Prosecutor, asking it to initiate a supervisory review of the decision, which was rejected on 21 June 2010.

2.4 The author also submits that, on 12 January 2010, her organization had presented for approval to the Deputy Akim of Almaty a schedule of activities that it intended to conduct. In a letter dated 21 January 2010, the Department of Youth Policy of Almaty responded that, according to article 4 of the Law on public associations, the unlawful interference of State organs in the work of associations is not allowed. The author maintains that, accordingly, the Akimat of Almaty is not authorized to approve the scheduled events of non-governmental organizations. She maintains that, as Head of the non-governmental organization, she was entitled to organize activities in accordance with the charter of the organization without asking for official permission from the authorities. The author contends that she has exhausted all available and effective domestic remedies.

The complaint

3.1 The author maintains that her arrest and conviction for organizing an art-mob event violated her constitutional rights and her rights under articles 9, paragraph 1; 12, paragraph 1; 19; and 21 of the Covenant.

3.2 The author submits that her arrest was conducted in violation of article 9 of the Covenant since she was told that had been detained in accordance with article 620 of the Code of Administrative Procedure, which allows administrative detention with the aim of ceasing an administrative violation, and since, at the time of her arrest, she was not carrying out any violations.

3.3 The author submits that, by organizing the art-mob event, she was expressing her opinion, which is her right under article 19 of the Covenant. The author maintains that the prosecution against her was *de jure*, having been made on the basis of a violation of the rules for organizing and holding assemblies, but was *de facto* on the basis of her public performance, which related to a political issue, namely, the extent to which the Kazakh population trusts government politicians. She maintains that freedom of expression is protected under article 19, paragraph 2, of the Covenant; that such protection includes the right of individuals to criticize or openly and publicly evaluate their Governments without

fear of interference or punishment;² and that she was punished for exercising her right to expression in the form of art. Under such circumstances, her unlawful detention on the basis of her performance, her trial, her conviction and sentence and the threat that any expression of opinion may be punished by similar sanctions in the future constituted restrictions on her freedom of expression.

3.4 The author submits that the above restrictions are not compatible with the meaning of article 19, paragraph 3, of the Covenant, which provides that, while the exercise of the right to freedom of expression may be subject to certain restrictions, these shall only be such as are provided by law and are necessary: (a) for the respect of the rights or reputations of others; or (b) for the protection of national security or of public order, or of public health or morals. She maintains that, in interpreting those exceptions, the Committee had noted that such restrictions must not “put in jeopardy the right itself”³ and that any limitation “must meet a strict test of justification”.⁴ Under the Committee’s jurisprudence, a legitimate limitation on the right to freedom of expression must be: (a) provided by law; (b) for the protection of one of the enumerated purposes; and (c) necessary to achieve that purpose.⁵ The author submits that the Committee has consistently held that “the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author’s conduct”,⁶ and that, in her case, the limitation on her right to freedom of expression was not made on the basis of the needs of national security or the protection of the rights or reputations of others. If the limitation had been made on the basis of a threat to national security, the State party should have provided a detailed justification and indicated the precise nature of the threat. The author further submits that her performance related to the possible distrust of the Kazakh population towards government officials; that the issue was a subject of permanent public discussion in Kazakhstan; and that the Government therefore cannot claim that its limitation on her right to freedom of expression was for the purpose of protecting the rights or reputations of others. She maintains that, even if the State party established the existence of a legitimate purpose for the limitation, it would also need to demonstrate that the actions taken were necessary⁷ in order to protect that purpose. The author submits that the Committee has consistently observed that “the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on the freedom of expression must be proportional to the value which the restriction serves to protect”.⁸ As the State party had not clearly explained through the court decisions what value it protected by imposing restrictions on the author’s freedom of expression, the administrative sanctions imposed on her constitute a limitation on her right to freedom of expression, as protected by article 19, paragraph 2, of the Covenant. She maintains that, since the narrow exceptions described in article 19, paragraph 3, of the Covenant do not apply to her case, the above limitations violate the Covenant.

3.5 The author submits that, in her case, the conviction and administrative sanctions imposed were the consequences of her holding a public assembly that had not been permitted by the local authorities. She maintains that, under such circumstances, her

² See communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.7.

³ See the Committee’s general comment No. 10 (1983) on freedom of opinion and expression, para. 4.

⁴ See communication No. 628/1995, *Park v. Republic of Korea*, Views adopted on 20 October 1998, para. 10.3.

⁵ See communication No. 926/2000, *Shin v. Republic of Korea*, Views adopted on 16 March 2004, para. 7.3.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ See *Marques de Morais v. Angola* (note 2 above), para. 6.8.

conviction and the threat that any future assembly may be punished by similar sanctions, constitute restrictions on her freedom of assembly. She submits that the above restrictions are not compatible with article 21 of the Covenant.

3.6 The author notes that, according to the Committee's jurisprudence, any restrictions of the right to freedom of assembly must fall within the permissible limitations of article 21 of the Covenant.⁹ The author submits that requiring a prior authorization by the local authorities for the conduct of any public event constitutes such a restriction. The author also submits that, under the Law on the Order of Organization and Conduct of Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations in the Republic of Kazakhstan, in order to hold any open-air public meeting, an application must be sent to the local authorities (Akimat) at least 10 days prior, and an authorization granted at least five days prior. She further submits that the court decisions did not provide any justification as to which values were being protected by the imposition of restrictions on her freedom of assembly, and, accordingly, that the administrative sanctions imposed on her constituted a limitation of her right to freedom of assembly, as protected by article 21 of the Covenant.

State party's observations on the merits

4.1 On 31 May 2012, the State party submits that the author had been convicted and sentenced on 16 March 2010 to a fine of 56,520 tenge for an administrative offence under article 373, paragraph 3, of the Code of Administrative Violations of the Republic of Kazakhstan by the Specialized Intradistrict Administrative Court of Almaty, and that the above ruling had been confirmed on appeal on 6 April 2010 by the Almaty City Court. The State party briefly restates the content of the court judgements.

4.2 The State party recalls the provisions of articles 19, paragraph 3, and 21 of the Covenant. It submits that the author's allegations that her rights under articles 9, paragraph 1; 19, paragraph 2; and 21, paragraph 1, of the Covenant had been violated are unsubstantiated. It submits that the format and the manner of the expression of societal, group or personal interests in public places, as well as certain limitations of the above, are established by Law No. 2126 of 17 March 1997 on the Order of Organization and Conduct of Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations in the Republic of Kazakhstan. In accordance with article 2 of that Law, in order to conduct an assembly, meeting, procession, picket or demonstration, a request must be submitted to the local executive authorities. In accordance with article 3, the request should contain all elements required by the Law and should be submitted no later than 10 days before the planned date of the event. The author had not addressed a request to the executive authorities and had not received a positive reply. Therefore, the author's claims that her rights had been violated under articles 19 and 21 of the Covenant are unsubstantiated, since she exercised those rights in violation of the limitations imposed by the Law.

4.3 The State party further submits that, in accordance with article 618 of the Code of Administrative Proceedings, in order to ensure that the proceedings of a case are conducted in a timely and correct manner and that the adopted decision is executed, certain measures can be taken towards physical persons, including administrative detention. The administrative detention against the author was implemented in accordance with the Law and for the purpose of ensuring the conduct of the proceedings of the case. The State party therefore considers the author's allegations that her rights under articles 9, paragraph 1, of the Covenant had been violated to be unsubstantiated.

⁹ See communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994.

Author's comments on the State party's submission

5.1 On 4 July 2012, the author notes that, in contesting her submission under article 19 of the Covenant, the State party quotes the provisions contained in paragraph 3 of that article. She maintains that those provisions are not applicable to her case, because the State party failed to explain the manner in which the author had violated the rights or reputations of others, or how she had endangered national security or public order, or public health or morals. She submits that she did not offend any public officials, since no offensive words that could have damaged their reputations were expressed towards any of them personally; that the art-mob event lasted for 10 minutes, was of a peaceful character and did not threaten the public order or the national security of Kazakhstan. She stresses that she was not convicted for endangering the rights or the reputations of others, national security, public order or public health or morals, but for holding a public event without the permission of the authorities.

5.2 In relation to her allegations under article 21 of the Covenant, the author stresses that her actions consisted of an art-mob event implemented with the assistance of three colleagues; and that the art-mob event addressed those visitors of the Mahatma Gandhi park in the vicinity of the monument dedicated to Mahatma Gandhi. The event was observed by about 15 persons, the majority of which were journalists and police officers. The author maintains that the event did not constitute a procession, a picket or a demonstration and that she therefore did not need the permission of the authorities to conduct it. She further submits that the authorities of Kazakhstan had been expanding the interpretation of the definition of a "peaceful assembly" beyond the scope determined by the Law of 17 March 1997, to include art-mob events, flash-mob events and even protest actions carried out by single persons. As a result of that broader interpretation, every action conducted in public is declared an illegal public assembly and the organizers are held administratively responsible for conducting public assemblies without the permission of the authorities, in violation of the Covenant.

Issues and proceedings before the Committee*Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 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.

6.3 The Committee notes that the State party does not challenge admissibility, nor provides information on available and effective remedies. Accordingly, the Committee finds that it is not precluded from examining the communication by the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee notes the author's claim that her rights under article 12, paragraph 1, of the Covenant had been violated by her arrest on charges of committing an administrative violation. In the absence of any other pertinent information in that respect, the Committee considers, however, that the author has failed to sufficiently substantiate that claim for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 Regarding the the author's claim that her rights under article 9, paragraph 1, of the Covenant had been violated by her arrest, the Committee notes the State party's submission that the arrest was lawful under article 618 of the Code of Administrative Violations. The

Committee notes, however, that this raises the issue of the arbitrariness of the author's arrest. It therefore considers that the author's claim under article 9, paragraph 1, has been sufficiently substantiated for purposes of admissibility, and declares it admissible. The Committee also considers that the author has sufficiently substantiated her claims under articles 19 and 21 of the Covenant, for purposes of admissibility. Accordingly, it declares those claims admissible and proceeds to their examination on the merits.

Consideration of the merits

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

7.2 Regarding the author's claim under article 9 of the Covenant, the Committee observes that there is a disagreement between the parties as to the legal basis for her arrest, but that it is undisputed that, on 16 March 2010, the police entered the author's office and arrested her. The Committee recalls that, in order for an arrest to be in compliance with article 9, paragraph 1, it must not only be lawful, but also reasonable and necessary in all the circumstances.¹⁰ The Committee observes that the State party has not provided any justification as to why the arrest of the author under the Code of Administrative Procedure was reasonable and necessary. The Committee considers that the State party has failed to show why it was necessary to detain the author. In the circumstances, the Committee finds that the author's detention was unreasonable and constituted a violation of article 9, paragraph 1, of the Covenant.

7.3 The Committee notes the author's allegations that the authorities violated her rights under article 19 of the Covenant. From the material before the Committee, it transpires that the author had been arrested and subsequently convicted and fined for organizing and participating in an art-mob event without requesting prior permission from the local executive authorities. In the opinion of the Committee, the above actions of the authorities interfere with the author's right to freedom of expression and to impart information and ideas of all kind, which is protected under article 19, paragraph 2, of the Covenant.

7.4 The Committee has next 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, paragraph 3, of the Covenant. The Committee recalls in this respect its general comment 34, in which it stated, *inter alia*, that the freedom of expression is essential for any society and a foundation stone for every free and democratic society.¹¹ It notes that article 19, paragraph 3, allows restrictions on the freedom of expression, including the freedom to impart information and ideas, only to the extent that they are provided by law and only if they are necessary (a) for respect of the rights and reputation of others; or (b) for the protection of national security or public order (*ordre public*), 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.¹²

7.5 The Committee observes that, in the present case, the detention of the author and the imposition of a significant fine on her raise serious doubts as to the necessity and proportionality of the restrictions imposed on the author's rights. The Committee further

¹⁰ See communications No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8; and No. 631/1995, *Spakmo v. Norway*, Views adopted on 5 November 1999, para. 6.3.

¹¹ See the Committee's general comment 34 (2011) on freedoms of opinion and expression, para. 2.

¹² *Ibid.*, para. 34.

observes that the State party has failed to invoke any specific grounds to support the necessity of the restrictions imposed on the author as required under article 19, paragraph 3, of the Covenant.¹³ Moreover, the State party did not demonstrate that the measures selected were least intrusive in nature or proportionate to the interest it sought to protect. 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 proportional pursuant to the conditions set out in article 19, paragraph 3, of the Covenant. It therefore concludes that the author's rights under article 19, paragraph 2, of the Covenant have been violated.¹⁴

7.6 Regarding the author's claim under article 21 of the Covenant, the Committee similarly considers that the State party has failed to demonstrate that the restrictions imposed on the author's rights, namely, the detention of the author and the imposition on her of a significant fine, were 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.¹⁵

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations by Kazakhstan of the author's rights under articles 9, 19 and 21 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including review of her conviction and to an adequate compensation, including reimbursement of the legal costs incurred. The State party is also under an obligation to prevent similar violations in the future. The State party should review its legislation, in particular the Law on the Order of Organization and Conduct of Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations in the Republic of Kazakhstan, 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.

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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, to have them translated in official languages of the State party and widely distributed.

¹³ See communication No. 1604/2007, *Zalesskaya v. Belarus*, Views adopted on 28 March 2011, para. 10.5.

¹⁴ See communications No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, para. 7.3; and No. 1009/2001, *Shchetko v. Belarus*, Views adopted on 11 July 2006, para. 7.5.

¹⁵ See *Zalesskaya v. Belarus* (note 13 above), para. 10.6.