TO THE HONORABLE MEMBERS OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

In the Matter of:

Mr. Ramazan Yesergepov
Citizen of the Republic of Kazakhstan

v.

The Republic of Kazakhstan

SUPPLEMENTAL MEMORANDUM OF LAW

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Submitted by:

Raushan Yesergepova
Victim's spouse

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*Freedom Now—a Washington, D.C. based non-profit legal advocacy organization that works to free prisoners of conscience worldwide through focused legal, political and public relations advocacy—was retained by Mr. Yesergepov's wife to serve as his *pro bono* international legal counsel during the period of his detention. This Memorandum is intended to supplement and not replace the Petition submitted by Ramazan Yesergepov on December 30, 2010.

I. Summary of Facts

Ramazan Yesergepov is a citizen of the Republic of Kazakhstan and the chief editor and founder of the *Alma-Ata Info* newspaper. Charged with violating state secrecy laws, the Kazakhstani government sentenced him to three years' imprisonment and two years' suspension from journalism for reporting on possible misconduct by local security forces.[1]

A. Arrest and Detention of Ramazan Yesergepov

On November 21, 2008, the *Alma-Ata Info* published a piece by Mr. Yesergepov in the paper's opinion section entitled "Who Rules our Country – the President or the CNS?" The article alleged interference by local officials from the Committee for National Security (CNS) in local tax evasion prosecution against a well known businessman, Sultan Makhmadov. The article reproduced "confidential" CNS file reports, which the editorial office received from an anonymous source after the paper published a number of articles on the subject.

Local CNS officials first attempted to abduct Mr. Yesergepov on December 1, 2008. They claimed to be acting under oral authorization to detain him as a witness, but Mr. Yesergepov escaped when other journalists and family members came to his aid.

After the attempted abduction, government officials made a series of public statements asserting Mr. Yesergepov's guilt. On December 2, 2008, local CNS officials claimed during a press conference to have discovered additional and unpublished CNS documents during a search of Mr. Yesergepov's home. They also claimed to have discovered a large amount of cash in the home of Mr. Makhmadov. The clear implication—that Mr. Yesergepov was being paid by the businessman for reporting the story—was later made explicit. On January 22, 2009, Kazakhstan's Ambassador to the Organization for Security and Cooperation in Europe (OSCE), Kairat Abdrakhmanov, issued a statement claiming that Mr. Makhmadov "organized [the] theft of investigation documents from [the] regional office of the National Security Committee and handed them over to Mr. Yesergepov for publication. There is a proof that Mr. Yesergepov received [] remuneration for publishing these documents." Later, at a press conference held on February 3, 2009, the CNS press-secretary claimed to have conclusive evidence of a criminal conspiracy between Mr. Yesergepov and Mr. Makhmadov, purportedly citing correspondence between the journalist and businessman.

On January 6, 2009, local CNS officials abducted Mr. Yesergepov from the Institute of Cardiology in Almaty. The hospital admitted Mr. Yesergepov on December 25, 2008 with ischemic heart disease, progressive stenocardia, third degree hypertension, and diabetes. Despite Mr. Yesergepov's serious illnesses, masked individuals armed with sub-machineguns forced him into a car, terminating his treatment. His captors provided no warrant or explanation for this abduction. They then transported Mr. Yesergepov to Taraz City—an eight hour trip by car during which he remained handcuffed—despite his severe physical condition.

[1] The information contained in this Summary of Facts is based upon the Petition submitted to the United Nations Human Rights Committee by Ramazan Yesergepov on December 30, 2010.

Upon arriving in Taraz City, authorities held Mr. Yesergepov *incommunicado* in a cold and windowless cell for three days, where he contracted bronchitis.

From the time authorities abducted Mr. Yesergepov on January 6, 2008 until December of that year, Mr. Yesergepov did not have access to medical care or the medications necessary to treat his many health conditions.

B. Civil Proceedings

On December 3, 2008, prosecutors filed a suit before the Special Inter-District Economic Court of Almaty against Zhuldyz Ltd., the editorship of the *Alma-Ata Info* newspaper. The suit sought an order suspending the publication of the paper in connection with the article by Mr. Yesergepov.

Mr. Yesergepov was prevented from taking part in the proceedings, although he was the owner, founder, and chief editor of the *Alma-Ata Info*. Authorities also prevented other members of the editorial staff from participating in the proceedings.

During the proceedings the court entered the legal opinion of the director of the Kazakhstani International Bureau for Human Rights and Rule of Law into the record. The opinion demonstrated that the CNS documents in question should not have been "classified" under Kazakhstani law. However, the court failed to take the opinion into account. On February 10, 2009, the special inter-district Economic Court of Almaty City found that the CNS documents were secret and suspended the printing of the *Alma-Ata Info* for a period of one month. On August 13, 2009, the Supreme Court of Kazakhstan rejected the appeal in this case.

C. Criminal Proceedings

On January 9, 2009 authorities brought Mr. Yesergepov before a judge for the first time since his abduction three days earlier. Prosecutors charged Mr. Yesergepov with violating Article 172, Part 4, of the Criminal Code of the Republic of Kazakhstan (CCRK) (collection and disclosure of information constituting state secrets), Article 228 of the CCRK (abuse of authority), and Article 339 of the CCRK (interference with the activity of a court). Court No. 2 of Taraz City then authorized Mr. Yesergepov's arrest.

The court closed the proceedings to the public for reasons of "national security." The court also excluded Mr. Yesergepov's family, journalists, human rights workers, and foreign diplomats.

During the proceedings, the government limited Mr. Yesergepov's access to his chosen counsel. The court refused to allow a number of advocates to participate in the proceedings, including U. Ikhsanov, the former Head of Criminal Cases Department for the Kazakhstani Supreme Court, R. Taukina, the President of the Journalists in Trouble Foundation, and Raushan Yesergepova, Mr. Yesergepov's wife. The court rejected them because CNS officials refused to grant them access to "secret materials." The court also rejected Mr. Yesergepov's petition to represent himself; instead, the court appointed a public defender, whose services Mr. Yesergepov refused.

During the trial, the court rejected Mr. Yesergepov's request to have a number of witnesses testify regarding the improper classification of the CNS documents. The court also rejected witnesses that would have testified that the article contained socially important information. Rather, in finding Mr. Yesergepov guilty, the court apparently relied on the opinion of the Standing Commission of the National Security Committee and the decision of the Inter-District Economic Court of Almaty—a decision which followed a civil proceeding where the court entirely excluded Mr. Yesergepov.

On August 8, 2009, the Court No. 2 of Taraz City convicted Mr. Yesergepov under Articles 172 and 228 of the CCRK and sentenced him to three years' imprisonment and two years' suspension from journalism. In the preparation of his appeal, Mr. Yesergepov did not have access to all of the documents regarding his case. Rather, the court provided him only partial copies of the indictment and sentence.[2]

The trial court's decision was affirmed by the Bench for Criminal Cases of Zhambyl Oblast Court on October 22, 2009. The Supervisory Bench of Zhambyl Oblast Court rejected Mr. Yesergepov's appeal on December 14, 2009. The Supreme Court of the Republic of Kazakhstan dismissed Mr. Yesergepov's appeal on May 24, 2010.

II. Legal Analysis

A. Mr. Yesergepov'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").[3] The Optional Protocol entered into force for the Republic of Kazakhstan on September 30, 2009.[4] Further, no ground of inadmissibility applies in this case. As such, Mr. Yesergepov's case is admissible.

1. Inadmissibility *ratione temporis* does not apply in this case

As a general rule of international law, the principle of inadmissibility *ratione temporis* provides that "a state is not bound by the terms of a treaty in respect of any dispute if the events in questions occurred before the treaty entered into force or if the subject matter of the treaty ceased

[2] Although the court never provided Mr. Yesergepov a full copy of the sentence, it appears that he was permitted to view the full text on one occasion two months after the court issued its opinion.

[3] Article 1 of the Optional Protocol to the Covenant on Civil and Political Rights provides that "[a] State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol." Optional Protocol to the Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, *entered into force* December 16, 1976 [hereinafter Optional Protocol], at art. 1.

[4] Depository Notification, CN.394.2009.TREATIES-1.

to exist before it entered into force for the State in question."[5] The Republic of Kazakhstan's declaration to the Optional Protocol—that it recognizes the competence of the Committee only "concerning actions and omissions by the State authorities or acts and decisions adopted by them following the entry into force of [the Optional Protocol] in the Republic of Kazakhstan"—is merely a restatement of this general principle.[6]

There is an exception to inadmissibility *ratione temporis* where "the effects of a violation of a treaty provision continue after the entry into force of the treaty for the State."[7] This "continuing injury" exception has become an accepted principle by the Committee.[8] For example, in *A et al v. S* the Committee affirmed that,

> "as a rule the Committee can only consider an alleged violation of human rights occurring [on or] after the date of entry into force of the Covenant and the Protocol for the State Party concerned, unless the alleged violation is one which, although occurring before that date, continues or has effects which themselves constitute violations after that date."[9]

The Committee has further interpreted the exception as requiring an "affirmation, by act or by clear implication, of previous violations by the State party."[10]

In *Holland v. Ireland*, the Committee applied the exception.[11] The author in that case complained that his trial by a "Special Criminal Court" failed to satisfy the requirements of a fair and impartial tribunal, as required by Article 14(1) of the Covenant. His initial trial and sentencing occurred before the Covenant entered into force for Ireland on March 8, 1990. However, the Irish Court of Appeal dismissed the author's petition after that date. In determining that

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[5] CONTE & BURCHILL, DEFINING CIVIL AND POLITICAL RIGHTS, (Ashgate 2009 2nd ed). The rule derives from Article 28 of the Vienna Convention on the Law of Treaties (hereinafter Vienna Convention), which states that "unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force with respect to that party." Vienna Convention on the Law of Treaties, 1155 UNTS 331, *entered into force* January 27, 1980, at art. 28.

[6] The full text of the declaration provides that, "[t]he Republic of Kazakhstan, in accordance with article 1 of the Optional Protocol on Civil and Political Rights, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Republic of Kazakhstan concerning actions and omissions by the State authorities or acts or decisions adopted by them following the entry into force of this Optional protocol in the Republic of Kazakhstan." Depository Notification, *supra* note 4.

[7] CONTE & BURCHILL, supra note 5, at 28.

[8] *See e.g. Loveless v. Canada*, Communication No. 24/1977 ¶ 7.3. Although the Optional Protocol and Human Rights Committee's Rules of Procedure are silent on the issue and the Human Rights Committee itself has not directly addressed the issue of precedent, the Committee's "long established practice of referring to previous Views and General Comments indicates that it considers its jurisprudence to be a critical element of the continued development of substantive norms." KIRSTEN A. YOUNG, THE LAW AND PROCESS OF THE U.N. HUMAN RIGHTS COMMITTEE 182 (Transnational Publishers Inc. 2002).

[9] *A et al v. S*, Communication No. 1/1976.

[10] *Anton v. Alegria*, Communication No. 1424/2005 ¶ 8.3.

[11] *Holland v. Ireland*, Communication No. 593/1994.

inadmissibility *ratione temporis* did not apply,[12] the Committee noted that,

> "[a]lthough the author was convicted and sentenced at first instance in June 1989, that is before entry into force of the Covenant for Ireland, his appeal was dismissed on 21 May 1990, that is after the entry into force of the Covenant for Ireland, and his imprisonment lasted until August 1994."[13]

The circumstances of Mr. Yesergepov's arrest, trial, sentence, appeal, and detention fall within the "continuing violation" exception to inadmissibility *ratione temporis*. The Optional Protocol entered into force for the Republic of Kazakhstan on September 30, 2009. Although some of the events in this case occurred prior to the entry into force, the government affirmed these violations "by act [and] by clear implication." In addition to decisions made by intermediate appellate bodies on October 22, 2009 and December 14, 2009, the Supreme Court of Kazakhstan rejected Mr. Yesergepov's appeal on May 24, 2010, well after the Optional Protocol entered into force for Kazakhstan. Further, like the author in *Holland v. Ireland*, Mr. Yesergepov's detention continued long after the treaty entered into force.[14]

Because the Republic of Kazakhstan recognizes the competence of the Committee to consider cases under Article 9(2) of the Optional Protocol and no basis for inadmissibility applies in this case, Mr. Yesergepov's petition is admissible.

B. The Republic of Kazakhstan violated Mr. Yesergepov's right to freedom of expression

1. Article 19(2) protects Mr. Yesergepov's expression in this case

Article 19(2) of the Covenant provides that "[e]veryone 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

[12] Although the Committee decided that inadmissibility *ratione temporis* did not preclude the Committee from considering the merits of the case, it did find that the case was inadmissible because the author failed to adequately exhaust all domestic remedies. *Holland v. Ireland*, Communication No. 593/1994 ¶ 9.3.

[13] *Holland v. Ireland*, Communication No. 593/1994 ¶ 9.2.

[14] Mr. Yesergepov's continued detention alone, in this context, would constitute a "continuing violation." Early in its jurisprudence, the Committee found that although a primary author's allegedly illegal detention came to an end before entry into force of the Covenant, and was therefore inadmissible, the complaint on behalf of her relatives, who remained in detention after the entry into force of the Committee, was admissible. *Hernandez Valentini de Bazzano v. Uruguay*, Communication 5/1977 ¶5(c)(b-c). After adopting the arguably narrower "affirmation" standard, the Committee developed a line of cases providing that "a term of imprisonment, without the involvement of additional factors, does not amount *per se* to a 'continuing effect.'" *Zhurin v. Russian Federation*, Communication No. 851/1999 ¶ 6.5. However, this line of cases appears limited to complaints based on only procedural deficiencies that result in a detention that extends past the entry into force. However, this analysis should not apply where, as here, the continued detention constitutes a violation of a separate protected right such as the right to freedom of expression. In such cases—even in the absence of additional court proceedings—the continued detention would constitute a "continued violation" because the continued detention in retaliation for the exercise of a fundamental rights in itself constitutes a violation of the Covenant.

through any other media of his choice."[15] This protection "includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment."[16]

Journalism is protected expression under Article 19(2).[17] The Committee has recognized that freedom of expression and "a free and uncensored press" are of "paramount importance" in a democratic society.[18] Reading Article 19(2) in conjunction with the right to take part in the conduct of public affairs, which is protect by Article 25 of the Covenant,[19] leads to the conclusion that the media must have "wide access to information" related to public affairs.[20] As such, the media must be able—without censorship or restraint—to comment and inform the public on issues of public importance.[21]

In this case, the government's prosecution of Mr. Yesergepov was based on his publication of an article in the *Alma-Ata Info*. The article, "Who Rules Our Country – the President or the CNS?" alleged misconduct related to a local tax evasion prosecution by local security officials. Mr. Yesergepov conveyed information regarding an issue of public importance that constituted "expression" and therefore entitled him to the protection of Article 19(2) of the Covenant.

2. The limitations on Mr. Yesergepov'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 theses 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."[22] Rather, any limitation "must meet a strict test of justification."[23]

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[15] International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, at art. 19(2) [hereinafter Covenant].

[16] *Marques de Morais v. Angola*, Communication No. 1128/2002.

[17] *Mavlonov et al. v. Uzbekistan*, Communication No. 1334/2004.

[18] *Marques de Morais v. Angola*, Communication No. 1128/2002. *See also* General Comment No. 25 ¶ 12 ("Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected.").

[19] Article 25 provides that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives…" Covenant, *supra* note 15, at art. 25.

[20] *Gauthier v. Canada*, Communication No. 663/95 ¶ 13.5.

[21] General Comment 25 ¶ 25.

[22] General Comment 10 ¶ 4.

Under the Committee's jurisprudence, a legitimate limitation on the right to freedom of expression must be, 1) "provided by law,"[24] 2) for the protection of one of the "enumerated purposes," and 3) "necessary" to achieve that purpose.[25]

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

In looking to the purported purposes, the government should not be given the benefit of the doubt.[26] Rather, 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."[27] In this case, the limitation on Mr. Yesergepov'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."[28]

i. 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."[29] In *Park v. Republic of Korea*, the State party

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[23] *Park v. Korea*, Communication No. 628/1995 ¶ 10.3.

[24] Although the Committee's jurisprudence on the "provided by law" requirement is limited, this requirement would likely be interpreted as requiring "that the limitation must be sufficiently delineated in a State's law." JOSEPH ET AL., The International Covenant on Civil and Political Rights: Cases and Controversies, 525 (Oxford 2004 2nd ed.). Such a requirement would certainly be met where the limitation in question, as here, is provided for by statute. *See e.g. Colman v. Australia*, Communication No. 1157/2003. *See also* MANFRED NOWAK, UN Covenant on Civil and Political Rights: CCPR Commentary, 351 (N.P. Engel 2005 2nd ed.) ("Interference based solely on an administrative provision or a vague statutory authorization" would fail to meet the "provided by law" requirement.).

[25] *Shin v. Republic of Korea*, No. 926/2000 ¶ 7.3.

[26] While the European Court of Human Rights will give the government some measure of discretion, called a "margin of appreciation," the Committee has only applied this relaxed standard in one case involving a limitation on the freedom of expression for the purpose of protecting public morals. JOSEPH ET AL., *supra*, note 24, at 527. However, in that case the Committee's analysis was limited to the "public morals" purpose. *Hertzberg et al. v. Finland*, Communication No. 61/79 ¶ 10.3 ("It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authority.") Given this specific rationale, the relaxed standard should not be applied where the limitation is based on another purpose. Further, the Committee has specifically rejected the "margin of discretion" in the context of other rights protected by the Covenant. JOSEPH ET AL., *supra* note 24, at 527.

[27] *Shin v. Republic of Korea*, No. 926/2000 ¶ 7.3.

[28] 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.

[29] *See* JOSEPH ET AL., *supra* note 24, at 534.

invoked national security as its purpose when it imprisoned the author for membership and participation in an "anti-State organization."[30] 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 concerns may in some instances justify reasonable limitations on the disclosure of "state secrets."[31] However, it would be inconsistent with the narrowness of the Article 19(3) exception to allow states to invoke the rationale in every case where a fact was disclosed which the state wished to keep secret. 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."[32] In the context of state secrets, the government must demonstrate "the precise nature of the threat" to national security posed by the *content* of the state secret disclosed, not only the fact of classification.

As in *Park*, the government of Kazakhstan must point to the "precise nature of the threat" posed by Mr. Yesergepov's speech. However, Mr. Yesergepov's writings merely disclosed possible misconduct by members of the local security services as they investigated the prosecution of a local businessman. While such behavior by security officials may be information the government would wish to keep secret, it in no way implicates the political independence or the territorial integrity of the Republic of Kazakhstan.[33] A blanket rule providing that any matter related to the actions of the security services is to be deemed a "national security" issue would not meet the requirement that the government identify the precise nature of the threat posed. As such, the national security rationale is inappropriate in this case.

ii. 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

[30] *Park v. Republic of Korea*, No. 628/1995 ¶ 2.1

[31] Although the Committee does not appear to have held specifically that limitations on disclosure of state secrets could be justified by national security concerns, scholars have noted that "[c]ommon national security restrictions include prohibitions on transmission of 'official secrets.'" JOSEPH ET AL., *supra* note 24, at 534. *See also*, NOWAK, *supra* note 24, at 355 (indicating that "procurement or dissemination of military secrets may be prohibited for this reason.").

[32] JOSEPH ET AL., *supra* note 24, at 540.

[33] The fact that the article in question was posted on the internet on a "foreign website," and was therefore available internationally, does not change the essentially local nature of the article or its content. The government appears to have reasoned that this implicates national security. *See* Petition submitted to the United Nations Human Rights Committee by Ramazan Yesergepov, Annex No. 34, December 30, 2010. However, accepting this reasoning would "internationalize" all materials posted on the internet, thereby profoundly expanding the scope of this narrow limitation on free expression.

equally important rights,"[34] 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, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high."[35]

In this case, Mr. Yesergepov's expression related to possible wrongdoing by security officials. The issue was already the subject of previous articles. Further, there appears to be no allegation by the government of Kazakhstan that Mr. Yesergepov's article contained anything false. The fact that the government did not charge Mr. Yesergepov with defamation further indicates that the rationale would not be appropriate in this case. As such, the government cannot claim that its limitation on Mr. Yesergepov's right to freedom of expression was for the purpose of protecting the "rights and reputations of others."

b. 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" for protecting that purpose.[36] It is not enough for the government to merely claim that limiting the author's free expression would in some way advance its purpose.[37] 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."[38] Because most limitations on

[34] 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.

[35] *Bodrozić v. Serbia and Montenegro*, Communication No. 1180/2003 ¶ 7.2. In arriving at this conclusion, the Committee cited its decision in *Aduayom et al. v Togo*, which held that "[T]he freedoms of information and of expression are cornerstones in any free and democratic society. It is the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticise or openly and publicly evaluate their Governments without fear of interference or punishment" *Aduayom et al. v Togo*, Communication No. 422-424/1990. This appears to be a clear indication from the Committee that although the limitations imposed on the right to freedom of expression in Article 19(3) don't reference necessity in the context of a "democratic society,"—in contrast to Articles 21 and 22—the special protections afforded to the freedom of expression where it implicates democratic rights (as in cases involving the press) still limit the reach of Article 19(3). Such an interpretation is consistent with the observation by some scholars that the distinction between the language of articles requires that "[t]he relevant criterion for the necessity of interference is thus not the principle of democracy but whether it was proportional in a given case." *See e.g.* NOWAK, *supra* note 24, at 352.

[36] *Shin v. Republic of Korea*, Communication No. 926/2000 ¶ 7.3.

[37] In *Kim v. Republic of Korea*, the Committee rejected the argument that punishing the distribution of materials that coincided with the policy statements of the Democratic Peoples' Republic of Korea, was "necessary" for protecting national security. The Committee noted that "North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk." *Kim v. Republic of Korea*, Communication No. 574/1994 ¶ 12.4.

free expression can point to an enumerated purpose, the element of proportionality must tightly constrain such limitations in order to prevent the exception from swallowing the rule.[39]

Where a government limits the disclosure of state secrets to protect national security—in cases where the content of those "secrets" truly implicates national security by threatening the political independence or territorial integrity of the state—the proportionality requirement should allow criminal penalties only against officials who have an obligation to protect the information. A proportional limitation, however, would not be so broad as to impose criminal sanctions against members of the press, particularly where they are reporting on official misconduct. Further, any proportional limitation should include a "public interest" defense to disclosure.[40]

Mr. Yesergepov is not an official charged with the duty of maintaining the confidentiality of state secrets. Rather, as a journalist he acted to fulfill his duty to inform the public about matters of public interest, notably allegations of corruption. Instead of investigating such allegations, Kazakhstani officials chose arrest Mr. Yesergepov for raising such issues. The government imprisoned him for reporting on and reproducing documents of significant public import. Such harsh criminal sanctions not only violate Mr. Yesergepov's right to freedom of expression, but also have a chilling effect on the press and human rights defenders in Kazakhstan. Additionally, no "public interest" defense to disclosure of state secrets is available in the Republic of Kazakhstan.[41] Such a disproportionate limitation on the right to freedom of expression fails to meet the "necessity" requirement of Article 19(3).

Because the criminal sanctions imposed on Mr. Yesergepov constitute a limitation on his 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.

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[38] *De Morias v. Angola*, Communication No. 1128/2002 ¶6.8. In determining whether an accreditation scheme that operated to exclude journalists from observing parliamentary proceedings was necessary and proportionate, the Committee held that "the accreditation scheme should be specific, fair and reasonable, and their application should be transparent." *Gauthier v. Canada*, Communication No. 663/1995 ¶ 13.6. *See also Sohn v. Republic of Korea*, Communication No. 518/1992 ¶ 10.4 (finding that "reference to the general nature of the labor movement" and "alleging that the statements issued by the author in collaboration with others was a disguise for the incitement to a national strike" was insufficiently precise to meet the necessity requirement).

[39] JOSEPH ET AL., *supra* note 24, at 252.

[40] The Special Representative for Freedom of the Media for the Organization for Security and Cooperation in Europe (OSCE)—the security organization at which the Republic of Kazakhstan held the Chairmanship in 2010—recently recommended that "Criminal and Civil Code prohibitions [for breach of secrecy] should only apply to officials and others who have a specific legal duty to maintain confidentiality." Further, he recommended that the "test of public interest in the publication should become an integral part of jurisprudence on disclosure of information." Organization for Security and Cooperation in Europe, The Office of the Representative on Freedom of the Media, *Access to Information by the Media in the OSCE Region: Trends and Recommendations*, 10-11, April 30, 2007, *available at* http://www.osce.org/fom/24892.

[41] Organization for Security and Cooperation in Europe, The Office of the Representative on Freedom of the Media, *Access to information by the media in the OSCE region: Country Reports*, 198, April 30, 2007, *available at* http://www.fas.org/sgp/library/osce-reports.pdf.

C. The Republic of Kazakhstan's detention of Mr. Yesergepov is arbitrary

Article 9(1) of the Covenant provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[42] Arbitrary detention is a broader category than merely "unlawful;" a detention must be consistent with the domestic law *and* not "arbitrary."[43] In addition to instances where deficiencies in due process can render a detention arbitrary—for example where the arrest and trial failed to meet the procedural requirements of Article 14—the Committee has recognized that a detention may be rendered arbitrary where the reason for the arrest is the exercise of a fundamental human right.[44] Because Mr. Yesergepov's arrest and trial did not meet minimum standards of due process, and because his detention is in response to his exercise of the right to freedom of expression, the detention is arbitrary.

1. Mr. Yesergepov's arrest and trial did not meet minimum standards of due process

The Covenant provides a series of procedural protections for civil and criminal proceedings.[45] These requirements establish the minimum international standards of due process among the State parties. These procedural protections, which serve to "safeguard the rule of law," apply to all State parties, "regardless of their legal traditions."[46] In this case, the Republic of Kazakhstan failed to satisfy a number of these requirements, thereby denying Mr. Yesergepov the right to due process under the Covenant and rendering his detention arbitrary.[47]

a. Right to be informed of the reason for arrest

Article 9(2) of the ICCPR provides that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges against

[42] Covenant, *supra* note 15, at art. 9(1).

[43] JOSEPH, ET AL., *supra* note 24, at 308-09.

[44] See JOSEPH ET AL., *supra* note 24, at 311.

[45] Although the Covenant contemplates procedural protections for both civil and criminal proceedings, not all the protections apply in civil proceedings. However, the following analysis is based upon only due process violations in the criminal proceedings against Mr. Yesergepov.

[46] General Comment No. 32 ¶ 2-3.

[47] The UN Working Group on Arbitrary Detention has recognized that a detention is "arbitrary" where "the total or partial nonobservance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character." Working Group on Arbitrary Detention, Fact Sheet No. 26, Annex IV, ¶ 8(c). Therefore, insofar as the deficiencies in this case violate specific procedural protections contained in the ICCPR, to which the Republic of Kazakhstan is a State party, they render the detention "arbitrary." Because such a detention is "arbitrary" these procedural failures combine to constitute a violation of the Article 9(1) prohibition on arbitrary detention, in addition to a violation of the specific procedural rights primarily found in Article 14.

him."[48] In this case, Kazakhstani authorities abducted Mr. Yesergepov on January 6, but did not provide a reason for the arrest until January 9.[49] This failure is a clear violation of the ordinary language[50] of Article, which requires that notice be given "at the time of arrest."

b. Right to a fair and public hearing by an impartial tribunal

Article 14(1) of the ICCPR provides that all criminal defendants "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[51] The right to a public trial is essential because it "ensures the transparency of the proceedings and thus provides an important safeguard for the interest of the individual and of society at large."[52] However, it also recognizes that "[t]he press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society…" This limited exception to the general requirement of openness is reserved for "exceptional circumstances."[53]

By preventing the public from attending the trial, the government violated Mr. Yesergepov's right to a public hearing. In this case, the government purportedly excluded family members, journalists, human rights workers, and foreign diplomats, for reasons of "national security." Although this rationale may be used in some circumstances to limit the public's access to a trial, its application is inappropriate in this case. As noted above, the "state secrets" in this case did not threaten either the political independence or territorial integrity of the Republic of Kazakhstan. Rather, the case involved allegations of interference by local officials in a local tax evasion prosecution. Although such revelations may have proven embarrassing to the government, they do not constitute the exceptional circumstances needed to close off a criminal proceeding from public scrutiny. As such, closing the trial to the public in this case violated Mr. Yesergepov's right to a fair and public hearing under Article 14(1).

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[48] Covenant, *supra* note 15, at art. 9(2). Article 14(3) of the Covenant also protects the right to be promptly informed of criminal charges. In this case it is unclear, because the applicant was never provided with a copy of the charging document, when charges were formally brought against him. Insofar as any formal charges were instituted prior to the hearing on January 9, 2010, the government's failure to inform Mr. Yesergepov of the criminal charges against him also violated his rights under Article 14(3).

[49] When the officers took Mr. Yesergepov from the hospital, they did not indicate the reason for the arrest. Rather, they merely referred to oral instructions of the Zhambyl Oblast CNS to bring Mr. Yesergepov before the department.

[50] The Committee has stated on a number of occasions that it applies the methods of interpretation contained in the Vienna Convention on the Law of Treaties, which "places the emphasis on a literal interpretation of the Covenant by reference to its object and purpose which can be derived from examination of its preamble." CONTE & BURCHILL, *supra* note 5, at 15. "Time" is defined as "a point in or period of duration at or during which something is alleged to have occurred. Black's Law Dictionary 1242 (8th ed. 2005). As such, failing to notify Mr. Yesergepov of the reason for his arrest for a period of days does not satisfy the requirement of Article 9(2) that a detainee be notified "at the time of arrest."

[51] Covenant, *supra* note 15, at art. 14(1).

[52] General Comment 32 ¶ 28.

[53] General Comment 32 ¶ 29.

c. Right to the presumption of innocence

Article 14(2) of the ICCPR provides that "[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."[54] This right to the presumption of innocence, "which is fundamental to the protection of human rights," ensures that the defendant be given the "benefit of the doubt," and that "all public authorities refrain from prejudging the outcome of the trial."[55] The Committee has recognized that this includes an obligation of the State party to "abstain[] from making public statements affirming the guilt of the accused."[56] In *Gridin v. Russian Federation*, the Committee found that "public statements made by high ranking law enforcement officials portraying the author as guilty which were given wide media coverage" violated the authors right to the presumption of innocence.

In this case, the Republic of Kazakhstan made a number of public statements asserting or implying Mr. Yesergepov's guilt prior to his conviction. These included statements by the Kazakhstani Ambassador to the OSCE that there was proof that Mr. Yesergepov received payment for publishing the documents and statements by the press-secretary of the CNS that they held conclusive evidence of his participation in a criminal conspiracy. These statements, both by high ranking members of the government publicly portray Mr. Yesergepov as guilty. As in *Gridin v. Russian Federation*, these statements violated Mr. Yesergepov's right to the presumption of innocence under Article 14(2).

d. Right to represent oneself and to counsel of one's own choosing

Article 14(3)(d) of the ICCPR provides that a criminal defendant shall be entitled to, "defend himself in person or through legal assistance of his own choosing." Although the Committee has recognized that these rights are not absolute,[57] the limitations on the rights recognized by the Committee do not apply in this case.

In *Corrreia de Mantos v. Portugal*, the Committee addressed permissible limitations on the right to self-representation, acknowledging that,

> The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further intimidation if they were to be questioned by the accused.[58]

The Committee has noted that such a restriction on the right to self-representation "must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the

[54] Covenant, *supra* note 15, at art. 14(2).

[55] General Comment 32 ¶ 30.

[56] General Comment 32 ¶ 30.

[57] CONTE & BURCHILL, *supra* note 5 at 188.

[58] *Correia de Matos v. Portugal*, Communication 1123/2002 ¶.

interests of justice."[59] In this case, none of these rationales could have justified the court's decision to prevent Mr. Yesergepov from representing himself, and thus preventing him from doing so violated his right to self-representation under Article 14(3)(d).

The government's interference with Mr. Yesergepov's right to the counsel of his own choosing also falls outside any permissible limitation on the rights protected by Article 14(3)(d). The Committee has recognized that in circumstances where counsel is assigned under a legal aid regime, "an accused is not entitled to counsel of his or her choice if he or she is being provided with a legal aid lawyer, and is otherwise unable to afford legal representation.[60]

In this case, Mr. Yesergepov was not appointed counsel under a legal aid regime; rather, the government refused to allow Mr. Yesergepov's chosen counsel to participate in the proceedings. The court's rationale for this denial was that Kazakhstani security officials refused to allow any of his chosen counsel access to "secret" documents. By refusing each one of his chosen representatives such authorization—including a former member of the Supreme Court of Kazakhstan—the CNS effectively ensured that Mr. Yesergepov would not have access to counsel of his own choosing. In this context, those refusals violated Mr. Yesergepov's right to representation by chosen counsel under Article 14(3)(d).

e. Right to appeal

Article 14(5) of the Covenant provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." This obligation imposes on State parties "a duty to review substantively, both on the basis of sufficiency of evidence and of the law, the conviction and sentence."[61] Further, the Committee has recognized that under this principle,

> [t]he convicted person is entitled to have access to a duly reasoned, written judgment of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal, also to other documents, such as the trial transcripts, necessary to enjoy the effective exercise of the right to appeal.[62]

However, in this case Mr. Yesergepov only received partial copies of the indictment and sentence from the trial court, two months after the court rendered its verdict.[63] The extract of the sentence provided merely concludes that Mr. Yesergepov is guilty of the charged crimes and then lists the "material evidence" of the case.[64] However, the court does not indicate what

[59] General Comment No. 32 at ¶ 37.

[60] CONTE & BURCHILL, *supra* note 5, at 188.

[61] General Comment No. 32, at ¶ 48.

[62] General Comment No. 32, at ¶ 49.

[63] Although not provided with a copy of the full judgment, it appears that two months after the court's decision, Mr. Yesergepov was allowed to view the full sentence on one occasion, but was not allowed to make a copy.

[64] Petition submitted to the United Nations Human Rights Committee by Ramazan Yesergepov, Annex No. 1, December 30, 2010.

evidence it relied upon, what evidence was given particular weight, or what the substance of each piece of evidence demonstrated to the court. Further, the excerpt appears devoid of any legal analysis whatsoever. The documents provided by the trial court in this case fell far short of those needed to prepare an effective appeal, and thus violated Mr. Yesergepov's rights under Article 14(5) of the Covenant.

By failing to provide an explanation at the time of his arrest, convicting him after a closed trial, presuming his guilt, denying both chosen counsel and self-representation, and providing only a partial copy of the sentence before his appeal, the Republic of Kazakhstan violated Mr. Yesergepov's right to the minimum standards of due process established under Articles 9(2), 14(1), 14(2), 14(3)(d) and 14(5) of the Covenant.

2. Mr. Yesergepov's detention resulted from the exercise of his fundamental right to freedom of expression

In addition to cases where a lack of due process renders a detention arbitrary, the Committee has recognized that a detention may be arbitrary where the reason for the arrest is the exercise of a fundamental human right, and thus a violation of Article 9(1).[65] This understanding is consistent with the definition of "Category II" deprivations of liberty adopted by the United Nations Working Group on Arbitrary Detention (UN Working Group). The UN Working Group has indicated that a detention is "arbitrary,"

> "[w]hen the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles, 7, 13, 14, 19, 20, and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26, and 27 of the International Covenant on Civil and Political Rights."[66]

In *Mukong v. Cameroon*, the Committee embraced this broad understanding of Article 9 noting that "[t]he drafting history of [A]rticle 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[67] In finding that the detention in that case constituted a violation of Article 9(1), the Committee referenced its analysis in the case pursuant to Article 19. Having determined that the detention was "neither reasonable nor necessary under the circumstances"—and thus a violation of the author's freedom of expression under Article 19—the Committee concluded that his detention also constituted a violation of Article 9(1). [68]

As demonstrated above, Mr. Yesergepov's expression was entitled to protection under Article 19(2). The narrow exception to the right to freedom of expression does not apply in this case because the limitations were neither necessary nor for a legitimate purpose. Rather, it was for the

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[65] *See* JOSEPH ET AL., *supra* note 24, at 311.

[66] Working Group on Arbitrary Detention, Fact Sheet No. 26, Annex IV, ¶ 8(b).

[67] *Mukong v. Cameroon*, Communication No. 458/91 ¶ 9.8.

[68] *Mukong v. Cameroon*, Communication No. 458/91 ¶ 9.8.

purpose of silencing a journalist who had fulfilled his duty to report on issues of public importance. Therefore, Mr. Yesergepov's detention constitutes a violation of his right to freedom of expression. As in *Mukong v. Cameroon*, this renders his continued detention "arbitrary" and thus a violation of his rights under Article 9(1) of the Covenant.

D. The Republic of Kazakhstan subjected Mr. Yesergepov to inhumane detention

Mr. Yesergepov's detention, without access to adequate medical treatment for prolonged periods of time, is inhumane. Article 10(1) of the Covenant provides that "[a]ll persons deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[69] While conditions of detention may vary depending upon levels of development, "[t]he humane treatment and the respect for human dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely upon material resources."[70] Where prisoners require basic medical treatment, it must be provided.[71]

In *Simpson v. Jamaica*, the Committee found that the State's failure to provide adequate medical treatment to the victim while in government custody constituted a violation of Article 10(1).[72] After police assaulted the victim, authorities refused him medical treatment.[73] The victim also suffered from an undiagnosed and untreated medical condition resulting in swelling and pain in his testicles, back pain, and eye problems. Although allowed to see a doctor who provided medication that proved ineffective, authorities would not allow him to see a specialist.[74] In such circumstances, and in the absence of an explanation from the State party, the Committee found that this constituted inhuman treatment under Article 10(1).[75]

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[69] Covenant, *supra* note 15, at art. 10(1). The prohibition on "inhuman treatment" referred to in Article 10(1) applies generally to all persons deprived of their liberty. General Comment No. 9 ¶ 1. "Not only must prisoners deprived of their liberty *not* be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty itself." CONTE & BURCHILL, *supra* note 5, at 125. Thus, the prohibition contained in Article 10 establishes a higher "positive" obligation of treatment where the victim is subject to limitations on his liberty and violations under Article 10 can occur at "a lower intensity of disregard for human dignity," than under Article 7. NOWAK, *supra* note 24, at 186-88.

[70] General Comment No. 9. Although prison conditions may vary, "[I]nhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all of the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim." *Brough v. Australia*, Communication No. 1184/2003, ¶ 9.2.

[71] CONTE & BURCHILL, *supra* note 5, at 128. *See also* Nowak, *supra* note 24, at 188-89 ("In other words, [the State] must provide its detainees and prisoners with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, privacy, etc.)").

[72] *Simpson v. Jamaica*, Communication No. 695/1996.

[73] *Simpson v. Jamaica*, Communication No. 695/1996, ¶ 2.1.

[74] *Simpson v. Jamaica*, Communication No. 695/1996, ¶ 2.7.

[75] *Simpson v. Jamaica*, Communication No. 695/1996, ¶ 7.2. Having found that the State party's failure to provide adequate medical treatment constituted a violation of "his right to be treated with humanity and with respect for the inherent dignity of the human person and are therefore contrary to article 10," it declined to decide whether this

At the time of his abduction by security officials, Mr. Yesergepov was receiving treatment at the Institute of Cardiology in Almaty, where he suffered from ischemic heart disease, progressive stenocardia, third degree hypertension, and diabetes. After enduring eight hours in handcuffs during the trip to Taraz City, authorities placed him in a cold and windowless cell, where he contracted bronchitis. Authorities then denied him access to medical care for over eleven months. It also appears that the government has refused repeated requests by Mr. Yesergepov to be transferred to a prison facility where he can receive proper medical attention and even used the fact that he took some medicines as a reason to deny him parole.[76]

The Republic of Kazakhstan's failure to provide adequate medical treatment in this case falls far short of the government's obligations to treat Mr. Yesergepov with respect for his human dignity and thus violates Article 10(1) of the Covenant.

III. Conclusion

Ramazan Yesergepov's detention was punishment for exercising his right to freedom of expression. His arrest and trial failed to meet the minimum international standards required for due process. Further, the government failed to provide him with adequate medical treatment despite his serious illnesses. As such, the Republic of Kazakhstan failed to meet its obligations under the International Covenant on Civil and Political Rights.

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failure also constituted a violation of the Article 7 prohibition on "cruel, inhumane or degrading treatment or punishment." *Simpson v. Jamaica*, Communication No. 695/1996, ¶ 7.2.

[76] Reporters Without Borders, *Journalist Kept in Prison Against the Law*, February 22, 2011, *available at* http://en.rsf.org/kazakhstan-journalist-kept-in-prison-against-22-02-2011,39597.html.