

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on discrimination against women and girls

REFERENCE:
AL KAZ 4/2019

25 October 2019

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on violence against women, its causes and consequences and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 34/18, 41/12, 34/5, 32/2, 41/17 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **discriminatory restrictions on the rights to freedom of peaceful assembly, freedom of association and freedom of expression of lesbian, bisexual, trans, intersex and queer (LBTIQ) human rights defenders, which may relate to their engagement in advocacy on human rights related to sexual orientation, gender identity and gender equality.**

"Feminita Kazakhstan Feminist Initiative" (Feminita) is a queer grass-roots initiative working on monitoring and documenting discrimination and hate crimes on the basis of sexual orientation and gender identity, as well as the strategic litigation and advocacy of the human rights of lesbian, bisexual, trans, intersex and queer women (LBTIQ) in Kazakhstan. Feminita manages a website, social media and runs media campaigns. To date, no organisation working on the human rights of LBTIQ persons has the status of a legal entity in Kazakhstan.

According to the information received:

Restrictions on registrations as legal entity

Co-founders and members of Feminita submitted an application for the registration as a legal entity with the Kazakh Law on Non-Commercial Organisations on three repeated occasions; on 27 December 2017, on 13 February 2018, and on 12 December 2018. In all three applications the Almaty Justice Department took the decision to discontinue the registration procedure (by decision of 9 January 2018, 20 February 2018 and 3 January 2019, respectively),

on grounds of non-compliance of the organisations objectives with Art. 4 of the Law on Non-commercial Organisations. Article 4 of the Law provides an open-ended list of objectives, stating: “[n]on-commercial organisations can be established for attainment of social, cultural scientific, educational, charity, management objectives; protection of rights, legal interests of citizens and organisations; dispute and conflict resolution; satisfaction of citizens’ spiritual and other needs; protection of public health, environmental protection, development of physical education and sports; provision of legal support, as well as other objectives aimed at provision of public good and benefits of its members”.

Feminita’s objectives are indicated in paragraph 2.1 of its Charter and read as follows: “[Feminita’s] main objective is protection of rights, legal interests of individuals, namely, provision of support for protection of the rights of women with limited physical and mental abilities, LGBTIQ communities, sex workers, human rights awareness raising”.

Reportedly, Feminita’s repeated requests for a detailed explanation to the Ministry of Justice, placed since 28 March 2018, are still pending a reply. On 12 March 2019, Feminita filed a complaint to the Almaty Medeu District Court. On 27 May 2019, the Almaty Medeu District Court dismissed the claim on two grounds largely based on reasonings of the Almaty Justice Department:

- (1) the objectives of the fund’s activities stipulated in paragraph 2 of its Charter do not provide for strengthening of well-established spiritual and moral values, spiritual culture, prestige and role of the family in society;
- (2) [according to] paragraph 2.1 of the entity’s Charter are entitled to bring changes in the political sphere which is unacceptable for a legal entity in the form of a public fund.

On 27 June 2019, Feminita filed an appeal to the Almaty City Court. On 3 September 2019, the Almaty City Court upheld the decision of the court of first instance.

Restrictions on the activities of human rights defenders, including violations on the exercise of their right to freedom of expression, peaceful assembly and association, in a safe and enabling environment

The lack of legal registration impedes on Feminita’s activists’ right to freedom of assembly and association and puts its members under risk of persecution for operating without legal registration.

On 8 August 2018, Ms. **Zhanar Sekerbayeva**, a women’s rights defender and co-founder of Feminita, took part in a photoshoot aimed at opening discussions around “uyat-man” (women-shaming) and the destigmatisation of menstruation.

On 15 August 2018, Ms. Zhanar Sekerbayeva was intercepted by seven police officers when leaving a café in Almaty in the company of her friend, Ms. **Gulzada Serzhan**. Two of the policemen present were in civil clothing. A police officer told Ms. Zhanar Sekerbayeva that they were going to detain her in relation to a criminal case. He demanded her to take a seat in the police car, threatening her of using phsyical force if she resisted.

Ms. Zhanar Sekerbayeva received a subpoena which contained several mistakes, including the spelling of Ms. Zhanar Sekerbayeva's name and surname, and making reference to the Criminal Code instead of the Administrative Offense Code. Her plea to contact her lawyer was rejected at first and she only managed to contact her lawyer with the help of her friend, Ms. Gulzada Serzhan. Once she managed to reach her lawyer, the police stayed within earshot, not allowing for a private conversation to take place.

Following the conversation with the lawyer, it has been reported that Ms. Zhanar Sekerbayeva was pulled into the police car by force. Ms. Zhanar Sekerbayeva asked Ms. Gulzada Serzhan to accompany her to the police station, located at 109 Karasay Batyr Street in Almaty. Inside the police car, the police inspector and his colleagues made comments on both women's gender expression.

It has been alleged, that once they reached the police station, Ms. Zhanar Sekerbayeva and Ms. Gulzada Serzhan were requested to leave their cell phones with staff at the entrance. They were kept for three hours at the police station, until Ms. Zhanar Sekerbayeva's lawyer arrived.

Ms. Zhanar Sekerbayeva was charged with "petty hooliganisms" under Article 434(1) of the Kazakhstan Administrative Offences Code (AOC). According to the Kazakhstan administrative legislation (Article 743(1) of AOC), participants in the proceedings on administrative offences should be notified about the time and place of case consideration and summoned to a court, authorised body or state official by a notice. Administrative detention is allowed only as "temporary limitation of personal freedom of a private person [...] with the objective (1) to stop an administrative offence, (2) to establish the identity of a suspect, (3) to draw up a protocol on an administrative offense, when it is impossible to draw it up at the place of the administrative offense, (4) to ensure rightful consideration of a case and enforce an existing court decision, (5) to prevent immediate threat to life or health of people, threats of accidents or man-made disasters". According to the Kazakhstan Criminal Code, subpoenas are issued exclusively in the cases of criminal detention.

The court hearing was appointed for the following day, which did not leave adequate time for Ms. Zhanar Sekerbayeva and her lawyer to prepare for the defense. Prior to the hearing Ms. Zhanar Sekerbayeva was given a paper, allegedly as "a necessary formality to sign", which in fact turned out to be a voluntary refusal from the lawyer/attorney's services. She did not sign the paper.

On 20 August 2018, a court found Ms. Zhanar Sekerbayeva guilty under Article 434 (1) of the Administrative Code and imposed her a fine of KZT 12025 (32 USD). On 29 August 2018, she applied for appeal, on 22 September 2018 the Appeal Court decided to uphold the decision. The case is currently pending at the Court of Cassation.

Restrictions to peaceful assembly

In February 2019 and in accordance with Art. 32 of the Kazakhstan Constitution, four individual applications have been submitted to the Almaty City Hall, requesting permission to hold a Women's March on 8 March 2019 in Almaty to mark International Women's Day. All four applications were rejected by the Almaty City Hall with a very similar wording, stating that "in accordance with paragraph 1.2 of the Decision of XVII session of the Almaty City Maslikhatof III convening number 167 dated 29 June 2005, it is recommended to hold all non-governmental events of public-political nature in the square behind the "Saryarka" cinema theatre. In light of non-compliance with established legal norms, your application is rejected." All four subsequent applications, suggesting the March would take place behind "Saryarka" cinema theatre, were rejected as well, either stating that other events were planned already or that sewage works were ongoing.

Ms. **Veronica Fonova**, a LBT human rights defender and one of the petitioners who submitted an application to hold the Women's March, was summoned to the City Hall on 20 July 2019 for a 1.5 hour talk with the deputy head of the Department of Public Development. In their interaction, authorities expressed their concern that "LGBT people may attend the demonstration".

While we do not wish to prejudge the accuracy of the information made available to us, we express our serious concern about the discriminatory restrictions placed on LBTIQ human rights defenders and advocacy groups. We are particularly concerned about the apparent discriminatory registration process and consider that the refusal to register Feminita as a legal entity may be related to the organization's peaceful activities in advocating and speaking out against discrimination and defending the human rights of LBTIQ persons. We are further concerned that LBTIQ human rights defenders could have been targeted due to their engagement in activities for the advocacy of human rights related to sexual orientation, gender identity and gender equality and that they face serious restrictions related to their right to freedom of expression, peaceful assembly and association.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain how the grounds evoked for the discontinuation of the registration process of “Feminita” as a legal entity are compatible with Your Excellency’s international human rights obligation, particularly with regard to the right to freedom of expression and association .
3. Please indicate the measures taken to ensure that human rights defenders, including those working towards the protection from violence and discrimination based on sexual orientation, gender identity and for gender equality in Kazakhstan are able to carry out their human rights activities, including the exercise of their right to freedom of expression, peaceful assembly and association, in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any sort.
4. Please provide further information on the legal grounds for denying permission to hold a Women’s March, and the summoning of Ms. Veronica Fonova, and explain how these measures are compatible with Kazakhstan’s international human rights obligations
5. Please provide information on the legal grounds for the arrest and detention and the judicial procedures introduced against Ms. Zhanar Sekerbayeva, and explain how these measures are compatible with international human rights norms and standards
6. Please indicate what measures have been taken or are envisaged to be taken to ensure that women and other persons are not discriminated against based on their perceived or actual sexual orientation or gender identity and to ensure enjoyment of all human rights, including their legitimate rights to freedom of assembly, association, expression and opinion.
7. Please provide information on any other measures taken by the authorities to prevent calls for, and acts of discrimination, incitement, hostility and violence against women and other persons based on their perceived or real sexual orientation or gender identity.
8. Please provide information on any plans to enact legislation that would include the grounds of sexual orientation and gender identity as prohibited grounds for hate speech, incitement to discrimination, and incitement to violence and hate crimes.

9. Please provide further information on measures taken by your Excellency's Government to foster, embrace and celebrate a diverse society.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule

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

Michel Forst

Special Rapporteur on the situation of human rights defenders

Victor Madrigal-Borloz

Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Dubravka Šimonović

Special Rapporteur on violence against women, its causes and consequences

Meskerem Techane

Chair-Rapporteur of the Working Group on discrimination against women and girls

Annex

Reference to international human rights law

The principles of equality and non-discrimination are part of the foundations of the rule of law. Under articles 1 and 2 of the Universal Declaration of Human Rights, '[a]ll human beings are born free and equal in dignity and rights', and '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. This is reaffirmed also in Article 2 (1) of International Covenant on Civil and Political Rights (ICCPR), to which Kazakhstan is party since 24 January 2006, Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Kazakhstan ratified on 24 January 2006, and in several provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Kazakhstan acceded to on 26 August 1998.

We further wish to refer your Excellency's Government to the jurisprudence, general comments and concluding observations of United Nations treaty bodies that consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law. In addition, the special procedures of the Human Rights Council have long recognized discrimination on these grounds. Articles 2, 3, 17 and 26 of the ICCPR are universal and apply to everyone, irrespective of their sexual orientation or gender identity. The Human Rights Committee also found that States have a legal obligation to ensure to everyone the rights recognized by the ICCPR without discrimination on the basis of sexual orientation or gender identity (CCPR/C/GC/35, paragraph 3) and established that "States parties shall respond appropriately to patterns of violence against certain categories of victims, including violence against persons because of their sexual orientation or gender identity" (CCPR/C/GC/35, para. 9). We further wish to recall General Comment 20 of the Committee on Economic, Social and Cultural Rights, which established that "any other social condition", as reflected in article 2.2 includes sexual orientation (E/C.12/GC/20, para. 32).

We would also like to recall resolution 17/19, 27/32 and 32/2 of the Human Rights Council, where the Council expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity. In this connection, we wish to draw your attention to the United Nations High Commissioner for Human Rights High Commissioner's High Commissioner's report to the Human Rights Council on violence and discrimination based on sexual orientation and gender identity (A/HRC/19/41), as well as his report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity (A/HRC/29/23). In his reports, he recommends that States should address discrimination by: (a) Revising criminal laws to remove offences relating to consensual same-sex conduct and other offences used to arrest and punish persons on the basis of their sexual orientation and gender identity or expression; ordering an immediate moratorium on related prosecution; and expunging the criminal records of individuals convicted of such offences; (b) Repealing so-called "anti-

propaganda” and other laws that impose discriminatory restrictions on freedom of expression, association and assembly; (c) Ensuring that antidiscrimination legislation includes sexual orientation and gender identity among prohibited grounds, and also protects intersex persons from discrimination (A/HRC/29/23, paras 48, 57, 79).

We further wish to draw attention to the Concluding Observations of 29 March 2019 of the Committee on Economic, Social and Cultural rights, in which it recommends that Kazakhstan take all steps necessary to prevent and combat discrimination against lesbian, gay, bisexual and transgender persons, and ensure their equal enjoyment of the rights under the Covenant, and enact tailored legal protections of these persons against attacks and harassment (E/C.12/KAZ/CO/2). We would like further like to refer to the Concluding Observations of 9 August 2016 of the Human Rights Committee, in which it expresses concern about reports of violence against LGBT persons by both State and non-State actors, and the failure to address such violence by Kazakhstan and providing specific recommendations to ensure that Kazakhstan’s anti-discrimination legal framework is in line with the International Covenant of Civil and Political Rights (ICCPR) (CCPR/C/KGZ/CO/2, para. 9-10).

We further wish to recall Your Excellency’s Government that Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, requiring States Parties to take all appropriate measures to eliminate discrimination against women in political and public life. We also wish to draw attention to the Human Rights Committee’s General Comment 28 (HRI/GEN/1/Rev.9 (Vol. I)), which states that “discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.” In this regard, we believe it is also pertinent to refer to the last Report of the Working Group on the Universal Periodic Review (UPR) of Kazakhstan (A/HRC/28/10), drawing special attention to the recommendation in paragraph 124.6, which states: “Enact specific legislation that prohibits discrimination against women and on the basis of sexual orientation, and develop a system through which all individuals can safely report cases of discrimination and access avenues of redress.” Additionally, we would like to draw your attention to the recommendation in paragraph 126.24, which states: “Strengthen the legal framework for the protection and non-discrimination of lesbian, gay, bisexual, transgender and intersex people”.

In addition, we wish to draw your attention to the report by the Independent expert on protection against violence and discrimination based on sexual orientation and gender identity which provides an overview of the violence and discrimination based on sexual orientation and gender identity (A/HRC/38/43). The Independent Expert in his report recommends that States repeal laws that criminalize consensual same-sex relations, gender identity or expression, and statements or publications or actions that discuss or refer to the identity or expression of lesbian, gay, bisexual, trans and gender non-conforming persons (so-called “anti-propaganda” laws). States should moreover review

other laws and policies that exacerbate police abuse and harassment, extortion and acts of violence against people based on their actual or perceived sexual orientation or gender identity, in particular, laws based on public decency, morals, health and security, including beggary and loitering laws; and laws criminalizing conduct seen as “indecent” or “provocative”, including laws criminalizing sex work.

Concerning the rights to freedom of expression, freedom of peaceful assembly and freedom of association, we would like to draw your attention to Articles 19, 21 and 22 of the ICCPR. Articles 21 and 22 state that the rights to freedom of peaceful assembly and of association should be recognized, and that no restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests 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.

The Special Rapporteur on the rights to freedom of peaceful assembly and of association, in his report, has also previously highlighted that provisions restricting or prohibiting the right to freedom of association of a specific group on discriminatory grounds, such as sexual orientation or gender identity, is not permitted under the Covenant (A/HRC/26/29, para. 64).

With regards to paragraph 1.2 of the Decision of XVII session of the Almaty City Mslikhat of III convening number 167 dated 29 June 2005, which recommends all non-governmental events of public-political nature in the square behind the “Saryarka” cinema theatre, we note that this may amount to a blanket ban on the holding of these types of events in other places. Blanket bans on protest locations are always contrary to Article 21 of the ICCPR as they do not permit a determination of the necessity and proportionality of such a measure in each individual case. Furthermore, “time, place and manner” restrictions should never be used to undermine the message or expressive value of an assembly. Communication between assembly organisers and participants with law enforcement should be entirely voluntary, and should not formally impose on organizers the obligation to negotiate the time, place or manner of the assembly with the authorities (A/HRC/31/66, paras. 30, 34, 39).

According to the Working Group on discrimination against women and girls report A/HRC/23/50, women’s autonomous civil society organizations are crucial to women’s participation in public and political life and integral to democracy, development and peace. In order to have the capacity to participate in political and public life on equal footing with men, women must be able to exercise their rights to freedom of thought, conscience, religion, expression, movement and association. However, the Group noted that lesbian, bisexual and transgender women who defend their human rights are vulnerable to attacks on their civil rights and personhood where there is a climate of intolerance arising from the perceived challenge to established norms of gender identity, gender roles and sexuality. It recommended that States support the growth of autonomous women’s movements in their multifaceted efforts to ground universal standards of equality and human rights in diverse contexts.

We additionally wish to reiterate the principle enunciated in Human Rights Council Resolution 12/16, which calls on States to recognise the exercise of the right to freedom of opinion and expression as one of the essential foundations of a democratic society. Any limitation to the right to freedom of expression must meet the criteria established by international human rights standards, such as article 19 (3) of the ICCPR.

In a joint statement on free expression and association, UN and regional human rights experts stated that they “categorically reject arguments that such restrictions to the rights of LGBTI people are necessary to protect public morals, health or the well-being of vulnerable people.”¹

We underscore that States have obligations to protect rights to freedom of thought and expression, association and peaceful assembly without discrimination on the grounds of sexual orientation or gender identity. To that end, they should review and repeal discriminatory provisions in domestic legislation that have a disproportionate impact on the exercise of these rights by LGBT persons and others advocating for their rights. States should refrain from directly interfering with these rights and protect LGBT persons exercising these rights from attacks and reprisals through preventive measures and by investigating attacks, prosecuting perpetrators and ensuring remedy for victims (A/HRC/29/23, para. 18 and 79(b)(c)).

We would also like to refer to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (A/RES/53/144, adopted on 9 December 1998), also known as the UN Declaration on Human Rights Defenders. In particular, we would like to draw your attention to article 1, 2, 5 and 6 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels, as well as the rights to meet or assemble peacefully, to form, join and participate in non-governmental organisations, associations or groups, and to freely publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms, while each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. In addition and for the particular concerns raised in this letter, we would like to refer to article 7 of the Declaration on Human Rights Defenders, which includes the right to discuss and advocate for human rights ideas that are not necessarily new but that, in some contexts, may be perceived as new or unpopular because they address issues that might challenge tradition and culture. States are encouraged to ensure the protection of defenders who are

¹ Joint statement by UN Special Rapporteurs on freedom of opinion and expression, freedom of peaceful assembly and of association, right to health, and human rights defenders African Commission on Human and Peoples' Rights, Special Rapporteur on Human Rights Defenders in Africa, Inter-American Commission on Human Rights and OSCE Representative on Freedom of the Media, “Free expression and association key to eliminating Homophobia and Transphobia” (May 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14602&LangID=E>

at greater risk of facing certain forms of violence and discrimination because they are perceived as questioning accepted sociocultural norms, traditions, perceptions and stereotypes, including about sexual orientation and gender identity.

And lastly, we would also like to refer to resolution 24/21 of The Human Rights Council, which reminds States of their obligation to respect and fully protect the civil, political, economic, social and cultural rights of all individuals, inter alia the rights to freedom of expression and opinion and to assemble peacefully and associate freely, online as well as offline, including for persons espousing minority or dissenting views or beliefs, and that respect for all such rights, in relation to civil society, contributes to addressing and resolving challenges and issues that are important to society, such as (...) empowering persons belonging to minorities and vulnerable groups, (...) empowering women and youth, (...) and the realization of all human rights. (A/HRC/RES/24/21, para 1)

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.