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The Honorable Yukio Shinada
Section DB, Civil Division No. 2 of Tokyo District Court
1-chōme-1-4 Kasumigaseki, Chiyoda City, Tokyo 100-8920, Japan

Re: *Case 2020 (gyo-u) No. 10 – Case about a request to revoke rejection of a passport issuance application*

I am writing to the Court in order to respectfully convey my views in connection with the case above. This case concerns the Japanese Government's rejection of a passport application by the plaintiff, a journalist who over the years focused on reporting from conflict zones such as those in the Middle East and Southeast Asia. In this letter, I briefly underscore rules under international human rights law and standards concerning journalism in conflict zones, which is one of the main, if not the only, underlying themes that highlight the present case.

For background, I served as United Nations ("UN") Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression from 2014 to 2020. In the context of my UN appointment, I studied and reported to the UN Human Rights Council, the central human rights body in the UN system, on the value of freedom of expression and ways to protect and preserve that fundamental right across the world. As part of this work, I released a report in 2017 on freedom of expression in Japan based on information I collected during my official visit to Japan from April 12 to 19, 2016.¹ I currently teach international and human rights law at the University of California, Irvine School of Law.

By using the knowledge and expertise I gained through this work, I have provided a number of expert opinions and amicus briefs to domestic and regional courts around the world, including the United States Supreme Court, the Constitutional Court of the Republic of Korea, the European Court of Human Rights, and the Community Court of Justice of the Economic Community of West African States, on important cases that could have a significant impact on the norms supporting freedom of opinion and expression.

The unique importance of journalism in conflict zones is recognized under international law and standards

In the present case, it is my understanding that the Government rejected the plaintiff's passport application based on factors such as the Turkish government's entry ban on him, his entry in

¹ David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/35/22/Add.1 (June 15, 2017).

Syria and Turkey without permission, and his detention in Syria by an anti-government armed group, which all occurred during or in association with his journalistic work, primarily his travel to Syria in 2015. The Government argues that these factors lead to a probability that, by allowing him to travel abroad, the plaintiff would repeat entry into foreign countries without permission or violate the law of those countries, damaging Japan's trust with the international society.² The central issue is whether such a rejection conforms with applicable legal standards, including International Covenants on Civil and Political Rights (ICCPR), which Japan ratified in 1976.

The plaintiff has already submitted to the Court³ how the Government's actions entirely deny and violate his right to movement guaranteed under ICCPR Article 12(2) and affirmed by the Human Rights Committee in its highly regarded General Comment 34, which specifically states that State parties should not restrict the movement of journalists in and out of the state.⁴ As provided under Article 12(3) of the ICCPR, States must demonstrate with concrete and objective grounds that any restriction on the movement of journalists meets the stringent, cumulative test that the restriction be (1) provided by law and (2) necessary to protect (3) a legitimate objective, which is either of respect of the rights or reputations of others or the protection of national security or of ordre public, or of public health or morals (so-called "three-part test"). I will not repeat these arguments here.

What I would like to add is the uniquely high value of journalism in conflict zones like Syria, which has been recognized by international courts and the UN and other international bodies, demanding a careful and stringent application of the above three-part test under ICCPR 12(3). For example, in the so-called *Randal* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) detailed the reason behind the high value of journalism in conflict zones.⁵ Quashing a subpoena of a war correspondent, the Appeal Chamber gave weight to "protecting the ability of war correspondents to carry out their functions" because given that "accurate information is often difficult to obtain and may be difficult to distribute or disseminate," "journalists in conflict areas play a vital role in both bringing to the attention of the international community the horrors and reality of the conflict," and assisting the prevention and punishment of violation of international humanitarian law.⁶

UN bodies and other international organizations have also long acknowledged such a vital role of journalism in conflict zones. In the 1970 resolution, "Protection of journalists engaged in dangerous missions in areas of armed conflict," which Japan voted in favor of, the UN General Assembly considered that "journalists, whatever their nationality, have an important role to play" for the UN to "obtain complete information concerning armed conflicts," and recognized their professional duty "to inform world public opinion objectively."⁷ Further, in a 1972 conference of government experts organized by the International Committee of the Red Cross, where experts from Japan also participated, the participants recognized "the spread of information and the presence of journalists on the spot could contribute to a more effective implementation of humanitarian law in armed conflicts."⁸ This recognition paved the way for the adoption of the 1977 Additional Protocol I to the Geneva

² Def.'s Br. No. 2, at 11-53.

³ Pl.'s Br. No. 2; Pl.'s Br. No. 5.

⁴ U.N. Human Rights Comm., General Comment No. 34, ¶ 45, U.N. Doc CCPR/C/GC/34 (Sept. 12, 2011).

⁵ Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-I, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, Int'l Crim. Trib. for the Former Yugoslavia (June 7, 2002).

⁶ *Id.* ¶¶ 36 and 37.

⁷ G.A. Res. 2673 (XXV). U.N. Doc A/RES/2673(XXV) (Dec. 9, 1970).

⁸ *Report on the Work of the Conference, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Int'l Committee Red Cross ¶ 3.78 (1972).

Conventions, of which Article 79 is the most recent and comprehensive guarantee of humanitarian protection to journalists in conflict zones.⁹

Such a recognition has further led to more recent UN bodies' actions and initiatives.¹⁰ For example, in 2015, the UN Security Council unanimously adopted in response to the series of murders of journalists, including Japanese journalists, by the Islamic State of Iraq and the Levant (ISIL), stating that journalists “can play an important role in the protection of civilians and conflict prevention by acting as an early warning mechanism in identifying and reporting potential situations that could result in genocide, war crimes, ethnic cleansing and crimes against humanity.”¹¹ In the meeting where the resolution was adopted, the representative of Japan affirmed the democratic value of journalism in conflict zones, saying “attacks on journalists were attacks on the foundations of democracy.”¹²

Beyond the UN bodies, the understanding that journalism plays a uniquely important role in conflict zones has been widely acknowledged. For example, in 1996, the Council of Europe emphasized in its Recommendation No. R (96) 4 of the Committee of Ministers to member states on the protection of journalists in situations of conflict and tension, “the importance of the role of journalists in informing the public about violations of national and international law and human suffering in situations of conflict and tension, and the fact that they thereby can help to prevent further violations and suffering.”¹³ And the Council has further reiterated this statement in its more recent Recommendations adopted in 2007 and 2016.¹⁴

The devastating situation in Syria, which has been continuously deplored by multiple UN agencies, demonstrates the vital role of journalists like the plaintiff in Syria. Since 2011 to date, the UN Security Council,¹⁵ General Assembly,¹⁶ and Human Rights Council¹⁷ have repeatedly passed resolutions, expressing grave concerns about the deteriorating violations of humanitarian and human rights law. Syria's crisis demonstrates the important need for journalists like the plaintiff who risk their lives to provide valuable information to international agencies and the public.

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

¹⁰ United Nations Plan of Action on the Issue of the Safety of Journalists and the Issue of Impunity, April 2012, CI-12/CONF.202/6 (endorsed by the UN Chief Executive Board, the highest-level coordination forum of the United Nations system, and has been welcomed in resolutions of the General Assembly, the Human Rights Council, and UNESCO); *Safety of Journalists*, UNESCO, accessed May 14, 2023, <https://www.unesco.org/en/safety-journalists>.

¹¹ S.C. Res. 2222, S/RES/2222 (May 27, 2015). *See* Letter from the Permanent Representative of Lithuania to the United Nations addressed to the Secretary-General, U.N. Doc. No. S/2015/307 (May 1, 2015).

¹² *In All-Day Debate, Security Council Voices Alarm at Growing Threats to Journalists, Unanimously Adopting Resolution 2222 (2015)*, UN Meetings Coverage and Press Releases, accessed May 14, 2023, <https://press.un.org/en/2015/sc11908.doc.htm>.

¹³ Council of Europe, recommendation No. R (96) 4 of the Committee of Ministers to member States on the protection of journalists in situations of conflict and tension, adopted on May 3, 1996.

¹⁴ Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted on Sept. 26 2007; Recommendation CM/Rec (2016) of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, adopted on Apr. 13, 2016.

¹⁵ Since 2012, the UN Security Council has adopted 27 resolutions on Syria's crisis.

¹⁶ Since 2012, the UN General Assembly has adopted 15 resolutions on Syria's crisis.

¹⁷ For example, the Human Rights Council Res. S-16/1, U.N. Doc. A/HRC/RES/S-16/1 (Apr. 29, 2011); Res. 25/23, U.N. Doc. A/HRC/RES/25/23 (Apr. 9, 2014); Res. 28/20, U.N. Doc. A/HRC/RES/28/20 (Apr. 8, 2015); Res. 34/26, U.N. Doc. A/HRC/RES/34/26 (Apr. 5, 2017); Res. 37/29, U.N. Doc. A/HRC/RES/37/29 (Apr. 9, 2018); Res. 19/22, U.N. Doc. A/HRC/RES/19/22 (Mar. 23, 2022).

A state's positive obligation to ensure enabling environments for journalism in conflict zones and to protect its exercise.

As ICCPR Article 2(1) sets out, ICCPR imposes on states an obligation to “respect,” meaning not to infringe, fundamental human rights guaranteed under the Covenant and to “ensure” them, which in the context of freedom of expression (ICCPR Article 19(2)) means ensuring environments that enable freedom of expression and protecting the exercise of such rights.¹⁸

Reflecting on the duty to “ensure” in the context of journalism in conflict zones, the UN Human Rights Council and General Assembly have repeatedly called on states to “promote a safe and *enabling environment for journalists to perform their work independently and without undue interference.*” This statement which calls on states to create an “enabling environment for journalists” has been renewed for many years by both the UN Human Rights Council and the General Assembly since it was first adopted in early 2010s.¹⁹ Additionally, the Council of Europe adopted a set of recommendations, first in 1996²⁰ and subsequently in 2022²¹ after the Russian invasion of Ukraine, for its member states to ensure their compliance with this positive obligation. One recommendation requests EU member states to facilitate journalist access to conflict zones by promptly issuing visas and other necessary documents as well as facilitating importing and exporting professional equipment.

The Council of Europe’s Recommendation is one possible, progressive interpretation of a state’s positive obligation under ICCPR. However, the positive obligation of the ICCPR at least requires a state, when denying a passport application in consideration of reasons associated with or incidental to journalism in conflict zones as in the present case, to demonstrate sufficient grounds to avoid chilling effects on future reporting in conflict zones by journalists or those who aspire to be journalists. More specifically, to ensure an enabling environment, a state should quell the fear among journalists that their actions in conflict zones may unexpectedly be grounds for a subsequent government denial of their passport application.²²

For the reasons above, I respectfully urge the Court to consider the important value of the work of journalists in conflict zones, as recognized by international organizations and international law, and carefully apply human rights law’s three-part test to the present case. A careful examination of the case would ensure Japan’s compliance with ICCPR – which is a legal obligation as well as an essential pillar for international trust.

¹⁸ David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018) (“The duty to ensure freedom of expression obligates States to promote, inter alia, media diversity and independence and access to information.”).

¹⁹ Human Rights Council Res. 21/12, U.N. Doc. A/HRC/RES/21/12 (Oct. 9, 2012); Res. 27/5, U.N. Doc. A/HRC/RES/27/5 (Oct. 2, 2014); Res. 33/2, U.N. Doc. A/HRC/RES/33/2 (Oct. 6, 2016); Res. 45/18, U.N. Doc. A/HRC/RES/45/18 (Oct. 12, 2020); G.A. Res. 68/163, U.N. Doc. A/RES/68/163 (Feb. 21, 2014); Res. 69/185, U.N. Doc. A/RES/69/185 (Feb. 11, 2015); Res. 70/162, U.N. Doc. A/RES/70/162 (Feb. 10, 2016); Res. 72/175, U.N. Doc. A/RES/72/175 (Jan. 29, 2018); Res. 74/157, U.N. Doc. A/RES/74/157 (Jan. 23, 2020); Res. 76/173, U.N. Doc. A/RES/76/173 (Jan. 10, 2022).

²⁰ Council of Europe, *supra* note 13.

²¹ *Journalism in Situations of Conflict and Aggression: Principles from the Relevant Council of Europe and Other International Standards*, Council of Europe (Mar. 7, 2022), accessed May 14, <https://www.coe.int/en/web/freedom-expression/-/journalism-in-situations-of-conflict-and-aggression-principles-from-the-relevant-council-of-europe-and-other-international-standards>.

²² See U.N. Human Rights Comm., General Comment No. 37, ¶ 61 and 94, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020) (The right of peaceful assembly guaranteed under ICCPR Article 21 requests that the data collection such as the one by the use of recording devices by authorities “must not result in suppressing rights or creating a chilling effect” on individuals’ participation in assemblies and “the authorities should have clear and publicly available guidelines to ensure that their use” “does not have a chilling effect on participation in assemblies.”)

Thank you very much.

Sincerely,

A handwritten signature in black ink, appearing to read "David Kaye". The signature is fluid and cursive, with the first letter 'D' being a large loop and the 'K' having a distinct shape.

David Kaye