

**TO THE HONORABLE MEMBERS OF THE UNITED NATIONS
HUMAN RIGHTS COMMITTEE**

In the Matter of:

Ms. Bahytzhan Toregozhina

Citizen of the Republic of Kazakhstan

vs.

The Republic of Kazakhstan

I. SUPPLEMENTAL MEMORANDUM OF LAW

Prepared by:*

Submitted by:

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Bahytzhan Toregozhina

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Victim of the HR violation

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March 14, 2012

* Victoria Tyuleneva works for Kazakhstan International Bureau for Human Rights and Rule of Law (KIBHR) and was retained by Ms. Toregozhina to serve as her *pro bono* legal counsel with regard to Ms. Toregozhina's Petition dated June 30, 2010. KIBHR is a non-governmental, non-profit human rights organization that assists to victims of HR violations in Kazakhstan and Central Asia through legal, political and public relations advocacy. This Memorandum is intended to supplement and not replace the Petition written by Bahytzhan Toregozhina on June 30, 2010.

II. Summary of Facts¹

Bahytzhan Toregozhina is a citizen of the Republic of Kazakhstan and the chief of "Ar.Ruh.Hak" Public Fund. Charged with violating Article 373 (3) Code on Administrative Offences of the Republic of Kazakhstan for conducting public assembly not authorized by local authorities (Almaty City Akimat) The Kazakhstani government sentenced her to the fine of 56 520 (fifty six thousands five hundred and twenty) KZT.

A. Peaceful Assembly

On March 11, 2010 Bahytzhan Toregozhina with 3 like-minded persons gathered together near the Monument to Mahatma Gandhi and conducted art-mob devoted to the memory of Mahatma Gandhi as a symbol of non violence around the world and Spiritual Leader of his nation. They brought a poster with image of the man without head and were trying to match the best head of attaching drawing heads of Kazakhstani governmental politicians. While matching the head they addressed to the people observing the art-mob the vast majority of who were journalists and policemen (totally about 15 persons) the question whether they would like this politician to be Kazakhstani leader like Mahatma Gandhi or not.

¹ The information contained in this Summary of Facts is based upon the Petition written by Bahytzhan Toregozhina on June 30, 2010.

The Art-mob lasted 20 minutes: started at 11 a.m. and ended at 11.20. By conducting the art-mob they planned to continue the public discussion on the possible distrust of Kazakhstani population to ongoing politicians and to raise the problem of absence the leader like Mahatma Gandhi in Kazakhstan.

The Monument to Mahatma Gandhi is placed in the City Garden located in the square limited by Shevchenko, Zhambyl, Zharokov and Gagarin streets. There is a plaza around the Monument that allows people gather together without creating any obstacles to those who are passing by.

B. Detention of Bahytzhan Toregozhina

On March 16, 2010 at 12 a.m. 20 policemen from Almaty City Interior Department (here and after ACID) and Almaly District Interior Department (here and after ADID) headed by the Chief of the Public Security Division of ACID, captain Zh. Baikenov entered "Ar.Ruh.Hak" Public Fund office and detained Bahytzhan Toregozhina. They provided no warrant or explanation for this detention, forced Bahytzhan into a car and then transported Ms. Toregozhina to ADID. After 3 hours of capturing in ADID she was then transported to the Special Inter-District Administrative Court (SIDAC).

With regard to her unlawful detention on April 2, 2010 Ms. Toregozhina sent complaints to the General Prosecutor office, to the Kazakhstani Ombudsmen, to the Chief of OSCE Centre in Astana, to the President of the Republic of Kazakhstan.

The General Prosecutor re-sent Ms. Toregozhina's complaint to the MIA Department of Security Service.

MIA Department of Security Service and Kazakhstani Ombudsmen rejected the complaints.

C. Administrative proceeding (proceeding under administrative offence)

On March 16, 2010 authorities brought Ms. Toregozhina before a judge of SIDAC. Prosecutor charged Ms. Toregozhina with violating Article 373 (3) Code on Administrative Offences of the Republic of Kazakhstan (conducting assembly not authorized by local authorities - Almaty City Akimat).

The same date the judge of SIDAC found Ms. Toregozhina guilty in violating 373 (3) Code on Administrative Offences of the Republic of Kazakhstan and sentenced her to the fine of 56 520 (fifty six thousands five hundred and twenty) KZT (about \$ 380). During the proceeding the government deprived Ms. Toregozhina's right to have adequate time and facilities for the preparation of her defence and to communicate with counsel of her own choosing.

On April 4, 2010 the trial court's decision was affirmed by the Court of Appeal (Almaty City Court).

On May 17, 2010 Ms. Toregozhina submitted the request to appeal the trial court's decision to the General Prosecutor's office².

On June 21, 2010 the General Prosecutor rejected Ms. Toregozhina's request to appeal the trial court's decision.

² Kazakhstani legislation doesn't provide Bahytzhan Toregozhina with the right to appeal court decisions to Kazakhstani Supreme Court. She only has the right to submit request to appeal the trial court's decision to the Prosecutors' office.

III. Legal Analysis

A. Ms. Toregozhina's application is admissible

The competence of the United Nations Human Rights Committee (hereinafter —the Committee) to hear individual cases against State parties to the International Covenant on Civil and Political Rights (hereinafter —the Covenant) relies upon, and is limited by, the Optional Protocol to the Covenant (hereinafter —the Optional Protocol). The Optional Protocol entered into force for the Republic of Kazakhstan on September 30, 2009. Further, no ground of inadmissibility applies in this case. As such, Ms. Toregozhina's case is admissible.

B. The Republic of Kazakhstan violated Ms. Toregozhina's right to freedom of expression.

1. Article 19(2) protects Ms. Toregozhina's expression in this case

In this case, the government's prosecution of Ms. Toregozhina was de-jure based on violation of the order for organizing and holding assemblies; de-facto based on her public performance related to political issue, in particular to what extent Kazakhstani population trust to ongoing governmental politicians.

Article 19(2) of the Covenant provides that "*everyone shall have the right to the freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*". Ms. Toregozhina's freedom of expression is under protection of the Article 19 (2). This protection includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or **punishment**³. However, Ms. Toregozhina was punished for exercising her right to expression in form of art (performance). Under such circumstances her unlawful detention on the basis of her performance and movement to 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. Such restrictions are not compatible with the meaning of article 19 (3) of the Covenant.

2. The restrictions on Ms. Toregozhina's freedom of expression were not for an enumerated purpose and were not necessary

Article 19(3) of the Covenant provides that, The exercise of the [right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) [f]or the respect of the rights or reputations of others; [or] (b) [f]or the protection of national security or of public order (ordre public), or of public health and morals.

Interpreting this limited exception, the Committee has noted that such restrictions must not "*put in jeopardy the right itself*"⁴. Rather, any limitation "*must meet a strict test of justification*".⁵ Under the Committee's jurisprudence, a legitimate limitation on the right to freedom of expression must be, 1) "*provided by law*", 2) for the protection of one of the "*enumerated purposes*", and 3) "*necessary*" to achieve that purpose⁶.

³ *Marques de Morais v. Angola*, Communication No. 1128/2002.

⁴ General Comment 10, Par. 4.

⁵ *Park v. Korea*, Communication No. 628/1995, Par. 10.3.

⁶ *Shin v. Republic of Korea*, No. 926/2000, Par. 7.3.

a. The limitation was not for an "enumerated purpose"

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*"⁷. In this case, the limitation on Ms. Toregozhina's right to freedom of expression cannot be based on the needs of "*national security*" or the protection of the "*rights and reputations of others*"⁸.

b. The limitation was not based on protection of "national security"

Limitations based on "*national security*" are properly invoked where "*the political independence or territorial integrity of the State is at risk*"⁹. In *Park v. Republic of Korea*, the State party invoked national security as its purpose when it imprisoned the author for membership and participation in an "*anti-State organization*"¹⁰. However, in invoking national security, the State party merely referred to the threat of "*North Korean communists*". The Committee found that the State party had "*failed to specify the precise nature of the threat*" which it argued the author's freedom of expression posed. National security, like public order, is frequently abused "*often invoked to protect the elite position of the government of the day, rather than to truly protect the State's population*" and therefore the Committee is reluctant accept these rationales "*in the absence of detailed justifications by the parties*".¹¹

As in *Park*, the government of Kazakhstan must point to the "precise nature of the threat" posed by Ms. Toregozhina's performance.

c. The limitation was not based on the protection of the "rights and reputations of others"

Recognizing that in certain circumstances "*one's freedom of expression can clash with another's equally important rights*"¹², Article 19(3)(a) contemplates legitimate limitations on the right to free expression where necessary "[f]or [the] respect of the rights and reputations of others". In *Bodrozić v. Serbia and Montenegro*, the Committee confirmed that this rationale is to be read particularly narrowly in the context of public discourse. It stated that "*in circumstances of public debate in a democratic society concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high*"¹³. In this case Ms. Toregozhina's performance related to possible distrust of the Kazakhstani population to ongoing governmental officials. The issue is a

⁷ *Shin v. Republic of Korea*, No. 926/2000, Par. 7.3.

⁸ The justifiable limitations based upon "public order (ordre public)" and "public health or morals" are also not applicable in this case. Although the Committee has not commented extensively on the "public health" rationale, it would most likely apply to prohibitions "of misinformation about health-threatening activities and restrictions on the advertising of harmful substances". JOSEPH ET AL., supra note 24, at 525. Typical examples of permissible "public morals" restrictions "include prohibitions of or restrictions on pornographic or blasphemous publications". NOWAK, supra note 24, at 358. A "public order" rationale is similarly inappropriate in this case. Properly defined as "the sum of rules which ensure the peaceful and effective functioning of society", these limitations commonly include "prohibitions on speech which may incite crime, violence, or mass panic. Prohibition of mass broadcasting without a license may also be justified as a public order measure to prevent confusion of signals and blockage of airwaves". JOSEPH ET AL., supra note 24, at 530.

⁹ See JOSEPH ET AL., supra note 24, at 534.

¹⁰ *Park v. Republic of Korea*, No. 628/1995, Par. 2.1

¹¹ JOSEPH ET AL., supra note 24, at 540.

¹² JOSEPH ET AL. supra note 24, at 541. This protection arises from the potential conflict between the right to freedom of expression and the right to privacy, contained in Article 17(1) of the Covenant, which specifically prohibits unlawful attacks on one's reputation. NOWAK, supra note 24, at 353.

¹³ *Bodrozić v. Serbia and Montenegro*, Communication No. 1180/2003, Par. 7.2.

subject of permanent public discussions in Kazakhstan. Thus, the government cannot claim that its limitation on Ms. Toregozhina's right to freedom of expression was for the purpose of protecting the "rights and reputations of others".

C. The limitation was not "necessary"

The Committee has noted that even if the State party establishes the existence of a legitimate purpose for the limitation, it must also demonstrate that the actions taken were "necessary"¹⁴ for protecting that purpose. 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"¹⁵. As the Government did not clearly explain through the court trials and further decisions what value it had protected by posing restrictions to Ms. Toregozhina's free expression thus the administrative sanctions imposed on Ms. Toregozhina constitute a limitation on her right to freedom of expression, as protected by Article 19(2), and because the narrow exception to free expression contained in Article 19(3) does not apply in this case, those sanctions violate the Covenant. Such restrictions prevent Kazakhstani society from public political discussions.

D. The Republic of Kazakhstan violated Ms. Toregozhina's right to assembly.

Article 21 protects Ms. Toregozhina's right to assembly in this case.

As it was noted above in spite the government's prosecution of Ms. Toregozhina de-facto based on her public performance related to political issue, in particular to what extent Kazakhstani population trust to ongoing governmental politics, de-jure it was based on violation of the order for organizing and holding assemblies. In case of Ms. Toregozhina de-jure her conviction and administrative sanctions are the consequences of holding her public assembly not permitted by the local authorities.

Under such circumstances her conviction and administrative sanctions, and the threat that any assembly may be punished by similar sanctions in the future constituted restrictions on her freedom assembly. Such restrictions are not compatible with the meaning of Article 21 of the Covenant.

In *Kivenmaa v. Finland*¹⁶ the Committee notes that any restrictions upon the right to assemble must fall within the limitation provisions of article 21.

In Kazakhstan, the Act on «Order of Organization and Holding of Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations» of 1995 requires prior application to local authorities (Akimat), at least 10 days before the beginning of any public meeting at a public place in the open air. The Act strictly prohibits organizing and holding any public meeting without further permission of local authorities. It means that local authorities have to approve the prior application and give a permission to conduct any public meeting at least 5 days before the beginning the meeting. Article 9 of the Act makes it a punishable offence to call a public meeting without prior application and permission (another words not authorized) by the local authorities. Another words Kazakhstani Act on «Order of Organization and Holding of Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations» provides legal requirement of pre-authorization for any public assembly. From the sense of *Kivenmaa v. Finland* where the Committee stressed

¹⁴ *Shin v. Republic of Korea*, Communication No. 926/2000, Par. 7.3.

¹⁵ *De Morias v. Angola*, Communication No. 1128/2002, Par. 6.8.

¹⁶ Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994).

that “a requirement to pre-notify a demonstration would normally be for reasons 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. Consequently, the application of Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant” pre-authorization requirement for public assembly cannot be considered as a restriction permitted by article 21 of the Covenant.

In case of Ms. Toregozhina did not explain through the court trials and further decisions what value it had protected by posing restrictions to Ms. Toregozhina’s right to assembly. Thus, the administrative sanctions imposed on Ms. Toregozhina constitute a limitation on her right to freedom of assembly, as protected by Article 21 of the Covenant.

III. Conclusion

An administrative sanction imposed on Bahytzhan Toregozhina was punishment for exercising her right to freedom of expression and right to freedom of assembly. As such, the Republic of Kazakhstan failed to meet its obligations under the International Covenant on Civil and Political Rights.