

Kazakhstan Country Practice Review
Worker Rights

Notice of Intent to Testify & Pre-Hearing Brief

Before the United States Trade Representative
USTR-2013-0008

Filed by the
American Federation of Labor & Congress of Industrial Organizations (AFL-CIO)

January 17, 2020

Notice of Intent to Testify:

This constitutes a request for Cassandra Waters to present testimony at the January 30, 2020 hearing regarding Kazakhstan's compliance with the Generalized System of Preferences eligibility criteria (19 U.S.C. § 2642(c)(7)). Docket number USTR-2013-0008.

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Pre-Hearing Brief:

This brief incorporates by reference all prior petitions, briefs and public testimony by the AFL-CIO regarding labor rights in Kazakhstan and should be read as a supplement to all such filings.

I. Introduction

The Government of Kazakhstan (GOK) is not taking steps to afford internationally recognized worker rights, including the right to freedom of association and the right to collective bargaining, as required by 19 U.S.C. § 2462(c)(7). Instead, the GOK continues long-standing efforts to restrict worker rights in both law and practice, through legal constraints on the ability to form and join trade unions and retaliation against labor leaders and activists.

At the International Labor Organization (ILO) International Labor Conference in June 2019, the Committee on the Application of Standards assessed the GOK's adherence to ILO Convention 87 on the Right of Freedom of Association and Protection of the Right to Organize. The Committee expressed regret at “the persistent lack of progress since the last discussion of the case, in particular with regard to the serious obstacles to the establishment of trade unions without previous authorization in law and in practice and the continued interference with the freedom of association of employers' organizations.”¹ The Committee was so concerned with that lack of progress, it determined it would include its conclusions in a special paragraph of its annual report, an action reserved for only the cases of utmost concern to the Committee. This is the second time in five years that the CAS conclusions on Kazakhstan were included in a special paragraph.

The ILO is far from the only international body to express concern over the breadth and scope of the GOK's actions against the independent trade union movement in Kazakhstan. The European Parliament passed a resolution on March 14, 2019 which noted that, “despite being protected in Kazakhstan's constitution, the right to freedom of association remains largely restricted in the country.”² The resolution expressed concern that the GOK committed to implementing a roadmap developed with the ILO, but “has not taken meaningful steps to implement provisions

¹ Report of the ILO Committee on the Application of Standards, Kazakhstan 198 (2019) *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_713974.pdf,

² European Parliament, Resolution on the human rights situation in Kazakhstan 2019/2610 RSP (March 14, 2019) *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0203+0+DOC+XML+V0//EN&language=EN>

of the roadmap such as amending the trade union law,” nor has the GOK “implemented the earlier recommendation of the ILO Committee on the Application of Standards to ... take all necessary measures to ensure that the Confederation of Independent Trade Unions of Kazakhstan (CITUK) and its affiliates are able to fully exercise their union rights.”³ The International Trade Union Confederation (ITUC) listed Kazakhstan as one of the 10 most dangerous places in the world to be a trade unionist for the second year in a row in its 2019 Global Rights Index.⁴

The United Nations Committee on Economic, Social and Cultural Rights reached the following conclusions in their 2019 Concluding Observations:⁵

“27. The Committee is concerned that, despite its previous recommendation (E/C.12/KAZ/CO/1, para. 22), restrictions on the right to strike of civil servants and law enforcement officers continue. The Committee is also concerned that the extensive interpretation of article 402 of the Criminal Code and of section 177 of the Labour Code, making punishable action in favour of the continuation of strikes declared illegal, may lead to unjustifiable restrictions on the right to strike (art. 8).

28. The Committee recommends that the State party amend its legislation, including article 402 of the Criminal Code and section 177 of the Labour Code, to ensure that workers can exercise their right to strike, without undue restrictions.

32. The Committee is concerned that the results of the efforts made in 2018 to amend the trade union law 2014 with a view to, inter alia, simplifying trade union registration procedures have not yet been submitted to the Parliament. The Committee is also concerned about the incidence of arrests and conviction of trade union leaders in connection with their activities. It also expresses deep concern over reports of assaults, intimidation and harassment of trade union activists (art. 8).

33. The Committee recommends that the State party ensure the effectiveness of collective bargaining and of the right to union representation, both in law and in practice, in conformity with article 8 of the Covenant and with the provisions of the International Labour Organization (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It also urges the State party to take all the measures necessary, including legislative measures, to prevent the criminal prosecution of workers who have participated in strikes. It also recommends that the State party take all

³ *Id*

⁴ ITUC Global Rights Index (2019) available at <https://www.ituc-csi.org/IMG/pdf/2019-06-ituc-global-rights-index-2019-report-en-2.pdf>

⁵ CESCR, Concluding observations on the second periodic report of Kazakhstan, E/C.12/KAZ/CO/2 (March 29, 2019) available at <https://undocs.org/en/E/C.12/KAZ/CO/2>

measures to protect trade union activists from assaults, intimidation and harassment.”

In practice, nearly all remaining legal trade unions in Kazakhstan are under the umbrella of the Government-controlled Federation of Trade Unions of Kazakhstan (FPRK). The GOK appointed the president of that organization and when the Government was dissatisfied with his actions in 2017, removed him and appointed a new president in his place. At the 4th International Trade Union Confederation (ITUC) World Congress in December 2018, the ITUC suspended the FPRK’s membership because its leadership was not independent and democratic. The FPRK acknowledged its close relationship with the government in August 2019 when it awarded former president Nursultan Nazarbayev its highest award, saying in a public announcement, “When our country gained sovereignty and then independence, in the early 90’s, a primary trade union organization was established in the new Office of the President with the support of Nursultan Abishevich Nazarbayev... Since then, the Head of State has taken care of the normal activities of the trade union committee.”⁶ At the most recent ITUC General Council meeting in October 2019, the Council noted that new leadership was elected at the FPRK in September 2019, but determined that “no positive changes can be noted since December 2018,” and decided to maintain the suspension.⁷

These recent actions taken by international bodies are in response to increasingly aggressive limitations on and attacks against independent trade unions that began after a wave of strikes and workers actions in the oil and gas sector in 2011. The AFL-CIO urges the United States Trade Representative (USTR) to suspend benefits under 19 U.S.C. § 2462(d) if the GOK does not immediately take clear, effective steps to reverse course and afford internationally recognized worker rights in both law and practice.

II. The legal framework of the Republic of Kazakhstan systematically restricts the rights to freedom of association and the right to organize and bargain collectively

In recent years, the GOK has erected legal obstacles that prevent workers from exercising their right to freely associate. This includes the 2014 Law on Trade Unions (“the Trade Union Law”), which forced the closure of nearly all independent unions; the imposition of criminal sanctions on individuals who lead or participate in unsanctioned civic organizations, including trade unions; and modifications to the Labor and Criminal Code that curtail the right to strike.

The increased restrictions on internationally recognized labor rights come at a time when the GOK is promising reforms to improve its adherence to human rights norms. However, in practice the GOK regularly detains human rights defenders, prohibits free expression and assembly and

⁶ FPRK Press Release (August 2, 2019) available at <http://fprk.kz/2019/08/02/union-award-of-the-yelbasy/>

⁷ ITUC General Council meeting notes (October 15-17, 2019) available at https://www.ituc-csi.org/IMG/pdf/21gc_e_05_-_affiliation_questions_rev.pdf

uses its judicial system to stifle dissent rather than uphold rule of law.⁸ These trends are all clearly visible in the labor rights space.

A. The 2014 Law on Trade Unions Prevents the Operation of Independent Trade Unions

Our 2018 pre-hearing brief discussed in detail how the 2014 Law on Trade Unions placed onerous restrictions on registration of independent trade unions and was used to effectively cease legal operations of the CITUK and its affiliates. Since the Trade Union Law passed, upwards of 600 worker organizations at various levels have been denied legal status under the restrictive registration provisions.⁹

Dozens of de-certified organizations have been pressured or forced to join the FPRK¹⁰ or “Amanat,” another trade union organization with ties to state authorities.¹¹ After years of promising but failing to deliver reform, the GOK introduced legislation in July 2019 meant to amend portions of the labor code in line with ILO recommendations. Unfortunately, the reforms do not go far enough and leave ample gaps for the GOK to continue denying the ability of workers to form trade unions and bargain collectively.

Proposed amendments to Articles 11 through 14 of the Law on Trade Unions revise the definitions of national, territorial and branch level trade unions, giving unions the option to join union federations, rather than compelling them to join. However, the proposed law maintains the rigid, hierarchical structure of trade union organizations, and the GOK retains the right to liquidate unions that deviate from said structure. National and sectoral unions still face onerous membership requirements, including requirements that any national union have representation in more than half of Kazakhstan’s administrative regions. Moreover, under Article 14.3 of the proposed legislation local unions must notify territorial union associations of their intention to engage in collective bargaining or sign a collective bargaining agreement, regardless of whether they chose to affiliate to such an association.

The bill does not introduce any significant changes to the regulation of the government entities responsible for registering trade unions, although representatives of the independent trade union movement have demonstrated how GOK officials routinely deny union applications. As detailed in previous submissions, GOK officials have rejected trade union applications for frivolous reasons such as the union’s proposed name, grammar discrepancies, or failing to include a sketch of the union’s logo -- if they offer reasons at all.

The ITUC detailed the problem in its 2019 Observations to the ILO Committee of Experts on the Application of Conventions and Recommendations submitted in September 2019:

⁸ For examples, see Human Rights Watch, Kazakhstan UN Review (2019) available at <https://www.hrw.org/news/2019/11/04/kazakhstan-un-review-should-press-reforms>

⁹ Andrei Grishin, Fergana News Agency, A Country Under a Paragraph: Kazakhstan has Serious Trouble Related to Trade Unions (July 15 2019) available at <https://fergana.agency/articles/108990/>

¹⁰ *Id.*

¹¹ See, e.g. Fergana News Agency, Will the authorities forbid their fake trade union Amanat, which was created and is acting in violation of the law? (2018) available at <http://socialismkz.info/?p=20966>.

“In numerous instances, registration has been denied for minor mistakes in the application form. Such mistakes include: absence of the postal code, inadequate description of the union logo, failure to indicate the name of the region in the postal address, minor differences in wording in the Russian and Kazakh language versions, underpayment of the registration fee by 0,5 tenge (around 0,0015 EUR), and typographical errors in the statute. Other reasons for refusal of registration included affiliation to international federations, which is a right recognised under ILO Convention No. 87. Some unions have been denied registration on more than 25 occasions. Overall, more than 30 member organisations of the CITUC/KNPRK have been denied re-registration.”¹²

The proposed law affirms the right to join international trade unions, but removes language in Article 6 that allows cooperation with “foreign” trade unions. One significant form of interaction between Kazakhstani unions and the international labor movement is funding for in-country projects implemented by Kazakhstani trade unions. The bill would not lift the restrictions contained in Article 5 of Law No. 3-I “On Public Associations” of May 31, 1996, which forbids trade unions from obtaining any financing from foreign legal entities, citizens and states, or international organizations. Under Article 404 of the Criminal Code, leadership of a trade union financed from prohibited sources is punishable by up to six years in prison. Under the proposed new law, the right of trade unions to conclude agreements and cooperate with international organizations will continue to be significantly limited.

Finally, Articles 11(3)(1), 12(3)(2); 13(2)(1); and 14(3) in the proposed law add new obligations to trade union associations to notify appropriate authorities about their participation in social partnership commissions or intent to engage in collective bargaining. The AFL-CIO believes these requirements are unreasonable and contrary to the proclaimed right of trade unions to effectively represent their members and freely organize their activities.

B. The Right to Engage in Union Activities, Including to Strike, is Severely Curtailed

While the right to strike is theoretically guaranteed under Kazakhstan’s constitution and national laws, in practice the GOK has imposed legal restrictions that make that right exceedingly difficult to exercise. Changes to the legal code made in July 2014 gave courts greater ability to declare strikes illegal, and to impose penalties including jail time and fines for workers who participate or advocate for illegal strikes. In February 2019, 20 workers were detained for participating in strikes with oil workers in the Zhanaozen region, the same region in which at least 20 workers were killed, and dozens more were arrested and tortured, in a violent response to a peaceful strikes.¹³ Examples of strikes that were resolved without worker retaliation do exist in the past year,¹⁴ limited to the economically vital and physically dangerous extractives sector,

¹² International Trade Union Confederation, Observations to the ILO Committee of Experts on the Application of Conventions and Recommendations (September 1, 2019)

¹³ People’s Dispatch, Pressure mounts on Kazakh authorities to release protesting workers (March 22, 2019) available at <https://peoplesdispatch.org/2019/03/22/pressure-mounts-on-kazakh-authorities-to-release-protesting-workers/>

¹⁴ See, e.g. Radio Free Europe, Kazakh Oil-Industry Workers On Strike For Pay Raise (May 7, 2018) available at

but the risk of arbitrary and severe punishment is a significant and effective barrier to the free exercise of the right to strike. The AFL-CIO and its partners are not aware of strikes that have received legal approval.

Proposed legal reforms will not afford the right to strike. The criminalization of participation in non-violent strikes fundamentally violates freedom of association. The draft changes to Article 402 of the Criminal Code maintains criminal penalties for public calls for continued participation in an industrial action deemed illegal by a court. The penalty is simply reduced from up to three years' imprisonment to 50 days in prison or 200 hours of compulsory labor. The ILO explicitly stated in comments to the GOK that "no penal sanctions should be imposed against a worker for having carried out a peaceful strike and thus for merely exercising an essential right."¹⁵ Moreover, compulsory labor as a sanction for participation in a strike is a violation of Article 1(d) of ILO Convention 105 on the Abolition of Forced Labor, which Kazakhstan ratified in 2001.

Proposed reforms also fail to address other provisions of the Criminal Code and Code of the Republic of Kazakhstan on Administrative Offenses (CAORK) directed at leaders of trade unions. Article 489 of the CAORK criminalizes leadership of or participation in unregistered public associations, including trade unions. The Article also contains vague wording that holds members and leaders of public associations liable for public actions that go beyond the goals and objectives stated in the charters of said associations or that violate other laws of the Republic of Kazakhstan. Other sections of the Criminal Code, such as paragraph 21 of Article 3 and Article 403, punish individuals who unlawfully "interfere in the activities of state bodies," with stiffer penalties for leaders of public associations, including trade unions.

III. The GOK Targets Union Leaders and Workers with Criminal Sanctions, Prosecutions and Harassment in Retaliation for Trade Union Activity

The GOK continues to target trade union leaders and activists with arrest, arbitrary detention, harassment, prohibitions on participation in the trade union movement and society, and at times even physical violence. This persecution creates an "atmosphere of intimidation and fear prejudicial to the normal development of trade union activities,"¹⁶ and infringes on freedom of association.

<https://www.rferl.org/a/kazakhstan-oil-industry-workers-on-strike-for-pay-rise/29213790.html>; Paolo Sorbello, The Diplomat, Mass Brawl at Kazakh Oil Field Unveils Labor Dissatisfaction (July 2, 2019) available at <https://thediplomat.com/2019/07/mass-brawl-at-kazakh-oil-field-unveils-labor-dissatisfaction/>

¹⁵ ILO Committee of Experts on the Application of Conventions and Recommendations Observations, Report adopted 2018, published 108th ILC session (2019), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3963821

¹⁶ Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Fifth (revised) edition, 2006, 66-67, available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_090632.pdf ("The detention of trade unionists on the grounds of trade union activities constitutes a serious obstacle to the exercise of trade union rights and an infringement of freedom of association. The arrest of trade unionists and leaders of employers' organizations may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities.")

The attacks on trade unionist leaders are a part of the broader effort by the GOK to neutralize independent worker voices. A coalition of Kazakhstani non-profit organizations issued a statement following the arrest of Yerlan Baltabai, whose case is discussed in more detail below, stating: “[w]e believe that the conviction of Yerlan Baltabai is a continuation of the campaign of the Kazakhstani authorities to intimidate and destroy the independent trade union movement, in this case the Confederation of Independent Trade Unions of the Republic of Kazakhstan, whose leader Larisa Kharkova was convicted on the same far-fetched charges.”¹⁷ The GOK’s actions to stifle dissent and criminalize trade union activities are a serious affront to internationally recognized worker rights.

A. Unjust Sentence Against CITUK President Larisa Kharkova Upheld and Intimidation and Harassment Continues

As detailed in previous filings, the GOK subjected Larisa Nikolaevna Kharkova, President of the dissolved CITUK, to an investigation based on false allegations related to embezzlement of trade union funds and fraud. The case was riddled with procedural irregularities and the prosecution was never able to present any material evidence of financial misconduct or pecuniary damages, yet on July 25, 2017, the Enbekshinskii District Court in Shymkent sentenced her to 100 hours of community service and 4 years of restricted freedom of movement. The court seized funds from her personal bank account as well as from the account of the liquidated trade union and banned her from holding a leadership position in any non-governmental organization, including a trade union, for five years. An appeals court upheld the verdict on September 27, 2017. In January 2018, Ms. Kharkova successfully contested the compulsory community service component of her sentence, but the other restrictions remain.

On May 22, 2019, the Supreme Court of the Republic of Kazakhstan upheld the decision of the court in Shymkent. Ms. Kharkova and her attorney sent multiple appeals to state bodies, including the Ministry of Labor and Social Protection, the Office of the President and the Human Rights Commission, throughout 2019 but with no positive result. Courts have repeatedly denied to hear appeals of her case. Ms. Kharkova has now exhausted all domestic avenues for remedy.

Even after her unjust conviction, the GOK continues attacks against Ms. Kharkova. She reports that both she and her son are subject to state surveillance, with their movements monitored and their communications tapped. In September 2018, Ms. Kharkova participated in discussions with the GOK and the state-dominated union federation FPRK, convened by the ILO. During those meetings, the FPRK offered to pay 4 million tenge (more than \$10,500 USD) in outstanding fines and fees Ms. Kharkova has accumulated related to these prosecutions. When she refused, a civil case was initiated against her within days, brought by one of the alleged victims in her criminal prosecution demanding 2,500,000 tenge (about \$6,600) in damages from her as an individual. That lawsuit was ultimately withdrawn, but it demonstrates the continued use of pressure tactics to intimidate and silence Ms. Kharkova.

¹⁷ Joint statement by the Kazakhstan International Bureau for Human Rights, International Legal Initiative and the social fund “Liberty” (July 31, 2019) *available at* https://bureau.kz/novosti/sobstvennaya_informaciya/obrashenie_po_erlanu_baltabayu/

B. Leader of Oil Workers Union Yerlan Baltabai Currently in Prison

Yerlan Blatabai, leader of the Sectoral Union of Fuel and Energy Workers, was also subjected to an illegitimate criminal investigation over alleged embezzlement of trade union funds. As with the case against Ms. Kharkova, the allegations are baseless without any substantiation of pecuniary damages. Under the guise of the investigation, GOK officials searched union offices, seized internal documents and froze all of Mr. Baltabai's assets in December 2018. In July 2019, he was sentenced to 7 years in prison and banned from conducting any public activity for a further 7 years.

An international campaign followed Mr. Baltabai's conviction, which came on the heels of Kazakhstan receiving the special paragraph at the International Labor Conference. A respected Kazakhstani human rights organization said the verdict demonstrated that the GOK was, "firmly holding onto its new international status – an adversary of independent trade unions."¹⁸ Likely due to international pressure, he was released in August 2019 by a special decree of President Kassym-Jomart Tokayev. GOK officials offered to commute Mr. Baltabai's prison sentence to a fine of 1,595,800 tenge (about \$4,200 USD). However, the commutation required an admission of guilt, which Mr. Baltabai refused to agree to. On October 16, 2019, the Al-Farabi regional court in Shymkent sentenced him to five months in prison, and he remains there at the time of this writing.

C. Union Leaders Prohibited from Union Activities in Retaliation for Strike Action

The AFL-CIO's 2018 brief detailed the illegitimate cases against union leaders Amin Eleusinov and Nurbek Kushakbaev. On May 16, 2017, Mr. Eleusinov, the leader of a local trade union in western Kazakhstan, was found guilty of "embezzlement," and sentenced to two years in prison. On April 7, 2017 Mr. Kushakbaev, a trade union activist who worked closely with Eleusinov, was criminally charged for calling on workers to continue an illegal strike, and sentenced to 2.5 years in prison. Both men have since been released but their convictions remain intact, as do the convictions of more than 30 workers who participated in a hunger strike to protest the dissolution of the CITUK. Both are both prohibited from participating in trade union activities until May 2022.

D. Violent Attack Against Trade Union Leader Dmitri Senyavskii

In November 2018, unidentified assailants attacked Dmitry Senyavskii, leader of the CITUK-affiliated Karaganda Regional Fuel and Energy Trade Union, at his home.¹⁹ He was hospitalized with a broken arm, a cut head, a concussion, and a bruised face. His injuries prevented him from meeting with a visiting international trade union delegation in Astana (now Nur-Sultan) three days later. Kazakhstani authorities initiated an investigation into the attack, classifying the incident as "hooliganism," but have not identified any suspects.

¹⁸ Kazakhstan International Bureau of Human Rights, A Matter of Principle, (July 17, 2019) *available at* https://bureau.kz/novosti/sobstvennaya_informaciya/delo_principa/

¹⁹ Human Rights Watch, Kazakhstan: Attack on Trade Union Leaders (November 12, 2018) *available at* <https://www.hrw.org/news/2018/11/12/kazakhstan-attack-trade-union-leader>

The GOK continues to use the court system to target trade union leaders and activists with arrest, prosecutions, arbitrary detention, fines and prohibitions on participation in the trade union movement and society. This is a deliberate attempt to stifle independent unions and their leaders, which is completely inconsistent with the internationally recognized right to freedom of association and a grave affront to the fundamental human rights of the individuals being targeted.

IV. Conclusion

The Government of Kazakhstan has not taken steps to afford internationally recognized worker rights, including the right of association and the right to organize and bargain collectively. Instead, the Government is actively restricting these rights in both law and practice. The AFL-CIO urges USTR to suspend benefits under 19 U.S.C. § 2462(d) if the GOK does not take immediate and effective steps to afford internationally recognized worker rights.

The GOK must promptly enact labor law reform consistent with the recommendations in the 2017 ILO report,²⁰ including expungement of all penalties levied against trade unionists for participation in a strike or other trade union activity and an end to the harassment of trade union leaders and their associates, with assurance that they will receive their full rights consistent with due process. The CITUK and affiliates that lost legal status must be allowed to reconstitute and register as fully functioning trade unions. Longer-term technical assistance and monitoring may be required to ensure that Kazakhstan comes into compliance and that workers can freely exercise internationally recognized worker rights.

²⁰International Labor Organization, Follow-up to the conclusions of the Committee on the Application of Standards 105th Session (May–June 2016, published 2017) *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3298653.