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**UNITED NATIONS  
OFFICE OF THE UNITED NATIONS  
HIGH COMMISSIONER FOR HUMAN  
RIGHTS**

**PROCEDURES SPECIALES ASSUMÉES  
PAR LE CONSEIL DES DROITS DE  
L'HOMME**

**SPECIAL PROCEDURES ASSUMED BY THE  
HUMAN RIGHTS COUNCIL**

**Mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and association**

11<sup>th</sup> of October 2016

**To Dignity / Kazakhstan**

Dear Dignity,  
Dear Arana,

We received information on the case of Max Bokayev, head of the NGO 'Arlan' (Altyrau, Kazakhstan). We understand that his case will soon be heard by the Altyrau City Court.

With this letter we wish to share some insights on international law, standards and principles that we believe could be useful in this case. These cover the following areas:

- (1) Relevance of international law before the Courts of Kazakhstan
- (2) Sanctioning peaceful participation in an unauthorized assembly
- (3) Sanctioning non-respect of notification procedure for assemblies
- (4) Disorder, disturbances and peaceful assemblies
- (5) Criminalization of people with dissenting opinions

Two documents are attached to this letter; they provide greater detail to some of the summary legal arguments made<sup>1</sup>.

You may want to share these legal arguments with the Court to facilitate a clear interpretation of the right to freedom of peaceful assembly as understood in international law, standards and principles as guaranteed under the constitution of Kazakhstan. In case you wish to send these arguments directly to the Court, kindly ensure inclusion of the Statement of Identity as included in this letter.

Sincere regards,

Maina Kiai  
Special Rapporteur on the rights to freedom of peaceful assembly and of association

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<sup>1</sup> Annex 1: United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association and Human Rights Centre of the University of Ghent, *Third Party Intervention before the European Court of Human Rights in Mahammad Majidli v. Azerbaijan (no. 3) and three other applications*, November 2015, <http://freeassembly.net/wp-content/uploads/2015/11/ECtHR-brief-Azerbaijan.pdf>

Annex 2: Human Right Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, U.N.Doc, A/HRC/31/66.

### **Summary of the facts**

Max Bokayev participated in a peaceful assembly on April 24<sup>th</sup> 2016, for which no authorization had been obtained. On May 6<sup>th</sup> 2016, Max Bokayev, requested to hold a peaceful assembly on 21<sup>st</sup> May 2016, but the authorities refused on 16<sup>th</sup> May. The next day, 17<sup>th</sup> May, Max Bokayev was arrested and has been detained since then. The criminal charges under Kazakh law, which seem to have been amended throughout the process, are:

- Social discord (article 174.2 Criminal Code);
- Distribution of knowingly false statements (article 274.4.2 Criminal Code) and
- Violation of the procedure to organize and conduct meetings, rallies, pickets, marches and demonstrations (article 400 Criminal Code).

### **Relevant issues:**

#### **(1) Relevance of international law before the Courts of Kazakhstan**

In the country report following the official mission to Kazakhstan in January 2015, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association welcomed the direct application of international human rights law, such as the right to freedom of peaceful assembly (art 21 of the International Covenant on Civil and Political Rights, or ICCPR) by national courts as stipulated by the constitution:

The Special Rapporteur welcomes the fact that the rights to freedom of peaceful assembly and of association are guaranteed in the Constitution, which also recognizes ideological and political diversity. He notes that the Constitution gives international treaties priority over domestic laws and allows them to be directly implemented. In theory, this allows courts to directly invoke, *inter alia*, articles 21 and 22 of the International Covenant on Civil and Political Rights in its judgements<sup>2</sup>.

When interpreting obligations under international law, legally binding international obligations are not the only obligations that are relevant. International standards and principles that emanate from legal and institutional frameworks, such as international treaty bodies; international or regional courts (jurisprudence, such as at the European, African or Inter-American level; existing or emerging practice (such as reflected in the OSCE principles on freedom of assembly<sup>3</sup>) are also crucial and relevant. That is why these sources will be referred to in the summary legal arguments below.

The United Nations Human Rights Committee--the body charged with authoritative interpretation and monitoring of implementation of the International Covenant on Civil and Political Rights (ICCPR)--consistently underscores that the right of peaceful assembly is a

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<sup>2</sup> Human Rights Council, U.N.Doc A/HRC/29/25.Add 2, para 11.

<sup>3</sup> OSCE-ODIHR (Office for Democratic Institutions and Human Rights), *Guidelines on freedom of peaceful assembly*, 2010, Warsaw.

fundamental human right that is essential for public expression of one's views and opinions and is indispensable in a democratic society<sup>4</sup>. The restriction of this right is only permissible when it is: (1) in conformity with the law; (2) for a legitimate aim as mentioned in article 21 of the ICCPR and (3) necessary in a democratic society. Any restriction must comply with the strict test of necessity and proportionality<sup>5</sup>.

In adopting laws providing for restrictions...States should always be guided by the principle that the restrictions must not impair the essence of the right...the relation between right and restriction, between norm and exception, must not be reversed.<sup>6</sup>

## **(2) Sanctioning peaceful participation in an unauthorized assembly**

National legislation often provides for procedures for organizing an assembly. While it is recommended that States provide provisions for organizers to notify authorities of an assembly--so that State authorities are able to facilitate the exercise of the right to peaceful assembly--it must be emphasized that the right to peaceful assembly is a right and not a privilege. Thus, peaceful assemblies can never be subjected to an 'authorization' procedure to be given at the discretion of authorities. In this regard, the Inter-American Commission rightly stated:

"...prior notification must not be confused with the requirement of prior authorization granted as a matter of discretion, which must not be established in the law or practice of the administrative authorities, even when it comes to public spaces."<sup>7</sup>

Requiring authorization turns the right into a privilege to be dispensed by authorities<sup>8</sup>.

The mere fact that an assembly was not authorized does not in and of itself justify interference with the freedom of peaceful assembly--such as by imposing sanctions upon participants<sup>9</sup>. The European Court of Human Rights clearly established that "the freedom to take part in a peaceful assembly [...] is of such importance that it cannot be restricted in any way...so long as the person concerned does not himself commit any reprehensible act on

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<sup>4</sup> Human Rights Committee, *Turchenyak et al. v. Belarus*, Communication No. 1948/2010, para. 7.4., (July 24, 2013); Reiterated in Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, para. 7.4., CCPR/C/112/D/2029/2011, (October 10, 2014).

<sup>5</sup> Human Rights Committee, *Sergey Praded v. Belarus*, Communication NO. 2029/2011, para. 7.5., CCPR/C/112/D/2029/2011, (October 10, 2014), with reference to Human Rights Committee, *General Comment No. 34*, para. 22.

<sup>6</sup> U.N. Human Rights Committee, *General Comment No. 27*, 1999, at para. 13.

<sup>7</sup> Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, op. cit., § 137.

<sup>8</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at § 60, U.N. Doc. A/HRC/29/25/Add.2 (June 2015)

<sup>9</sup> See European Court of Human Rights [ECtHR], *Primov v. Russia*, op. cit., § 119; *Oya Atman v. Turkey*, op. cit., § 39; ECtHR, *Samüt Karabulut v. Turkey* Application no. 16999/04, 27 January 2009, § 35.

such an occasion”<sup>10</sup> The court ruled this was even true for a penalty at the lower end of the scale of disciplinary penalties<sup>11</sup>.

*For in-depth arguments on the impermissibility of sanctions for participation in unauthorized assemblies see annex 1: United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association and Human Rights Centre of the University of Ghent, Third Party Intervention before the European Court of Human Rights in Mahammad Majidli v. Azerbaijan (no. 3) and three other applications, November 2015, <http://freeassembly.net/wp-content/uploads/2015/11/ECtHR-brief-Azerbaijan.pdf>*

### **(3) Punishing the non-respect of procedure to notify an assembly**

First, since an authorization procedure is not allowed under international law, it necessarily follows that punishing or sanctioning the lack of request for authorization by organizers does not conform to international law.

Second, while the lack of notification may make an assembly ‘unlawful’ under national legislation, such a peaceful assembly does not lose its protection under international law. Mere non-notification or non-respect of the national procedures is not legitimate grounds for sanctions, whether criminal or administrative.

The European Court of Human Rights held that “merely formal breaches of the notification time-limit [were] neither relevant nor a sufficient reason for imposing administrative liability”<sup>12</sup>.

The UN Human Rights Committee has found that States have consistently failed to demonstrate that a legitimate aim is served by prosecuting the non-notification of an assembly<sup>13</sup>. The European Court stressed that the enforcement of notification should not become an end in itself<sup>14</sup>. Indeed, in the case of *Novikova a.o. v Russia* the European Court of Human Rights said it could not see ‘what legitimate aim the authorities genuinely sought to

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<sup>10</sup>ECtHR, *Ezelin v. France*, Application no. 11800/526, 26 April 1991, para. 53. ECtHR, *Taranenko v. Russia*, Application no. 19554/05, 15 May 2014, para. 88; ECtHR, *Ashughyan v. Armenia*, Application no. 33268/03, 17 July 2008, para. 98.

<sup>11</sup> ECtHR, *Ezelin v. France*, Application no. 11800/526, 26 April 1991, para. 53. In the Court’s view, where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance. See ECtHR, *Oya Ataman v Turkey*, Application no. 74552/01, 5 December 2006, para. 42.

<sup>12</sup> ECtHR, *Kuznetsov v. Russia*, Application no. 10877/04, 23 October 2008 para. 43.

<sup>13</sup> UN Human Rights Committee, *Sergey Praded v Belarus*, Communication No.2029/2011, CCPR/C/112/D/2029/2011, November 2014, para. 7.8.

<sup>14</sup> ‘An unlawful situation does not justify an infringement of freedom of assembly. While rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public events [...], the Court emphasizes that their enforcement cannot become an end in itself. In particular, where irregular demonstrators do not engage in acts of violence the Court has required that the public authorities show a certain degree of tolerance towards peaceful gatherings’, ECtHR, *Primov and Others v. Russia*, Application no. 17391/06, 12 June 2014, para. 118.

achieve [...] for non-observance of the notification requirement, where they were merely standing in a peaceful and non-disruptive manner at distance of some fifty meters from each other. Indeed, no compelling consideration relating to public safety, prevention of disorder or protection of the rights of others was at stake. The only relevant consideration was the need to punish unlawful conduct.’<sup>15</sup>

The Special Rapporteur has underscored several times that ‘should the organizers fail to notify the authorities, the assembly should not be dissolved automatically and the organizers should not be subject to criminal sanctions, or administrative sanctions, resulting in fines or imprisonment’<sup>16</sup>. As this is valid for non-notified assemblies that take place, it is evidently also valid for assemblies for which notifications were flawed according to national law.

Criminalization and the potentiality of prosecution have serious chilling effects upon the exercise of the right to freedom of peaceful assembly, not only for the person concerned, but for the community at large<sup>17</sup>.

#### **(4) Disorder, disturbances and peaceful assemblies**

Peaceful assemblies naturally come with disturbances. The fact that an assembly may lead to disruptions is not a legitimate ground to interfere with the right to freedom of peaceful assembly. The Inter-American Commission on Human Rights has recognized that in a democratic society ‘the urban space is not only an area for circulation, but also a space for participation’<sup>18</sup>. Institutions at both the Inter-American<sup>19</sup> and European regional level have clearly stated that tolerance, from the public and the authorities, towards those disruptions of life is required. Such disruptions are part of the mechanics of a pluralistic society in

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<sup>15</sup> ECtHR, *Novikova a.o. vs. Russia*, para. 199. The Court also mentioned that after having considered the facts at hand, ‘nothing in the circumstances of the applicants’ demonstrations discloses that their prosecution was aimed at protecting ‘health or morals’, national security or even public safety.’ ECtHR, *Novikova a.o. vs. Russia*, para. 147. Interestingly the Court refers to *Ziliberberg v Moldova*, No 61821/00, 4<sup>th</sup> May 2004, indicating that it recognizes the prevention of disorder as a legitimate aim for persecution. However, this is not what is found in *Ziliberberg v Moldova*. The mentioning in para. 148 is contrary to the conclusion of the Court in this case as clearly stated in para. 199.

<sup>16</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at para. 29, U.N. Doc. A/HRC/20/27 and United Nations General Assembly, *Human Rights Council. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, at para. 51, U.N. Doc. A/HRC/23/39.

<sup>17</sup> On disproportionality of criminal sanctions and the effects on human rights, in case the right to freedom of expression, see also Inter-American Court on Human Rights, *Case of Norín Catrimán et al. (leaders, members and activist of the Mapuche Indigenous People) v Chile*, Judgment of May 29, 2004, para. 374-378.

<sup>18</sup> IACHR, *Report*, para. 136, citing a decision of the Constitutional Tribunal of Spain, Decision 66/1995, p. 3.

<sup>19</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights, Volume II. Report of the Special Rapporteur for freedom of expression to the Inter-American Commission*, 2008, Chapter IV, para. 70.

which diverse and sometimes conflicting interests coexist and find the forums and channels in which to express themselves<sup>20</sup>. The European Court of Human Rights held that:

Any demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic and, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly [...] is not to be deprived of all substance.<sup>21</sup>

Criminally charging participants or organizers of an assembly because of the natural disturbances that come with assemblies, amounts to a violation of the rights to freedom of peaceful assembly.

### **(5) Criminalization of people with dissenting opinions**

There is increasing concern globally that human rights defenders and, more generally, people with different opinions face criminalization. This concern has been expressed by different Special Rapporteurs, including the Special Rapporteur on the rights to freedom of peaceful assembly and of association<sup>22</sup>. Laws which are ‘vulnerable to selective interpretation and enforcement’<sup>23</sup> are of a particular concern. Such laws incorporate insufficient accountability mechanisms to protect against abuses. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed his concern about criminal laws being used to suppress information<sup>24</sup>. In a report on human rights defenders, the OSCE’s Office for Democratic Institutions and Human Rights expressed the same concern about vague laws arbitrarily applied as well as about administrative procedures and regulations: ‘[I]aws, regulations and practices that directly or indirectly criminalize carrying out unregistered human rights work [...] violate fundamental international human rights guaranteed.’<sup>25</sup> It is therefore of utmost importance for the court, especially in a context of assemblies, to scrutinize criminal charges to avoid

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<sup>20</sup> United Nations General Assembly, *Human Rights Council. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, at para. 65, U.N. Doc. A/HRC/23/39.

<sup>21</sup> ECtHR, *Ashughyan v. Armenia*, App. No. 33268/03, 2008, para. 90. See also ECtHR, *Balcik v. Turkey*, App. No. 25/02, 2007, para. 52: ‘In the Court’s view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance’. Also ECtHR, *Oya Ataman v. Turkey*, App. No. 74552/01, 2006, para. 41-41.

<sup>22</sup> For specific arguments on criminalization of behavior in relation to the exercise of freedom of peaceful assembly, see United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association and Human Rights Centre of the University of Ghent, *Third Party Intervention before the European Court of Human Rights in Mahammad Majidli v. Azerbaijan (no. 3) and three other applications*, November 2015, para 14-16 <http://freeassembly.net/wp-content/uploads/2015/11/ECtHR-brief-Azerbaijan.pdf>

<sup>23</sup> Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N. Doc A/HRC/26/30 (July 2014), para. 39.

<sup>24</sup> Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N. Doc A/HRC/20/17 (June 2012), p.1.

<sup>25</sup> OSCE Office for Democratic Institutions and Human Rights, *Guidelines on the Protection of Human Rights Defenders*, Warsaw, 2014, para 196 and 24.

the punishment of the exercise of rights protected by international law, such as the right to freedom of peaceful assembly.



**Mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and association**

**Statement of Identity United Nations Special Rapporteur**

1. Maina Kiai is the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association.
2. Special Rapporteurs are part of the special procedures mechanism of the Human Rights Council, made up of independent human rights experts with the mandate to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As at October 1, 2015, there were 41 thematic and 14 country mandates.
3. The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association was established by Human Rights Council Resolution 15/21 adopted in October 2010. The mandate was renewed for three years by Human Rights Council Resolution 24/5 adopted in September 2013 and another three years by Human Rights Council Resolution 32/32 in 2016. Mr. Maina Kiai took up his duties as the first Special Rapporteur on the rights to freedom of peaceful assembly and of association on May 1, 2011. Mr. Maina Kiai will be the mandate holder up to 30<sup>th</sup> April 2017.
4. The Special Rapporteur examines, monitors, advises and publicly reports on the freedoms of assembly and association worldwide. He does this by receiving individual complaints, conducting country visits, issuing thematic reports, providing technical assistance to governments, and engaging in public outreach and promotional activities – all with the ultimate goal of promoting and protecting the rights to freedom of peaceful assembly and of association worldwide. It is against this background and within this mandate that the Special Rapporteur seeks to contribute to this case where the right to freedom of peaceful assembly is at stake.
5. Any submission by the Special Rapporteur shall be provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with his independence, shall neither be sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.