

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

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolution 41/12.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **draft law "On the Procedure for Organising and Holding Peaceful Assemblies in the Republic of Kazakhstan" (the "draft law")** developed by the Ministry of Information and Public Development of the Republic of Kazakhstan (MIPD), published on the website www.legalacts.egov.kz on 7 February 2020 and the draft law **"On Introduction of Amendments to Certain Legislative Acts of the Republic of Kazakhstan Concerning the Organization and Holding of Peaceful Assemblies in the Republic of Kazakhstan" (the "draft amendments law")**.

I welcome the decision of your Excellency's Government to draft a new law, rather than propose amendments to the current law from 1995 on freedom of assembly. This aligns with recommendation 97(a) of my predecessor's country visit report, which states: "the Special Rapporteur calls on the relevant authorities [...] to adopt within a specific time frame a new law on public assembly in compliance with international human rights law, with the participation of civil society. The new law should eliminate the State's prior approval to hold an assembly, strictly and narrowly define the limited places where assemblies cannot take place, explicitly specify that public order and safety is the State's duty only and remove criminal liability for "participation in an illegal assembly" (art. 400 of the Criminal Code)" (A/HRC/29/25/Add.2).

However, I remain concerned that parts of new draft law do not seem to be in line with international human rights standards and more precisely the right to freedom of peaceful assembly as guaranteed by article 21 of the International Covenant on Civil and Political Rights, ratified by Kazakhstan on 24 April 2006. I observe that the right of assembly is essential to the enjoyment of various rights such as freedom of expression, the right of association, and the right to defend human rights. States furthermore have an obligation to not only refrain from violating the rights of individuals involved in an assembly, but to ensure the rights of those who participate or are affected by them, and to facilitate an enabling environment (A/HRC/31/66 para. 13).

The draft law foresees that only citizens of Kazakhstan can be the organizers and participants of assemblies. This proposed provision violates the principle of non-discrimination of article 2 para. 1 of the ICCPR, which also applies to freedom of assembly. Furthermore, the draft law requires all organizers to be at least 18 years old.

This violates the rights of children to organize assemblies (Art. 15 of the Convention of the Rights of the Child).

With regards to the notification process, whereby depending on the type of assembly, ten or five days prior notice is required, I would like to recall that notification procedures should be subject to a proportionality assessment and their objective should be solely to facilitate the exercise of the right to freedom of peaceful assembly, to protect public safety and order and to facilitate the rights of others. Notification should not be expected for assemblies that do not require prior preparation by State authorities, such as those where only a small number of participants is expected, or where the impact on the public is expected to be minimal (A/HRC/31/66 paras. 21 & 22). In addition notification process, may have the end result of inhibiting spontaneous demonstrations.

Furthermore, the notification process in the draft law seems to be a de facto pre-approval procedure, as the authorities can refuse the permission to hold the planned assembly and on very broad grounds. I would thus like to remind your Excellency's Government that where a notification system is in place, it must facilitate peaceful assembly, and must not operate as a de facto requirement for prior authorization (A/HRC/31/66 para. 28).

I wish to underscore that failure to notify authorities of an assembly does not render it unlawful, and consequently should not be used as a basis for the dispersal of an assembly. I further note that this applies equally in the case of spontaneous assemblies, where prior notice is otherwise impracticable or where no identifiable organiser exists. (A/HRC/31/66 para. 23). In the event of failure to notify authorities of a demonstration, the organisers should not be subject to criminal or administrative sanctions resulting in fines or imprisonment. (A/HRC/20/27 para. 29). The requirement of prior notification must not be confused with the requirement of prior authorisation 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.

The draft law makes a distinction between pickets, assemblies and rallies, which need a notification; and demonstrations and marches, which need authorization. Freedom of peaceful assembly is a right and not a privilege and as such its exercise should not be subject to prior authorization by the authorities.

Regarding the use of public space for assemblies, I am concerned about the very restrictive provisions in the draft law, which foresees that assemblies are only allowed in "Special Venues" established by the government or local parliaments (maslikhats). I would like to reiterate that assemblies are an equally legitimate use of public space as commercial activity or the movement of vehicles and pedestrian traffic. Any use of public space requires some measure of coordination to protect different interests, but there are many legitimate ways in which individuals may use public spaces. A certain level of disruption to ordinary life caused by assemblies, including disruption of traffic, annoyance and even harm to commercial activities, must be tolerated if the right is not to be deprived of substance. (A/HRC/31/66 para. 32). Access to public space means

concretely that organizers and participants should be able to use public streets, roads and squares to conduct (static or moving) peaceful assemblies. Spaces in the vicinity of iconic buildings such as presidential palaces, parliaments or memorials should also be considered public space, and peaceful assemblies should be allowed to take place in those locations.

The draft law foresees extensive responsibilities and liabilities for the organizer of assemblies. While organizers should make reasonable efforts to comply with the law and encourage peaceful conduct of an assembly, organizers should not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability, weaken trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights. No person should be held criminally, civilly or administratively liable for the mere act of organizing or participating in a peaceful protest. (A/HRC/31/66 paras. 26 & 27).

Regarding the peacefulness of the assembly, the draft law foresees that acts of violence committed by participants are a ground for termination of the assembly. I would like to emphasize that the criteria of violence should be applied to individuals and not to the assembly as a whole, given that the right to peaceful assembly is the individual right of all persons. Isolated acts of violence by some participants should not be attributed to organizers or other participants. Some participants or parts of an assembly may thus be covered by article 21 ICCPR, while others in the same assembly are not. An assembly only ceases to be peaceful when it is characterized by widespread and serious violence. Whenever violence is observed in an assembly, the law enforcement officials have the obligation to isolate and remove violent elements from an otherwise peaceful assembly, in a manner which is respectful of their rights to life and physical integrity. The acts of violence by some, does not render an assembly not peaceful. (A/HRC/31/66 para. 61).

Furthermore, the draft law gives government officials the grounds to interrupt or terminate assemblies on the basis of a vast and vague catalog of grounds. This seems to restrict assemblies unproportionally and creates further legal uncertainty.

I am also concerned over the provision in the draft law which prohibits the use of masks and other items which conceal the face of protesters, as both scarves and gas masks may fall into this category, items which may be used by demonstrators to protect themselves from the effects of tear gas in cases where it may be used in order to disperse protests. Additionally, in the current COVID-19 crisis, there are legal requirement in Kazakhstan to wear face masks in public. In the future, participants of peaceful assemblies might want to wear face masks for their own health and for the health of others.

I further express concerns that the use of such facial coverings may give rise to criminal sanctions against the user, the organizer or lead to the dispersal of a peaceful assembly. While I assume that the purported justification of this restriction is to facilitate identification of demonstrators, I remind your Excellency's Government that such restrictions must be necessary and proportionate to the aim pursued, and a blanket ban on

the use of facial coverings in the context of manifestations may constitute an a priori assumption of criminality. I note that facial coverings do not necessarily prevent identification, as such can be removed in the case of arrest for criminal behaviour. Moreover, I would like to note that in the context of public demonstrations is very common to use bandanas, masks, hoods, caps, backpacks and other types of clothing and accessories in public. These elements cannot be considered sufficient signs of threat of use of violence, nor be used as grounds for dispersion, detention or repression of demonstrators.

The draft law makes multiple references to extremism and “extremist crimes”. In one paragraph, it forbids citizens of Kazakhstan the organization of assemblies if they have outstanding convictions of “extremist crimes”. I would like to express my apprehension with this wording. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has highlighted in her country visit report to Kazakhstan that the term “extremism” has no purchase in binding international legal standards and, when employed as a criminal legal category is incompatible with the exercise of certain fundamental human rights. She found that article 174 of the Criminal Code, which is the most commonly used article against civil society activists in Kazakhstan, broadly criminalizes incitement to social, national, tribal, class, racial or religious discord, all of which are extremely vague grounds (A/HRC/43/46/Add.1 para. 15). I share the Special Rapporteurs concerns, especially with regards to this new draft law and would like to remind your Excellency’s Government that that the use of counter-terrorism and “extrimisms” laws to quell legitimate activities protected by international law, such as peaceful assembly, is inconsistent with the State’s treaty obligations.

I have also taken note with worry of the article that proclaims any form of foreign funding as a reason to refuse approval of a peaceful assembly. I would like to remind your Excellency’s Government that the mandate has stated in previous reports that general restrictions on foreign funding do not comply with article 22, paragraph 2, of the Covenant, which states that “no restrictions may be placed on the exercise of [the right to freedom of association] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” The conditions for any restriction are cumulative, that is, motivated by one of the above limited interests, have a legal basis and “necessary in a democratic society” (A/HRC/23/39 para. 19). Furthermore, Human Rights Council resolution 22/6 calls upon States to ensure that “that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto.”

Lastly, I welcome the decision of your Excellency’s Government to hold a consultation process for the draft laws with domestic civil society organizations and regions of Kazakhstan. However, the inputs from civil society need to be reflected in the draft laws, to ensure that the consultation process is meaningful and representative. Thus,

I call on your Excellency's Government to ensure that all stakeholders are given ample time to contribute to the process especially in the current State of Emergency.

Your Excellency's Government should ensure that the draft laws are in accordance with its obligations under international law regarding the right to freedom of peaceful assembly. To ensure this, your Excellency's Government should remove all broad and vague limitations from the draft laws and ensure that the goal and core of the draft aim at facilitating peaceful assemblies rather than restricting them. Moreover, I strongly urge your Excellency's Government to amend the draft law to include a broader scope of use of public space for assemblies and to ensure that in each case a test of proportionality between the different public interests is conducted. The draft laws should also be reviewed regarding the obligations and liabilities of organizers and to ensure that only widespread violence from participants is considered as grounds for the termination of an assembly.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would therefore be grateful for your observations on the following matters:

1. Please provide any additional comment(s) you may have on the above-mentioned information.
2. Please provide information regarding the steps taken by your Excellency's Government to ensure that the draft laws mentioned are in line with international standards, especially with Article 21 and Article 22 of the International Covenant on Civil and Political Rights.
3. Please provide information on consultations that have taken or will take place with civil society organizations and how their comments and recommendations have been integrated into the draft laws.

I finally urge your Excellency's Government to continue its cooperation with the mandates of the Special Procedures of the Human Rights Council, to take into account the concerns raised, and to avail of any technical assistance that Special Procedures may be able to provide in order to ensure the full promotion and protection of human rights in Kazakhstan.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

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

