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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3039/2017*, **, ***

Communication submitted by:	N.S. (represented by counsel, Anastassiya Miller)
Alleged victims:	The author
State party:	Kazakhstan
Date of communication:	15 June 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 10 November 2017
Date of adoption of decision:	19 March 2024
Subject matter:	Criminal prosecution of a journalist for libel
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Effective remedy; fair trial; freedom of expression; legal assistance
Articles of the Covenant:	2 (3), read in conjunction with 14 (1), 14 (3) (a), 14 (3) (d) and 19
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is N.S., a national of Kazakhstan born in 1986. She claims that the State party has violated her rights under article 2 (3), read in conjunction with article 14 (1), and articles 14 (3) (a), 14 (3) (d) and 19 of the Covenant. The Optional Protocol entered into force for Kazakhstan on 30 September 2009. The author is represented by counsel.

Factual background

2.1 The author was a journalist for an online newspaper, *Respublika*. On 23 December 2013, the newspaper published an article entitled "Not enough government contracts for everyone in Aktobe", by Bahyt Ilyasova. On 31 December 2013, a former Member of

* Adopted by the Committee at its 140th session (4–28 March 2024).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

*** A joint opinion by Committee members Rodrigo A. Carazo and Hélène Tigroudja (dissenting) and an individual opinion by Committee member Hernán Quezada Cabrera (partially concurring) are annexed to the present decision.

Parliament and entrepreneur named M.I. filed a criminal complaint for libel against Ms. Ilyasova with the police. On 6 February 2014, the author was summoned to the regional police investigation department, where she was informed about the complaint filed by M.I. against Ms. Ilyasova. The author denied knowing who Ms. Ilyasova was.

2.2 On 11 February 2014, the head of the police investigation department ordered a forensic examination of the article by Ms. Ilyasova and articles by the author in order to establish the authorship of the former. The examination determined that the article in question had been written by the author. The police advised M.I. to file a complaint with the court.

2.3 On 5 March 2014, M.I. filed a criminal complaint for libel against the author under article 129 (3) of the Criminal Code with Aktobe City Court No. 2. On the same date, the court accepted the complaint, appointed a lawyer for the author, who never contacted her, and set a preliminary hearing for 7 March and the first hearing of M.I.'s complaint against the author for 17 March 2014. On 7 March 2014, the preliminary court hearing took place, at which the parties were to be informed of their status and procedural rights and the author was to be presented with M.I.'s complaint and to be given the opportunity to familiarize herself with the case file. The transcript of the court hearing indicates that the author had been notified by the secretary of the court by phone on 6 March 2014 about the date and time of the hearing. The author claims not to have received such a notification and, as a result, she did not attend the hearing. The court issued a ruling for the author's mandatory appearance before the court on 17 March 2014. The court bailiff informed the court, in a report dated 7 March 2014, that the author's husband, A.S., had told him that the author did not reside at the address that had been given as her contact address. There was no signature of the author's husband on the bailiff's report.

2.4 On 12 March 2014, Aktobe City Court No. 2 placed a charge against the author's property, following M.I.'s suit for moral damages in the amount of 10 million tenge (approximately $54,881 at the time). On 17 March 2014, a district inspector went to the author's address to bring her to the court hearing, in accordance with the court ruling of 7 March 2014. According to his report, no one opened the door. At the hearing on 17 March 2014, the court learned that the author had left the country on 9 March. The court suspended all proceedings in the case and issued a search warrant. The court ordered the author's arrest in view of her absconding from the court and transferred the case to the prosecutor's office. On 19 March 2014, the author learned about the warrant for her arrest and the seizure of her property from the Supreme Court website.

2.5 In June 2014, after applying for refugee status in Ukraine,[1] the author hired a private lawyer in Kazakhstan. On 25 September 2014, the author, through her lawyer, submitted an appeal to Aktobe City Court No. 2 against the actions of the judge presiding over the case, asking the court: (a) to find the court decision of 5 March 2014 accepting M.I.'s complaint unlawful; and (b) to disqualify the presiding judge from the case. On 2 October 2014, Aktobe City Court No. 2 returned the appeal without consideration on the grounds that the case was suspended due to the outstanding search and arrest warrant for the author and that no procedural actions could be taken until the suspension was lifted. On 5 January 2015, the author submitted an appeal to the Aktobe Regional Court. On 29 January 2015, the Aktobe Regional Court rejected the appeal on the same grounds as the lower instance court.

Complaint

3.1 The author claims that the lack of possibility to appeal procedural decisions (admission of the case for criminal prosecution by the court and the search and arrest warrant) while the case is suspended violates article 2 (3), read in conjunction with article 14 (1), of the Covenant.

3.2 The author alleges that, by failing to duly inform her about the date and the time of the hearings, the court failed to promptly inform her of the charges against her, as well as to provide her with an opportunity to defend herself in person or through counsel of her own

[1] On 21 November 2014, the author and her family were granted refugee status in Ukraine.

choosing. In this regard, she claims a violation of articles 14 (3) (a) and 14 (3) (d) of the Covenant.

3.3 The author claims that, by broadly applying criminal law, among others, to claims for libel against persons expressing their opinion, the State party violates the right to freedom of expression.[2] She argues that by suspending her case for years and thus making it impossible for her to return to her home country to continue her journalistic activities, the State party has violated her rights under article 19, read in conjunction with article 2 (3), of the Covenant.

State party's observations on admissibility

4. By note verbale dated 14 August 2018, the State party submitted its observations. The State party submits that the author has failed to exhaust domestic remedies. The State party refers to article 291 (3) of the Criminal Procedure Code, according to which a suspended pretrial investigation can be reinitiated only if the criminal charges are not barred by the statute of limitations.

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

5. On 6 November 2018, the author replied to the observations of the State party. She explains that in her case the statute of limitations does not expire because, under article 45 (7) (2) of the Criminal Code, the duration of the statute of limitations is interrupted if a suspected or accused person is outside of the territory of Kazakhstan or is absconding from criminal investigation authorities. The proceedings may be re-established when the person returns to Kazakhstan.

State party's additional observations

6.1 By note verbale dated 20 July 2020, the State party reiterated its position on the inadmissibility of the complaint. The State party argues that, under articles 415 (2)[3] and 419 (1)[4] of the Criminal Procedure Code, the author has the possibility to appeal the Aktobe City Court No. 2 decision of 17 March 2014, by which the proceedings in the author's case were suspended and a search and arrest warrant was issued for her.

6.2 The minutes of the court's preliminary hearing on 7 March 2014 indicate that, on 6 March, the secretary of the court personally informed the author by phone about the date and the time of the hearing. The author did not attend the hearing. When the court bailiff visited the author's known address, the author's husband, A.S., told him that the author did not reside at that address. According to the minutes of the court hearing of 17 March 2014, the author could not be brought to the court hearing by the district inspector on that date because no one had opened the door at her address. After the court established that the author had left the country, it decided to suspend the case and to issue a search and arrest warrant for the author.

Additional comments from the author

7.1 On 17 November 2020, the author provided her comments on the State party's additional observations. The author reiterates her position that the domestic remedies were not available to her. She insists that the proceedings in her case can only be re-established once she returns.

7.2 The author denies the State party's assertion that the court informed her by phone on 6 March 2014 about the hearing of 7 March. She did not receive a message and the State party did not present any proof that such a message had been sent.

[2] See CCPR/C/KAZ/CO/1 and CCPR/C/KAZ/CO/2; and *Kankanamge v. Sri Lanka* (CCPR/C/81/D/909/2000).

[3] Article 415 (2) reads as follows: "Private complaint may be filed and prosecutor's petition may be brought in the manner prescribed by this Chapter to the decisions of the courts of first instance that have not entered into legal force, except for those specified in part three of this article".

[4] Article 419 (1) deals with the procedure for re-establishing a missed deadline for filing an appellate complaint and bringing a petition of the prosecutor.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 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.

8.3 The Committee notes the State party's argument that the author failed to exhaust domestic remedies as she has the possibility to appeal the Aktobe City Court No. 2 decision of 17 March 2014, by which the proceedings in her case were suspended and a search and arrest warrant was issued for her (see para 6.1 above). In this regard, the Committee also notes the author's counterargument that the courts rejected her appeals (see para. 2.5 above). The Committee further notes that the domestic court decisions (see para. 2.5 above) clearly stated that any procedural steps in the author's case were suspended on the ground of a valid search and arrest warrant for the author and the fact that the author's case had been transferred to the prosecutor's office and had not yet returned to court for a renewal of proceedings. In the light of the conclusions of the domestic courts, the Committee considers that the author did not have any more effective remedies to exhaust. The Committee is thus not precluded by article 5 (2) (b) of the Optional Protocol from considering the present communication.

8.4 The Committee notes the author's claim that, by suspending all proceedings in her case, the State party deprived her of the possibility to appeal the criminal charges against her and the issuance of a search and arrest warrant for her. The Committee also notes that the proceedings in the author's case were suspended when Aktobe City Court No. 2 discovered that the author had left the country. The Committee further notes that the author left the country to avoid criminal prosecution for libel under article 129 (3) of the Criminal Code. Under this article, the maximum punishment is three years in prison. The author has not raised claims of a risk of an irreparable harm that forced her to leave.[5] The Committee notes that the suspension of criminal proceedings when a defendant in a criminal case leaves the country, and the effects thereof as a result, is a general procedural rule in the domestic criminal legislation (article 45 of the Criminal Procedure Code), and not something left to the discretion of the court. The Committee observes that the proceedings were suspended because the author left the country. In these circumstances, the Committee finds the author's claim under article 2 (3), read in conjunction with article 14 (1), of the Covenant insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.5 The Committee notes the author's claim that the court failed to notify her of the date and time of the hearings of 7 and 17 March 2014, in violation of articles 14 (3) (a) and 14 (3) (d) of the Covenant. The Committee also notes that paragraphs 2–5 of article 14 contain procedural guarantees available to persons charged with a criminal offence.[6] The Committee further notes that, although a private criminal complaint filed against the author by M.I. was accepted for consideration by Aktobe City Court No. 2, the author has not been presented with charges, there has been no trial in her case and no judgment has been delivered by the court. The Committee notes from documents on file that the court hearing of 7 March 2014 was preliminary in nature and that no substantive decision was taken concerning the author in her absence. The Committee also notes that, once the court became aware, on 17 March 2014, that the author had left the country on 9 March 2014, it did not hold a trial in absentia, but suspended the proceedings. Therefore, there has been no determination of criminal charges against the author in the context of article 14 (1), which would trigger procedural guarantees under articles 14 (3) (a) and 14 (3) (d) of the Covenant. The Committee therefore concludes that the author's claims under articles 14 (3) (a) and 14 (3) (d) are insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

[5] *Brewer-Carías v. Bolivarian Republic of Venezuela*, (CCPR/C/133/D/3003/2017), para. 9.8.

[6] General comment No. 32 (2007), para. 3.

8.6 The Committee notes the author's claim that, by prosecuting her for libel under criminal law, the State party violated her rights under article 19 of the Covenant. The Committee recalls its general comment No. 34 (2011), paragraph 47 of which states:

> Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth … In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. … States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.

8.7 The Committee notes that, in its general comment No. 34 (2011), it does not consider criminalization of defamation in itself to violate the Covenant. In accordance with that general comment, States should exert caution against the overly broad application of criminal laws in the context of free speech, provide defendants with an opportunity to establish the truth, take into account the social importance of the statement and avoid, in all cases, imposing prison sentences for defamation. In the present case, since the author left the country, and therefore deprived herself of the possibility to defend her case, it is premature for the Committee to consider a claim about wrongful application of the law when there is no final court decision in the case.[7] The Committee thus finds the author's claims under article 19, read alone and in conjunction with article 2 (3), of the Covenant inadmissible under article 2 of the Optional Protocol as insufficiently substantiated.

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author.

[7] Cf. *Brewer-Carías v. Venezuela*; *Adonis v. the Philippines* (CCPR/C/103/D/1815/2008/Rev.1), para. 7.10; and *Kankanamge v. Sri Lanka*, para. 9.4.

Annex I

Joint opinion of Committee members Rodrigo A. Carazo and Hélène Tigroudja (dissenting)

1. We are not able to follow the line of reasoning of the Committee in this case, which raises important questions of freedom of expression and the inappropriate use of criminal procedure by domestic tribunals. We are not convinced by the overall approach to the complaint by the Committee. There are at least two strong shortcomings in the way that the Committee addressed the case: the first dealing with the situation of the author and the second – interrelated but even more concerning – dealing with freedom of expression, as enshrined in article 19 of the Covenant.

2. Regarding the situation of the author, it is true that the factual background is not entirely clear – for instance, the author explained that she had fled to Ukraine with her family, where she was granted the status of refugee (para. 2.5), but she did not elaborate on the grounds for granting them that status. However, despite this important information, the Committee disregarded the author's professional and personal situation. It noted in paragraph 8.4 that "the author left the country to avoid criminal prosecution for libel under article 129 (3) of the Criminal Code". It went on to note that "the author has not raised claims of a risk of an irreparable harm that forced her to leave" and that "the suspension of criminal proceedings when a defendant in a criminal case leaves the country, and the effects thereof as a result, is a general procedural rule in the domestic criminal legislation … and not something left to the discretion of the court". The Committee observed that the proceedings were suspended because the author left the country. Therefore, regardless of the author's refugee status, the Committee treated the case as if she were fleeing a fair criminal trial opened against a person fairly accused of a serious criminal offence. The Committee totally omitted the refugee status mentioned by the author, and the fact that she and her family were granted such status by Ukraine is simply not considered in the reasoning.

3. More importantly, the Committee does not say anything on the use of criminal procedural and substantive law for libel against the author, who is a journalist (para. 2.1) prosecuted for being the author of an article dealing with a general interest matter. The Committee fully missed the letter and the spirit of its general comment No. 34 (2011), in particular paragraph 38 thereof: "Concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned."

4. In the Committee's reasoning, two elements were taken into consideration: the fact that the criminal action for libel was brought by a private person against another private person and that the procedures were pending. However, the first element is not relevant, in the sense that what is at stake here is the criminal apparatus used against a journalist who is allegedly the author of a controversial public interest article. The second element is also not relevant, insofar as the chilling effect of such a criminal apparatus is obvious and constitutes in itself a limitation of the freedom of journalists to exercise their work and of the right of the public to receive information. The Committee missed the opportunity to follow the clear international and regional lines against criminal sanctions for libel and to elaborate more on the proportionality of interference in the exercise by journalists of their freedom to inform

the society on general interest topics. In his 2012 thematic report, the Special Rapporteur on freedom of expression stressed as a matter of concern "the continuing existence and use of criminal laws against journalists and members of the media, which are often used by authorities to suppress 'inconvenient' information and to prevent journalists from reporting on similar matters in the future. Consequently, there is a chilling effect which stifles reporting on issues of public interest. Charges such as treason, subversion and acting against national interests continue to be brought against journalists worldwide, as well as allegations of terrorism and criminal defamation for reporting false news or engaging in ethnic or religious insult."[1] Along the same lines, the African Commission on Human and Peoples' Rights called for the decriminalization of defamation and libel in its 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa.[2] This follows standards already affirmed by organs of the United Nations Educational, Scientific and Cultural Organization, the Council of Europe and the Organization of American States.[3]

5. Despite the factual elements of the case, which were not entirely clear, the inadmissibility decision of the Committee is not only legally problematic, but also at odds with the well-established international and regional trends in favour of the decriminalization of defamation and libel.

[1] A/HRC/20/17, para. 79.

[2] In particular principle 22 (3), which reads: "States shall amend criminal laws on defamation and libel in favour of civil sanctions which must themselves be necessary and proportionate."

[3] See, for example, the United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity.

Annex II

[Original: Spanish]

Individual opinion of Committee member Hernán Quezada Cabrera (partially concurring)

1. Although I generally agree with the Committee's decision in the present communication, I disagree with the line of argument followed in certain parts of the decision.

2. First, it seems to me that the reasoning contained in paragraphs 8.4 and 8.5 is inconsistent. Paragraph 8.5 begins with the premise that article 14 (2) to (5) of the Covenant provides for the procedural guarantees available to persons charged with a criminal offence but then goes on to note that, although a complaint filed against the author by M.I. was accepted for consideration by Aktobe City Court No. 2, the author was not presented with charges and there has been no trial or judgment, before concluding that there has been no determination of criminal charges against the author in the context of article 14 (1), which would trigger procedural guarantees under articles 14 (3) (a) and 14 (3) (d) of the Covenant. This conclusion is consistent with the provisions of article 14 (1) of the Covenant and article 14 (2) to (5).

3. However, in paragraph 8.4 of the decision, the finding that the claim of a violation of article 2 (3), read in conjunction with article 14 (1) of the Covenant, is inadmissible is not based on the fact that there has been no determination of criminal charges against the author that would trigger the guarantee of an effective remedy (art. 2 (3) of the Covenant), read in conjunction, in the present case, with article 14 (1) of the Covenant. This matter is not addressed despite the fact that the case does involve article 14 (1), which presupposes for its application, in the particular circumstances of this case, the bringing of a criminal charge by a competent authority rather than a mere private complaint.

4. Turning to a different topic, the decision states that author left the country to avoid criminal prosecution for libel; that the suspension of criminal proceedings when a defendant in a criminal case leaves the country, and the effects thereof as a result, is a general procedural rule in the domestic criminal legislation and not something left to the discretion of the court; and that the proceedings were suspended because the author left the country. All this would indicate, according to the Committee's decision, that the complaint of a violation of articles 2 (3) and 14 (1) of the Covenant is insufficiently substantiated and inadmissible.

5. This reasoning is contradictory to the idea that we are not dealing with a criminal charge or the determination of a criminal charge. If the logic of this idea had been followed, the author's claims discussed in paragraph 8.4 of the decision could have been dismissed on the same grounds as the allegations discussed in paragraph 8.5.

6. However, it is precisely the elements that appear in paragraph 8.4 of the decision, together with other background information in the case, that point to a possible violation of article 19 of the Covenant insofar as the private complaint concerning a public interest article allegedly written by the author may have led to a violation of the author's freedom of expression. It seems disproportionate prima facie to issue an arrest warrant for someone who has been reported not by the Public Prosecutor's Office or any other public authority, but by a mere private individual. The State party did not explain the necessity or proportionality of such a serious measure which, together with the criminal prosecution as a whole, may have motivated the author's flight from the country. In this regard, the decision merely notes that the suspension of criminal proceedings, and the effects thereof as a result – which should include the issuance of an arrest warrant against a person who has been reported – is a general procedural rule in the domestic legislation and not something left to the discretion of the court. However, the Committee failed to establish, first, whether the arrest warrant against the author was the only temporary measure that the court could adopt or whether there were alternatives; second, in the absence of alternatives, whether the procedural rule was necessary

and proportional; and third, if alternatives did exist, whether the judge's decision was necessary and proportional in this case.

7. Even though the criminal proceedings remained at the preliminary stage, it has been demonstrated that the State party brought to bear its criminal prosecution system on a journalist for the alleged offence of libel reported by a private individual and adopted measures that threatened her personal freedom and caused the author to leave the country. In this regard, it is worth recalling that, in the Committee's view, States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.[1] If imprisonment is never an appropriate penalty, nor should any measure of deprivation of liberty ordered during criminal defamation proceedings ever be considered appropriate.

8. Based on the foregoing, I believe that the Committee could have examined more closely a possible violation of the freedom of expression, taking into consideration, among other elements, the fact that the author was criminally prosecuted on the basis of a libel complaint brought by a private individual. Doing so might or might not have led to a different decision, but the examination of the elements of the case would have been more complete.

[1] General comment No 34 (2011), para. 47.