



COMMENTS OF KAZAKHSTANI HUMAN RIGHTS NGOs ON KAZAKHSTAN'S SECOND PERIODIC REPORT ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

(For submission to the UN Human Rights Committee)

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INTRODUCTION

These Comments on the Second (Periodic) Report of the Republic of Kazakhstan on the implementation of the International Covenant on Civil and Political Rights (ICCPR) have been prepared by a number of leading non-governmental organizations (NGOs) working on human rights in Kazakhstan: Kazakhstan International Bureau for Human Rights and Rule of Law, Charter for Human Rights, Legal Policy Research Centre, International Legal Initiative, “Kadir-Kassiet” (“Dostoinstvo”/“Dignity”), Union of Crisis Centres in Kazakhstan, International Centre of Journalism “Media Net”, Freedom of Speech Foundation “Adil Soz”, Children Fund of Kazakhstan, Confederation of Free Trade Unions of Kazakhstan, and “Aman Saulyk” Public Fund.

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The authors of this document point out that in 2015 and at the beginning of 2016 the authorities of the Republic of Kazakhstan (RoK) conducted a relatively intensive dialogue with Kazakhstani human rights NGOs on the main provisions of the Government’s Second (Periodic) Report on the implementation of the ICCPR, as well as specific concerns and recommendations raised by NGOs, including those contained in the document, entitled “Kazakhstan. List of issues: Analysis, Commentary, and Recommendations”, that had been submitted to the United Nations (UN) Human Rights Committee (the Committee) by a number of Kazakhstani NGOs in August 2015. In addition, in 2014-2016 government representatives and human rights groups discussed the implementation of specific provisions of the ICCPR in the framework of the “Dialogue Platform on the Human Dimension”, an Advisory Body under the Ministry of Foreign Affairs of Kazakhstan. In both frameworks the Kazakhstani authorities have responded to a number of comments and recommendations that had been raised by human rights NGOs.

Nevertheless, the findings and recommendations in this document are for the most part similar to those presented by Kazakhstani NGOs in 2011 prior to the consideration of Kazakhstan’s initial report on the implementation of the ICCPR, because, according to the authors of this document, the situation regarding fundamental political rights and civil liberties has not changed significantly, and it has even deteriorated in some areas.

The Commentaries in this document have been prepared in accordance with the structure of the Second (Periodic) Report of the RoK on the implementation of the ICCPR.

International Partnership for Human Rights (IPHR, Brussels) assisted with editing and revising the English translation of the report within the framework of the EU-funded projects “Action for Freedom from Torture in Kazakhstan and Tajikistan” and “A Transnational Civil Society Coalition in Support of Fundamental Rights in Central Asia”.

I. IMPLEMENTATION OF RECOMMENDATIONS ISSUED TO KAZAKHSTAN BY THE UN HUMAN RIGHTS COMMITTEE

Recommendations: The Committee urges the State party to provide comprehensive information on the constitutional framework within which the rights under the Covenant are guaranteed. In this regard, the Committee invites the State party, to submit a core document in accordance with the harmonized guidelines on reporting under the international human rights treaties (HRI/GEN/2/Rev.6, Chapter I), which were adopted at the Inter-Committee Meeting of the human rights treaty bodies.

- The State party should take all necessary measures to ensure legal clarity on the status and applicability of the Covenant and other international human rights treaties ratified by the State party. The State party should also take appropriate measures to raise awareness of the Covenant among judges, lawyers and prosecutors to ensure that its provisions are taken into account before national courts.

1. As noted in the 2011 report submitted to the Committee by Kazakhstani NGOs prior to the Committee's consideration of Kazakhstan's initial report on the implementation of the ICCPR, Kazakhstan's domestic legislation contains the principle of supremacy of international treaties ratified by the RoK. However, Resolution No. 2 of the Constitutional Council, dated 18 May 2006 and entitled "On Official Interpretation of Subparagraph 7) of Article 54 of the Constitution of the RoK", is a source of serious concern.

2. In the narrative part of the said Resolution, the Constitutional Council referred to its Resolution No.18/2, of 11 October 2000, which states that the Vienna Convention on the Law of Treaties "*does not define the order of execution of treaties. This refers to the constitutional and legislative prerogatives of States and follows from the generally recognized principle of international law - the sovereign equality of States*".

3. And then, "*on the basis thereof, the Constitutional Council considers that when it is recognized, in accordance with the established procedure, that an international treaty of the Republic of Kazakhstan or certain provisions are in conflict with the Constitution of the Republic of Kazakhstan, which has -- in accordance with paragraph 2 of Article 4 of the fundamental law -- the highest juridical force and authority in the entire territory of the Republic of Kazakhstan, such a treaty that does not comply with the Constitution in whole or in part, shall not be enforceable*".

4. Finally, in the operative part of the Resolution, the Constitutional Council states: "*4. In case it is recognized, in accordance with the established procedure, that the international treaty of the Republic of Kazakhstan or certain provisions are in conflict with the Constitution of the Republic of Kazakhstan, such a treaty or the relevant provisions shall not be enforced*".

5. In our view, this Resolution of the Constitutional Council is contrary to the Vienna Convention on the Law of Treaties of 1969,¹ in particular to Article 27 of the Convention, which provides: "*A party cannot rely on the provisions of its domestic law as an excuse of failing to comply with the treaty*".

6. Although judges, prosecutors and lawyers receive extensive training on the application of the ICCPR, there are only very few cases where criminal courts have referred to provisions of the Covenant in its rulings. As a rule, such judgments are issued by judges in major cities such as Almaty and Astana.

7. The Supreme Court should keep statistics of references to the Covenant and of the application of the Covenant's provisions in judgments issued across the RoK enabling it to present reliable empirical data on this topic. Meanwhile, a small number of such judgments cannot be proof of the widespread use and application of the Covenant by judges in Kazakhstan.

8. While – as mentioned above – there are some cases where criminal courts referred to provisions of the

¹ See: Conventions. The Resolution of the Supreme Council of the RoK No. 2059-XII dated 31 March 1993 "On Accession of the Republic of Kazakhstan to the Vienna Convention on the Law of Treaties of 1969".

Covenant, we are not aware of any cases where its provisions were applied in judgments on civil and administrative matters.

Recommendation: The State party should strengthen its efforts to ensure that the Commissioner for Human Rights enjoys full independence. In this regard, the State party should also provide him with adequate financial and human resources in line with the Paris Principles (General Assembly resolution 48/134, annex). The Committee further recommends that the Commissioner for Human Rights should apply for accreditation to the Subcommittee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. Finally, when establishing the National Preventive Mechanism as provided for under the Optional Protocol to the Convention against Torture, the State party should ensure that this does not compromise but improve the execution of its core functions as a National Human Rights Institution in line with the Paris Principles.

1. As noted in the 2011 report of Kazakhstani NGOs to the Committee, the powers and procedural guarantees of the two types of national human rights institutions that exist in Kazakhstan – the Commission on Human Rights under the President of the RoK and the Commissioner for Human Rights of the RoK - do not meet the UN principles adopted in 1993 relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).

2. According to these Principles, a national human rights institution should be vested with as wide powers as possible, which should be clearly set forth in a constitutional or legislative act defining its composition and competence.

3. The Commission on Human Rights under the President of the RoK can be considered as a specific advisory body on human rights under the Head of State and thus, the Paris Principles may not be fully applicable.

4. But the institution of the Commissioner for Human Rights of the RoK has not been brought in line with the Paris Principles either, despite the Committee's recommendation to this effect. It was not established by law, but by Presidential decree. The order of its formation is also not in line with the Paris Principles since it was set up by the President of Kazakhstan and not chosen in the course of a transparent in compliance with the principle of pluralism.

5. According to the 19 September 2002 Decree of the President of the RoK, that established the position of the Commissioner for Human Rights, the powers of this institution have significant limitations: *"18. The Commissioner shall not consider complaints against actions and decisions of the President of the Republic of Kazakhstan, the Parliament and its members, the Government, the Constitutional Council, the Prosecutor General, the Central Election Commission and the courts of the Republic of Kazakhstan"*.

6. In 2013-2014, in Kazakhstan, the National Preventive Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (NPM) was established. It was created based on the model "The Commissioner for Human Rights of the RoK (Ombudsman) plus". The process of its formation and the representation of civil society activists and human rights defenders in the NPM is more in line with the Paris Principles.

7. However, we are concerned that the NPM is not authorized to monitor such places of deprivation of liberty as the premises of the National Security Committee of the RoK, orphanages, special boarding schools, nursing homes for the elderly and disabled people, and military barracks. We are also concerned that the NPM has insufficient financial resources and has to coordinate with the Commissioner for Human Rights of the RoK when it wants to carry out urgent and unscheduled inspections of places of detention.

8. In February 2016, the President decreed to establish the institution of the Commissioner for Children's Rights, and just like the institution of the Commissioner for Human Rights, it does not comply with the Paris Principles in terms of its legal framework and the order of its formation.

Recommendation: The State party should adopt measures to ensure that the activities of its law enforcement officials in the fight against terrorism do not target individuals solely based on their status or religious belief and manifestation. Furthermore, the State party should ensure that any measures to combat terrorism are compatible with the Covenant and international human rights law. In this regard, the State party should compile comprehensive data, to be included in its next periodic report, on the implementation of anti-terrorism legislation, and how it affects the enjoyment of rights under the Covenant.

1. In recent years, dozens of members of religious organisations worshipping different schools of Islam, as well as those perceived to be members of so-called “non-conventiona” religions risked being charged with extremism and terrorism, as well as inciting religious hatred and enmity.

2. The concepts of “extremism” and “religious hatred or enmity” applied by the authorities are not clearly defined in the law and do not comply with the principle of legal certainty and predictability. The Government has prepared a list of illegal extremist organisations, including religious ones, based on which believers are arraigned on a criminal charge, not for any extremist actions, but for allegedly belonging to such organisations.

3. Almost all criminal proceedings on charges of extremism are held behind closed doors, including the announcement of the judgment. As a result, it is difficult to assess the soundness and relevance of the charges, the justification of the verdicts, and whether the legal proceedings were in line with international fair trial standards.

4. In some cases, additional punishments are imposed on religious leaders prohibiting them to engage in religious activities for several years, which is a direct restriction of the right to freedom of conscience and religion.

For more information, please see the section on Article 18 of the ICCPR below.

Recommendations: The State party should take steps to safeguard in law and practice the independence of the judiciary and its role as the sole administrator of justice and to guarantee the competence, independence and tenure of judges. The State party should, in particular, take measures to eradicate all forms of interference with the judiciary, and ensure prompt, thorough, independent and impartial investigations into all allegations of interference, including by way of corruption; and prosecute and punish perpetrators, including judges who may be complicit. The State party should review the powers of the Office of the Prosecutor/Procurator General to ensure that the office does not interfere with the independence of the judiciary.

1. The reasonable and detailed recommendations that Leandro Despouy, the UN Special Rapporteur on the independence of judges and lawyers, presented in the report on his visit to Kazakhstan in 2004, have not been implemented by the authorities of Kazakhstan.

2. The prosecution authorities continue to dominate the criminal justice system.

3. In the new Criminal Procedure Code of the RoK, the court of jury has not been developed further as an important institution to strengthen the democratisation and humanisation of criminal justice. The jurisdiction of this court has not been extended. Some of the most fundamental recommendations that the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) made based on its monitoring of Kazakshtan’s legal proceedings, have yet to be implemented. The issue of the transition to the classic English-American model of the court of jury remains open.

4. All over the world, instituting jury trials is associated with a high rate of acquittals. The jury trial is more humane than a professional court. Before jury trials were introduced in Kazakhstan the overall rate of acquittals was considerably lower: in 2007 it amounted to only 1.2%; in 2008 - 1.4%; and in 2009 - 1.5%. According to the report on the situation of human rights in the RoK in 2012 that was produced by the Presidential Human Rights Commission, specialized inter-district criminal courts conducted jury trials in 276

criminal cases with regard to a total of 379 individuals. 355 individuals were convicted while 24 were acquitted. This represents more than five percent of the total number of acquittals in Kazakhstan.²

5. On 1 January 2016, the new Law “On the Supreme Judicial Council of the Republic of Kazakhstan” came into force. Despite the fact that the new Law was supposed to strengthen the independence of the Supreme Judicial Council as well as of the entire judicial system, the new Law has not solved the basic problems of this institution.

6. One of the key problems relating to the independence of the judiciary is that under Article 4 of the Law the Council consists of the Chairman and other members who are appointed by the President of the RoK. The Chairman of the Supreme Court, the Prosecutor General, the Minister of Justice, the Head of the Authorized Body for Civil Service Affairs and Corruption Control, the chairmen of the relevant standing committees of the Senate and the Parliament’s Majilis are appointed as members of the Council by the President. In accordance with Article 82 of the Constitution, the Chairman and the judges of the Supreme Court are elected by the Senate at the President’s proposal. The President’s proposal is based on the recommendation of the Supreme Judicial Council. The chairmen and the judges of local and other courts shall be appointed to their positions by the President based on recommendations of the Supreme Judicial Council.

7. The relevant international standards suggest that the judges elected to the existing legal councils, should be elected by their colleagues and represent the entire judiciary, including representatives of the lowest instance courts. According to Article 40 of the Constitution, the President of the RoK “*shall ensure the coordinated functioning of all branches of power*”, but international standards stipulate that the President is solely a representative of the executive power. The fact that the President also appoints the Chairman of the Supreme Court and forms the Supreme Judicial Council does not strengthen guarantees against undue influence of the executive power on the judiciary.

8. The fact that the members of the Supreme Judicial Council are appointed by the President contradicts international standards stipulating that at least half/a significant amount/the great majority of the members of such a body should be elected by judges. Thus, Kazakhstan should establish a mechanism that enables judges -- for example, the Congress of Judges -- to appoint the majority of the Council’s members. Prosecutors and other representatives of the law enforcement system should not be members of the Council. The Chairman of the Council should be elected by a majority vote from among its members.

9. Paragraph 1 of Article 1 of the Law provides that the Supreme Judicial Council is an autonomous government institution established in order to ensure the constitutional powers of the President of the RoK to form courts, and to guarantee the independence of judges and their immunity. Paragraph 7 of Article 1 of the Law stipulates that the Regulation on the Council's staff and its structure shall be approved by the President.

10. Paragraph 1 of Article 3 of the Law stipulates that the Council shall recommend to the President of Kazakhstan the candidates to be appointed to vacant positions of chairmen and judges of district and regional courts, chairmen of judicial boards of regional courts and of the Supreme Court; it also recommends to the President a candidate for the vacant position of the Chairman of the Supreme Court that he shall introduce to the Parliament’s Senate.

11. In addition, upon the proposal of the Chairman of the Supreme Court, the Council is tasked with considering the dismissal of a judge and, if applicable, making a recommendation to this effect to the President of Kazakhstan. This can happen in cases where the Qualifications Commission of the Judicial Jury gives an unsatisfactory assessment of the professional activities of a district court judge based on reviewing the results of his or her work after one year into his or her appointment to the position. The Council may also submit to the President a resolution with the request to make a decision about the arrest, detention or house arrest of a judge, bringing him to court for questioning, about the adoption of administrative non-punitive measures to him/her imposed through legal proceedings, and the criminal prosecution of the judge.

² See: <http://365info.kz/2015/10/advokaty-kazahstana-vystupili-s-zayavleniem/>

12. Thus, the primary functions regarding the selection of judges have been assigned to the Supreme Judicial Council, which was formed by the President of the RoK (paragraph 4 of Article 82 of the Constitution of the RoK, Article 36 of the Constitutional Law “On the Judicial System and Status of Judges of the Republic of Kazakhstan”, Article 4 of the Law “On the Supreme Judicial Council of the Republic of Kazakhstan”). This system does not guarantee the independence of the judiciary from the executive branch of power.

13. The scope of the judges’ responsibility and the grounds for their dismissal are not in line with international standards in many ways. The grounds for bringing judges to disciplinary responsibility, including their dismissal, as provided by Articles 34 and 39 of the 25 December 2000 Constitutional Law of the RoK, entitled “On the Judicial System and Status of Judges of the Republic of Kazakhstan”, are unclear. They permit making judges responsible for the most insignificant, even unintentional violations (“gross violation of the law when reviewing court cases”).

14. Paragraph 2 of Article 39 of the Constitutional Law stipulates that the chairmen of courts and the chairmen of the courts’ judicial boards can be brought to disciplinary responsibility for the improper execution of their obligations that are outlined by the Law. In addition, judges can be made responsible for their interpretation of the law or for establishing facts that contradict the findings of the highest instance court.

15. There is no disciplinary procedure prescribed by law that would meet the requirements of fair legal proceedings and guarantee the right to appeal a judgment.

16. The Law provides for some immunity to judges. A judge may not be arrested, subjected to detention or administrative non-punitive measures imposed through legal proceedings or brought to criminal responsibility without approval of the President of the RoK. The President’s approval shall be based on a decision of the Supreme Judicial Council. The Chairman or a judge of the Supreme Court may not be subjected to similar actions without the Senate’s approval. The only exceptions are cases when the person is arrested at the crime scene or when he/she commissioned a serious crime (Article 79 of the Constitution, Article 27 of the Constitutional Law “On the Judicial System and Status of Judges of the Republic of Kazakhstan”).

17. After registering a ground to instigate pre-trial investigation against a judge in the Unified Register of Pre-Trial Investigations, the pre-trial investigation may be opened only with the consent of the Prosecutor General of the RoK. When a judge is detained on the crime scene or when it is suspected that a judge prepared, attempted to commission or commissioned a serious crime or an especially grave crime, the pre-trial investigation against him/her can be continued before receiving the consent of the Prosecutor General, but the Prosecutor General has to be notified within 24 hours.

18. Special investigative activities and covert surveillance of judges may be initiated with the approval of a prosecutor, as set forth by legislative acts of the RoK (Article 27 of the Constitutional Law “On the Judicial System and Status of Judges of the Republic of Kazakhstan”). Thus, the Constitution provides judges with too generous immunity from criminal and administrative responsibility, which goes beyond the scope of their professional activities. But at the same time it stipulates that political authorities have the authority to lift the immunity. It is also untenable from the point of view of the independence of the judiciary of the prosecution authorities that the special investigation activities related to judges may be initiated only with the approval of the prosecutor. This can lead not only to the violation of personal rights of the judge, but also to the violation of the secrecy of the court’s deliberations room, as well as to obtaining information that can be used to put pressure on the judge.

19. The following measures are proposed to eliminate these drawbacks:

- to set out in the law specific grounds for disciplinary sanctions applicable to judges (including dismissal) and specific criteria to assess when judges do not act in consistence with their duties, which will ensure that judges are not punished for their conscientious interpretation of the law including in those cases where their interpretation does not correspond with the opinion of a higher instance court. The disciplinary rules shall

comply with the principle of legal certainty, so that the judge can orientate his/her behaviour towards the rules and does not have to be afraid to be brought to responsibility when fully complying with them;

- to establish two bodies of disciplinary responsibility: one for the preliminary examination of complaints of judges' misbehaviour and supporting prosecution, the second - for the in-depth consideration of the disciplinary case. Both of them shall be independent from the legislative and executive powers. It is advisable that most members of these bodies are judges elected by bodies of judicial self-government;
- to regulate the disciplinary procedure by legislative means, based on the principles of competitiveness and equality, with respect for the rights of defence and appeal of a decision in court;
- to limit the possible application of immunity to actions carried out in connection with judicial functions. The power to waive the immunity of judges shall be transferred from the political authorities to the reformed Supreme Judicial Council, and the power to authorize the investigation activities related to judges - from the prosecution service to the court.

For more information, please see of the section on Article 14 of the ICCPR below.

Recommendation: The State party should conduct a study to establish the causes of the low acquittals in criminal cases in order to ensure that the rights of accused persons under the Covenant are guaranteed and protected throughout the trial process. Furthermore, the State party should ensure that measures are put in place to guarantee the exclusion by the judiciary of evidence obtained under torture.

1. The number of acquittals has increased insignificantly, not even reaching the level of 2%.
2. Paragraph 13 of the Regulatory Resolution of the Supreme Court dated 28 December 2009³ stipulates that in cases when a complaint of torture, violence and other cruel or degrading forms of treatment is made in court, the court should take actions prescribed by the law for its immediate consideration. If it is necessary to take steps that go beyond the competence of the court in order to perform a full check (e.g a pre-investigation check, the initiation of a criminal case, an inquest or an investigation), then the court shall issue a decision ordering that the prosecutor conduct a check and report back to the court within a set time frame. The documents relating to the check of the complaint and any procedural measures that have been taken have to be presented in court and attached to the case. The checking of materials and bringing individuals to justice, who committed illegal acts, do not lead to the suspension of the proceedings.
3. When courts consider petitions lodged by litigants about excluding evidence from being admitted in court because it was extracted under torture or as a result of other illegal actions, the courts should base their consideration on the principle that the responsibility to confirm the legality of the received case materials rests with the prosecutor. If the criminal defendant declares in the court session that his or her statements were made with the use of physical or psychological violence by the criminal prosecution authorities, that he/she was not informed of the right to invite a defense lawyer and not to incriminate him/herself, that his/her interrogation was carried out without the participation of a defense lawyer, then the evidence in question should be recognized as inadmissible. If a lawyer participated in the legal proceedings, then he/she has to report about any violations of the law when signing the record.⁴
4. In order to prevent torture, cruel or degrading forms of treatment or punishment, the courts are tasked with identifying the causes and conditions conducive to the use of torture, and deliver special resolutions on the eradication of such treatment.⁵
5. The prosecutors are authorized to respond to allegations of torture and other forms of ill-treatment in the main legal proceedings.⁶ In line with Article 365 of the Criminal Procedure Code of the RoK the prosecutor

³ See: The Regulatory Resolution of the Supreme Court No. 7 dated 28 December 2009 "On the application of criminal and criminal procedure legislation for compliance with personal liberty and inviolability of human dignity, against torture, violence or other cruel or degrading forms of treatment or punishment" (as amended as at 21 April 2011). URL: <http://sud.gov.kz/rus/legislation/CAT01/79692/2009>.

⁴ Ibid. Paragraph 14.

⁵ Ibid. Paragraph 22.

⁶ See Chapter 4 of the Instruction on checking applications about torture and other unlawful methods related to cruel treatment of individuals involved in criminal proceedings and retained in the specialized institutions, and their prevention. Approved by the Order of the Prosecutor General of the Republic of Kazakhstan No. 7

who participants in the main legal proceedings has to find out whether the criminal defendant alleges that he/she was subjected to unlawful methods during the inquest and the investigation. If such an allegation is made, the prosecutor shall turn to the presiding judge and request an adjournment of the court session in order to check take the defendant's allegations.

6. If time is needed to check the allegation and the main legal proceedings cannot continue then the prosecutor has to lodge a petition to suspend the proceedings, in accordance with Article 45 of the Criminal Procedure Code of the RoK. After receiving the necessary information, the prosecutor has to report to his/her direct superior about the circumstances of defendant's allegations. The prosecutor also has to lodge a petition in court to resume the proceedings. The results of checking the defendant's allegations have to be announced in the court session, and the prosecutor shall request to include them in the criminal case file.

7. If the use of torture or other ill-treatment is confirmed, an assessment has to be made in the course of the pre-trial investigation about the admissibility of the evidence obtained through the use of unlawful methods during the inquest and the investigation. The position shall be adjusted accordingly, up to the point where the charges can be withdrawn when there is no other evidence to support them. When courts consider petitions lodged by litigants about excluding evidence from being admitted in court because it was extracted under torture or as a result of other illegal actions, the court should be provided with sound reasoning as to why the evidence should be excluded or not.

8. However, these procedures are not followed in practice. The most recent data were presented in the report entitled "Monitoring of legal proceedings of criminal cases related to drug trafficking in the Republic of Kazakhstan".⁷

9. In the course of the monitoring, 5 cases were recorded, where a total of 8 defendants alleged to have been subjected to torture, violence, threats, deception, or other unlawful actions and cruel treatment. Observation has shown that in 28% of cases, the defendants applied to the court alleging that they were subjected to torture, violence, threats, deception, or other illegal actions and cruel treatment by the prosecuting authorities to extract confessions at the pre-trial stage.

10. The monitoring data show that 1/3 of the defendants alleged in the course of the consideration of their case in court that they were subjected to torture, violence, threats, deception, as well as other illegal actions and cruel treatment. A poll among lawyers that was conducted in the framework of the above study has shown that 61.5% of the respondents reported that they had encountered violations committed by operating officers and investigators in the form of unlawful methods of investigation and torture when working on cases involving drug trafficking. 35.5% of these lawyers responded that they often encounter such cases.

11. The defendants have mentioned various methods of psychological and/or physical abuse that they were subjected to during the preliminary investigation. The defendants reported about threats from the operating officers (50%), cruel treatment (12.5%), and torture (25%). Here is an example from the monitoring report:

EXAMPLE No.9

Excerpts from the monitoring card on the case U., O., S. I M.⁸

When the lawyer asked defendant M. to "tell the court about the gist of the case" M. said: "S. and I were arrested in the yard of the house where I live. They did not find anything on me when I was arrested. After that I was taken to the narcological dispensary for examination, where police officers physically abused me. Even a doctor, who examined me, told the police: "Why do you beat him? Video cameras are installed here".

dated 1 February 2010. URL: http://online.zakon.kz/Document/?doc_id=30581044&

⁷ See: "Monitoring of legal proceedings of criminal cases related to drug trafficking in the Republic of Kazakhstan", Almaty, 2016. This study has been conducted within the project "Monitoring of legal proceedings of criminal cases related to drug trafficking in the Central Asia", funded by the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State. Conclusions and recommendations do not necessarily reflect the position of ABA ROLI, INL and the US Government. The findings of this study can be distributed by third parties without the prior consent of ABA ROLI, with the condition that the appropriate reference to the source shall be made.

⁸ Written by an observer in the monitoring card. REPORT No.02/2015/SHIMKENT/1-KZ on the case U., O., S. I M. See "Monitoring of legal proceedings of criminal cases related to drug trafficking in the Republic of Kazakhstan", Almaty, 2016.

In the DIA (Department of Internal Affairs) they forced me to sign the papers”. The lawyer T.: “Were you pressed to incriminate O.?” M.: “The police officers put pressure on me, and then I signed the papers”. The judge T.: “M., do you confirm that you were beaten by the police? Has there been any examination in this regard? Because the doctor, who examined you, stated in the conclusion of the examination that you did not have any injuries”. M.: “The police officers beat me on the ribs, but no injuries were visible. They know how to beat. When I was put in the pre-trial detention facility, my ribs were painful for a week”. The checking of this application was limited to a single question from the judge. There was no reaction from the prosecutor to the announcement. No inspection related to this application has been instigated.

12. With regard to ill-treatment, the monitoring materials include a case where the defendant stated that the investigator put psychological pressure on her during night-time interrogations.⁹

13. In the course of the monitoring special attention was given to the court's and the prosecutor's reaction to such statements. For the purpose of the monitoring report a “reaction” could involve any of the following: expression of interest, clarifying questions about the application, ordering a check, inviting police officers implicated in the allegation for questioning, examinations etc. In most cases, the judges reacted to statements of the criminal defendants (87.5%). But the reaction was usually just superficial and was limited to asking 1-3 questions about the allegation. The court ordered further checking in the cases of only two defendants. However, the results of this checking were not announced during the court proceedings. With regard to the applications of 6 defendants no checks were initiated.

14. The above statistics show the courts’ and prosecutors’ negligence of regulations and procedures provided by the legislative acts of the RoK pertaining to the issue of responding to allegations of defendants about torture. This is clearly inconsistent with Kazakhstan’s international obligations and points at the ineffectiveness of the system to counteract torture and violations of the rights of those participating in legal proceedings.

15. It is necessary to oblige the court and prosecutors by law not to only question the defendant/accused individuals about violations of their rights, but to respond to each allegation of torture and other ill-treatment aimed at extracting a confession by checking them impartially and comprehensively.

For more information, please see the sections on Articles 7 and 14 of the ICCPR below.

Recommendation: The Committee encourages the State party to abolish the death penalty and to accede to the Second Optional Protocol to the Covenant.

1. The death penalty is retained in the Constitution of the RoK. The Criminal Code of the RoK (Criminal Code of the RoK), adopted in 2014, includes 17 crimes that carry the death penalty.

For more information, please see the section on Article 6 of the ICCPR below.

Recommendation: The State party should exercise utmost care in relying on diplomatic assurances when considering the return of foreign nationals to countries where they are likely to be subjected to torture or serious human rights violations. The State party is encouraged to continue to monitor the treatment of such persons after their return and take appropriate action when the assurances are not fulfilled. Furthermore, the State party should fully comply with the principle of non-refoulement and ensure that all persons in need of international protection receive appropriate and fair treatment at all stages in compliance with the Covenant.

1. Kazakhstan does not fully comply with the principle of non-refoulement of asylum seekers to countries where they are likely to be subject to torture or other serious human rights violations. For example, it is

⁹ Written by an observer in the monitoring card. REPORT No.04/2015/ALMATY/6-KZ on the case P. See “Monitoring of legal proceedings of criminal cases related to drug trafficking in the Republic of Kazakhstan”, Almaty, 2016.

virtually impossible for people from Uzbekistan to get asylum in Kazakhstan even if there are grounds to believe that they are at serious risk of torture if returned to Uzbekistan. Their deportation or extradition, if criminal proceedings have been opened against them in Uzbekistan.

For more information, please see of the section on Articles 12 and 13 of the ICCPR below.

Recommendation: The State party should take appropriate measures to put an end to torture by, inter alia, strengthening the mandate of "Special Procurators" to carry out independent investigations of alleged misconduct by law enforcement officials. In this connection, the State party should ensure that law enforcement personnel continue to receive training on the prevention of torture and ill-treatment by integrating the Istanbul Protocol of 1999 (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) in all training programmes for law enforcement officials. The State party should thus ensure that allegations of torture and ill-treatment are effectively investigated and that perpetrators are prosecuted and punished with appropriate sanctions, and that the victims receive adequate reparation. In this regard, the State party is encouraged to review its Criminal Code to ensure that penalties on torture are commensurate with the nature and gravity of such crimes.

1. Despite a number of steps to address these recommendations, they have largely not been implemented, as evidenced by the 2014 Concluding Observations of the UN Committee against Torture following the consideration of the Third Periodic Report of the RoK on the implementation of the Convention against Torture.

2. The UN Committee against Torture, in particular, pointed out that the State party should:

- a) bring domestic legislation and practice in full compliance with international standards, and with the provisions of Article 15 of the Convention, in particular;
- b) take all necessary steps to ensure that, in practice, the courts do not accept any information or confessions obtained through torture and ill-treatment and that they are not used as evidence in any proceedings, except in cases against alleged perpetrators;
- c) improve the methods of criminal investigation in order to put an end to the practice of using confessions resulting from torture and ill-treatment as evidence in criminal proceedings;
- d) provide information the application of provisions prohibiting the use of evidence obtained under duress, as well as on whether any officials were subjected to criminal prosecution and punishment in case of violation of this prohibition or threat of its violation.

3. In addition, the UN Committee against Torture stated that the State party should:

- a) establish an effective, independent and accountable body, equipped with adequate resources, that is able to conduct prompt, impartial, thorough and effective investigations, including preliminary investigations, into all allegations of torture and ill-treatment, ensuring that such investigations are never conducted by employees working in the same department as the accused;
- b) ensure that such an independent body is also authorized to receive complaints of torture and ill-treatment by law enforcement officials, including complaints of sexual violence, and take action on them; ensure that individuals deprived of their liberty can transmit confidential complaints to such body, and ensure that this body could effectively protect complainants from repressive measures.

For more information, please see of the section on Article 7 of the ICCPR below.

Recommendation: The State party should strengthen its efforts to combat trafficking in human beings by ensuring that efforts are directed towards establishing and dealing with the root causes of trafficking. Furthermore, the State party should ensure that children are protected from the harmful effects of child labour, particularly those employed in cotton and tobacco fields. In this regard, the State party should ensure that all cases of human trafficking and use of child labour are effectively investigated and that perpetrators are prosecuted and punished with appropriate sanctions, and that the victims are adequately compensated.

1. Although the authorities have taken significant measures against trafficking in human beings in recent years,

a number of problems continue to exist both in law and in practice. They are connected with the fact that when investigating crimes related to trafficking in human beings, the law enforcement agencies do not meet the standards of thoroughness and impartiality. During the investigation and judicial inquiry of crimes related to trafficking in human beings for sexual exploitation, the victims are often perceived negatively, putting them in a weak and vulnerable position. Often victims and witnesses are not promptly provided with security measures promptly; as a result victims and witnesses often withdraw their earlier testimony.

The lack of knowledge of investigators, operatives and prosecutors about methods to investigate trafficking in human beings contributes to the lack of effectiveness of the fight against such crimes, Corruption among the law enforcement agencies is another major obstacle to the effective fight against such crimes.

For more information, please see the section on Article 9 of the ICCPR below.

Recommendation: The State party should take urgent measures to address overcrowding in detention centres and prisons, including through increased resort to alternative forms of punishment, such as electronic monitoring, parole and community service. The State party should end the practice of tolerating inter-prisoner violence and should take measures to address the underlying causes of self-mutilation by prisoners. In this regard, the State party should ensure that all cases of inter-prisoner violence and deaths are thoroughly investigated and that the perpetrators are prosecuted, and punished with appropriate sanctions. Furthermore, public oversight commissions should be granted the ability to make unannounced inspections of all prisons and detention facilities.

1. Despite the fact that with the adoption of the new Criminal Code of the RoK, the Criminal Procedure Code and the Criminal Execution Code, all of which entered into force on 1 January 2015, the number of prisoners decreased significantly, the problem of overcrowding in certain temporary detention facilities, pre-trial detention centres and prisons has not yet been solved.

2. Violence among prisoners is widespread, and mutilation as a way to protect their rights is considered as a violation of the prison regime and is subject to punishment, including additional terms of imprisonment. Although informal prisoner hierarchies are not recognized officially, the prison administration relies on them and cooperates with them in order to maintain order. Such hierarchies do not only pose a threat to the order within the institution, but they also create a situation where prisoners are at high risk of being intimidated. They may promote the inequality in the treatment of prisoners and lead to acts of violence of one group of prisoners over the other – under instruction or with the acquiescence of prison administration staff.

3. In some cases prisoners have been subjected to abuse by other prisoners the acquiescence or even direct participation of the administration staff. However, unless such violence leads to serious harm to health or the death of a prisoner, usually no investigations are conducted and the victims refrain from lodging complaints.

For more information, please see of the section on Article 10 of the ICCPR below.

Recommendation: The State party should abolish the exit visa requirement, and also ensure that the requirement that individuals should register their place of residence is in full compliance with the provisions of article 12 of the Covenant.

1. Kazakhstan does not require an exit visa to leave the country.

2. The main limitation of the right to freedom of movement within the territory of the RoK remains the obligatory requirement to register the place of residence. This system has been inherited from the Soviet passport system and registration requirement (“propiska”), and has not been brought in compliance with the requirements of Article 12 of ICCPR.

For more information, please see of the section on Article 12 of the ICCPR below.

Recommendation: The State party should review its legislation on refugees to ensure that it complies with the Covenant and international standards on refugee and asylum law. The State party should also ensure that it provides the necessary cooperation to UNHCR in order to allow it to execute its mandate and functions as provided by the UNHCR Statutes, the 1951 Convention and other international treaties ratified by the State party in order to guarantee the rights provided under the Covenant.

1. Despite the close cooperation of UNHCR with the State party, as well as with non-governmental organisations (one of the authors of these comments - Kazakhstan International Bureau for Human Rights and Rule of Law - is an official partner of the UNHCR and provides legal assistance to asylum seekers and stateless people by participating in procedures of determination and trains border guards and migration police), no major changes have occurred in refugee legislation.

For more information, please see of the sections on Articles 12 and 13 of the ICCPR below.

Recommendation: The State party should ensure that any measures taken to protect State secrets should not involve undue restrictions on an individual's right to access lawyers of their choice. Furthermore, the State party should ensure that in all cases of arrest, arresting officers have an obligation, at the time of arrest, to inform accused persons of their right to a lawyer.

1. The new Criminal Procedure Code of Kazakhstan of 4 July 2014 does not retain the old problems of ensuring the right to defense and qualified legal aid. But the procedure of the lawyer's entry in a case that contains state secrets is not resolved properly. Currently, the investigation authorities apply a practice that is contrary to the law and Article 14 of the ICCPR. They restrict the right of the defendant to a lawyer of his or her choice on the grounds that the lawyer should not have access to state secrets. The lawyers' association insists to be admitted to such cases based on a written pledge to keep the information confidential, as is customary in Russia, for example. This problem has already been pointed out by the UN Human Rights Committee in its Views on the case "Yesergepov v. the Republic of Kazakhstan."

2. Paragraph 19 of the Basic Principles on the Role of Lawyers adopted by the Eighth UN Congress on the Prevention of Crimes in August 1990, explicitly states that the court or the administrative authority shall not deprive the lawyer of his rights to represent the interests of his or her client, unless the lawyer has been disqualified in accordance with national law and practice, and the Basic Principles. Although restricting the right to choose a lawyer contradicts both international standards pertaining to the organisation and activity of the legal profession as well as relevant decisions of the UN Committee on Human Rights, this problem has not been solved in the Criminal Procedure Code of the RoK.

3. The current legislation does not guarantee the inviolability of lawyers when exercising their professional activities. The prohibition – contained in paragraph 8 of Article 232 of the Criminal Procedure Code of the RoK -- of secret investigative proceedings against lawyers, except in cases when they commission or prepare grave and especially grave crimes, deserves support. But this rule along is not sufficient to protect lawyers from pressure by their procedural opponents. The law should contain a set of guarantees for the legal profession, consisting of a clear prohibition on carrying out searches in lawyers' offices, their homes and vehicles, on listening to their conversations and other technical intrusion into the sphere that relates to their professional confidentiality. Unfortunately, relevant requests of the lawyers' association have not been taken into account by those who drafted the Criminal Procedure Code.

4. In recognition of the absolute value of personal freedom the OSCE/ODIHR recommended in 2011 to ensure that all detainees -- those held under criminal procedure and administrative procedure, or those "deprived of liberty in a different legal procedure," appear before the court no later than 48 hours from the moment of actual deprivation of liberty in order to assess the legality and soundness of his or her detention. Unfortunately, this right is not granted to everyone in Kazakhstan (see: Part 3 Article 147 of the Criminal Procedure Code of the RoK. Like the previous Criminal Procedure Code, the new Criminal Procedure Code gives priority not to assessing the legitimacy and soundness of a person's detention by the court, but to the question of whether the

person should continue to be detained or not. Thus, the Habeas Corpus procedure continues to be limited.

5. In our observation the authors of the new Criminal Procedure Code have moved away from the ideas of humanizing criminal justice procedures and reducing the prison population that had formed the basis of Kazakhstan's prison reform. Part 4 Article 151 of Criminal Procedure Code of the RoK stipulates that for some categories of criminal cases the maximum period of pre-trial detention is 18 months, which is half a year longer than the period that the repressive Soviet criminal procedure allowed itself at the end of the last century. Here, the strengthening of the inquisitional principle in criminal proceedings becomes obvious, which, of course, cannot but disturb civil society. We believe that such novelties reflect the corporate interests of the law enforcement agencies that played a leading role in creating the new Criminal Procedure Code.

6. Among the positive legal changes relating to this chapter is the expansion of the list of restraint measures that are not related to deprivation of liberty as well as the court's duty to set the amount of bail in all cases where it sanctions detention except for cases involving very serious crimes etc. (Parts 8, 9 of Article 148 of the Criminal Procedure Code).

Recommendation: The Committee encourages the State party to take necessary measures to review its legislation with a view to provide for alternative military service.

The State party should also ensure that the law clearly stipulates that individuals have a right to conscientious objection to military service, a right which they should be able to exercise before service begins and at any later stage during the military service.

1. To date, there are no provisions on alternative service in the legislation of the RoK.

For more information, please see of the section on Article 18 of the ICCPR below.

Recommendation: The State party should ensure that its law relating to the registration of religious organisations respects the rights of persons and freely practice and manifest their religious beliefs as required by the Covenant.

1. In 2011 the RoK adopted a new law on religious activity and religious associations, which significantly tightened the requirements for registration of religious associations, missionary work, performance of religious rituals, distribution of religious literature and materials. Heiner Bielefeldt, the UN Special Rapporteur on Freedom of Religion or Belief Professor, mentioned this in his report on the visit to the RoK in 2014.

2. After this legislation was adopted and entered into force in 2012 several hundred small religious communities were not able to re-register due to the requirement of re-registration contained in the new legislation, dozens of missionaries, who were foreign citizens, were fined and expelled from the country, religious leaders were prosecuted for religious meetings in private houses, in dozens of cases religious literature was confiscated for distributing it not in designated places. Especially, the persecution affected communities of Baptists, "Jehovah's Witnesses", the church "New Life", Ahmadiyya communities and some others.

For more information, please see of the section on Article 18 of the ICCPR below.

Recommendation: The State party should ensure that journalists, human rights defenders and individuals are able to freely exercise the right to freedom of expression in accordance with the Covenant. In this regard, the State party should review its legislation on defamation and insults to ensure that it fully complies with the provisions of the Covenant. Furthermore, the State party should desist from using its law on defamation solely for purposes of harassing or intimidating individuals, journalists and human rights defenders. In this regard, any restrictions on the exercise of freedom of expression should comply with the strict requirements of article

19 paragraph 3.

1. This recommendation has not been implemented. Moreover, the new Criminal Code that came into force on 1 January 2015 expanded the grounds and retained sanction in the form of three years' imprisonment for defamation; it introduced a punishment of 1 year imprisonment for defamation that is not associated with the spread of information in mass media; and it retains the special protection of moral rights of senior civil servants. A new article on "Spreading false information" was introduced, which provides for punishment up to ten years' imprisonment and does not exclude prosecution for the spread of opinions, attitudes, beliefs and assumptions.

For more information, please see the section on Article 19 of the ICCPR below.

Recommendation: The State party should re-examine its regulations, policy and practice, and ensure that all individuals under its jurisdiction fully enjoy their rights under article 21 of the Covenant, and ensure that the exercise of this right is subjected to restrictions which comply with the strict requirements of article 21 the Covenant.

1. The analysis of domestic legislation governing the right to freedom of peaceful assembly and the monitoring of the legal practice show that Kazakshtan is not in compliance with the principles and provisions of international law. Domestic legislation on this issue is very restrictive and has not been subjected to any revision in order to bring it into line with international standards. Maina Kiai, the UN Special Rapporteur on freedom of assembly and association, took note of in the report about his visit to Kazakhstan in 2015.

For more information, please see the section on Article 21 of the ICCPR below.

Recommendation: The State party should bring its law, regulations and practice governing the registration of political parties into line with the Covenant. It should in particular ensure that the process of registration complies with articles 22(2) and 25 of the Covenant. The State party should not use the process of registration to victimise groups that are seen to hold contrary political views to the ruling party.

1. The legislation on registration of political parties continues to be extremely restrictive, practically making it impossible to register new political parties, especially opposition parties. In 2015, after many years of existence, the opposition Communist Party of Kazakhstan was denied registration because it was not able to confirm that it had 40 thousand members. As a result, the country has only one opposition political party, the National Social Democratic Party of Kazakhstan, which, however, is neither represented in the Parliament nor in local representative bodies.

For more information, please see the section on Article 22 of the ICCPR below.

II. IMPLEMENTATION OF THE PROVISIONS OF THE ICCPR

Article 2, paragraph 3

1. From 2010 to 2016, the UN Committee against Torture, the UN Human Rights Committee and the UN Committee on the Elimination of All Forms of Discrimination Against Women adopted more than 10 views and decisions on individual complaints origination from Kazakhstan. In the overwhelming majority of these applications the committees found violations of articles contained in the UN Convention against Torture, the ICCPR and the Convention on the Elimination of All Forms of Discrimination Against Women, respectively and the state party was recommended to restore the violated rights of the applicants, provide compensation and take measures in order to avoid such violations in the future.

2. However, apart from two or three decisions of the UN Committee against Torture, which were partly

implemented (by awarding the victims some compensation), the decisions of the UN treaty bodies had no legal consequences. Kazakhstan has not taken any steps to revise the judgments rendered by national courts, although the UN committees established violations of the international treaties ratified by Kazakhstan, nor has it taken any measures to eliminate systemic problems.

3. This is also the case, for example, with regard to the views of the UN Human Rights Committee on the cases of “Toregozhina against the Republic of Kazakhstan” and “Esergepov against the Republic of Kazakhstan”. The main argument brought forward by the Prosecutor General’s Office of the RoK as to why the decisions have not been implemented was the absence in domestic legislation of the procedure to implement such decisions.

4. We are concerned that such a procedure has not yet been developed although Kazakhstan recognized the competence of the above-mentioned UN treaty bodies more than five years ago. The authorities should establish a procedure to implement the decisions taken by these UN treaty bodies under their individual complaint procedures as a matter of urgency.

Articles 2, 3 and 26

1. Article 14 of the Constitution of Kazakhstan¹⁰ stipulates that everyone shall be equal before the law and in court, and that no one shall be subject to any discrimination for reasons of origin, social, official or property status, sex, race, nationality, language, belief, convictions, place of residence or any other circumstances. The Constitution provides that rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary to protect the constitutional system, defend public order, human rights and freedoms, health and morality of the population.

2. The rights and freedoms stipulated by Article 14 of the Constitution may not be restricted under any circumstances. Any actions capable of upsetting interethnic concord shall be deemed unconstitutional. Any form of restrictions to the rights and freedoms of citizens on political grounds shall not be permitted (Article 39 of the Constitution).

3. The principle of equality of rights and freedoms is stipulated by the basic codifying statutes of the RoK, which, however, do not contain a direct prohibition of discrimination. For example, the Civil Code of the RoK¹¹ does not contain the terms “discrimination” or “right to freedom from discrimination” but its Article 2 envisages that civil legislation shall be based on the recognition of equality of the participants of the relations governed by the Code, and ensuring that rights that have been violated rights are restored and protected by the courts.

4. The only law in Kazakhstan, which provides for the definition of discrimination in a particular area, is the Law “On State Guarantees of Equal Rights and Equal Opportunities of Men and Women”.¹² It provides for the following definition of gender discrimination: *“any limitation or impairment of human rights and freedoms as well as disparagement of his or her dignity on the grounds of gender identity”* (sub-paragraph 3 of Article 1).

5. A number of enactments do not contain any provisions on the equality of rights and prohibition of

¹⁰ See: The Constitution of the Republic of Kazakhstan. Adopted in the republican referendum on 30 August 1995 (as amended and supplemented on 2 February 2011) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K950001000>

¹¹ See: Civil Code of the Republic of Kazakhstan (General Part). Adopted by the Supreme Council of the Republic of Kazakhstan on 27 December 1994 (as amended and supplemented on 29 December 2014) // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=1006061

¹² See: Law of the Republic of Kazakhstan No.223-IV dated 8 December 2009 “On State Guarantees of Equal Rights and Equal Opportunities of Men and Women” (as amended and supplemented on 3 July 2013) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z090000223_

discrimination at all.¹³ There are no provisions in legislation that make government officials liable for discriminatory treatment, although the liability of the leaders of public associations for discrimination is expressly specified in criminal legislation (part 2 of Article 145 of the Criminal Code).

6. Thus, although a number of laws contain the term “discrimination”, domestic legislation does not contain a conceptual framework on discrimination, non-discrimination, nor does it contain a system prohibiting discrimination.

7. In Kazakhstan the issue of eliminating discrimination falls within the mandate of the Human Rights Commissioner (Ombudsman) of the RoK¹⁴ and, to a certain extent, of the Human Rights Commission under the President.¹⁵ It should be noted once again that the competence of the Commissioner is limited so that he shall not consider submissions and complaints against actions and decisions of the President, Parliament and its members, the Constitutional Council, the Prosecutor General, the Central Election Commission and the courts. The Commission has the status of a consultative/advisory body under the Presidential Administration and has no significant impact on providing protection against discrimination.

8. In its annual activity reports, the Human Rights Commissioner regularly refers to incoming submissions from citizens on matter of discrimination on different grounds. In 2012 and 2011, 0.8% of the submissions addressed to the Commissioner related to discrimination based on national origin. Those implicated in the complaints as subjecting others to discrimination were employers, law enforcement officers and neighbors. The Commissioner informed that the submissions were studied but the allegations were not substantiated.¹⁶

9. In 2013, according to the Commissioner’s data, 1.2 % of submissions received by his Office related to the violation of women’s rights in the reporting year. Applicants mainly referred to discrimination in the work place because of pregnancy and child care. Complaints about discrimination based on national origin (0.4%) were also submitted to the Commissioner during this year; the applicants claimed that they were discriminated against in the work place and the criminal justice system. As before, the violations were not confirmed, but the Commissioner noted that, generally, violations relating to this category of submissions are difficult to prove.¹⁷

10. In 2014, 0.8% of the submissions addressed to the Commissioner related to discrimination based on national origin. The applications complained about actions of law enforcement officers, akimats and educational institutions. Again, no violation has been confirmed in a single case.¹⁸

11. The UN Committee on the Elimination of Racial Discrimination (CERD) took note of this situation. In its Final Remarks on the Consolidated Sixth and Seventh Periodic Reports of Kazakhstan in 2014 the CERD recommended Kazakhstan to make a careful analysis of why the Human Rights Commissioner has been able to establish discrimination only in a low number of cases, and to ensure effective investigation by the

¹³ See, for example: Law of the Republic of Kazakhstan “On Education”, No.319-III, dated 27 July 2007 (as amended and supplemented on 19 May 2015). Sub-paragraph 1 of paragraph 1 of Article 3 contains only the principle of equality of the rights to education of all citizens of the Republic of Kazakhstan. // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z070000319_
See also: Law of the Republic of Kazakhstan “On Housing Relations”, No.94-1, dated 16 April 1997 (as amended and supplemented on 10 January 2015) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z970000094_
See also: Law of the Republic of Kazakhstan “On Protection of Consumers’ Rights”, No.274-IV, dated 4 May 2010 (as amended and supplemented on 29 December 2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z100000274_
See also: Law of the Republic of Kazakhstan “On Religious Activity and Religious Associations”, No.483-IV, dated 11 October 2011 (as amended and supplemented on 29 September 2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z1100000483_

¹⁴ See: Decree of the President of the Republic of Kazakhstan “On Institution of the Position of the Human Rights Commissioner”, No.947, dated 19 September 2002 (as amended and supplemented on 29 August 2006) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/U020000947_

¹⁵ See: Decree of the President of the Republic of Kazakhstan “On Human Rights Commission under the President of the Republic of Kazakhstan”, No.1042, dated 19 March 2003 (as amended and supplemented on 4 December 2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan.. URL: http://adilet.zan.kz/rus/docs/U030001042_

¹⁶ See: Report on the Activity of the Human Rights Commissioner (Ombudsman) in the Republic of Kazakhstan for the year 2012 // Website of the Human Rights Commissioner in the RoK. URL: http://www.ombudsman.kz/purchase/files/otchet_2012_ru.pdf

¹⁷ See: Report on the Activity of the Human Rights Commissioner in the Republic of Kazakhstan for 2013 // Website of the Human Rights Commissioner in the RoK. URL: http://www.ombudsman.kz/upload/file/otchet_2013_ru.pdf

¹⁸ See: Report on the Activity of the Human Rights Commissioner in the Republic of Kazakhstan for 2014 // Website of the Human Rights Commissioner in the RoK. URL: http://www.ombudsman.kz/upload/file/otchet_2014_ru.pdf

Commissioner of all complaints about racial discrimination.¹⁹

12. It should be noted that, in the RoK, there is no special body tasked with preventing discrimination counteracting discrimination on the local and national levels. It is therefore not surprising that from 2010 to 2014 not a single crime has been registered relating to violating the equality of citizens²⁰.

13. The review of Kazakhstani legislation allows to conclude that issues pertaining to the right to freedom from discrimination have not been decided comprehensively. Existing legislation is of a fragmentary nature and does not allow for the effective protection against discrimination in various spheres of life. Furthermore, there is no clear system of legal provisions and prohibitions intended to ensure equality and non-discrimination.

14. As mentioned above, there is no special anti-discrimination legislation in Kazakhstan.²¹ To date, the measures taken by Kazakhstan for the prevention of discrimination are, in our opinion, insufficient. The state has failed to bring the national legal framework and practice in line with international norms and standards contained in the documents that Kazakhstan is a party to.

15. As shown in the course of monitoring carried out by human rights organisations,²² women, children, the elderly and various minorities (e.g. national, religious and sexual), face discrimination to one extent or another.²³

16. Based on the above and in order to improve the legal guarantees for equality and protection against discrimination, we find it necessary to propose a number of recommendations that are aimed at: 1) reviewing the norms and practices that cause discrimination; 2) developing and adding to the norms that constitute countermeasures against violations of equality; 3) developing and adding to the norms that meet the needs of citizens to preserve, develop and expression their ethnical identity:

- to devise a national strategy aimed at developing anti-discrimination legislation, including specific measures for combating discrimination in all spheres of life;
- to develop its own “umbrella” law “On Combating Discrimination”.

17. In order to combat discrimination in all areas, including access to housing, issues of citizenship, education, employment, medical care and social services, it is necessary to adopt basic anti-discrimination legislation that would include:

- A definition of discrimination that will form the basis for developing relevant administrative and civil legislation. This will then allow to contest discriminatory treatment, irrespective of whether it resulted in the violation of rights, and without the need to prove the violation of rights. The definition of discrimination must also include the terms “incitement to violence”, “hatred” or “discrimination on the ground prohibited by law”;

¹⁹ See: Final Remarks in respect of the Consolidated Sixth and Seventh Periodic Reports of Kazakhstan. Adopted by the Committee on its eighty-fourth session (3–21 February 2014). Section 21 . URL: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=CERD%2fC%2fKAZ%2fCO%2f6-7&Lang=en

²⁰ See: Report on registered crimes and results of activity of prosecuting agencies for 12 months for the period of 2010 to 2014. (1-M Form) // Information service of the Committee on Legal Statistics and Special Records of General Prosecutor’s Office of the RoK. URL: <http://service.pravstat.kz/>

²¹ Committee on the Elimination of Racial Discrimination in the Final Remarks in respect of the Fourth and Fifth Periodic Reports of Kazakhstan ((CERD/C/KAZ/4-5), provided in one document, at its 1991st and 1992nd sessions (CERD/C/SR.1991 and CERD/C/SR.1992) held on 26 February and 1 March. At its 2006th and 2007th sessions (CERD/C/SR.2006 and CERD/C/SR.2007), held on 10 March 2010), noted with concern that Kazakhstan has not adopted comprehensive legislation regarding prevention of discrimination and combating it in all fields, including the definition covering both direct and indirect discrimination on the grounds of racial and ethnic origin, and also legislation declaring all forms of racial discrimination under paragraphs a) and b) of Article 4 of the Convention crimes punishable under law. Referring to its previous recommendation (CERD/C/ 65/CO/3, paragraph 8), the Committee encourages the state party to pursue its efforts by adopting a comprehensive law on combating discrimination, which would include a definition of direct and indirect discrimination, as envisaged in paragraph 1 of Article 1 of the Convention. Furthermore, the Committee recommends the state party to make a comprehensive review of the current legislation for the purpose of bringing it in line, to the fullest extent, with provisions of the Convention, primarily with provisions of paragraphs a) and b) of Article 4 // Website of the Office of the UN High Commissioner for Human Rights. URL: www2.ohchr.org/english/bodies/cerd/.../CERD.C.KAZ.CO.4-5_ru.doc

²² See: Preliminary review report on certain aspects of inequality and discrimination in the Republic of Kazakhstan. Kazakhstan International Bureau for Human Rights and Rule of Law, Almaty, March 2015// Website of Kazakhstan International Bureau for Human Rights and Rule of Law. URL: www.bureau.kz

²³ See: Report on the results of monitoring of the observance of the rights of LGBTs in Kazakhstan on the basis of the principle of non-discrimination. Kazakhstan International Bureau for Human Rights and Rule of Law, Almaty, 2014// Website of Kazakhstan International Bureau for Human Rights and Rule of Law. URL: www.bureau.kz

- The prohibition of discrimination, including on the following grounds: race, skin colour, origin, nationality, certain ethnicity or social status, language proficiency, religious beliefs and convictions, gender, disability, age, gender identity, gender reassignment, political preferences, circumstances of birth, property or other status;
- The prohibition of “direct” and “indirect” discrimination;²⁴
- A non-exhaustive list of areas²⁵ where discrimination is prohibited by law: residence, education, labour and professional activity, social protection and social support, electoral rights, provision of public goods, funds and services and access to them etc.;
- The responsibility of the state to prevent and (or) to compensate for disadvantage directly caused by discrimination in those cases, where certain exceptions to the principle of prohibition of discrimination are set forth by law;
- The prohibition of any acts of discrimination, and also effective and proportionate sanctions for acts of discrimination. Authorising the courts to remedy discriminatory situations (restoration of the person’s rights as an employee or a householder, etc.) and to rule on compensatory measures. Authorising administrative bodies to impose sanctions on offenders (withdrawal of a licence, penalty, etc.);
- Introducing an effective mechanism to investigate cases of discrimination and bring to justice the offenders;
- Equal access to effective remedies and to justice (judicial or administrative procedures, conciliation or mediation procedures);
- The burden of proof in civil and administrative cases on discrimination shall be imposed on the respondent;
- Effective specialized institutions shall ensure the application of such legislation as well as the national tools of monitoring the observance and application of anti-discrimination legislation;
- Clarifying the constituent elements of offences that result in them being covered by criminal, administrative or civil law and applying severe measures of punishment for crimes/offences related to discrimination and committed both by private individuals and public employees;
- Clarifying the authority and responsibility of the various control and supervisory bodies that are tasked with monitoring complaints of discrimination and reacting to them.

Article 4

1. After oil workers had been on strike for several months, clashes took place between the population and the police in the city of Zhanaozen in the Mangistau Oblast of Kazakhstan on 16 December 2011. The authorities labelled the events as mass riots; a state of emergency was imposed on the city. A total of 17 people died in the city of Zhanaozen city and the nearby city of Shetpe city as a result of the clashes. The victims were either protestors or passers by.

2. Criminal proceedings were instigated in 2012 and resulted in the imprisonment of several oil workers and police officers as well as the opposition politician Vladimir Kozlov. However, Kazakhstani civil society remained dissatisfied with the course and the results of the investigation and called for the establishment of an international commission to investigate the events.

3. Navi Pillay, the UN High Commissioner for Human Rights, who visited Kazakhstan in 2012, and Maina Kiai, the UN Special Rapporteur on the Right to Freedom of Peaceful Assembly and the Right to Association,

²⁴ On the model of the Directive of the European Union. See: EU Directive 2000/43/EU dated 29 June 2000 on implementation of the principle of equal treatment, irrespective of racial or ethnic origin, which contains the direction that “Direct discrimination shall occur where one person is treated less favorably than another, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”. Indirect discrimination is associated with impact of policy or measures. It shall occur where an apparently neutral provision, criterion or practice de facto puts a representative or representatives of any minority at a particular disadvantage compared with other persons. An example may be the prohibition to enter and stay covered in the state institution or school. These rules being ex facto neutral in relation to ethnic origin or religion may de facto prejudice, to a greater extent, the interests of the representatives of certain minorities or confessions wearing headscarves. // Website “Without Borders”. URL: <http://noborders.org.ua/>

²⁵ This list may not be exhaustive.

made the same recommendation to the authorities of Kazakhstan, but the authorities have not implemented it.

4. We find it necessary to reiterate the calls of the UN High Commissioner for Human Rights and the UN Special Rapporteur on the Right to Freedom of Peaceful Assembly and the Right to Association to establish an independent international commission tasked with conducting a comprehensive and thorough investigation into the events in the cities of Zhanaozen and Shetpe in the Mangistau Oblast of Kazakhstan in December 2011.

Article 6

1. Kazakhstan has not abolished the death penalty as a form of criminal punishment yet. On 21 May 2007, amendments were made to the Constitution of the RoK stipulating that the death penalty may be imposed for the crime of terrorism involving loss of life as well as for extremely serious crimes committed in wartime.²⁶

2. Experts noted that *“this norm does not allow Kazakhstan to ratify the Second Optional Protocol to the Covenant, since paragraph 1 of Article 2 of the Protocol stipulates that the only admissible reservation is the application of the death penalty ‘in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime’.”*²⁷

3. On 3 July 2014, the new Criminal Code of Kazakhstan was adopted,²⁸ which provides for 17 crimes that are punishable by death.²⁹

4. Thus, according to changes made to the criminal legislation of Kazakhstan, the imposition of the death penalty has become possible not only for crimes associated with loss of life and for extremely serious crimes committed in wartime but also for other crimes that go far beyond the formulation contained in international standards as well as in Article 15 of the Constitution of the RoK. These amendments are inconsistent with international standards concerning the right to life and go against the general global practice of limiting the application of death penalty.

Article 7

1. As opposed to some other political rights and civil freedoms, the RoK has taken tangible steps to implement its obligations relating to the right to be free from torture, but not in all cases everything depends on those applying the law.

2. The definition of torture in the Criminal Code of the RoK still needs to be amended in order to bring it fully in line with the Convention against Torture. Although the range of subjects covered by Article 146 of the new Criminal Code of the RoK has been expanded,³⁰ the Criminal Code still fails to fully cover all possible

²⁶ See: The Constitution of the Republic of Kazakhstan. Adopted in the republican referendum on 30 August 1995 (as amended and supplemented on 2 February 2011) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K950001000> Before 2007, the death penalty was regarded as an exceptional measure of punishment admissible for commitment of extremely serious crimes.

²⁷ See: Kazakhstan - OSCE 2010: Progress or regress? By completion of Kazakhstan's presidency of OSCE – 23 February 2011 // URL: <http://www.humanrights.kz/orgreprus.php?id=4261>

²⁸ See: Criminal Code of the Republic of Kazakhstan dated 3 July 2014 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000226>

²⁹ Part 2 of Article 160 of the Criminal Code of the RoK “Unleashing or prosecution of aggressive war”; part 2 of Article 163 “Use of mass destruction weapons prohibited by international treaty”; part 2 of Article 164 “Violation of the laws and customs of war”; part 2 of Article 168 “Genocide in wartime”; part 4 of Article 170 “Mercenary activities that resulted in the death of people or other grave consequences”; part 3 of Article 175 “Treason against the State in wartime”; Article 177 “Attempt on the life of the First President of the Republic of Kazakhstan – the Leader of the Nation”; Article 178 “Attempt on the life of the President of the Republic of Kazakhstan”; Article 184 “Sabotage”; part 4 of Article 255 “Acts of terrorism” (“An attempt upon the life of an individual committed for the purposes of violating public security, intimidation of the population, duress on the state authorities of the Republic of Kazakhstan, foreign state or international organisation to adopt certain decisions, provocation of war or aggravation of international relations, and also an attempt upon the life of a state or public activist”); part 5 of Article 437 “Disobedience or other insubordination in wartime”; part 4 of Article 438 “Resistance to superior or duress on him to violate official duties in wartime”; part 4 of Article 439 “Acts of violence towards superior in wartime”; part 4 of Article 442 “Malicious desertion in wartime”; part 3 of Article 443 “Evasion or refusal of military service in wartime”; part 3 of Article 444 “Violation of rules of combat alert in wartime”; Article 455 “Surrender or leaving to an enemy of the weapons of war”.

³⁰ See: Criminal code of the Republic of Kazakhstan dated 3 July 2014 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000226>

situations. For example, a teacher at children's home will not be liable for committing torture since he or she does not meet the criterion of being "an official" and is not a common subject acting at the instigation of an official or with the knowledge or implied consent of an official.

3. The agency that investigates torture has remained unchanged in the new Criminal Code.³¹ Paragraph 4 of Article 187 of the new Criminal Procedure Code stipulates that the preliminary investigation into criminal offences envisaged by article 146 of the Criminal Code *"shall be conducted by agencies of internal affairs or the Financial Police that initiated pre-trial investigation in respect of individuals who are not employed by this agency"*.

4. Part 3 of Article 9 of the Criminal Code of the RoK does not contain the clear term "prohibited" but stipulates the "impossibility" to extradite or expell a person to *"a foreign state when there are serious grounds to assume that he or she may be at risk of torture, violence, other cruel or degrading treatment or punishment and also where they are at risk of execution, unless otherwise envisaged by international treaties of the Republic of Kazakhstan."*

5. Article 101 of the Criminal Procedure Code obliges the administration of preliminary detention facilities to forward complaints about torture to the prosecutor without delay. However, this provision is not operational since nothing prevents the administration of the institution from failing to do this.

6. In addressing the general framework of exercising authorities, Paragraph 5 of Article 56 of the Criminal Procedure Code obliges the investigating judge to order a supervising prosecutor to promptly check any complaints of torture or other illegal actions made by a suspect or injuries that may have been caused by abuse. In line with sub-paragraph 3 of paragraph 4 of Article 482 of the Criminal Procedure Code of the RoK, the judge is obliged to act in the same way when considering complaints lodged by convicts. After reviewing the evidence the judge should issue a decision on referring the complaint to the relevant prosecutor to conduct an investigation into the allegation of torture or other forms of ill-treatment.

7. It is unclear why the courts are severely limited in the types of decisions they can make (the limitations are justified by what is described as the independence and impartiality of the courts). For example, judges are not authorized to demand the presentation of crucial documents, to order necessary procedural activities, including the instigation of expert examinations, to suspend alleged perpetrators from duty or to order his or her isolation, and to issue security guarantees to the alleged victim and witnesses. All that the court is able to do – also under the new Criminal Procedure Code -- is to send the complaint on torture to the prosecutor for checks;

8. Article 275 of the Criminal Procedure Code prohibits, when carrying out a forensic examination, the deprivation or restriction of the rights of a person (without limitation) by way of torture or cruel treatment. However, it does not regulate who must control it and how to avoid it.

9. Paragraph 3 of Article 347 of the Criminal Procedure Code states that *"the results of the checks conducted into the allegations of torture have to be recorded on paper unless the judicial proceedings were audio- or video-taped"*. The Criminal Procedure Code does not specify whether or not the results of the prosecutor's checks are to be included in the criminal case file.

10. For certain reasons (for example, because of the repressive nature of criminal proceedings in practice) the application (or rather the formal presence) of the rule to exclude evidence obtained under duress, if such rule is available in the Criminal Procedure Code, causes serious concern. It appears, the problem is that the sequence of procedures for such exclusion is not regulated in the Criminal Procedure Code. Except for the suspension of criminal proceedings by the court while the prosecutor is checking the defendant's complaint about torture and the appeal against the decision, no procedure has been established with regard to the

³¹ See: Criminal Procedure Code of the Republic of Kazakhstan No.23131 dated 4 July 2014 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000231>

exclusion of evidence extracted under torture.

11. The issue of unlimited access to a lawyer and doctor of the detainee's or prisoner's choice is another problem of both legal and practical nature that needs to be resolved. While the general provision – the Code of the RoK “On People's Health and Healthcare System”³² – for example, provides for the right of a person and patient to choose a doctor and medical institution, the special provision – the Criminal Execution Code of the RoK³³ and other regulations, on the contrary, unfortunately, seriously restrict it.

12. Deprivation of liberty as a punishment envisages the isolation from society and shall limit only certain rights (the right to elect and be elected, freedom of movement, right to freedom). Providing the prisoner with access to his or her family members and friends, i.e. the communication with the external world, are essential components of the guarantees that detainees/prisoners are entitled to. Prisoners serving life imprisonment who only receive one visit per year, long-term solitary confinement and other issues are only some examples. Such facts, along with their unjustified severity, violate the minimal basic standards as well as standards that are forming and constantly developing (evolutionary), which are being adapted to modern conditions. Although the new Criminal Execution Code grants lifers the right to long visits, but in practice this category of prisoners is deprived of such a right since the the prison in Kostanay Region (RGU “UK 161/3” of DUIS (Penal Enforcement System)), where all those are kept who were sentenced to life imprisonment or to death, does not have premises for such visits. The new Criminal Execution Code of the RoK, which became effective on 1 January 2015, has significantly reduced the quantity and time of communications of a prisoner with his or her family as compared to prior legislation.

13. The guarantees of effective investigations into allegations of torture are mostly reflected in law, when taking into account the basic principles of criminal proceedings. However, in the majority of cases, no prompt, thorough, independent and impartial investigations are carried out in most cases, let alone in cases where no formal complaints are made. The work led by the Prosecutor General's Office, particularly, the opening of criminal cases and conduct of fair investigations into allegations of torture has largely been positive. However, not every complaint of torture is properly investigated, and not every victim of torture is provided the necessary protection.

14. The Criminal Code continues to punish self-mutilation (Article 360 of the old Criminal Code and Article 428 of the new Criminal Code of the RoK) although this the Regulatory Resolution of the Constitutional Council of the RoK dated 27 February 2008.³⁴

15. Paragraph 2 of the Regulatory Resolution of the Constitutional Council considers that mutilation (i.e. intentional self-mutilation) is an *“extreme form of protest and an approach applied by people who are isolated from society to protect their dignity. Restricting (...) the possibility of protecting ones rights and freedoms by way of criminalizing acts of mutilation is admissible only when carried out in strict compliance with the requirements of paragraph 1 of Article 39 of the Basic Law”*.

16. Hence, the Constitutional Council ruled parts 1 and 4 of Article 361 of the Criminal Code, which were introduced into criminal legislation in 2008, unconstitutional. Pursuant to paragraph 2 of Article 74 of the Constitution, the laws and other regulatory legal acts that are held unconstitutional, including those that prejudice the rights and freedoms of an individual and citizen established by the Constitution, shall be cancelled and shall not be subject to application. Article 428 of the Criminal Code needs to be excluded from criminal legislation both in accordance with international standards and the Regulatory Resolution of the Constitutional Council dated 27 February 2008.

³² See: Code of the RoK “On People's Health and Healthcare System” No.193-IV ZRK, dated 18 September 2009 (as amended and supplemented on 29 December 2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/K090000193_

³³ See: Criminal Execution Code of the Republic of Kazakhstan dated 5 July 2014 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000234>

³⁴ See: Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan, No.2, dated 27 February 2008 “On verification of constitutionality of the first and fourth parts of Article 361 of the Criminal Code of the Republic of Kazakhstan upon application of the Kapshagay City Court of the Almaty Oblast”. // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/S080000002_

18. Prisoners or their relatives and friends continue to turn to human rights defenders and journalists reporting about ill-treatment and about the discrimination of some and the provision of privileges to others. The NGO Coalition against Torture, which comprises some of the authors of this document, has operated in Kazakhstan for several years. 162 people applied to the Coalition in 2015, and 78 people – since the beginning of 2016.

19. In relation to the majority of complaints received by the Coalition, the Coalition applied to prosecutors, but the number of checks and criminal cases that have been opened show that so far the efficiency of investigation is still rather low, and that in many cases pressure is placed on the applicants to withdraw their complaints. For example, in April 2016, the Coalition received complaints from the prisoners B., Zh., E. and M., held in a penal institution in Almaty Region, who alleged that they were subjected to physical and psychological coercion by the institution's administration. A representative of the regional prosecutor's office visited the prisoners. Subsequently, Almaty Regional Prosecutor's Office informed the Coalition that the applicants had withdrawn their complaints about the institution's administration. The complaints were forwarded to the Internal Security Directorate of the Department of Internal Affairs of Almaty Region. Reports regarding all prisoners held in facilities in the Almaty and the Pavlodar Regions were submitted to the UN Special Rapporteur on Torture. Furthermore, human rights defenders have noticed a negative trend in recent month: when questioning or interrogating an alleged victim of torture law enforcement officers often urge the detainee to acknowledge in writing that he or she was informed that they can be held criminally responsible for falsely and deliberately denouncing a person of having committed a crime and that such a crime is punishable by a fine or imprisonment of up to 10 years. Law enforcement officers often use this approach to deter victims of torture from lodging complaints. During the period of 2015 to 2016, the prosecutor's office open several criminal cases for falsely and deliberately denouncing a person and charges were brought against people who had alleged to have been subjected to torture. For example, on 14 September 2015, citizen T. lodged a complaint with the Prosecutor's Office of Uzunkol District alleging that the District's Deputy Head of the Department of Internal Affairs and the District's Head of the Criminal Operations Branch of the Department of Internal Affairs tortured him to extract a confession. The criminal case against the police officers was dismissed, but a criminal case was initiated in respect of citizen T. for falsely and deliberately denouncing the officers. On 16 February 2016, Uzunkol District Court found citizen T. guilty and sentenced him to 3 year's imprisonment with a probationary period for the same period.³⁵

20. Another issue of concern, which has been recognized by the authorities, is the low number of cases and the amounts of compensation payments to torture victims. The compensation payment is limited to damages for moral harm only. No rehabilitation to the fullest extent (legal, social, labour, medical, psychological etc.) is included. Both the Criminal Procedure Code and the Regulatory Resolution of the Supreme Court of the RoK on compensation for harm do not facilitate establishing an appropriate amount to compensate for moral harm.

21. The practice shows (one of the authors of this document, "Kadyr-kassiet", conducted an investigation into this issue) that there is an extreme disproportion regarding the amounts of compensation in various legal situations. For example, the court established the amount of moral harm under the suit of "Kazkommerzbank" against the mass media and journalists at 40 mil. tenge (over 120 thousand US dollars); following a suit of the Akim (mayor) of the South Kazakhstan Region against the mass media and journalists the court set the amount of moral harm at 500 thousand tenge (over 1.5 thousand US dollars), and under the suit of the parents of children infected by HIV/AIDS vaccines in the same region the court awarded from 50 to 150 thousand tenge (from 150 to 450 US dollars). Torture victims were granted from 100 thousand to 2 mil. tenge (from 300 US dollars to 6 thousand US dollars).

22. Checks and investigations into torture allegations are usually not conducted promptly and impartially. For example, the investigation of the case of D. Polienko, that was initiated in the autumn of 2014, has yet to be completed.

³⁵ Press-release of the Prosecutor's Office of the Uzunkol District of the Kostanay Oblast is available at: <http://kst.prokuror.kz/rus/novosti/press-releasy/ob-otvetstvennosti-za-zavedomo-lozhnyy-donos>.

23. Victims are rarely granted measures of protection. For example, on 22 April 2016, the Prosecutor's Office of Astana City dismissed a petition of his legal representative who requested the authorities to ensure O. Evloev's safety while his case was undergoing pre-trial checking. Under its individual complaint procedure the UN Committee against Torture had found violations of O. Evloev's rights and the authorities of Kazakhstan had subsequently opened a criminal case. Measures of protection that had been instituted in the case of D. Polienko were abolished in February 2016 although the investigation into his case is ongoing (see above).

24. Civil society organisations have little influence over the investigative process in cases of torture since even the victims themselves and their legal representatives are not given access, for example, to crucial information about the investigation, such what questions are being studied in a particular examination, and to the case file. For example, the father of D. Rakishev, who died in the temporary detention facility of the Department of Internal Affairs of the Stepnogorsk City, did not know for a whole year about the resumption of proceedings in a criminal case that had been opened against doctors. He only learnt about it when receiving a letter from the UN Committee against Torture that contained this information in the authorities' reply to the Committee.

25. Judges do not have clear guidelines outlining a course of action to take when receiving a complaint about torture in the course of a trial. Evidence obtained through torture is not excluded. Prosecutors do not implement the Instruction approved by the Order of the Prosecutor General of the RoK in 2010, nor do they order the necessary examinations. Instead they typically dismiss the petitions of alleged victims without thorough checking. Prosecutors either do not wish or do not know the forensic techniques for conducting a comprehensive investigation.

26. Human rights defenders in the cities of Pavlodar and Astana who are members of the public monitoring committees (PMC) have on many occasions simply been denied access to institutions where detainees or prisoners are held. The institutions and departments of the penitentiary system and the prosecutor's office justify the denial of access by stating that the PMC members did not submit a written notification. There is a trend in the specified regions that, when the PMC detects cases of torture, the penitentiary institutions and departments subsequently deny them access to penal colonies and pretrial detention facilities.

27. Deprivation of liberty is the punishment that is most frequently applied by the courts (it is envisaged in the majority of sanctions of the Special Part of the Criminal Code of the RoK) and in the new Criminal Code; and the prison terms are often extremely long.³⁶

28. It is necessary to note that, from 1991 to 2014, Kazakhstan in terms of the number of its prison population has shifted from the 3rd to the 36th place in the world: from 397 to 296 people out of 100,000. However, it is still early to assess how long these achievements will last and whether or not this trend is steady.

29. So far it has been impossible to reduce the term for conditional release from prison of those sentenced to life imprisonment from 25 to 15 years; the authorities have argued that such a reduction would violate the principle of fairness in criminal law.³⁷ Those whose death sentences have been replaced by life imprisonment do not have the right to apply for release on parole, and the punishment in such cases may be ended only by death.

30. According to official data, the courts of Kazakhstan render 0.5-1.5% of non-guilty verdicts,³⁸ which, among others, casts doubts on the observance of the presumption of innocence.

31. Overcrowding continues to be a grave problem and the index of the prison population describes only one

³⁶ If, as a general rule, the period of imprisonment may be up to 15 years, the period of imprisonment for some extremely serious crimes may be up to 20 years or for life. Upon determination of punishment by cumulation of crimes and sentences, there shall be envisaged the imposition of punishment in the form of imprisonment for up to 25 and 30 years (article 48 of the Criminal Code of the RoK / article 46 of the new Criminal Code of the RoK).

³⁷ Ibid.

³⁸ See: "Statement of Kozhamzharov frightens by the possibility of returning to the realities of 1937", - lawyers", newspaper "Kursiv" dated 26 November 2014 // Website of the newspaper "Kursiv". URL: http://www.kursiv.kz/news/details/obshestvo/zaya_vlenie_kozhamzharova_pugaet_vozmozhnostyu_vozvrashcheniya_k_realiam_37_go_goda_yuristy/

part of the problem. The other part of the problem becomes apparent when looking at the actual facilities of the penitentiary system, in which it is not unusual for detainees or prisoners to sleep on the third shelves for lack of space, or they are not placed in empty prison cell.

32. In those cases when life imprisonment is imposed by pardon (that is, it is determined not on behalf of the State but the person is pardoned by the President Kazakhstan), it may not be treated as a punishment, but as a type of deprivation of liberty. This special measure is chosen by the President to replace the death penalty, i.e. as a form of clemency. This is the reason why there is no separate chapter in the Criminal Execution Code dedicated to these cases. In Kazakhstan life imprisonment is served in high-security prison colonies where other categories of prisoners also serve their sentences, but the prison conditions of lifers are particularly strict and resemble those of convicts who serve their sentences in prison. In fact, they are even stricter than those of convicts held in prison. For example, they lifers are held in particularly strict conditions for 10 years while this measure is applied for a maximum of 5 years in prisons.

33. While detention conditions improved in some reception centres, special detention rooms and temporary detention facilities after the Working Group on considering allegations of torture under the Human Rights Commissioner of the RoK and the Prosecutor General's Office got involved, the situation in the institutions under the Penitentiary System Committee of the RoK still require serious improvements. Such improvements are crucial in a wide range of areas ranging from much needed additional equipment, medical support, sanitary and epidemiological issues, to improving the complaint procedure in order to ensure full and confidential access to it as well as its effective functioning, and, more generally, to combat impunity.

34. As previously noted, one of the critically important problems still pending is the fact that legislative obstacles do not allow a victim of torture (not as a crime yet but already as a serious violation of absolute freedom of each person) to receive effective protection and guarantees not to be subjected to repeated victimization, proper and sufficient compensation for moral harm, rehabilitation and guarantees of non-repetition. To date there have only been few cases of compensation that were limited to an inadequate amount of monetary compensation without any legal, social, labour, medical or psychological rehabilitation.

35. Domestic legislation should reflect different forms of compensation recognized by international law such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), and it should ensure that the compensation awarded reflects the gravity of the violation.

36. Practice has shown that in Kazakhstan victims of torture only have a chance to be granted compensation for moral harm if the criminal case against them has been terminated. In those cases where a torture victim is convicted, no proceedings are opened on compensation and rehabilitation. In addition, the UN Committee against Torture has clarified already in two decisions (the cases of: A. Gerasimov, O. Evloev) that compensation and rehabilitation are to be granted no matter whether the perpetrators have been brought to justice. The fact that a person's freedom from torture has been violated gives sufficient grounds to initiate civil proceedings for compensation of moral damages sustained through torture, the UN Committee against Torture stated. However, in practice the decisions of the UN Committee against Torture have not been fully implemented, although Kazakhstan recognized the Committee's competence.

37. The practice of lining up arriving prisoners along the corridor of the quarantine facility forcing them to strip down naked in order to conduct a search on them continues to be reported from the penitentiary system. Several people are examined at the same time. The prisoners are requested to crouch and bend; photos are taken and video recordings are carried out. Many people are present when this search operation is carried out. Although there are no such provisions in the legislation, military exercises such as marching on the parade ground, collective singing etc. continue to be practiced in almost all penal institutions.

38. The following issues are also matters of concern since they provide the general context to the problem that is described in this chapter:

- many cases of sanctioning arrest in Kazakhstan constitute violations of Article 9 of the ICCPR, since the

courts often justify the restriction of freedom by the gravity of an offence although: a) the charge carries no gravity, such a definition is only appropriate with regard to a crime, b) the arrest is an exceptional measure of restraint;

- the Criminal Procedure Code of the RoK contains a provision stipulating that the time required for the familiarization with the case materials is not included when the time of a person's detention is calculated, although the detainee's freedom is restricted throughout. This fact constitutes a gross violation of article 9 of the ICCPR;

- the ability of individuals, who are subjected to administrative arrest, to appeal the court decision is restricted since the measure of administrative punishment is implemented immediately, based on a court decision that has not yet come into effect. There is no equality of the parties in administrative proceedings. The person held on administrative charges is not able to apply directly to the court, using the cassational procedure, in order to appeal the arrest warrant, since the Code on Administrative Offences of the RoK stipulates that the person shall apply to the prosecutor who decides, at his own discretion, whether or not to submit a protest to the court or to dismiss the complaint.

39. Based on the above mentioned information, we find it necessary to provide a number of basic recommendations and proposals aimed at improving the legislation, institutional development and the law enforcement practice relating to the right to freedom from torture:

- Add to the definition of torture the subject, i.e. "a person acting in his/her official capacity";
- The punishment for torture must be proportionate to the offence and ensure the purpose of criminal law – justice/fairness;
- The lower limit of sanction in the first part of the article on torture should be set at 5 years, thus excluding the possibility of reconciliation of the parties;
- Provide for criminal liability for degrading, cruel and inhuman treatment and punishment;
- Establish the right of the court to independently undertake basic steps of an initial investigation into allegations of torture (in order to preserve the evidence and to ensure the right to effective remedies at the national level) and, thus, to strengthen the independence of the investigating agency;
- Authorize and oblige the Ministry of Justice and the Prosecutor General's Office to implement of the decisions of international human rights bodies;
- Regulate by law the procedure for implementing UN treaty body decisions. In particular, provisions should be included in the Criminal Procedure Code and the Civil Procedure Code that court proceedings shall be opened when new information becomes available that is relevant to a case or to introduce new circumstances for the initiation of proceedings ("new circumstances");
- Specify a list of measures (general and special) binding for taking by the State with regard to changes to legislation of the RoK in order to avoid violations of human rights and freedoms;
- Strictly pursue the policy of zero tolerance for torture, and implement all recommendations of the UN Committee against Torture as well as all recommendations issued in the framework of the Universal Periodic Review;
- It is necessary to grant constitutional status to the Human Rights Commissioner of Kazakhstan by conferring powers that allowing the institution to ensure the effective provision of remedies at the national level;
- Transfer the medical service from its current subordination to the Ministry of Internal Affairs, the National Security Committee, the Ministry of Defense, the Ministry of Education and Science and other institutions to the jurisdiction of the Ministry of Healthcare and Social Development;
- Consider removing the penitentiary system from its current subordination to the Ministry of Internal Affairs, ensuring its autonomy and, accordingly, its own responsibility;
- Bring the conditions of detention of people in custodial institutions in line with the Minimum Standard Rules of Treatment of Convicts, Mandela Rules), the UN Rules for Protection of Persons with Mental Disorders, Beijing and Riyadh Rules, etc. To take necessary measures for the training of personnel of such institutions

etc.;

- Expand the list of institutions that can be visited by the participants of the NPM, and improve the procedure for special visits;
- The issue of impunity currently directly depends on the victim's ability to prove that torture took place, which he or she must not do in principle. Therefore, all international documents establish the obligation of the State and guarantees to victim. In this respect, it is important to implement the provisions of the UN Declaration on Protection of Victims of Abuse of Power and Crimes. By doing so the authorities will solve the current problem of not recognizing a violation of rights and freedoms that has been established by UN treaty bodies. Based on Kazakhstan's international obligations, it has to implement the treaty body's view to compensate the victim for moral harm and take measures for his or her rehabilitation (not limited to minor monetary compensation);
- Consider adopting a Regulatory Resolution of the Supreme Court outlining the terms established by General Comment No.3 of the UN Committee against Torture with regard to rehabilitation and compensation for damages;
- Implement the treaty bodies' decisions on the case "Oleg Evloev against the Republic of Kazakhstan" and on other cases by amending the Civil Procedure Code: i.e. regulate the rights of torture victims, on the one hand, and the obligation of the State to ensure the rehabilitation and fair and adequate compensation for harm caused by torture, on the other hand;
- Establish by law that the right of torture victims to compensation and rehabilitation must not be dependent on whether or not the perpetrators have to be brought to justice.
- Searches, especially strip searches and body cavity searches must be carried out in special conditions, in separate premises, out of sight of other employees or prisoners. The procedure must be conducted in appropriate sanitary and hygienic conditions. The number of employees present during the search also plays an important role in judging the correctness of its performance or the presence of signs of humiliation. As a rule, ensuring security does not require the presence of several employees. Ideally, the search should be conducted by one employee. In correctional institutions, it is necessary to end the practice of conducting searches of large numbers of prisoners, naked, and in public places.

Article 8

1. Since 2003 several UN treaty bodies and thematic mechanisms have issued several dozens of recommendations to Kazakhstan related to the prohibition of slavery, forced labour and combating human trafficking.
2. Some recommendations especially those made over the last years related to improving the legislation, in particular, by making amendments and additions to bring domestic legislation in line with international standards. It was recommended to include a comprehensive and clear list of all modern forms of slavery, including forced and bonded labour, as well as the worst forms of child labour and bonded labour of household servants. This recommendation is specially highlighted in the report of the UN thematic mechanism – UN Special Rapporteur on the Matters of Modern Forms of Slavery, including its Reasons and Consequences, who visited Kazakhstan first in 2013 and then with a follow-up mission in 2014.
3. The Special Rapporteur also recommended that reference rules to "other laws" must be removed from the legislation of Kazakhstan in order to eliminate vagueness and legal uncertainty. Unfortunately, this recommendation has not been fulfilled.
4. The Special Rapporteur's recommendation concerning the formation of a special institutional mechanism or an interdepartmental commission tasked with coordinating or monitoring policies and programs aimed at ending all forms of slavery, and with carrying out control over their performance, also appeared important. However, it has not been implemented.

5. The Constitution of Kazakhstan does not contain a direct prohibition of involuntary labour, but it establishes that “involuntary labour shall be permitted only based on a court verdict or in the conditions of a state of emergency or martial law”.³⁹

6. The prohibition of involuntary labour is reflected in Kazakhstan’s labour legislation. Involuntary labour shall be permitted only based on a court verdict or in the conditions of a state of emergency or martial law. However, the Criminal Execution Code of Kazakhstan stipulates that “*all those sentenced to imprisonment are obliged ... 1) to work in places and engage in work determined by the institutions’s administration* (sub-paragraph 1 of paragraph 2 of Article 104 of the Criminal Execution Code).⁴⁰ Refusing to fulfil this requirement is subject to disciplinary measures.

7. In our opinion, the provisions of this article of the Criminal Execution Code contradict Article 8 of the ICCPR and should be brought in line with Kazakhstan’s international obligations. These legal provisions actually establish the obligation to work in the absence of a relevant court decision. Compulsory labour such as work benefitting the public and correctional labour are measures imposed by a court verdict., but compulsory, albeit paid labour, in places of deprivation of liberty that is not included in the verdict appears to be a measure that is added to the punishment of deprivation of liberty. The experts of the ODIHR of OSCE also share this position.⁴¹

8. The UN Committee for Economic, Social and Cultural Rights issued a similar recommendation when considering Kazakhstan’s initial report on the fulfillment of the International Covenant on Economic, Social and Cultural Rights. It “*strongly urges that the state party eliminates involuntary labour as a measure of punishment for convicted persons and makes changes to legislation in order to bring the relevant provisions of the Criminal Code in line with article 6 of the Covenant. The Committee encourages the state party to ensure that the work of convicted persons be made conditional on their consent in accordance with Convention No.29 of the International Labour Organisation (ILO) on involuntary or compulsory labour (Article 6)*”, has remained unfulfilled.

9. Despite this recommendation, the new Criminal Execution Code, that was adopted in 2014 and came into force on 1 January 2015, retained the compulsory labour of prisoners without their consent. The compulsory nature of this measure becomes apparent in the obligatory signing of a labour agreement for paid work at places determined by the administration of the institution. Refusal to sign is subject to punishment. These provisions of the Criminal Execution Code must be abolished.

10. Experts estimate that more than 50 thousand people become victims of labour and sexual exploitation in Kazakhstan every year. The problem of human trafficking has become topical in Kazakhstan in the last ten years. Kazakhstan is the country of destination for victims of human trafficking from other countries of the Central Asia region, and thousands of people are annually subjected to labour and/or sexual exploitation in the country’s territory.

11. Often the victims of human trafficking cannot obtain social assistance from the state because they have no official residence registration or citizenship.

12. In Kazakhstan victims of human trafficking are only able to access the services of medical doctors, psychologists and social rehabilitation within the framework of the system of special social services, but there is no dedicated legal and social rehabilitation program to protection victims of human trafficking.

³⁹ Article 24 of the Constitution of the RoK.

⁴⁰ See: Criminal Execution Code of the Republic of Kazakhstan No. 234-V dated 5 July 2014, became effective as of 1 January 2015 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000234#z466>

⁴¹ See: Commentaries of the ODIHR of OSCE in relation to article 99 of the Criminal Execution Code of the Republic of Kazakhstan. Opinion-Nr.: GEN-KAZ/157/2010

2 June 2010. URL: www.legislationline.org

16. In accordance with the Strategy on Gender Equality for 2006-2016,⁴² the state undertook “to create rehabilitation centres at the state border crossing checkpoints to accommodate trafficking Kazakhstan and CIS countries until the circumstances of their stay abroad have been clarified”. However, to the best of our knowledge, not a single centre has been created at the checkpoints. It is known that only in the capital city of Astana, the Ministry of Justice supports the operation of a centre for victims of human trafficking.

17. There are no programs for the timely identification of human trafficking victims. It is necessary that the law enforcement officers working in temporary isolation facilities (such as reception centres for people without documents and reception centres for administratively arrested people), and officers of other state agencies and institutions, who come into contact with victims of human trafficking in the course of their work, conduct surveys among the detainees or people applying to them for assistance, by using specially developed questionnaires, in order to identify the victims of human trafficking among them.

18. Based on the above, we propose the following recommendations in order to improve protection and guarantees of freedom from slavery and combating human trafficking:

- Create crisis centres and shelters for victims of human trafficking in all administrative centres of Kazakhstan’s regions. To provide for long-term state funding of such centres;
- Introduce in Kazakhstan the institute of a national rapporteur on the problems of human trafficking;
- Conduct research to assess the number of victims of human trafficking in Kazakhstan;
- Conduct mass legalization of individuals without documents (children and adults), registration and permanent place of residence since this group of the population is at particular risk to be caught up in human trafficking;
- Oblige police officers, in particular officers of special institutions and local police officers, but also migration police to conduct surveys, by using specially developed forms, in order to reveal victims of human trafficking;
- Make changes to the Constitution of Kazakhstan and establish in it the freedom from slavery in accordance with Article 8 of the ICCPR.

Article 9

1. Despite certain positive developments in the legislation of Kazakhstan pertaining to the right to freedom and personal security, the law enforcement agencies relatively frequently restrict the rights of detainees suspected of having committed a crime by:

- refusing to document the precise time of arrest;
- detaining a person for a fabricated administrative offence to avoid following the procedure of detaining a suspect;
- failing to respect the rights of detainees to inform their relatives and to access to a lawyer and doctor.

2. The practice of illegal delivery to detention facilities and violation of time-limits during detention has remained largely unchanged.

3. It is necessary to promptly adopt and publish subordinate legislation (rules, instructions, guidelines) that is in line with international standards and that establishes strict procedures of arrest, transfer to detention facilities and custody of individuals detained both under criminal or administrative procedures. The legislation should also cover people who are subject to expulsion or deportation or whose applications for refugee status are being reviewed; those detained in facilities to prevent the spread of infectious diseases as well as mentally ill people, alcohol or drug addicts, and homeless people.

⁴² See: Decree of the President of the Republic of Kazakhstan No.1677 dated 29 November 2005 “On approval of the Strategy on Gender Equality for 2006-2016”
// Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/U050001677_

- 4.** The excessive use of pre-trial arrest is a serious problem. In particular:
- frequently the decision to remand a person in custody is not well-founded;
 - often people who committed non-serious crimes are remanded in custody;
 - the time limits stipulating how long a person can be held in custody in the course of the preliminary investigation and during the judicial examination remain too long.
- 5.** Since international standards relating to the procedure of Habeas Corpus guarantee everyone deprived of liberty the right to be brought before the court to assess the legitimacy and soundness of the detention, it is crucial to ensure that the judge rules on the legitimacy of the detention. This will help to better ensure the right to integrity of the person, significantly reduce cases of unjustified deprivation of liberty at the pre-trial stage of criminal proceedings.
- 6.** It is necessary to expand the powers of investigating judges to sanction actions aimed at restricting fundamental individual rights, including search, examination of homes against the will of the inhabitants, monitoring telephone communication, wiretapping and other covert actions infringing on a person's privacy, the secrecy of correspondence and communication and personal integrity. This will ensure that infringements on a person's privacy and his or her personal rights are carried out in a more reasonable and appropriate way. When investigating judges rule on the legitimacy of detention and sanction additional actions this will strengthen the position of the judiciary at the stage of the pre-trial investigation and will improve its quality and objectivity.
- 7.** In connection with the above and based on the adoption of the new criminal procedure legislation and administrative legislation, it is necessary that the Supreme Court of Kazakhstan revise or adopt new relevant regulatory resolutions concerning detention, delivery to the detention facility, custody, administrative arrest, arrest (pre-trial) and deprivation of liberty.
- 8.** It is necessary to introduce into the judicial practice, when making decisions about compulsory treatment of mental disorders the so called "triple-test approach" that is accepted in international practice. According to this method, no one can be subjected to compulsory medical treatment in conditions of deprivation of liberty if one or more of the following three conditions is not met: first, it must have been objectively established that the person is mentally ill; second, the psychological disorder must be of such nature and reach such a level that they justify the compulsory medical treatment under conditions of deprivation of liberty; third, the lawfulness of the length of the compulsory medical treatment under conditions of deprivation of liberty depends on the length/persistence of the psychological disorder.
- 9.** In order to objectively establish that a person is mentally ill, a fair medical examination is required. It is therefore necessary to ensure that the person in question has unimpeded and effective access to independent psychiatric examination.
- 10.** Compulsory medical treatment under conditions of deprivation of liberty is justified only if other less severe measures were considered and found insufficient to protect private and public interests.
- 11.** Amendments and additions have to be made to the Law of the RoK "On the procedure and conditions of detention of persons in special institutions ensuring temporary isolation from the society" (dated 30 March 1999, amended and supplemented on 10 January 2015) in order to bring it in line with international standards.
- 12.** It is also necessary to make amendments and additions to the Law of the RoK "On compulsory medical treatment of those addicted to alcohol, drugs and inhalants" (No. 2184, dated 7 April 1995, as amended and supplemented on 29 September 2014) in order to bring it in line with international standards.

Article 10

- 1.** Kazakhstan took a set of measures to humanize its criminal policy that had a positive impact on the position

of detainees and prisoners. For the last years, the size of the country's prison population has significantly decreased. As of 1 January 2015, 49,821 individuals served sentences in the penitentiary system (in 2012 – 48,684 individuals), including 43,220 convicted people in correctional institutions (in 2012 – 42,052 convicted people). 6,601 individuals were detained in pre-trial detention facilities (in 2012 – 6,632 individuals). However, the penal system of Kazakhstan has not yet abolished the “military” principles it applies to manage the inmates.

2. Over the years of independence, the penal system of Kazakhstan has undergone structural changes many times. According to the 26 July 2011 Resolution of N. Nazarbaev, the President of Kazakhstan, “On the Penitentiary System”, the penitentiary system was transferred from the Ministry of Justice to the the Ministry of Internal Affairs. Thus, the penal system was moved from a civil institution to one run by the prosecuting agencies of Kazakhstan, which contradicts the world practice and international standards in the field of execution of punishments.⁴³

3. Issues connected to ensuring the rights of prisoners, such as the modernization of the penitentiary system, are worthy of attention. Currently, it is being discussed to keep prisoners in separate wards in penitentiary facilities. This would mean the transformation of the “penal colony” model into the “prison” model. As noted in the legal science, the convergence of both systems would be ideal, i.e. the gradual merging of the “penal colony” and “prison” models. The abrupt introduction of detention in separate wards without taking into account the communal mentality of the majority of prisoners, may turn out to be a painful process. One should also take into account such factors as the economic cost incurred by society and the state in a system that holds prisoners in separate wards⁴⁴ and the problem of ensuring that prisoners have valuable social contact, which would become an even more pressing issue in case of a transfer to the “prison” model.

4. Based on the above and based on our support of a transition to a “prison” model, because, among other issues, it increases the security of prisoners, we believe that it is crucial to take into consideration the international experience of such transitions to the maximum extent.

5. Labour in places of deprivation of liberty should also be noted. In Kazakhstani criminal legal doctrine, labour has traditionally and also since the Soviet period been considered as the most important tool for ensuring the execution of punishments. The penal legislation of Kazakhstan currently in force considers labour as one of the means of correction of prisoners, by introducing them to the values of social life that apply outside prison. At the same time, the meaning of labour should not be overemphasized since in places of deprivation of liberty labour is generally of unqualified nature, without creative initiatives. Moreover, there must not be any involuntary albeit paid labour without the consent of a prisoner.

6. In modern times it is impossible to employ labour as it was done in Soviet times in the “prison colonel” model.⁴⁵ The use of prisoners' labour to gain profit is inadmissible. Now, prison labour, based on internal legal acts, must be oriented at preserving the prisoners' socially useful skills, motivation to work and ability to manage his or her own time. Therefore, it appears necessary that labour of prisoners should depend not only on their age and state of health but also on the level of their education, qualification, skills to certain types of labour and creative component of such labour.

7. Unfortunately, we should state that the basic part of the recommendations included in the National Plan for Human Rights in the RoK for 2009-2012⁴⁶ that is related to the rights of convicts was not translated into

⁴³ According to the substantiated opinion of N.P.Kovalev, there are several institutional models of organizing a penitentiary system in the world, however, the most popular and democratic model is the penitentiary system regulated by the ministry of justice. See: Analytical note “Penitentiary systems: comparative analysis of organizational and legal forms”. URL: http://pravo.zakon.kz/134443-analiticheskaja-zapiska-penitenciarnye.html#_ftn2

⁴⁴ Thus, according to the date of the MIA of the RoK, at present, already 7 institutions with persons serving in separate wards already operate, the construction of institutions in Kyzylorda, Uralsk has been completed. There has been developed the standard project “Specialized Penitentiary Facility for 1,500 seats” for 5 climatic zones. In Karaganda, the construction of a standard project within the framework of the public private partnership is already being performed.

⁴⁵ This problem is also recognized by the Committee of the Correctional System of the MIA of the RoK, so at the end of 2013 from the working-age population of 23,806 prisoners (in 2012 – 24,968 people), 12,482 persons are employed and paid for their work (in 2012 - 12,011 people) or 52.4 % (in 2012 - 48.1%). In particular, 7,022 persons are employed on the enterprises of the system (in 2012 – 6,468).

⁴⁶ See: Review of the implementation of the recommendations of the National Plan for Human Rights of the Republic of Kazakhstan for 2009-2012, prepared by Doctor of Law K.H. Rakhimberdin 20.06.2012. <http://www.bureau.kz/news/download/332.pdf>

action and, therefore, the new Criminal Execution Code of the RoK must be fairly assessed taking into account its potential to defend human rights.

8. It should be noted that the Criminal Execution Code does not outline any steps to be taken to ensure the rights of specifically “vulnerable”. Therefore, the requirements of international standards regarding the rights of these prisoners have not been fulfilled. Thus, for example, the Code does not highlight measures for ensuring the rights of convicted women, disabled people, the elderly, people belonging to sexual minorities, etc. It is obvious that for these people deprivation of liberty is associated with additional difficulties and risks of violation of rights and legal interests. It is necessary to include in the Criminal Execution Code provisions regulating the procedure and conditions of serving sentences by representatives of these groups.

9. In Kazakhstan, both the public monitoring committees (PMC) and the NPM provide control over places of deprivation of liberty. The PMCs have been legally acting in Kazakhstan since 2004, but they do not have institutional independence from the executive authorities and their activity is to a certain extent not effective when it comes to public control over the observance of the rights and freedoms of convicts by the penal authorities and institutions of Kazakhstan.

10. In 2013, Kazakhstan adopted a national law regulating the activity of the NPM. Since 2014, the members of the NPM have conducted preventive visits to 597 facilities within the scope of the NPM mandate. However, to this day the civil society activists and government authorities have debated about the NPM’s independence and effectiveness in Kazakhstan.

11. The trend of re-socialisation, “tied” to the Criminal-Execution Code of the RoK in its new model, has not been fully implemented and has not facilitated a development that would be desirable for society and the State.

12. The right to “protection of health and quality medical assistance in accordance with the healthcare legislation of the RoK” (as per sub-paragraph 8 of paragraph 1 of Article 10 of the Criminal Execution Code) is an extremely important right. We believe the convicts should have a right to receive not only quality medical assistance provided by professionals but also pre-doctor care which should be provided by the penitentiary staff while waiting for the medical professionals to arrive.

13. It is crucial that the administrations of penitentiary institutions create the appropriate conditions for the convicts to receive medical care. It is precisely when the penitentiary administration fails to create those conditions what makes the provisions of the criminal-execution legislation extremely declarative. It is not the administrations of penitentiary institutions that provides professional medical care but it is its task to create conditions that facilitate the provision of quality medical aid, e.g. by granting access to representatives of the civil health service, or by taking the convicts to medical institutions outside of the jurisdiction of the Committee for the Correctional System of the Ministry of Internal Affairs. The failure to provide conditions within which quality medical care can be administered can be qualified as a form of cruel treatment.

14. We believe that the right to receive medical care that is spelled out in the Criminal Execution Code should be complemented by the right to receive “pre-doctor care” and a requirement for the administrations of penitentiary institutions to create the necessary conditions that facilitate the convicts’s access to professional medical care, both with regard to those medical services that are provided by the state free of charge, as well as those medical services that require private payments.

15. Based on the above, we propose the following recommendations to ensure that the international standards pertaining to medical care to detainees/prisoners are adhered to:

- carry out a phased transfer of the medical service that is currently under the supervision of the criminal execution system to the Ministry of Healthcare and Social Development of the RoK;
- develop medical care in the criminal execution system in accordance with the main conceptual directions that related to improving the healthcare system;
- ensure that the criminal execution system is fully included and participates in national healthcare

programmes and projects;

- ensure that the guaranteed level of free medical care is provided on the basis of a rational distribution among the correctional facilities, promote its accessibility and quality;

- improve the quality of the (technical) equipment available at medical facilities of the criminal enforcement system;

- further develop and implement modern methods of prevention, diagnosis, treatment and rehabilitation of the most commonly encountered diseases among prisoners, with participation of the leading scientific research organisations in the field of healthcare, in order to reduce the rate of diseases, disabilities and mortality;

(c) in order to improve the ways in which the administration tries to educate the prisoners, the practice of informal prisoners' organisations should be done away with, since they have been used not as a means of re-socialising the convicts but as an instrument to manage the prisoners and impose control.

16. Article 9 of the Criminal Execution Code of the RoK describes the basis of the prisoners' legal status, and Article 10 lists their main rights. However, there is no mention of the right to receive information about further measures of criminal discipline, those that do not relate to the punishment itself but the criminal-execution legislation.

17. In our opinion, sub-paragraph 10 of paragraph 1 Article 10 of the Criminal Execution Code of the RoK is too narrowly worded. In the legal science, social security is recognized as only one of several forms of social protection. The right to social protection as stipulated by the international legal documents of the UN and the Council of Europe includes not only social security but also social insurance and rehabilitation after an injury or illness (social rehabilitation). Therefore, it would be more correct to word this provision as "a right to social protection, including pension and other social security in accordance with the legislation of the RoK."

18. It seems that, based on the norm of sub-paragraph 11 of paragraph 11 Article 10 of the Criminal Execution Code of the RoK, it is necessary to speak not only about safe working conditions but also about labour protection, and to complement the undoubtedly important reference to the labour legislation of the RoK with a point about the remuneration of labour with regard to the particular types of punishments. For example, a punishment in the form of community service does not provide for any payment to the convict, and this restriction is stipulated by the criminal law. Unless this particular circumstance is taken into account, any free (or underpaid) work by a convict could be qualified as a violation of his/her rights.

19. We believe that Article 10 of the Criminal Execution Code of the RoK should provide for the right of prisoners who are unable to speak, who have hearing or vision impediments to avail themselves to services of professionals who can speak sign language or use the Braille alphabet. This right has every chance to remain a mere declaration unless it is complemented by a requirement for the penitentiary administrations and correctional bodies to provide the prisoners with information about the availability of such services. Then this right of a special group of convicts will not only become a reasonable innovation but also come with a kind of toolbox which will facilitate its implementation.

20. We believe also that in order to maximize the implementation of international legal acts in the field of criminal justice, paragraph 4 of Article 10 of the Criminal Execution Code of the RoK should be defined more precisely, by wording it as follows: "The imprisoned individuals in whose respect alternative measures of criminal discipline are applied may not be subjected to scientific or clinical experiments and tests, even if they give their consent."

21. Sadly, the list of rights of the convicts notably omits such important rights as the right to education (including higher education), the right to apply to courts of law with petitions of early release on parole, the right to turn to the court requesting an early release, to keep in contact with the "outside world" as a precondition to re-socialising, and the right to exercise freedom of conscience and belief.

22. In the latter case, this right could be complemented by a requirement for the penitentiary administrations and correctional bodies to create conditions for the clergy to conduct religious ceremonies with respect to

those convicts who are seriously ill or have received life-threatening injuries and who would be invited by the convicts themselves or by other people (e.g. the convict's relatives). If the State pays respect to the religious beliefs of prisoners, especially those who are in a critical or terminal state, this would be in line with the principle of humanism that has been declared in the criminal-execution law and with international human rights standards.

23. Currently, the procedure for conducting religious ceremonies at penitentiary institutions is set forth by an Instruction for the creation of conditions to administer religious ceremonies.⁴⁷ This document defines a procedure for visits by representatives of the registered religious associations (paragraphs 2-10). Individual administration of religious ceremonies is only permitted if carried out next to the prisoner's bed; no other space or premises are provided (paragraph 11). Convicts are significantly restricted in their ability to read religious texts; they are not permitted to keep such texts and they are only permitted to read them once they have passed a theological inspection.

24. Restrictions such as those violate the right to freedom of conscience and religion, which is a right that is realized along with other rights. Such restrictions are not caused by a necessity in a democratic society, and are disproportionate to the presumed threat, even if we are talking about people who have been imprisoned. The UN Committee on Human Rights has stated, "*Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.*"⁴⁸

25. It should be noted that it is very important to strengthen the rights of the convicts institutionally, but doing so is not sufficient to ensure a sustainable practice of legal protection of individuals who are serving punishment in the criminal justice system. Unfortunately, many years of reforms of the penal system and the positive results that have been achieved (the single most important one is the laying of a foundation for a legal formation of the NPM in Kazakhstan) have failed to result in a radical transformation of the correctional system and creation of a new paradigm which would orient the system towards the concept of re-socialising an individual rather than forceful suppression wherein coercion or enforcement is the answer to everything.

26. We propose several recommendations to improve the protection of rights and lawful interests of prisoners in Kazakhstan:

- Change the provisions of the new Criminal Execution Code relating to the rights of prisoners paying due attention to critical comments that have been made, since the shortcomings of the Criminal Execution Code facilitate imperfections in their implementation;
- Continue work on the creation and development of a national probation system in Kazakhstan. Avoid simply changing the name of the criminal-execution inspection, but pay special attention to developing and implementing a methodology for a social-legal study of the convict's personality, which would be useful in the course of developing and creating the new system. It should be kept in mind that an effective probation supervision not only reduces the "imprisoned population" but also serves as a key factor in reducing the risk of human rights violations;
- Based on the international experience in the field of correctional enforcement and Kazakhstan's international obligations, the penitentiary system should be transferred from the jurisdiction of the Ministry of Internal Affairs to a civil body, the Ministry of Justice of the RoK. While doing so, it should be realized that the structural changes in the management of the penitentiary system are not the goal in and of themselves but a means to demilitarize and democratize the correctional system;
- In order to improve the forms and methods of educational impact on the convicts, the practice of having self-forming activity organisations of convicts at penitentiaries should be done away with, since it has been used not as a means of re-socialising the convicts but as an instrument to exercise management and impose control;
- Optimize professional training provided for the Committee of Correctional System of the Ministry of Internal

⁴⁷ Order of the Minister of Internal Affairs of the RoK No.503 dated 8 August 2014 "On the Approval of the Instructions for the creation of conditions to administer religious ceremonies by the imprisoned". Registered with the Ministry of Justice of the RoK under No.9722 on 6 September 2014 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/V14C0009722>

⁴⁸ See UN Human Rights Committee general comment 22 (48) "Freedom of thought, conscience and religion" (Article 18), 1993 // website of the Office of UN High Commissioner for Human Rights. URL: <http://www.ohchr.org/ru/HRBodies/Pages/TBGeneralComments.aspx> (date visited: 28 August 2014).

Affairs to strengthen their practical competences regarding the re-socialisation of convicts and the implementation of international legal acts pertaining to the treatment of various groups of convicts, including those who are HIV positive or suffer from tuberculosis or other serious illnesses;

- Ensure and harmonize the criminal, criminal procedural and criminal execution legislation in the broader context of legally regulating the activities of government institutes aimed at ending and preventing human rights abuses by creating the institute of the “prison ombudsman,” and promote coordination between the government and public oversight in this field;

- Use the mechanism of public expert check of the legislation of the RoK pertaining to the fight against crime in order to determine those provisions that ensure protection of human rights and individual safety;

- Establish/reinstate prayer rooms and other places for religious ceremonies in penitentiary institution. It seems reasonable to recommend that the Committee for the Correctional System of the Ministry of Internal Affairs sign memoranda of understandings with various religious organisations which would employ the help from the clergy in the process of spiritual and moral education of the convicts, re-socialising them, and preventing religious extremism among the imprisoned population;

- Continue the practice of developing new forms of public control through the expansion of the range of its subjects and introduce various organisational and legal forms of such control. In addition, increase the number of subjects able to be involved in public control in the national legislation (by including the probation authorities in the number of those subjects of public control).

Article 12

1. Everyone who stays within the territory of the RoK legally has a right of free movement, which is set forth in Article 21 of the Constitution: *“Everyone who has a legal right to stay on the territory of the Republic of Kazakhstan shall have the right to freely move about its territory and freely choose a place of residence except in cases stipulated by law. Everyone shall have the right to leave the territory of the Republic. Citizens of the Republic shall have the right to freely return to the Republic.”*

2. In spite of this constitutional provision, domestic legislation contains a number of limitations on the freedom of movement.⁴⁹ In particular, the institute of mandatory registration at the place of residence, a remnant of the Soviet passport registration “*propiska*” system, limits freedom of movement in Kazakhstan.

3. It is important to note that many matters of social security, including quality medical assistance, education, realization of the citizens’ voting rights, and the right to leave the territory of Kazakhstan, as well as many others, are directly affected by, and predicated upon, the institute of registration at the place of residence.

4. Such an important institute, which limits the freedom of movement significantly, has been regulated only on the basis of a single government resolution, the 24 February 2012 Resolution of the Government of the RoK No.132.⁵⁰ The Resolution establishes a standard of the government service “Registration of the citizens of the RoK at the place of residence” and sets out a list of documents that are required for registration at the place of residence:

- 1) the national ID of the owner of the house (his/her personal appearance is a requirement) and his/her consent to a permanent or temporary registration;

- 2) a document confirming that the owner of the house has indeed legally acquired it, or confirming that he/she has received it for use, including as a tenant (with a contract), sublet, or giving him/her the right to occupy the dwelling on other grounds as stipulated by the RoK legislation, and a pledge on the property, with a seal of the relevant banking institution;

- 3) an ID document (for children under 16 a birth certificate); for citizens of the RoK who arrived from abroad for permanent residence in Kazakhstan, a passport with a mark confirming that they have been removed from

⁴⁹ Paragraph 3 of Article 12 of the ICCPR stipulates that the restrictions of this and other rights are possible only when they are (a) provided by law; (b) necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and (c) consistent with the other rights recognized in the Covenant.

⁵⁰ See Resolution of the Government of the RoK No. 132 of 24 February 2014 “On the Approval of Standards of Government Services Pertaining to Documenting and Registration of the Population of the Republic of Kazakhstan” // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/P1400000132>

the consular records in the country of departure. If no such mark can be produced one has to provide a note confirming that they were removed from the registry of residents in the country of departure, with a mandatory note confirming their citizenship which must be issued by a foreign representation of Kazakhstan (or by the Department of Consular Services of the Ministry of Foreign Affairs), or a document confirming that they have been removed from the registry at their former place of residence, such document being issued and duly notarized by the competent authorities of the foreign state);

4) a receipt confirming that the appropriate fee for the permanent or temporary registration has been paid;

5) a note confirming that the person was released from a penitentiary institution and a note confirming that the person has been registered for preventive monitoring, made by the relevant public safety body.

5. As follows from the above, the list of required documents is very comprehensive; in order to obtain ID documents a registration is required, and in order to get registered an ID document is mandatory. Thus, a vicious circle is created wherein paperless people have to struggle through perennial problems. Children whose birth has not been registered are especially vulnerable.

6. The new edition of the Code of Administrative Infractions of the RoK still provides for administrative penalties for those citizens who are not registered at the place of residence, and the term has been increased compared to the previous edition, from 10 days to three months.⁵¹

7. Moreover, the Kazakhstani legislators have not stopped at penalizing the un-registered people, but the owners of apartments and other premises housing unregistered individuals are also subject to administrative penalties.⁵² Those provisions reflect the position of the Ministry of Internal Affairs of the RoK, who maintain that they must have more control over the population.

8. The offenses listed above are covered in Chapter 27 of the Code of Administrative Offenses, entitled “Administrative Infractions Against the Established Order of Governance.” Thus, the RoK states that the order of state governance is dependent on whether the citizens and stateless people are registered at their places of residence. However, fundamental rights and freedoms are being sacrificed in the name of such an order, including the right to freedom of movement. Any person who is not registered is deprived of his/her right to social guarantees, access to quality medical assistance, education, legal employment as well as his/her very

⁵¹ See Code of the RoK No. 235-V ZRK dated 5 July 2014 “On Administrative Infractions.” Article 492. Residence in the Republic of Kazakhstan without registration or without the documents certifying identity

1. Residence of the citizens of the Republic of Kazakhstan without identity certificate or with invalid identity certificate or without the registration at the place of residence for the term from ten calendar days to three months, shall entail a notification.

2. Residence of the citizens of the Republic of Kazakhstan without identity certificate or with invalid identity certificate or without the registration at the place of residence for the term more than three months, shall entail a fine in amount of five monthly calculation indices.

3. The act provided by parts one and two of this Article committed repeatedly second time within a year after imposition of the administrative sanction, shall entail a fine in amount of ten monthly calculation indices.

4. Permanent residence of a foreign person or stateless person in the Republic of Kazakhstan without the registration at the place of residence, or without the residence permit or without certificate of a stateless person or with invalid residence permit, certificate of the stateless person for the term more than ten calendar days, as well as untimely notifying the internal affairs bodies on loss of passport, residence permit or certificate of the stateless person, shall entail a fine in amount of five monthly calculation indices.

5. Acts provided by a part four of this Article committed repeatedly second time within a year after imposition of the administrative sanction, shall entail a fine in amount of fifteen monthly calculation indices. // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL:

<http://adilet.zan.kz/rus/docs/K1400000235>

⁵² Same document. Article 493. Admission of registering individuals by the owner of a dwelling place or other persons the authority of which includes dwelling places, buildings and (or) premises, that do not live there in fact.

1. Admission of registering individuals by the owner of a dwelling place or other persons the authority of which includes dwelling places, buildings and (or) premises, that do not live in the dwelling places, buildings and (or) premises belonging to the owner or being under authority of the other persons, shall – entail a fine on individuals in amount of five, on subjects of small entrepreneurship or non-profit organisations – in amount of ten, on subjects of medium entrepreneurship – in amount of fifteen, on subjects of large entrepreneurship – in amount of twenty monthly calculation indices.

2. The act provided by a part one of this Article committed repeatedly second time within a year after imposition of the administrative sanction, shall – entail a fine on individuals in amount of ten, on subjects of small entrepreneurship or non-profit organisations – in amount of twenty, on subjects of medium entrepreneurship – in amount of twenty five, on subjects of large entrepreneurship – in amount of thirty monthly calculation indices.

3. Failure to take measures by the owner of a dwelling place or other persons the authority of which includes the dwelling places, buildings and (or) premises on removing the registration of the individuals registered and not residing in the dwelling places, buildings and (or) premises belonging to the owner or being under authority of the other persons, shall –

entail a fine on individuals in amount of three, on subjects of small entrepreneurship or non-profit organisations – in amount of ten, on subjects of medium entrepreneurship – in amount of twenty, on subjects of large entrepreneurship – in amount of forty monthly calculation indices.

4. The act provided by a part three of this Article committed repeatedly second time within a year after imposition of the administrative sanction, shall – entail a fine on individuals in amount of ten, on subjects of small entrepreneurship or non-profit organisations – in amount of twenty, on subjects of medium entrepreneurship – in amount of forty, on subjects of large entrepreneurship – in amount of eighty monthly calculation indices.

right to elect and be elected. Taking into account the consequences such kinds of limitations cannot be recognized as commensurate and proportionate to the hypothetical danger for public order, even though it is stated in the law.

9. It should be noted that the new edition of the Code of Administrative Offenses of the RoK, which was adopted on 5 July 2014, no longer contains the article “Preventive Restraint of Freedom of Movement.” This article has been removed from the Code of Administrative Offenses following pressure from human rights activists who participated in the Working Group of the *Majilis* of Parliament that was working on the new edition of the Code of Administrative Offenses. However, the Ministry of Internal Affairs has no intention to abandon the practice of imprisoning paperless people; as far as we know, the Ministry has every intention to continue to apply this practice only under a different article, Article 29 of the Law “On the Prevention of Offenses.”⁵³

10. From the point of view of the law enforcement agencies, and in particular the migration police of the Ministry of Internal Affairs, preventive limitation of freedom of movement, as set forth in Article 29 of the Law “On the Prevention of Offenses”, is a very convenient tool to control homeless people and those without documents, who are difficult to identify. As a result, a fundamental human right, the one that is set forth in the Constitution of the RoK, is being violated only to make it easier for law enforcement officers, whose main job is to protect human rights.

11. In practice, this article, as it was stated earlier, is being applied to homeless people and people without documents. Therefore, what we observe here is a blatant discrimination of a certain category of people who are being profiled for not having a permanent place of residence or documents; this is a gross violation of Article 14.2 of the Constitution of the RoK and Article 2 of the ICCPR. Considering that there are between seven thousand and ten thousand homeless people in Almaty alone, according to different estimates, we can only imagine the scale of human rights abuses against this vulnerable group.⁵⁴

12. According to human rights defenders, the police regularly conduct raids to catch people without documents as part of their so-called crime-prevention operations. This practice is accompanied by arbitrary arrests en masse and abuse at the crowded police stations, where these people are transferred and deprived of their liberty for several hours at a time, with no communications with their relatives, no food, water, or right to legal protection.⁵⁵

13. Finally, the migration police hold citizens to administrative responsibility for residing at places where they are not legally registered, by imposing penalties on them, and in the case of foreign citizens, by deporting them from Kazakhstan.

14. In connection with the above, it is necessary to make the following recommendations to the government of Kazakhstan in order to strengthen the right to freedom of movement:

- Identify the exact number of people without registration and documents in the RoK;
- Carry out an analysis of the impact of the limitations of freedom of movement on the realization and protection of other fundamental rights and freedoms as set forth in the Constitution. Such an analysis shall result in a change in state policy with regard to freedom of movement;
- Carry out a mass legalization of people without documents (children as well as adults), registration and permanent place of residence;
- Abandon the requirement of having to provide an address note (confirmation of registration at the place of residence) as a prerequisite for issuing ID documents;
- Abandon the practice of making the provision of social guarantees dependent on the place of registration. Instead the provision of social guarantees should, for example, be tied to the individual ID number;
- Remove Article 29 from the Law “On the Prevention of Offenses”;

⁵³ See Law of the RoK No. 271-IV dated 29 April 2010 “On the Prevention of Offenses” (as amended as of 3 July 2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z100000271_

⁵⁴ See “Diagnosis: Homeless” by Nelya Sadykova / Karavan newspaper, issue No. 29 dated 22 June 2011. URL: <http://www.caravan.kz/Article/32953>

⁵⁵ Information provided by the International Legal Initiative Public Foundation

- Increase the period of residence without registration for which no administrative liability arises, to six months;
- Adopt a law on freedom of movement, which includes clear definitions of freedom of movement, place of residence, place of stay, and a ban on excessive and disproportionate limitations of freedom in Kazakhstan.

Article 13

1. Kazakhstan has no separate law regulating labour migration. The matters of labour migration are regulated in Chapter 6 of the Law “On the Migration of the Population,” which has no provisions that would protect migrant workers against enslavement and cruel treatment.

2. When analysing the quotas relating to foreign workers that come to the country to work on priority projects, we would see that only highly qualified workers, business immigrants or seasonal workers have the right to work in Kazakhstan. They do not cover the many poorly qualified workers who come to Kazakhstan from neighbouring states such as Uzbekistan, mostly, to work in the fields and at construction sites. They have no rights whatsoever and are not protected against slave labour and cruel treatment. It must be noted that quite often adult workers who spend their time on the fields picking cotton or tobacco are accompanied by their underage children who also work long 10-12-hour days and live in conditions without even basic sanitary conditions.⁵⁶

3. The problems of migrant workers in Kazakhstan are of a systemic nature. For those migrants who do not have a permit to enter and be employed in the country, the matters of personal security and health safety, guarantees of minimal wages, and other rights, are of critical importance. It is not a rare case that migrant workers are subjected to torture and ill-treatment. Elements of slavery, abuse and coercion in employment relations are often considered normal, not a violation of human rights. This is perpetuated by the migrant workers’ readiness to comply with the unacceptable labour conditions, which they experience as a given, the attitude of the authorities and society at large, who tend to condone the exploitation of labourers, and the suspicions the regime and society in general harbour against migrants. Corruption is another contributing factor.

4. Kazakhstan supports a policy of temporary labour migration, including with respect to skilled specialists and workers, and only issues permits to employers to hire foreign workers for a period not exceeding one year.⁵⁷

5. The support and creation of conditions for immigration into Kazakhstan of certain categories of foreign citizens is based, first and foremost, on the priority given to ethnic migration (oralmans) and on the acknowledgment of the rights of certain people to return to their historic fatherland and reunite with their families (these are mainly people who were born in Kazakhstan or who had Kazakhstani citizenship in the past, their families, citizens of the former republics of the Soviet Union who have close relatives who are citizens of Kazakhstan). But those who are granted the right of permanent residence in the country are not regarded as labour migrants.

6. In Kazakhstan, the established procedure for issuing permits to use migrant workers is based on the idea of a gradual replacement of foreign labourers with national cadres, including through the relevant investments by the employers. Such an approach differs from the practice of most industrially developed countries that compete for attracting highly skilled workers and where the rights of residence are increased the longer the worker stays in the country.

7. In addition, the International Convention on the Protection of the Rights of all Migrant Workers and their Families provides for the right of migrants to free access to the labour market after the conclusion of their

⁵⁶ See An Analysis of the situation with migrant workers. Kazakhstan International Bureau for Human Rights and the Rule of Law, 14 March 2012 // website of the Kazakhstan International Bureau for Human Rights and the Rule of Law. URL: www.bureau.kz

⁵⁷ See Law of the RoK “On the Migration of the Population”

lawful work in the country, for a certain period of time. It should also be noted that in Kazakhstan the procedure for issuing work permits to retain foreign labour force is extremely convoluted, time-consuming and costly for the employers. Moreover, the scope of requirements has been increasing and becoming more convoluted every year, which could be, to an extent, the reason for such increasing waves of unregulated labour migration in the country.

8. The principle of non-discrimination, including on the grounds of nationality, is acknowledged in Kazakhstan, and when it comes to labour conditions the national legislation contains no discriminatory provisions with respect to migrant workers. However, the fact that labour migration is considered as something temporary and its influx is regulated by linking permissions to a particular employer, migrant workers effectively face significant limitations in the field of employment, (which manifests itself in the migrant workers being “tied” to one particular employer).

9. Besides, despite the fact that Kazakhstan has ratified the International Covenant on Economic, Social and Cultural Rights⁵⁸ and Convention No.87⁵⁹ of the International Labour Organisation (ILO) on the Freedom of Association and Protection of the Right to Organise, migrant workers in Kazakhstan have no right to organize themselves in professional unions and their ability to participate in the existing workers’ unions and associations are extremely limited.

10. Existing measures to integrate migrant workers into local communities are being implemented very slowly, for a number of reasons. Firstly, the policy of regulating labour migration is based on the idea that it is of a temporary nature. Secondly, the majority of migrant workers coming to Kazakhstan fairly recently used to be citizens of the same state as the citizens of Kazakhstan, i.e. the former Soviet Union, so they usually not to face significant language or cultural barriers when integrating in the country where they came to work. The migrants coming from such states as Mongolia or China are provided with adaptation services by a designated institution. In addition, since there is a no-visa regime between Kazakhstan and the countries most migrant workers originate from, and due to the open nature of the visa policies generally, there are no serious barriers for realizing the right of family reunification for those migrant workers who stay in Kazakhstan legally.

11. As for the development and implementation of a policy to provide equal access to healthcare and education for children as set forth by the International Covenant on the Protection of the Rights of all Migrant Workers and their Families and Convention No.143⁶⁰ of the ILO, the following should be noted. Migrant workers in Kazakhstan have a certain level of access to healthcare and education, and in both cases the relevant rights are spelled out in the national legislation,⁶¹ healthcare being the better of the two.

12. Migrant workers in Kazakhstan do not have access to the pension system and social insurance. This is because those rights are provided only to those who have been granted the right of permanent residence in Kazakhstan. Employers are not obliged to make payments for their migrant worker employees. Thus, the provisions contained in domestic legislation⁶² on the rights of foreign workers to social insurance do not comply with international standards as established by the International Covenant on the Protection of the Rights of all Migrant Workers and their Families and ILO Conventions Nos. 118, 143, and 157.⁶³ But

⁵⁸ See International Covenant on Economic, Social and Cultural Rights. Adopted by Resolution 2200 A (XXI) of the UN General Assembly dated 16 December 1966 // website of the United Nations Organisation. URL: http://www.un.org/ru/documents/decl_conv/conventions/pactecon.shtml

⁵⁹ See Convention No.87 of the International Labour Organisation “On the Freedom of Association and Protection of the Right to Organize”. Adopted by the General Conference of the International Labour Organisation convened at San Francisco by the Governing Body of the International Labour Office, 17 June 1948 // website of the International Labour Organisation. URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_c087_ru.htm

⁶⁰ See Convention No. 143 of the ILO “Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers ” (Geneva, 4 June 1975) // website of ILO. URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_c143_ru.htm

⁶¹ See Order of the Minister of Healthcare of the RoK No. 665 dated 30 September 2011 “On the Approval of Rules for Provision of Medical Assistance to Immigrants” // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31087592

⁶² See Law of the RoK “On the Pension Coverage in the Republic of Kazakhstan” (as amended as of 19 May 2015) Article 2 // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31408637#sub_id=20000

⁶³ See Convention No. 118 of the ILO “Equality of Treatment of Nationals and Non-Nationals in Social Security” (1962) // website of the ILO. URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_c118_ru.htm

See also Convention No. 157 of the ILO “The Establishment of an International System for the Maintenance of Rights in Social Security (1982) // website of the ILO. URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_c157_ru.htm

regarding the right to be compensated for harm to the life and health of a worker while carrying out his/her job, the national legislation provides migrant workers with the same rights as their local counterparts.

13. Kazakhstan has not yet ratified the 1990 International Covenant on the Protection of the Rights of all Migrant Workers and their Families, the 1949 ILO Convention No.97⁶⁴ on migrant workers (revised), and the ILO Convention No.143 on migrant workers (supplementary provisions).

14. Up until 2010, Kazakhstan did not have its own law on refugees. Because of this the country provided refugee status mainly to the citizens of Afghanistan while other categories of people seeking asylum were given mandate refugee status by the Office of the UN High Commissioner for Refugees (UNHCR). Since the majority of mandate refugees were not provided with opportunities to integrate in the RoK, the Office of the UNHCR relocated them to third countries.

15. Kazakhstan's Law "On Refugees" entered into force on 1 January 2010.⁶⁵ The law was adopted in a hurry and of draft quality, although civil society activists had submitted comments and recommendations. The Office of the UNHCR declared that the adoption of this law, even if in such an unfinished form, was a huge step forward for Kazakhstan.

16. The law that was adopted contains a multitude of contradictory provisions and does not comply to international law; it contains many references and links to other legislative acts which, sadly, have never been developed properly. For example, the Law provides for the refugee status for a period of one year only, which is a violation of international principles of providing asylum, and the 1951 Geneva Convention "On the Status of Refugees."

17. The articles of the Law regarding the rights of refugees for healthcare, social assistance, employment, all refer to other regulatory and legislative documents which provide no guarantees of the rights of refugees; for example, the legislation on pension coverage does not provide the rights of refugees for social and pension coverage; the same situation applies to healthcare.

18. The Law provides that refugee status will not be given to people who are being prosecuted for participating in banned religious organisations.

19. Asylum seekers are not guaranteed unhindered access to Kazakhstan because the legislative provisions and the level of skills of border patrol employees do not always allow to draw a difference between a refugee and a regular foreign citizen.

20. No amendments have been made to bring the relevant legislative acts in line with international standards pertaining to the provision of medical assistance to asylum-seekers and refugees, their labour activity and social and pension coverage. In the entire Code on People's Health and the Healthcare System,⁶⁶ there is only the small paragraph 5-1 of Article 88, which states that "*refugees and persons seeking asylum shall be provided with preventative, diagnostics and medical services that are proven to have the maximum efficiency, in the procedure and to the extent determined by an authorized body.*" The Law "On Pension Coverage in the RoK"⁶⁷ provides no rights whatsoever to refugees. It only includes a mention of foreign citizens and stateless people (paragraph 2 of Article 2).

21. Based on the above, the following can be recommended:

(a) in respect of migrant workers:

⁶⁴ See Convention No.97 of the ILO on Migrant Workers (revised in 1949). URL: http://moscow.iom.int/russian/Legislation/ILO97_ru.pdf

⁶⁵ See Law of the RoK No.216-IV dated 4 December 2009 "On Refugees" (as amended as of 29 September 2014) // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=30525705

⁶⁶ See Code of the RoK No.193-IV dated 18 September 2009 "On the Public Health and Healthcare System" (as amended as of 6 April 2015) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/K090000193_#z1965

⁶⁷ Law of the RoK No.105-V dated 21 June 2013 "On the Pension Coverage in the Republic of Kazakhstan" (as amended as of 19 May 2015). URL: http://online.zakon.kz/Document/?doc_id=31408637

- legal protection of the main rights of all migrant workers, irrespective of their status, must be ensured;
 - those migrant workers who work illegally must be legalized;
 - a law must be adopted or updated to extend the list of free healthcare services for migrant workers;
- (b) in respect to refugees and asylum seekers:
- clear procedures for access of refugees to the country must be developed. Consider equating a refugee certificate to a permanent residence card;
 - consider pension coverage for officially recognized refugees and replace those provisions of the immigration legislation that equal refugees with foreign citizens staying in Kazakhstan on a temporary basis;
 - amend those legislative acts that require refugees to provide forms from the embassies of their countries when applying for permanent residence or citizenship. The rights of asylum seekers should be spelled out more broadly in the legislation. This category of people should be given the right to be employed, educate their children and have access to medical assistance in accordance with international standards and best foreign practices;
 - provisions should be added to the legislative framework allowing the employment of asylum seekers. Refugees should be provided with travel documents.

Article 14

1. The issue of the independence of judges in Kazakhstan is one of the issues regarding which it is most difficult to have an open public and professional discussion. Obviously, this stems from the political nature of this issue, which goes back to the problems of democratization of the country's political structure, strengthening the division of power, and development of checks and balances in the interactions among the various branches of power.

2. In our opinion, doubts about the independence of judges in the RoK arise because of the specific features of the formation of the judiciary, and the methods used to manage this system. In accordance with current legislation, the judges of the Supreme Court are elected by the Senate after being put forward by the President on the basis of a recommendation by the Supreme Court Council (Article 31 of the Constitutional Law on the Judicial System and the Status of Judges). Regional and district courts, as well as courts that are equated to them are established, reorganized, renamed and abolished by the President upon recommendation by the Chairman of the Supreme Court, as agreed with the Supreme Court Council (paragraph 1 of Article 1 and paragraph 1 of Article 10 of the Constitutional Law on the Judicial System and the Status of Judges).

3. An analysis of the procedure for the "election" and appointment of judges gives rise to certain concerns from the point of view of democracy and transparency. For example, senators can only select judges for the Supreme Court among the candidates proposed by the President. Thus, these judges are in fact "elected" on a "non-alternative" basis, which basically constitutes a procedure of approving already proposed candidates and deprives the senators of freedom of choice on this matter.⁶⁸

4. The participation of the Supreme Court Council in the appointment of judges creates the impression that decisions are made in a "collegial" fashion and that this process is democratic. However, a detailed analysis of the formation and functioning of this body shows that it only enjoys relative independence from the executive branch.

5. In particular, the Supreme Court Council consists of a Chair and several other members who are appointed by the President of Kazakhstan (paragraph 2 of Article 82 of the Constitution, Article 3 of the Law on the Supreme Court Council⁶⁹). As of the end of September 2014, the members of the Council also included: the

⁶⁸ See The Fundamentals of Fight Against Corruption: a study book. / Under the ed. of I.I.Rogov, S.F.Bychkova. – Almaty: Transparency kaz Public Foundation, OFPPI "Interlegal", 2004. Chapter 5, page 84.

⁶⁹ See Law of the Republic of Kazakhstan No.79-IV dated 17 November 2008 "On the Supreme Court Council" (as amended as of 17 November 2014 Adilet

Chair of the Committee on Legislation and Judicial and Legal Reform of the *Majilis* (lower house) of the Parliament; the Chair of the Supreme Court; the Prosecutor General; a senator; three judges from the Supreme Court; the President of the Union of Attorneys; and the Secretary – the head of the State-Legal Department of the Presidential Administration.⁷⁰ The Council's operation is supported by its administration, whose staff members are employees from the Presidential Administration (Article 22 of the Law on the Supreme Court Council). Therefore, the President of the Union of Attorneys is the only civil society representative among the members of the Supreme Court Council.

6. In many civilized countries, the head of the executive branch appoints judges and we do not consider this to undermine their independence. However, in this case, it is problematic that not only the appointment but also the selection of judges is carried out by people (meaning members of the Supreme Council) who have been engaged by the executive branch on the basis of the criteria that have not been clearly defined by law. In addition, the weak representation of civil society in this body is a matter of concern.

7. The level of democracy in a state is determined by the degree to which its citizens are involved not only in the formation of state bodies, but also in the functioning of these bodies. The engagement of citizens may manifest itself in different ways depending on the specifics of the relevant activity: in the form of elections, direct participation, external control, appraisal of results, etc.

8. We believe that the bodies that make up the judicial system should be established with popular participation and that they should have civil society representatives among their members. The procedure for establishing these bodies should be spelled out in the Constitution and should imply transparent and fair procedures that guarantee that the most honest, conscientious and professional candidates are elected.

9. Citizens should not only be involved in the process of selecting judges, but should also be able to influence the results of this process, to voice their opinion on it and to expect their opinion to be respected when decisions are made. A situation in which bureaucratic structures subordinate to the head of the executive branch pick staff for the judiciary without citizen participation not only fails to ensure the independence of judges, but also - on the contrary - promotes further merging of the two branches of power, which is impermissible in a state that calls itself democratic.

10. In this context, we find it advisable to consider changes to the procedure for selecting members of the Supreme Court Council and to put in place more transparent, competitive procedures that contain elements of election. For example, in order to strengthen the role of the local population in the formation of the first chain of the judicial system, it would be advisable to introduce discussions and approvals of candidates who have been recommended by the Supreme Court Council at regional *maslikhats* before these candidates are presented to the President of Kazakhstan for appointment as judges. In this way, the President would be able to choose from several candidates when deciding whom to appoint to a particular judicial position.

11. However, the fact that judges are granted their status by the executive branch is not the only reason that they are dependent on this branch. The existing system for the administration of justice also limits the independence of judges. The current practice of assessing the performance of judges on the basis of the number of overturned judgments may have an impact on the career of a judge and is a disguised form of manipulation of the judges.

12. Judges are afraid of issuing judgments that are not desirable for higher instances because overturned judgments are considered shortcomings in their work and may result in negative appraisals, with all relevant consequences.⁷¹ In addition, the fact that power is concentrated in the hands of court chairs who are appointed

Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z080000079_

⁷⁰ See Decree of the President of the Republic of Kazakhstan No.696 dated 21 November 2008 "On the Establishment and Membership of the Supreme Court Council of the Republic of Kazakhstan" (as amended as of 17 September 2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/U080000696_

⁷¹ For example, according to A.Kishkembayev, a former judge at Court No.2 of the Sary-Arka District in Astana, "... there are incidents when a first instance court, having ensured a full and objective review of the case circumstances, renders a judgment. And that judgment gets overturned later on. The judge who rendered the first instance acquittal verdict, if he does not agree in principle with the resolution of the appellate collegium, he has no legal means and abilities to defend his

by the executive power also limits the independence of the judges. We believe that in order to develop self-governance within the judicial community and strengthen the independence of judges, the ill-advised practice of counting the number of overturned judgments should be ended, and the selection of court chairs should be a matter decided at plenary sessions of the respective courts.

13. The development of jury trials is another important aspect of the process of improving the judicial system, strengthening its independence and promoting democracy in the administration of justice. Unfortunately, the trend of reducing the scope of applicability of such trials that has been observed in recent years, the ill-advised practice of repeatedly challenging and overturning acquittals handed down at jury trials, and the de-facto refusal to continue the discussion of the use of the classic (British-American) model of jury trials all attest to the lack of willingness to implement this aspect of judicial reform and the desire by the government to retain control over the process of administration of justice.

14. In our opinion, this is the wrong approach because jury trials could be the silver bullet to strengthening the independence of courts. It is precisely this form of judicial proceedings that could provide for division of responsibility between the state and its citizens with respect to ensuring fair court decisions. We believe that the development of jury trials and the implementation of such trials in their classic model in court cases concerning serious and especially serious crimes, as well as in certain categories of civil cases could contribute considerably to strengthening the independence of courts in our country.

15. Despite the sufficiently liberal interpretation of the right to a public hearing that exists in national legislation, the practical implementation of this right leaves much to be desired in some cases. For example, citizens who arrive to a courthouse in search of justice cannot but be depressed by the presence of barriers, screens and a great number of security guards, not only from the ranks of the police but also from among the employees of the judicial system itself. During trial monitoring conducted by the OSCE Office of Democratic Institutions and Human Rights (ODIHR) as far back as in 2004-2006, the observers were disturbed that they were not able to freely access court rooms at certain courthouses, that they were required to explain to police and court employees what the reason for their visit was and what relationship they had to court cases that were subject to review in open hearings, as well as other restrictions on the principle of transparency of judicial proceedings.⁷² Unfortunately, some of the recommendations made on the basis of this monitoring⁷³ have not been implemented to date.

16. Moreover, in the last few years, the situation with respect to the transparency of judicial proceedings has become even more problematic. Practically all courthouses have adopted a practice of searching all visitors, including attorneys, and requiring that they leave recording devices (such as phones and computers) outside the courtroom. Numerous proceedings that have generated great public interest have been conducted so that the public has been seated in rooms adjacent to the courtroom, where the court proceedings have been broadcast on screens. This has usually involved poor sound quality, which has made it impossible to fully monitor the process.

17. We believe it is necessary to put an end to the practice of regulated public access to the courtroom by maintaining only a general non-contact security control, without police interfering with the realization of the right of citizens to open and transparent court proceedings.

18. In a series of cases, court proceedings have not been conducted in courthouses but on the premises of penitentiary institutions, thereby limiting access for the public and journalists.

opinion. Moreover, theoretically—in fact, even practically—it is very possible that a disciplinary action may be taken against the judge. In other words, we are talking about a punishment for beliefs which were expressed in a judicial act. In foreign countries, overturning or change of judicial acts do not result in a judge being punished, because otherwise it would be considered an infringement of the judge's status and independence. In our country, if a judge has several of his judgements overturned, that may constitute a ground for his punishment or even dismissal. Figuratively speaking, the prospect of punishment hangs over the judge's head as "the sword of Damocles," which does not help promote his sense of independence. In this context fair is the criticism of attorneys and other parties participating in the case, who wonder how the court is independent." Askar Kishkembayev, "Is it easy to render an acquittal verdict?" Legal Newspaper, 16 March 2006.

⁷² See Results of the Monitoring of Court Proceedings in the Republic of Kazakhstan 2005-2006. Report. – Almaty, 2007. pp.38-52.

⁷³ Same document, pp. 121-122.

19. According to the new Criminal Procedural Code, which entered into force on 1 January 2015, appeals against the decisions and actions of preliminary investigation bodies are reviewed by an investigating judge behind closed doors. Likewise matters relating to the enforcement of verdicts (such as petitions for early release on parole or the replacement of imprisonment with a more lenient sentence, and appeals against the actions of the prison administration) are reviewed at closed court sessions. We believe that these provisions of the law unjustifiably limit the principle of transparency of judicial proceedings, especially as far as the rights of inmates are concerned, and that they should be abandoned.

20. In accordance with Article 14 of the ICCPR, as well as paragraph 3 of Article 29 of the Criminal Procedural Code of the RoK, court decisions must be made public without exception. However, in practice, there have been cases when verdicts have not been publicly announced. In cases concerning crimes related to national security, only the concluding part of judgments has been announced. We believe that violations of the ICCPR such as these are unacceptable and must end.

21. Formally, the principle of presumption of innocence is applied by courts in the consideration of criminal cases. The judicial system of Kazakhstan has complied with the recommendations of international organisations in this regard and has almost completely abandoned the practice of using cages in the courtroom. At the same time, it is problematic that there is a widespread practice on the part of mass media of publishing information about individuals who are being tried in criminal cases, as well as video and audio materials that are used as court evidence against such individuals. We believe that the dissemination of information relating to the indictment of individuals in criminal cases, especially when this information originates from the authorities should not violate the principle of presumption of innocence.

22. As for the right of individuals to be informed about the nature of the charges against them, and their right to be assisted by a translator, a number of observations can be made. The existing regime for the administration of justice does require that the essence of the charges brought against individuals are explained to them and this requirement is, as a general rule, implemented by the investigative authorities. The right to have free assistance of a competent interpreter with respect to translations between the language used by the court and the language of the defendant, in cases when the defendant does not understand and speak the language used by the court, is guaranteed by relevant criminal procedure law provisions. It should be noted that the realization of this right in practice has improved in recent years: courts and law-enforcement agencies have concluded contracts with companies providing relevant services so that they can invite interpreters in cases when their services are required.

23. However, it is obvious that interpretation of legal proceedings involving legal terms requires that interpreters have a higher qualification than usual. In addition, it is important to take into consideration the extent and level of seriousness of the responsibility placed on the shoulders of interpreters participating in criminal proceedings. Therefore, we believe that interpretation services during criminal proceedings should be provided by individuals who do not only can speak the relevant language but whose professional credentials have been adequately confirmed. Perhaps this should be a profession by certification only, with a self-governing association of court interpreters being set up.

24. Guarantees of the right to defence and equality of arms are inalienable elements of a fair criminal proceeding. The Roman-German law family, to which Kazakhstan belongs, is characterised by a system for the administration of justice in which the prosecution traditionally plays a strong role and is supported by an equally strong investigative and police apparatus. In this regard, it would be extremely important to do away with the remnants of the repressive criminal-procedural past and balance the powers of the prosecution with those of the defence. Unfortunately, to this day, the criminal justice remains unnecessarily harsh and almost inquisition-like, rendering very few acquittals.⁷⁴

⁷⁴ For instance, in 2009 the number of acquittal verdicts was 1.5% of the total number of verdicts. See Dimash Syzdykov. Kazinform. Kazakhstan Has Seen A Positive Trend in the Number of Acquittal Verdicts in Criminal Cases. 15 January 2010 // website "NOMAD". URL: <http://www.nomad.su/?a=3-201001180034>. See also: The Final Comments of the UN Committee on Human Rights: "The Committee expresses its concern regarding the information that the Prosecutor's office exercises pressure on the judicial power, which ultimately impacts the judgments rendered by the courts, to the point that the acquittal verdicts constitute only one percent of verdicts in criminal cases". Committee on Human Rights, 102nd session. Geneva, 11-19 July 2011 // website "Rule of Law Platform. Central Asia". URL:

25. One of the most problematic issues in criminal procedure practice remains the limitations imposed on the right of individuals to have access to a lawyer of their choice because of the lack of security clearance of lawyers with respect to accessing classified information. The Criminal Procedure Code does not require lawyers to obtain such clearance. The legislation on state secrets also does not mention lawyers participating in criminal proceedings among those who are required to have security clearance. The procedure for obtaining security clearance for accessing classified information is regulated by obscure instructions that have never been published, and clearance is only granted on the basis of the results of a special check carried out with the participation of national security authorities. Because of this, the procedural opponents of an attorney have the ability to influence whether he or she is granted access not only to state secrets, but above all to the court case at hand. This clearly violates the principle of equality of arms in criminal proceeding. We consider that the practice of restricting access of defendants to attorneys who do not have security clearance must be abolished.

26. Unfortunately, attorneys still lack reliable guarantees of attorney privilege and non-intervention by their procedural opponents. It is shameful for a state that claims that it is governed by law that there have been reported cases of searches of the offices of attorneys, summoning attorneys for questioning regarding issues that are known to them as a result of the provision of legal assistance, and the use of violence against attorneys by law-enforcement officials.⁷⁵

27. We believe that it is imperative that a provision be introduced into the legislation on attorney and investigative activity that directly prohibits confidential cooperation between attorneys and law-enforcement agencies. Not only does such cooperation contradict the ethical standards of the profession and is immoral, but it also violates the principle of equality of arms in criminal proceedings and undermines trust between the attorney and the person seeking legal assistance.

28. It is necessary to prohibit, on a legislative level, any operational-investigative activities against attorneys in relation to the discharge of their professional duties. National legislation must prohibit infiltration of lawyers' office by law enforcement officials, wiretapping of the premises and phones of lawyers, surveillance of lawyers, secret inspections and other similar actions. Lawyers, the absolute majority of whom are law-abiding citizens, do not need such immunity as such. It is above all needed to ensure protection of such fundamental institutes of a law-governed democratic state as the right to legal defence and to have access to professional legal assistance, the attorney-client privilege, protection of privacy, and privacy of phone and other communications.

29. It should be admitted that the powers of the defence are much more limited than those of the prosecution in criminal proceedings. The expanded rights of attorneys to gather evidence, stipulated by the new Criminal Procedure Code, are no doubt positive, but unfortunately not sufficient to ensure true equality of the parties in the criminal proceedings. For example, the procedure for conducting expert examinations on the basis of a request from the attorney is extremely sparsely regulated and existing legislation does not provide any guarantees for the implementation of this provision in practice.⁷⁶ The same can be said about the procedure whereby an attorney can question a person who may have information relating to the case. Unfortunately, the Criminal Procedure Code does not contain a direct prohibition on conducting searches of attorneys' offices, and the issue concerning access of attorneys to the premises of law-enforcement bodies and, more recently, even courthouses remains unresolved.

http://ruleoflaw.eu/wp-content/uploads/2014/10/Criminal-procedure-reform-RU_reduced.pdf

⁷⁵ See R.Bakhtygareyev, "The Attorneys Were Fed Some "Dates" (*A date, a fruit of a date palm, is "Finik" in Russian, a rephrase of "Financial Police" – translator's note*), 25 February 2012 // website of Vremya social and political newspaper. URL: <http://www.time.kz/index.php?module=news&newsid=26095>;

See also: A.V. Rozenzwaig, A Prosecutor's Duplet, 16 February 2012 // website of Novaya Gazeta-Kazakhstan newspaper. URL: http://www.novgaz.com/index.php/2-news/317-прокурорский_дуплет;

See also: France/Kazakhstan. To the visit of Nicolas Sarkozy to Astana, 4 October 2009 // website Human Rights Watch. URL: <http://www.hrw.org/ru/news/2009/10/04>;

See also: R.Bakhtygareyev. Lady, give me your phone, 7 April 2012 // website of Vremya social and political newspaper. URL: <http://www.time.kz/index.php?module=news&newsid=26747>

⁷⁶ See G.Zh.Yertayeva, L.F. Paramonova. Appointing and arranging a forensic check based on an attorney inquiry (in the new Code of Criminal Procedure of the Republic of Kazakhstan) // Papers of the International Theoretical and Practical Conference "East-West: a Partnership in Forensic Expertise. Actual Issues of Theory and Practice in Forensic Expertise". Almaty, 6 November 2014, pp.145-147

30. We believe it is necessary to regulate the right of attorneys to gather evidence in more detail. In particular, they should be given the right to initiate expert examinations at state expert institutions without limitations, a procedural form of attorney questioning of case witnesses should be introduced, attorneys should be granted the right to engage private detectives etc.

31. International standards concerning reasonable timeframes of court proceedings should be better reflected in national legislation and in the implementation of legislation in Kazakhstan. In this context, the new wording of Article 192 of the new Criminal Procedure Code raises questions. Strangely, in this provision, the requirement regarding reasonable timeframes of an investigation is limited to concrete periods (one, two, three or twelve months). It is confusing that the “reasonable” timeframe may be extended up to the period of limitation with respect to criminal liability. While limitation periods have a legal basis and are logically justified, the same cannot be said of the timeframes of investigations in those cases when they may be as long as the limitation periods. It is obvious that it cannot be considered reasonable that proceedings can be extended to this extent, in particular not in cases involving serious restrictions on the rights of defendants that may be imposed in criminal proceedings. Therefore, we believe that the timeframes for pre-trial proceedings should be strictly defined by law. When such time limits expire, criminal cases, where the guilt of defendants has not yet been proven, should be terminated on the grounds that the defendants are not guilty.

32. The legal and practical basis for the realization of the right of defendants to cross-examine witnesses who testify against them is incomplete in Kazakhstan. Article 98 and Article 217 of the new Criminal Procedure Code allows for questioning witnesses without the presence of the defendant. This concerns cases when witnesses are in need of protection. These rules contradict the aforementioned sub-paragraph (f) of Article 14 of the ICCPR.

33. The application of such a questionable practice creates opportunities to manipulate evidence, makes it more difficult to verify witness statements, and undermines trust in the fairness of judicial proceedings. There are many reasons to mistrust a witness who hides his or her face, is not present in the courtroom, testifies in an altered voice and avoids direct questions from the person whose fate is being decided in the courtroom.

34. It should be noted that Kazakhstan has adopted quite a few measures aimed at ensuring a systematic and principled fight against torture and other inhuman, cruel and degrading treatment and punishment. For the purpose of strengthening criminal and procedural guarantees against the use of torture and other coercive measures, we recommend granting detainees the right to call not only their relatives but also attorneys. In order to ensure realization of this right, the law must contain a provision requiring that the protocols of detention and/or interrogation of a suspect contain an entry confirming that he or he was given the opportunity to make phone calls and whether he or she did so.

35. Another effective guarantee of this right could be providing attorneys unhindered access to their clients held in the premises of law-enforcement authorities, from the moment when attorneys accept clients’ request to represent them. Attorneys often face the problem of untimely or delayed access to their clients (especially during the initial phases of the process). We believe that abolishing this practice by law would significantly decrease the number of cases when people are coerced to confess or testify.

36. In view of the description provided above of the current situation with respect to ensuring the right to a fair and public trial by a competent, independent and impartial court, we would like to make the following recommendations for how to change and improve existing legislation and the implementation of this legislation:

- Provide for the possibility of forming a Supreme Court Council of the RoK jointly by the heads of executive, legislative and judicial branches of power, with mandatory inclusion of representatives of the civil society;
- Provide for the use of more competitive procedures in the selection of judges, including procedures with the elements of elections and participation of local executive bodies;

- Consider expanding of the use of jury trials to all court cases concerning serious and especially serious crimes, as well as transferring to the classic (British-American) model of such trials;
- Abolish legal and other grounds for reprimanding judges for overturned judgments, and apply other methods to evaluate their performance;
- Consider establishing a professional organisation of court translators to ensure the right of defendants to have access to professional interpretation during court proceedings;
- Develop and define in detail the powers of attorneys to gather evidence by providing a detailed description in relevant legislation of the procedure for questioning witnesses, initiating and conducting expert examinations, obtaining samples for comparative studies, retrieval of case material, and employing the services of private detectives;
- Strengthen and improve legal provisions guaranteeing immunity of attorneys when discharging their professional duties, in particular ban wiretapping and recording of attorneys' phone communications, prohibit any intrusion into the offices and apartments of attorneys, including through announced and unannounced inspections, searches, seizure of documents and other similar investigative and operational activities in relation to attorneys;
- Introduce a legal ban on engaging attorneys in cooperation with law-enforcement agencies on a confidential basis;
- Ensure that attorneys are allowed to take part in court cases of all categories, including cases involving classified information, which attorneys should be allowed to take part in after signing a nondisclosure agreement;
- Grant attorneys unhindered access to their clients who are held in pre-trial detention facilities, prisons, or the premises of law-enforcement authorities on the basis on an attorney order and without the obligation to obtain permission from criminal prosecution bodies or court;
- In relevant legislation, set out concretely defined timeframes for the conduct of pre-trial investigations, as well as the unconditional closure of criminal cases when this period expires, unless the guilt of the individual concerned has been proven;
- Abolish legal provisions that create opportunities for violations of the right of defendants to cross-examine witnesses of the prosecution;
- Introduce a requirement for law enforcement authorities to record whether a detainee has been allowed to make a phone call and whether he or she has used this right in relevant protocols.

Article 16

1. Paragraph 1 of Article 13 of the Constitution of the RoK grants everyone the right to be recognized as a subject of law (possessing legal capacity).
2. The ability of citizens to realize their right to be recognized as subjects of law depends on them having a document confirming their identity, as well as on them being able to obtain such a document in an easy and simple procedure without hindrance. In accordance with the provisions of national legislation, passports and identification cards of citizens of the RoK *“shall be issued by the authorized state body at the place of permanent registration of the person whose documents are being issued.”*⁷⁷
3. National legislation contains no provisions regulating the procedure of obtaining identity documents by individuals who are not registered at their place of residence. Moreover, it states that only those individuals who possess a document confirming their identity may be registered at their place of residence. Therefore, the

⁷⁷ See paragraph 4 of the Rules of applying for, issuance, replacement, surrendering and destroying the passport of a citizen of the Republic of Kazakhstan, identification card of a citizen of the Republic of Kazakhstan, permanent residence card of a foreign citizen in the Republic of Kazakhstan, identification card of a stateless person, and identification card of a refugee, as approved by Resolution of the Government of the Republic of Kazakhstan No.852 dated 26 August 2013 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/P1300000852>

legislation in this area has created a vicious circle: if individuals do not have a document confirming their identity, they cannot be registered at their place of residence, and vice-versa, if individuals do not have registration at their place of residence, they are not able to obtain a document confirming their identity. In practice, this is a situation that individuals who have been released from prison often face.

4. International documents, including the ICCPR, as well as the Constitution of the RoK, guarantee everyone the right to have their legal standing/capacity recognized, irrespective of their citizenship status.

5. If we consider this issue from the point of view of the legal standing of residents of the RoK who do not have any documents confirming their identity or whose identity documents are invalid, their legal capacity may be considered very “abridged”. In practice, a person who has no identity documents is not able to apply to a court of law seeking protection of his/her rights in the case of violations, or to confirm parenthood, claim inheritance, register a marriage, freely move around the country, or cross the national border. Such an individual cannot even access government buildings where visitors are required to obtain temporary visitor permits when entering. Therefore, the right to legal standing/capacity is in fact recognized only with respect to individuals who possess identity documents, and not everyone residing in the country.

6. The legislation of the RoK does not permit documenting stateless persons at penitentiary institutions. Therefore, stateless persons are unfairly deprived of the right to employment and, consequently, of the right to be released on parole (as he/she will not be able to repay his/her civil debts), and of the right to obtain social benefits (pensions and certain types of allowances).

Article 17

1. Article 25 of the Constitution of the RoK protects the right to inviolability of housing and states that it is only permitted to enter, inspect and search dwellings in cases stipulated by law, as well as in accordance with the procedures set out by law. The Constitution does not exclude that these rights may be limited, in accordance with paragraph 1 of Article 39. Currently the limitations allowed for by this article do not fully reflect the principles of clarity, precision, specificity, certainty, proportionality and legality of limitations on the right to privacy, as stipulated by the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.⁷⁸

2. Paragraph 4 of Article 13 of the Law of the RoK on State Legal Statistics and Special Registers⁷⁹ states the following: *“The surname, names, patronymic name, and place of birth of a person, as well as the fact that this information has been changed along with the information previously provided shall not constitute a personal or family secret. A person does not have the right to either prohibit or permit such information or other information obtained legally from being included in special registers.”* Previously, as set out by the Government Service Standard on issuing criminal record certificates, the information included in such certificates took into account whether convictions had expired and been lifted, in accordance with Article 77 of the Criminal Code of the RoK.

3. On 17 May 2014, through its Resolution No. 505, the Government approved a new Government Service Standard on issuing criminal record information that is included in the registers of the Committee on Legal Statistics and the special registers of the Prosecutor-General’s Office. Now certificates issued contain information about crimes of which individuals have been convicted, irrespective of whether the conviction has expired or been lifted, and also information showing that individuals have had the status of suspects in criminal processes or been exempted from criminal responsibility and punishment or that decisions have been made not to open criminal cases against them on non-exonerative grounds. In our opinion, this is unlawful.

⁷⁸ See: Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. UN document E/CN.4/1985/4, Schedule (1985) // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=30449593

⁷⁹ See: Law of the Republic of Kazakhstan No.510-II dated 22 December 2003 “On the State Legal Statistics and Special Reports” // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=1045609

4. In the RoK Concept of Information Security for the period until 2016⁸⁰, it is stated that security inspections of e-government databases have revealed the absence of an adequate legal, organisational and technical mechanism to protect citizens' personal data.

5. According to the 2013 Activity Report of Kazakhstan's High Commissioner for Human Rights⁸¹, in the course of that year he received seven complaints regarding violations of the right to privacy, the right to non-interference with family life, and the right to protection of one's honour and reputation. The claimants drew his attention to such violations as illegal wiretapping, unauthorized surveillance, illegal entering into their apartments, and the publication of private videos in mass media. A review of similar reports from previous years showed that complaints concerning violations of privacy rights were filed 1-3 times a year.

6. Official statistics show the following:

The number of privacy related crimes recorded (The Committee for Legal Statistics and Special Records of the Prosecutor General's Office⁸²)

Articles of the Criminal Code of the RoK	2009	2010	2011	2012	2013
Article 142. Violation of privacy	2	0	1	4	1
Article 143. Illegal interference with private correspondence, telephone calls, and mail, telegraph, or other messages	73	38	30	67	17
Article 144. Divulging medical secrets	0	0	0	1	0
Article 145. Violation of the inviolability of housing	633	566	805	1265	1316

7. In the last few years, there were only a few cases where Criminal Code Article 135 on disclosing secret information related to adoption was applied and no cases at all under Article 84-1 of the Code on Administrative Offenses, which concerns violations of national legislation on personal data and the protection of such data.

8. As for court practice, a document entitled "The 2010 Synthesis of the Supervisory Judicial Panel on Criminal Cases of the Republic of Kazakhstan"⁸³ should be noted. This document expounds the content of the principle of personal immunity as applied to criminal proceedings. The document also notes that a study of court practices testifies to that the constitutional principle of personal immunity is all too often violated in the course of pre-trial proceedings.

9. In order to solve existing problems in this area, the Supreme Court of the RoK adopted a regulatory resolution entitled "The Judicial Protection of Human Rights and Civil Liberties in Criminal Proceedings"⁸⁴. At the same time, a study of case material included in the Unified Automated Information System of the Judiciary Bodies of the RoK⁸⁵ brought to light a number of precedents on the topic in question over the reporting period. Mainly, these were cases in which privacy issues were addressed along with other issues that

⁸⁰ See: Decree of the President of the Republic of Kazakhstan No.174 dated 14 November 2011 // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31086318

⁸¹ See: High Commissioner for Human Rights Activity Report for 2013 (Astana, 2014) // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31620438

⁸² See: The number of privacy crimes recorded // Information service of the Committee for Legal Statics and Special Record Keeping of the General Prosecutor's Office of Kazakhstan. URL: <http://service.pravstat.kz/portal/page/portal/POPageGroup/Services/Pravstat>

⁸³ See: The Synthesis of Court Practice concerning The Application of Some Provisions of the Criminal Procedure Code of the Republic of Kazakhstan on the Enforcement of Rights and Freedoms of Civilians in the Criminal Procedures (personal immunity, privacy, inviolability of housing, privacy of correspondence, telephone calls, and mail, telegraph, or other messages) (The Supervisory Panel for Criminal Cases of the Supreme Court of Kazakhstan, 2010) // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=30783586

⁸⁴ See: A regulatory resolution of the Supreme Court of Kazakhstan #4 of June 25, 2010 On judicial protection of human and civilian rights and freedoms in criminal proceedings (as changed and amended as of December 30, 2011) // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=30798839

⁸⁵ See: The Automated Information System of the Judiciary Bodies of the Republic of Kazakhstan // AIS JB RoK. URL: <http://eaias.supcourt.kz>

were the main focus, such as cases on defamation, the protection of honour and dignity, and the protection of personal images. The analysis of these cases showed that existing court practices are ambiguous, which is apparently due to the ambiguity of the wording of the relevant legislation. This, in turn, results in that the legislation is understood and interpreted in different ways by different courts. Although there are quite a few legal provisions regulating issues relating to the protection of privacy rights, many practical aspects of these issues have been poorly elaborated.

10. The study of existing case law shows that, on the whole, Kazakhstani courts have taken the position that the right to privacy should be subject to certain restrictions that are reasonably required for balancing the interests of, on the one hand, the individual and, on the other hand, the society and the state representing “the public interest”. Most consistently, courts found violations of privacy rights in cases when the name and image of individuals were used for commercial purposes in mass media, advertising etc. They took a more cautious stance when the offender referred to the need to protect property rights, such as in cases when hotel, shop or business owners had installed surveillance of visitors, buyers or employees. The case law shows that it was even more difficult to secure remedies for violations of privacy rights in cases when lawsuits were filed against public authorities.

11. The Legal Proceedings Reference Book, which is part of the Unified Automated Information System of court bodies of the RoK, features many publicly accessible records that contain personal information.⁸⁶ From time to time, this is publicly criticized. However, this practice has been in place for many years. Currently Article 9 of the Law on Personal Data and its Protection states that personal data may be gathered and processed without the consent of the individuals concerned or their legal representatives in court cases. However, this year the Supreme Court has decided to implement anonymization of personal data and to considerably restrict access to the existing database⁸⁷.

12. Prosecutor offices exercise the highest-level supervision of the implementation of the Law on Personal Data and Its Protection, ensuring that the law is accurately and uniformly applied. As for relevant official documents on this matter, currently only a Letter of the Prosecutor General's Office of 8 January 2014 is available.⁸⁸ At the same time, according to the KazTAG Information Agency, the head of the Second Department of the Prosecutor General's Office reported in June 2014 that the capital's Prosecutor's Office had revealed numerous cases of violations of the right to privacy and protection of family life.⁸⁹ “*The General Prosecutor's Office has sent out a letter to all government agencies informing them that stricter responsibility will be enforced for the illegal acquisition and dissemination of personal data concerning individuals and legal entities*” - he noted. Unfortunately, the letter itself was not made public. Later it was reported that an investigation carried out by the Astana City Prosecutor's Office concluded that the information exchange system of law enforcement and specialized agencies (IES LESA) does not feature any data that violates the right to privacy and protection of family life and that information can only be obtained from this system with the permission of a prosecutor.⁹⁰ There are no other examples of prosecutor activities in this area worth mentioning.

13. The above-mentioned information allow us to make the following recommendations:

- In order to bring Kazakhstani legislation into line with international privacy protection standards, specialized legislation should be adopted, as recommended in the Human Rights Committee's General Comment No.16.⁹¹

⁸⁶ See: A Reply by the Chairman of the Supreme Court of Kazakhstan of November 18, 2013 (supcourt.kz) On Protection of Personal Data in the Court Proceedings Reference Book // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31474573

⁸⁷ See: Draft Procedures for Putting out on Internet Resources of Court Bodies Court Rulings, Information on the Court's Activity and Data on Cases Involved in Court Proceedings of Courts in Kazakhstan // Site The Supreme Court of Kazakhstan. URL: <http://sud.gov.kz/rus/content/o-poryadke-razmeshcheniya-sudebnyh-aktov-informacii-o-deyatelnosti-suda-svedeniy-o-delah>

⁸⁸ See: Letter of the General Procurator's Office of Kazakhstan of January 8, 2014 #2-011500-14-00633 On Clarifying the Procedures for Discovery of Bank Secrecy Information // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31499305

⁸⁹ See: Privacy is violated in Kazakhstan // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31567061

⁹⁰ See: The database of the police and special services has no data regarding violating the rights of Kazakhstanis // Yurist Legal Information Suite. URL: http://online.zakon.kz/Document/?doc_id=31623574

⁹¹ See: United Nations Human Rights Committee (HRC), General Comment No.16, Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, 8 April 1988, para.8 // Site United Nation High Commissioner for Human Rights. URL: <http://www.unhchr.en/tbs/doc.nsf/o/23378a8724595410c12563ed004aeecd>

Such legislation should contain definitions of all key terms used in Article 17 of the ICCPR, in accordance with the recommendations of Human Rights Committee and international best practice.

- Also, a specialized body, a National Personal Data Protection Centre should be set up to function as a regulatory body based on international best practice. Its role should be to supervise the processing of personal data independently from other authorities, individuals and legal entities. The experience of other post-Soviet countries in this area could be used as an example⁹²;
- Among privacy-protected information is information on the involvement of an individual in legal proceedings. Currently it is often impossible to keep such information confidential in practice. The solution to this is to adopt legislation on access to court-related information;
- Legislation on mass media and e-commerce needs to be harmonized with legislation on personal data and cross-border data transmission. Research should be carried out and discussions held on the usefulness of ratifying the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January, 1981);
- Kazakhstani laws, unfortunately, do not spell out any clear-cut rules for how to prove that information of private nature, including personal data has been published on the Internet (in particular, in those cases when this information is eventually deleted). This results in disputes on this issue;
- It is necessary to elaborate legislation on these issues and to ensure legal regulation of all cases in which citizens automatically consent to third party use of their personal data when posting such information, while also adopting provisions enumerating cases when the use of information requires mandatory consent by individuals posting this information and establishing in what ways such consent can be provided;
- Consideration should be given to the issue of making personal data of public officials and other public figures publicly accessible, in compliance with the requirements of the law. Such cases should be determined by law, in order to avoid disputes about the disclosure of private information of public officials;
- Best international practice should be taken into account when adopting the laws on Fingerprinting and Genome Record-keeping, Private Investigators' Activity and Debt Collectors' Activity. At the same time, the principle of transparency should be implemented to ensure that individuals may obtain information on how files containing their personal data have been created and there are clear mechanisms for contesting such actions;
- For the storage and usage of information by law enforcement bodies, an internal legal database should be set up that is predictable in its consequences and subject to thorough review with respect to how it serves public interests;
- Stricter regulatory measures should be introduced to restrict access of government agencies to information of third parties, including in the framework of procedures for submitting reports. The burden shouldered upon third parties to gather additional information should be minimized and constitutional and legal safeguards should be applied whenever third parties act in the name of the state;
- The use of video surveillance footage should be subject to legal regulation in order to protect privacy, and procedures elaborated for the lawful usage of video surveillance cameras, including for surveillance of next-door neighbours, hotel tenants, buyers and clients.

Article 18

1. We have reviewed and analysed the laws of the RoK on safeguarding and protecting the right to freedom

⁹² See: The National Centre for Personal Data Protection of Moldova. Its functions includes handling claims by personal data holders as to compliance of the content of personal data and methods of personal data processing and making the relevant decisions, providing information to personal data holders on their rights with regard to the processing of their personal data, examining information on personal data processing or retaining other government bodies in such examination within the scope of competence; issuing instructions required for bringing personal data procedures into line with the principles of the relevant laws; taking measures in the manner prescribed by law for suspending or ceasing personal data processing carried out in breach of the laws on personal data protection; demanding from the holder to confirm, block or eliminate untrue or illegally acquired personal data; lodging lawsuits to court for the purpose of protection of personal data holders' rights; making up as prescribed by administrative law reports on law violations ; maintaining register of personal data holders // Site The National Centre for Personal Data Protection of Moldova. URL: <http://www.datepersonale.md>

of conscience and religion in order to examine their conformity with international standards. The results of this review allows us to make a number of conclusions.

2. In national legislation, and in particular in national law enforcement practice, the right to freedom of conscience and religion is considered to be a collective rather than an individual right, in spite of a constitutional provision that states that "everyone has the right to freedom of conscience". Thus, this right is perceived as the right to create religious associations and undertake religious activity granted by the state by way of mandatory public registration. This interpretation is not consistent with relevant international standards and international legal understanding and has resulted in the formation of religion-specific legislation containing numerous restrictions that are not in conformity with recognized principles of international human rights law or criteria for acceptable restrictions on the right to freedom of religion and conscience. Based on such legislation, current law enforcement practice also does not correspond to international standards guaranteeing the rights to freedom of conscience and religion and is discriminatory.

3. The legislation of the RoK does not distinguish between internal freedom (*forum internum*) and external freedom (*forum externum*) as to freedom of conscience and religion.⁹³

4. The right to freedom to "have or adopt" a religion or belief of one's choice necessarily implies freedom to choose religion or belief, including the right to change one's religion or belief, to adhere to atheistic views, as well as to continue to practise one's religion or adhere to one's beliefs. The right to "choose" or "have or adopt" a religion or confession is considered to be part of the absolute right to internal freedom and any provisions of law that establish restrictions in this area are incompatible with the protection of the right to internal freedom.

5. External freedom entails that everyone has the right, either individually or in community with others and in public or private, to "manifest his religion or belief in worship, observance, practice and teaching."

6. The spectre of religious activity protected by international law is quite wide. Accordingly, legislation that exclusively regulates worship or individual elements of religious observance is insufficient. Unlike internal freedom, the expression of religious beliefs or convictions may be restricted. However, such restrictions may be imposed only in strictly defined circumstances and in accordance with the criteria for acceptable restrictions.

7. This content and understanding of the right to freedom of conscience and religion has failed to find its way into Kazakhstani law making and law enforcement practice.

8. The wording of Article 22 of the Constitution of Kazakhstan⁹⁴, which guarantees freedom of conscience to everyone, does not fully comply with definitions existing in international law since constitutional safeguards should apply to freedom of religion as well.

9. The main regulatory legal act in the field of freedom of conscience and religion is the Law of Kazakhstan on Religious Activity and Religious Associations.⁹⁵ This law contains a number of restrictions that do not comply with major principles of international human rights law (the principle of presumption in favour of the right, the principle of legal certainty and predictability, and the principle of proportionality). The law and several other legal acts adopted on the basis of this law are aimed at ensuring rigorous regulation of religious activity and violate the right of everyone, in community with others, to have and share religious and other beliefs and to act upon them. They also violate the constitutional principle of separation of religious

⁹³ See: Guidelines for Review of Legislation Pertaining to Religion or Belief. Endorsed by the Venice's Commission at the 59th Plenary Session (Venice, June 18-19, 2004) and approved by the Parliamentary Assembly of OSCE at an annual session (Edinburgh, July 5-9, 2004) // Site Organisation for Security and Co-operation in Europe URL: <http://www.osce.org/ru/odihr/13994>

⁹⁴ See: The Constitution of Kazakhstan. Article 22: "1. Everyone shall have the right to freedom of conscience. 2. The right to freedom of conscience must not specify or limit universal human and civil rights and responsibilities before the state" // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/K950001000_

⁹⁵ See: The Law of Kazakhstan No.483-IV of October 11, 2011 On Religious Activity and Religious Associations (as changed and amended of September 29, 2015) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/Z1100000483>

associations and the state with regard to disproportionate interference of the state in the internal matters of religious associations, as well as the rights to freedom of association and freedom of expression. With rather dubious criteria being applied, terms such as “traditional” and “non-traditional” religious organisations, “religious extremism” etc. are being introduced into the realm of law-related definitions.

10. According to Paragraph 1 of Article 39 of the Constitution of Kazakhstan⁹⁶, “*the rights and freedoms of individuals and citizens may only be restricted by law and to the extent deemed necessary to safeguard the constitutional order or protect public order, human rights and freedoms, or the health and morality of the population*”. Requiring mandatory registration of religious associations and thereby prohibiting individuals or small groups of individuals from fully enjoying the right to freedom of conscience and religion does not pursue any legitimate objective, is not needed in a democratic society and is disproportionate to those objectives.

11. A decision on whether to undergo state registration may be linked to religious beliefs and is a key element of religious freedom⁹⁷.

12. Some restrictions on the activities of unregistered religious groups are lawful and proportionate (due to their lack of legal status), for example, restrictions on the opening of a bank account or the conduct of financial transactions. However, currently unregistered religious associations are not allowed to carry out basic religious activities, including missionary activity, establishing, renting and maintaining public places of worship or religious assembly etc.

13. Since unregistered religious activity also may result in administrative or even criminal responsibility, these provisions of law represent a direct violation of the right to freedom of religion and Article 18 of the ICCPR, which protects the right to practise one's religion or beliefs “either individually or in community with others” “in worship, observance, practice and teaching.” Moreover, this is linked to violations of other rights guaranteed by the ICCPR, in particular the right to freedom of expression and freedom to seek, receive and impart information (Article 19): the right to freedom of association (Article 22) and the right to freedom of peaceful assembly (Article 21).

14. There is no justification for the requirements concerning the number of individuals needed to establish religious associations (50 people for local religious associations, 500 for regional ones and 5,000 for national ones) nor for linking religious associations to geographic location.

15. If the acquisition of legal status is considered a necessary condition for carrying out missionary activities, or establishing, renting and operating public places of worship or religious assembly, it is important that the requirements for obtaining legal status are not too strict and allow also small groups to conduct religious activities.

16. The attempt to divide religious associations into local, regional and national ones and to allow them to carry out religious activities only in the geographical area in which they are registered is discriminative in so far as it does not apply to other types of legal entities, with the exception of public associations, for which similar restrictions are in place. These provisions resemble the notorious Soviet-era “*propiska*” regime, as applied to religious and public associations.

17. Current legislation seriously restricts missionary activities, which may only be carried out on the basis of mandatory registration. Such activities are interpreted as the spreading of the doctrine of registered religious associations. The peaceful expression of one's beliefs is a key element of the right to exercise one's religion. Missionary activities are also protected by the right to freedom of speech and freedom to disseminate

⁹⁶ See: The Constitution of Kazakhstan. Adopted at the National Referendum on August 30, 1995 (as changed and amended as of 02.02.2011// Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K950001000>

⁹⁷ See: Comments to the Law of the RoK “On Amendments and Addenda to Some Legislative Acts of the Republic of Kazakhstan on the Issues of Freedom of Conscience and Religious Organisations”. Prepared by the Advisory Panel of ODIHR/OSCE on freedom of religion and belief. Statement - #: REL-KAZ/125/2009. Warsaw, January 2009 // Site ODIHR/OSCE Legislationline. URL: www.legislationline.org/ru/documents/id/16325

information. Existing restrictions are unlawful and are not necessary in a democratic society or proportionate to legitimate objectives and infringe the right to freedom of religion and freedom to express one's opinion.

18. Current legislation restricts the right to freedom of expression and freedom to disseminate religious literature, other information with a religious content and religious material by way of censorship of such information (in the form of religious expert analyses), although censorship is prohibited by the Constitution; restrictions concerning the locations where religious books and materials may be distributed; restrictions on who may share religious views and distribute religious literature; and also a requirement to provide the full name of religious associations on any religious materials. All these restrictions seriously infringe provisions of international human rights law that guarantee freedom of religion and freedom of expression.

19. Current legislation allows the state to assess whether religious teachings are “acceptable” by way of a religious expert analysis, on the basis of the results of which decisions are made on the registration of religious associations, missionaries, and the closure of religious associations. These provisions do not comply with international standards and foreign practice, with the exception of some countries of the former Soviet Union.

20. The religious expert analysis provides many opportunities for abuse of power and discriminatory treatment. It is incompatible with freedom of religion as protected by international law, which excludes any freedom of action on the part of the state as concerns determining the legality of religious views or the means used to express such views.

21. National legislation provides for respite from compulsory military service for students of religious educational institutions and grants clergy of registered religious associations exemption from conscription. However, the right to refuse to carry out military service on the basis of religious or other convictions is not recognized, and no alternative civilian service is foreseen.

22. The grounds on which administrative or criminal responsibility can be incurred for violating legislation on religious activities and religious associations are unclearly and vaguely worded in a number of cases, e.g. terms such as “religious extremism” and “inciting religious discord and enmity” are incompatible with the principle of legal certainty and predictability.

23. Through monitoring of the implementation of the new Legislation on Religious Activities and Religious Associations adopted in 2011, large-scale violations of this right were documented. These were manifested in religious discrimination, xenophobia and intolerance and entailed lack of respect of the principle of equality in relation to religious associations; unlawful obstruction (or restriction) of the activities of religious organisations; increased pressure on religious minorities by local executive authorities and law enforcement bodies (illegal interference with private life, threats, unlawful detentions and arrests, etc.); and the dissemination of inadequate and discrediting information about activities of religious associations in mass media.

24. The monitoring also showed that there is considerable stigmatisation of religious minorities and a widespread sense of vulnerability on their part. The situation deteriorated, in particular for organisations that carry out active missionary activities and those that have chosen to be independent from the authorities or the Spiritual Directory of Kazakhstan Muslims.

25. The legal recognitions of a number of Islamic organisations as “terrorist” organisations has resulted in dozens of criminal cases, in which proceedings in most cases have been initiated on a formal basis. Sometimes there are even grounds to suspect that law enforcement authorities have “fabricated” such cases. Trials are almost always held behind closed doors, which calls into question the impartiality and fairness of the proceedings. During searches carried out in the homes of defendants, religious literature and other information are often confiscated allegedly confirming that the individuals in question belong to a terrorist or extremist organisation.

- 26.** Criminal proceedings have been instituted against a number of public religious figures and even atheists in the last few years, in most cases on charges of inciting religious discord and enmity.
- 27.** In 2013, 62-year old Alexander Kharlamov, an atheist rights advocate from the town of Ridder in the East Kazakhstan Oblast, was accused of inciting religious discord and held in pre-trial detention for half a year.
- 28.** He had published his ideological views and opinions in newspapers and on the Internet over the course of several years. His “teachings” consisted in the theory that it is currently necessary to return lost morality to humankind, which quintessence, according to him, is contained in Christianity. He suggested a scientific approach to Christianity and argued that the most valuable element of Christianity in his view: its philosophy of morality should be abstracted from its religious form.⁹⁸
- 29.** Experts, who analysed Kharlamov’s “teachings”, came to the conclusion that they contained signs of incitement to religious discord since they allegedly contradicted the views of the majority of the population.
- 30.** Criminal proceedings were instituted against Kharlamov in spring 2013. He was subject to a psychiatric examination by the local psychiatric committee, which made a preliminary diagnosis concluding that he was mentally inadequate. He was sent to Almaty in the summer of 2013, where he underwent a second mandatory psychiatric examination. However, the Republican Psychiatric Committee found him mentally sane.
- 31.** He was sent back to East Kazakhstan, and the trial in his case commenced in Ridder in August-September 2013. However, no sentence was handed down. Instead the case was sent for additional investigation, and Kharlamov was released.
- 32.** 67-year old pastor Bakhytzhon Kashkumbaev, who has health problems, spent 9 months in pre-trial detention in 2013. The leader of the Protestant Grace church was accused of extremism, inciting religious discord and leadership in an illegal religious association. He was eventually given a four-year suspended prison sentence for allegedly intentionally inflicting severe damage to the health of a church member. He was forcibly placed in a psychiatric clinic, and his right to defence, as well his right to promptly receive medical assistance were restricted.
- 33.** In 2015 a parishioner of the Seventh Day Adventist Church, Ykylas Kabduakasov was sentenced to seven years of restricted liberty in Astana after being held under arrest for almost three months⁹⁹. The court found him guilty of “inciting religious discord”. A restricted liberty sentence entails a prohibition on leaving the country and visiting places of entertainment during the indicated period, as well as an obligation to notify the authorities about any change of the place of employment or place of residence.
- 34.** Kabduakasov was accused of making statements inciting religious discord during lectures for students held in an apartment he rented in Astana from November 2014 to August 2015. According to investigation, his lectures allegedly contained offensive statements about Muslims and the Prophet Mohammed. These conclusions were made on the basis of a religious expert analysis.
- 35.** Kabduakasov’s defence attorney requested that the judge reject the expert analysis, arguing that the assigned experts were incompetent. Professor of religion, Ph.D. Y. Trofimov, who appeared in court on 4 November 2015 as an expert, said that Kabduakasov’s statements contained no calls to violence and religious discord. Trofimov underlined that the meeting participants considered themselves to be Christians, not Muslims and did not object to what Kabduakasov said. In his assessment, the meetings were internal meetings of a religious community. Ykylas Kabduakasov himself repeatedly asserted in court that he was not guilty. Nevertheless, he was convicted.

⁹⁸ See: “An atheist under investigation has been waiting for his case movement for more than a year”. 2 February 2015. // Site of the Azattik Radio. URL: <http://rus.azattyq.org/a/kharlamov-delo-ateist-bolshe-goda/26825318.html>

⁹⁹ See: “The Protestant is at liberty, but restricted”. 9 November 2015. // Azattik Radio Site. URL: <http://rus.azattyq.org/a/kabduakasov-protestant-adventisty-sedmogo-dnja-prigovor/27353933.html>

36. The authorities of Kazakhstan have failed to heed to recommendations of the UN Human Rights Committee, the UN Special Rapporteur on freedom of religion or belief and experts of the OSCE Office of Democratic Institutions and Human Rights (ODIHR) to abolish the requirements of mandatory registration of religious associations, provide for alternative civilian service, to review the requirement for registration of missionary activities and the procedures for appointing leaders of religious associations, to end religious literature censorship etc.

37. In view of the information provided above, the following recommendations can be made:

- Review national legislation and law enforcement practice to ensure that they guarantee and protect the right of everyone to freedom of conscience and religion in accordance with international standards and international commitments of Kazakhstan;
- Ensure that national legislation regulating freedom of conscience and religion guarantees internal freedom (*forum internum*) and, if necessary, establish restrictions only on external freedom (*forum externum*) in accordance with the criteria for permissible restrictions under international law;
- Review the Law on Religious Activities and Religious Associations and other legislative acts adopted on the basis of this law to bring them into compliance with international standards, taking into account recommendations of the UN Human Rights Committee, the UN Special Rapporteur on freedom of religion and belief and OSCE ODIHR experts. Ensure that the objective of the law is reflected in its title, i.e. the guaranteeing and protecting the right to freedom of conscience and religion;
- Abolish the requirement for mandatory registration of religious associations and ensure that the legislation in this areas safeguards the right of individuals to freely confess their religion and religious convictions, including without establishing any formal organisations, as required by the ICCPR;
- If religious associations are required to have legal status to be entitled to certain privileges or to carry out certain activities, the minimum number of members required for registration should be reduced to 10 people, as is the case for public associations;
- Abolish the use of territory-based legal status for religious and public associations, as contradictory to international provisions guaranteeing the right to freedom of association;
- Delete terms such as “sect”, “cult” and others that have a negative connotation from the legislation on freedom of conscience and religion and ensure that any terms that are used do not allow for discriminatory or preferential treatment of any religious denomination or group;
- Ensure that religious associations enjoy independence with respect to determining their structures and management by abolishing the requirement that leaders of religious associations appointed from abroad must be agreed with authorities in charge of religion affairs;
- Regulate foreign citizen missionary activities by issuing appropriate visas to enter Kazakhstan;
- Review national legislation with a view to providing for a civilian alternative to compulsory military service and granting individuals the right to refuse military service on conscientious grounds;
- Abolish the control, supervision and administrative functions of the Religion Affairs Agency, limiting its powers to analytical and consultative work in the field of state interaction with religious associations;
- Abolish the institution of “religious expert analysis”, leaving theological research and discussions to research institutes, higher education institutions and spiritual centres;
- Review anti-extremist and anti-terrorist legislation to bring them into compliance with the ICCPR, taking into account the recommendations made by the UN Human Rights Committee;
- Review provisions of administrative and criminal legislation concerning the responsibility of religious associations, their leaders and individual believers for violations of legislation on religion and bring them into compliance with the principle of legal certainty and predictability and the principle of proportionality to legitimate objectives;

- Abolish the punishment in the form of prohibition to engage in religious activities;
- Closely cooperate with the UN Human Rights Committee, the Office of the UN High Commissioner for Human Rights, the Special Rapporteur on freedom of religion and belief, the OSCE ODIHR and the European Commission for Democracy through Law (Venice Commission) on bringing national legislation and law enforcement practice in the field of freedom of conscience and religion into compliance with international standards and international obligations of Kazakhstan.

Article 19

1. Article 20 of Kazakhstan's Constitution¹⁰⁰ protects the right to freedom of expression with some limitations. This article reads: *"1. Freedom of speech and creativity shall be guaranteed. Censorship shall be prohibited. 2. Everyone has the right to freely receive and distribute information by any means not prohibited by law. A list of information constituting state secrets of the Republic of Kazakhstan shall be determined by law. 3. Propaganda or agitation for the forcible change of the constitutional order, violation of the integrity of the Republic, undermining state security, or war, social, racial, national, religious, birth and tribal superiority, or a cult of violence and cruelty shall not be acceptable"*.

2. Kazakhstan's legislation fails to reflect freedom of expression as provided for in the ICCPR. In practice, this leads to that national mass media may be held responsible under criminal and civil law for citing foreign information sources. The Constitution also provides that the right to receive and distribute information may be limited by law, but fails to specify that such legislation should be aimed at protecting public interests. As a result, national legislation on the right to information contains a number of provisions that protect departmental rather than public interests.

3. The Law of the RoK on Mass Media¹⁰¹ confirms constitutional guarantees for the right to freedom of speech (Article 2), but does not provide for any measures to protect this right in case of illegal or excessive limitations of it.

4. The Informational Kazakhstan – 2020¹⁰² State Programme states that national legislation on mass media will be improved "in accordance with emerging public demands" and "with the involvement of all the concerned parties". However, the entire legislative and regulatory basis in the field of freedom of expression contradicts both international and constitutional provisions.

5. The current Criminal Code of the RoK, which entered into force on 1 January 2015¹⁰³, increased penalties for defamation and violations of personal non-property rights of the highest government officials and representatives of the authority. Moreover, a new article on "deliberately spreading false information" was adopted and provides for punishment of up to 10 years' imprisonment. As worded, this provision provides for punishment for the distribution of both information and opinions. The argument that criminal responsibility for defamation help citizens to defend their honour and dignity, which was made in the government's report submitted within the framework of the second Universal Periodical Review (UPR) of Kazakhstan under the UN Human Rights Council¹⁰⁴, did not convince experts. As during the first UPR in 2010, also this time Kazakhstan was recommended to decriminalise defamation and insult.

6. Those who elaborated the new Criminal Code assured that criminal responsibility for defamation was

¹⁰⁰ See: Republic of Kazakhstan Constitution. Adopted by the Republican Referendum of 30 August 1995 (as amended and added as of 2/02/2011) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K950001000>

¹⁰¹ See: Republic of Kazakhstan Law No. 451-І of 23 July 1999, On Mass Media (as amended and added as of 03.07.2014 г.) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z990000451_

¹⁰² See: Decree of the Republic of Kazakhstan President of 8 January 2013 No. 464 On the Informational Kazakhstan – 2020 State Programme // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: <http://adilet.zan.kz/rus/docs/U1300000464> ,

¹⁰³ See: Republic of Kazakhstan Criminal Code of 3 July 2014. // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000226>

¹⁰⁴ See: Republic of Kazakhstan Government Decree No. 1038 of 29 September 2014 On Approval of the Second Periodical National Report of the Republic of Kazakhstan under the Universal Periodical Human Rights Review // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: <http://adilet.zan.kz/rus/docs/P1400001038>

retained for preventive reasons. However, only in 2014, a total of 15 criminal defamation cases were initiated against journalists, two of which ended in convictions.¹⁰⁵ According to official information, in 2015, verdicts were delivered in a total of 187 criminal cases opened under Criminal Code Article 130 on defamation. Monitoring carried out by the Adil Soz Foundation documented 35 cases where defamation charges concerned information disseminated in mass media or information and communication networks. Civil society activist Amangeldy Batirbekov, was sentenced to 1.5 years' imprisonment for an article published in the *Adilet* newspaper. On 28 January 2016, the appeals court cancelled the sentence against him on non-rehabilitating grounds.

7. A court ruling that gained legal force on 27 August 2015 ordered, Guzyal Baidalinova, the owner of the NAKANUNE.kz news portal, to pay KZT 20 million (more than \$60,000) in moral compensation for alleged damages to the business reputation of Kazkommertsbank. This case was initiated on the basis of an online publication, which had received a total of 800 views. It was a letter to the editor by a reader, who asked for assistance with addressing information on corruption.

8. After the civil court ruling had been handed down, Kazkommertzbank appealed to the police to initiate a criminal case under Part 3 of Criminal Code Article 274 (deliberately spreading false information by a group of persons on previous agreement, which caused major damage to a citizen, organisation or the state, or other serious consequences).

9. As part of the preliminary investigation into this case, police searched the apartments of Guzyal Baidalinova and Yulia Kozlova, another journalist with the NAKANUNE.kz site on 18 December 2015. Police also searched the office of the news portal. They confiscated computers, flash cards, modems, and accounting documents. On 23 December 2015 Guzyal Baidalinova, who is also a former employee of the well-known opposition *Respublika* outlet, was detained and has been held in detention ever since. The trial in her case began on 5 May 2016 and on 24 May, she was convicted and sentenced to 1.5 years in prison.

10. Kazakhstani laws and law enforcement practice in the field of freedom of expression, speech and mass media contradict international standards to a considerable degree. The country's Civil Code¹⁰⁶ does not provide for any time limitation with respect to lawsuits on the protection of honour, dignity and business reputation. The plaintiff may request compensation for material and moral damages, in addition to rebuttal of information. Until recently, national legislation did not establish any limitations on the amount of moral damages that may be awarded. This resulted in that unreasonably high amounts of damages were awarded. Thus, in 2013, about KZT 2.5 billion were claimed in compensation for moral damages over publications in mass media¹⁰⁷. In late 2015, new provisions were introduced, according to which the amount of state duties payable by claimants in defamation suits depend on the amount requested in moral damages.¹⁰⁸

11. Paragraph 3 of Article 951 of the Civil Code provides for the right to receive compensation for moral damages if it is established that discrediting information has been distributed, irrespective of whether the defendant is found guilty. Existing legislation does not define who can be considered to have business reputation, which in practice results in that these provisions are abused by public officials to bring defamation suits against mass media.

12. National legislation does not contain any provisions stating that the right to enjoy protection of personal images shall not apply in cases, when the public interest to see a certain picture exceeds the right of the individual to privacy.

¹⁰⁵ See: Monitoring of Court Rulings under Cases of Defamation, Adil Soz International Freedom of Speech Protection Fund // Site of the Adil Soz International Freedom of Speech Protection Fund. URL: <http://www.adilsoz.kz/politcor/show/id/138>

¹⁰⁶ See: Republic of Kazakhstan Civil Code (General Part). Put in force by the Republic of Kazakhstan Supreme Council Decree of 27 December 1994 (as amended and added as of 07.11.2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/K940001000_

¹⁰⁷ Freedom of Speech Infringements Monitoring in 2013, Adil Soz International Freedom of Speech Protection Fund // Site of the Adil Soz International Freedom of Speech Protection Fund. URL: <http://www.adilsoz.kz/politcor/show/id/52/parent/3>

¹⁰⁸ See: Republic of Kazakhstan Civil Code of Practice of 31 October 2015. // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: <http://adilet.zan.kz/rus/docs/K1500000377>

13. Article 145 of the Civil Code protects the right to protection of personal images through the following wording: “1. No one shall have the right to use pictures of a person without the consent of this person, and in the case of his/her death, without the consent of his/her heirs. 2. The publication, reproduction and distribution of visual outputs (pictures, photographs, films etc.), where an individual is depicted, is only allowed with the consent of the depicted person, and after his/her death, with the consent of his/her children and surviving spouse. No such consent is required if provided by law or if the depicted person posed for a fee”.

14. The right of individuals to access information related to their personal rights is set out by paragraph 3 of Article 18 of the Constitution of Kazakhstan: “State bodies, public associations, officials and mass media shall provide the possibility for each citizen to familiarise himself/herself with documents, resolutions and information sources concerning his/her rights and interests”. However, this provision, which is reproduced in the same wording in paragraph 2 of Article 2 of the Law on Mass Media, contradicts Article 20 of this law, which safeguards the right of journalists to protect the confidentiality of authorship and of their sources, with the exception of cases when such information must be disclosed at the request of court. International law¹⁰⁹ on freedom of access to information recognizes the obligation of public authorities to disclose information to the public, with certain exceptions. However, placing such a responsibility on mass media amounts to interference with editorial independence and infringes the right to freedom of speech.

15. The right to receive and distribute information is limited by the Law on State Secrets¹¹⁰, the Law on National Security¹¹¹, and Civil Code provisions related to bank secrecy, commercial secrets, secrecy of personal life etc.

16. The notions of bank and commercial secrecy are inadequately defined in the legislation, which has resulted in numerous refusals to grant journalists access to information of public importance.

17. National legislation does not define the terms “information of public importance” and “public persons”, which serves as the basis for unjustified restrictions on access to information. An example of such restrictions is that information on the health and personal life of the president of Kazakhstan and his family are treated as state secrets.

18. Unjustified restrictions on access to information, which impede freedom of speech, are contained in the Presidential Decree on the Code of Honour of State Officials.¹¹² This document, in particular, states: “State officials shall not publicly express their opinion on issues concerning government policies or activities if this opinion does not correspond to basic tenets of government policies. In case a state official is publicly accused of corruption, he/she shall take measures to rebut such accusations, including in court”.

19. The Law on Mass Media¹¹³ grants representatives of mass media particular rights to access information (Article 18). Such rights are protected by two provisions of the Administrative Code: Article 347 (Deliberately providing false information to mass media), and Article 352 (Impeding the lawful professional activities of journalists)¹¹⁴, the violation of both of which may result in fines. Nevertheless, many years of practice show¹¹⁵

¹⁰⁹See: Right of Citizens to Access to Information. Freedom of Information Law Principles // Article 19 International Non-Governmental Organisation Site. URL: <http://www.Article19.org/data/files/pdfs/standards/foi-the-right-to-know-russian.pdf>

¹¹⁰ See: Republic of Kazakhstan Law No. 349-1 of 15 March 1999, On State Secrets (as amended and added as of 7/11/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/Z990000349_

¹¹¹ See: Republic of Kazakhstan Law No. 527-IV of 6 January 2012, On Republic of Kazakhstan National Security (as amended and added as of 4/07/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: <http://adilet.zan.kz/rus/docs/Z1200000527>

¹¹² See: Republic of Kazakhstan President's Decree No. 1567 of 3 May 2005, On the Republic of Kazakhstan State Officials Code of Honour (as amended and added as of 1/10/2013) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/U050001567_

¹¹³ See: Republic of Kazakhstan Law No. 451-1 of 23 July 1999, On Mass media (as amended and added as of 3/07/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: <http://adilet.zan.kz/rus/docs/Z990000451>

¹¹⁴ See: Republic of Kazakhstan Code, On Administrative Violations of 30 January 2001 (as amended and added as of 5 July 2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/K010000155_

¹¹⁵ See: Statistic Analysis of the Right to Information Access Violations, Adil Soz International Freedom of Speech Protection Fund // Site of the Adil Soz International Freedom of Speech Protection Fund. URL: <http://www.adilsoz.kz/politcor/index/id/3/page/1>

that unjustified refusals by authorities to grant access to information are widespread and there have been only sporadic cases of judicial protection.

20. The Law on Mass Media sets out the term “*official message*”, which is defined as “*information presented by state authorities for further distribution by mass media*”. Mass media are exempt from responsibility for distributing false information only in the following cases:

- “1) *if this information is contained in official communications and documents;*
- 2) *if it is received from advertising and information agencies or press services of state authorities;*
- 3) *if it is a word-for-word reproduction of a formal address by deputies of representative bodies, officials of state bodies, organisations and individuals;*
- 4) *if it is contained in speeches that are broadcasted without preliminary recording, or in texts, which are not subject to editing in accordance herewith;*
- 5) *if the information is contained in mandatory communications*” (Article 18 of the Law on Mass Media)

21. Thus, distribution of any information other than that received from state authorities that is deemed incorrect may result in civil or criminal responsibility for mass media and journalists.

22. The legal regulation of the establishment and activities of mass media in Kazakhstan is not consistent with principles for the free and independent operation of mass media. In view of the prognosis made in the Informational Kazakhstan-2020 Programme that 95% of printed and electronic mass media will be represented on the Internet by 2020 these provisions are outdated and need to be updated to correspond to current realities of mass media development.

23. There are no legal provisions that prevent monopolisation of mass media. Information on the real owners of mass media is concealed under the pretext that it constitutes a commercial secret. In general, in accordance with the Law on Mass Media, the regulation of the activities of mass media activities falls under the responsibility of government, the national-level authority in charge in this area and local executive bodies. The powers of the national and local-level authorities are so broad that the state fully controls the public mass information field through them.

24. According to our opinion, the administrative regulation of the establishment and activities of mass media does not serve any objectives.

25. The registration regime for mass media contradicts the principles of free establishment and operation of mass media. This regime is implemented by the state authority in charge in this area. Print media may only start issuing information three months after receiving their registration certificate and information agencies six months after this date. The application for registration should specify both technical and creative parameters. An application for registration may be denied if it is submitted on behalf of a media outlet the name and thematic focus of which duplicate those of a media outlet that has previously been closed down by court, or if it is submitted by the owner or chief editor of a media outlet, the publication activities of which have been terminated by a court ruling. This provision applies within three years from the day the corresponding court ruling gained legal force. Foreign citizens and stateless persons cannot be chief editors of mass media.

26. The registration regime is not transparent and there is no publicly available list of registered media outlets. This lack of transparency creates an opportunity to deny registration to opposition and independent media. Renewed registration is required in case of changes with respect to the owner of the media outlet, the name and organizational status of it, the language in which it issues or broadcasts information, its area of distribution, its thematic focus, and the frequency with which it publishes information (Articles 10 and 11 of the Law on Mass Media).

27. The Code on Administrative Offenses provides for disproportionately severe penalties for a number of violations in the area of press and information. Among these offenses are:

- Publishing activities of a media outlet that does not have registration or that has been suspended may result in fines and the confiscation of media products;
- Publishing activities of a media outlet without re-registration may result in heavy fines, suspension of the outlet for a period of up to three months and a ban on publishing information;
- Violations of requirements to provide copies of publications to the authorities may result in fines and suspension of the media outlet for a period up to three months;
- Violations of requirements with respect to providing publishing information may result in heavy fines, confiscation of the entire edition of a publication, as well as of equipment, or suspension of the publishing activities of the media outlet for a period of up to three months.

28. Suspending or prohibiting the activities of media outlets is an extraordinary sanction. The failure of media outlets to comply with procedural requirements such as requirements to provide copies of their publications or include publishing information in their editions should not, even if it happens repeatedly, be used as a ground for imposing restrictions on freedom of expression, which may exceptionally be permissible in accordance with the criteria of Article 19 of the ICCPR and Articles 20 and 39 of Kazakhstan's Constitution.

29. The authorities use a range of direct and indirect measures to put pressure on "inconvenient" mass media. The cases of the *Respublika* publishing group, the ADAM magazine, the *Zhas Alash* newspaper and the *Tribuna* newspaper are typical in this respect.

30. In December 2012, a court declared "extremist" and banned a number of opposition media outlets (including several newspapers of the *Respublika* publishing group, and 23 internet resources, including the Facebook pages of the newspapers concerned which were all deemed a "unified media outlet"). This decision was made in response to a request by the Public Prosecutor's Office¹¹⁶ and followed an earlier court ruling against opposition politician Vladimir Kozlov. Kazakhstan's Supreme Court upheld the sentence in November 2013.

31. Prior to the consideration of this case by the Supreme Court, the editorial offices of the banned opposition media outlets distributed a press release, stating that the guilt of the defendants had not been proven during the consideration of the merits of the case. They pointed out that the court used the verdict handed down in the criminal case against Vladimir Kozlov, which asserted that the newspapers in question had published material aimed at inciting social discord.

32. Sergey Utkin, the lawyer in the case, stressed that this allegation was not confirmed by the court. In his view, if the media outlets were considered "extremist", the Public Prosecutor's Office should have filed civil lawsuits against them in accordance with the Civil Procedural Code and the Law on Counteracting Extremist Activities since media cannot be deemed "extremist" under criminal law. If the media outlets had been found "extremist", further lawsuits could have been filed to request that their publication activities be terminated. The Public Prosecutor, however, considered that it had already been proven that the media outlets were "extremist", although this was in fact not the case.

33. The closure of these media outlets is related to their coverage of the Zhanaozen events. In October 2012, opposition politician Vladimir Kozlov was sentenced to 7.5 years' imprisonment and confiscation of his property after being found guilty of inciting social discord during a lengthy oil worker strike in Zhanaozen. This strike ended with the shooting of demonstrators and mass arrests on 16-17 December 2011. At that time, police used firearms against demonstrators, which resulted in that 17 people died and more than a hundred were injured.

34. The first number of the ADAM Reader's Magazine was issued in early 2013. In July the same year, its Chief Editor Gulzhan Ergalieva reported that all printing houses in the country had refused to publish the

¹¹⁶ See: Unified Mass Medium has exhausted its potentials for appeal in Kazakhstan. 28 November 2013 r. // Azattyk Radio Site. URL: <http://rus.azattyq.org/a/verkhovniy-sud-delo-yedinogo-smi/25182961.html>

magazine due to pressure by authorities. Following an enforced 3-month break in its activities, the magazine lost the right to engage in publishing activities.

35. The following year, the group of publishers and journalists behind the ADAM Reader's Magazine started publishing a new magazine called ADAM bol. However, on 18 November 2014, the Internal Policy Department of the Almaty mayor's office requested court to close down the magazine. The magazine was accused of war propaganda and agitation on the basis an article published in August 2014, entitled "Our People in an Alien War", which featured an interview with Kazakhstani activist Aidos Sadikov. In the interview, Kiev-based Aidos Sadikov expressed his point of views on the events in Ukraine and said that he planned to join an international military unit. The lawsuit against ADAM bol was satisfied on 24 December 2014. On 26 February 2015, the ruling was upheld on appeal, as a result of which it gained legal force.

36. In 2015, the same group of people initiated yet another publication, the ADAM magazine. On 27 August 2015, the publication of this magazine was suspended for three months by court for allegedly violating the Law on Mass Media (under paragraph 2 of Article 451 of the Code on Administrative Violations). Also this time, the Internal Policy Department of the Almaty mayor's office was the initiator of the legal proceedings. According to this Department, the owner of the ADAMDAR LLP issuing the ADAM magazine had violated re-registration regulations since the magazine was published only in Russian, although the registration certificate stated that it would be published in both Kazakh and Russian.

37. It should be noted that the Law on Mass Media provides that print media should be re-registered if the language of publication is changed. However, the ADAM magazine did not change its language of publication, but used one of the two languages it had the right to use in accordance with its registration certificate.

38. In order not to lose the readers and to be able to make use of information that had already been prepared, ADAM's journalist posted this information on Facebook. In response to this, the Public Prosecutor of the Almaty Medeu District filed a lawsuit on 8 October 2015 requesting that the ADAM and ADAM bol magazines, as well as the electronic versions of ADAM on Facebook be deemed "a unified mass media" and that the publication of the ADAM magazine be terminated.

39. The Public Prosecutor justified the lawsuit by claiming that the magazine's editor Ayan Sharipbaev had failed to address the reasons for the earlier suspension of the media outlet, i.e. to re-register it. However, according to the editorial staff of the magazine, this was not a valid reason since the period during which the alleged violation should have been addressed had not yet expired. In addition, it was the printed publication of the ADAM magazine that was suspended by court, no other publication. They argued that since other versions of the magazine, in particular its electronic version had not been affected by the suspension, no violations had taken place.

40. However, the Medeu District Court of Almaty ruled in favour of the lawsuit filed by Public Prosecutor's Office on 22 October 2015, recognizing the ADAM and ADAM bol magazines, as well as the Facebook version of the ADAM magazine "a unified mass media" and terminating the publication of the ADAM magazine.

41. The *Zhas Alash* newspaper is an opposition newspaper issued in the Kazakh language. On 13 November 2015, Almaty City Court No. 2 ordered the newspaper's editor Risbek Sarsenbai, its journalist Meruert Turlibekova, its reader Kaden Mukanuly and two other people to pay KZT 40 million (about Euro 100,000) in moral compensation to Zhasan Zekeyuly, manager of the Tibetan Medicine Centre. According to the applicant, Zekeyuly, an article published by *Zhas Alash* in May 2015 discredited his honour and dignity. The Adil Soz Foundation stated that the article was based on official documents, including court rulings, and that the claimant failed to prove that the information in question was incorrect.¹¹⁷

¹¹⁷ See: Kazakhstan: Persecution of Newsmen and Bloggers. // Open Dialogue Fund Site. URL: <http://ru.odfoundation.eu/a/7229,kazakhstan-presledovaniya-zhurnalistov-i-bloggerov>

42. In 2013, Kupesbai Zhampiyisov, a retired official from Kazakhstan's Ministry of Defence, filed a lawsuit against the *Tribuna – Sayasat Alany* newspaper, alleging that its editor had distorted a statement he made in an interview, making it sound like he criticized the "mentality of the authorities" instead of "people's mentality".. The editorial office of the newspaper acknowledged this misrepresentation of his words, but insisted that the lawsuit constituted a form of politically motivated persecution by authorities.¹¹⁸

43. The Medeu District Court of Almaty ruled that the then founder of the *Sayasat Alany* newspaper should pay KZT 2 million (about US \$11 000 at the current rate) to Zhampiyisov as compensation for moral damages allegedly inflicted by the interview with published by the newspaper.

44. Representatives of the opposition newspaper argued that this amount was enormous and concluded that the court ruling was aimed at closing it down. The *Tribuna–Sayasat Alany* newspaper was also eventually closed down. The *Tribuna–Ashik Alan* newspaper was published for some time after this, and currently the *Tribuna–Sayasy Kalam* is published.

45. No compensation was paid to Zhampiyisov for two years. In early April 2016, the management of the *Tribuna–Sayasy Kakam* newspaper learned that court bailiffs had initiated a criminal case against the former founder of the newspaper for failing to comply with the court ruling, an offense that carries a punishment of up to three years' imprisonment. After this, the newspaper management paid KZT 1.3 million. Notwithstanding this, the former founder was forcibly brought to the police station on 21 April 2016 and interrogated as a witness, with the right to defence.

46. Other problematic trends include widespread blocking of websites, as well as attempts by the authorities to control the Internet and social media and to persecute individual bloggers.

47. Blocking of the ratel.kz website began on 9 September 2015. At that time, the site had above 30 000 visitors and more than 100 000 views daily. No court decisions or administrative sanctions had been issued in relation to the online publication or its founders.

48. After ratel.kz was blocked, the founders launched a new site at www.itaau.kz. However, in only a few hours, problems with access to this site began as well. "It takes about six minutes to track down each new IP address that we launch for public access", said ratel.kz journalists. They conclude: "To all appearances, a 'personal employee' was assigned to keep track of us. But we are on the air anyway". The ratel.kz journalists also created a new Facebook group, The Friends of the Ratel.kz Aite, at <https://www.facebook.com/groups/911418695560588/>.

49. The editorial staff of the ratel.kz sent letters to the chairman of the board of the state Kazakhtelecom , the Prosecutor General , the chairman of the presidium of the Atameken National Chamber of Businessmen of Kazakhstan (NCB) and the National Security Committee regarding the restrictions on access to the site.

50. On 17 September 2015, the Prosecutor General's Office forwarded a complaint by the co-founder of the ITAU LLP regarding the illegal restrictions on access to the ratel.kz and itau.kz sites to the Committee on Communications, Informatization and Information of the Ministry of Investments and Development, the National Security Committee and the Ministry of Internal Affairs.

51. On 22 September 2015, the Atameken NCB appealed to the Committee on Communications, Informatization and Information of the Ministry of Investments and Development to assist in determining the causes and the grounds for blocking access to ratel.kz. It also requested the Prosecutor General's Office to notify it about any measures initiated by prosecutors with respect to blocking the site, to explain the reasons and grounds for such measures and to advice on the procedure for restoring access to the site.

¹¹⁸ See: An Old Conflict is Revived around the Tribuna. 23 April 2016 // Azattyk Radio Site. URL: <http://rus.azattyq.org/a/gazeta-tribuna-kupesbay-zhampiisov/27690950.html>

52. On 8 October 2015, the Committee on Communications, Informatisation and Information of the Ministry of Investments and Development reported that there were no court decision or order by the Prosecutor General's Office to block the ratel.kz resource. Also, no DDos attacks on either the ratel.kz or the itau.kz resource had been recorded. The Ministry of Investments and Development also reported that, according to Kazakhtelecom, these internet resources had never been blocked within Kazakhstan.

53. On 14 December 2015, the Deputy Head of the Investigation Department of the Ministry of Internal Affairs informed the Director of the ITAU LLP that his request to take measures in relation to the blocking of the Ratel.kz and Itau.kz internet resources by the Kazakhtelecom provider had been registered. The Internal Affairs Department of the Medeu District of Almaty had been asked to review the request, which was registered in the Unified Register of Pre-Trial Investigation under Article 207 of the Criminal Code (disturbance of information system or the information-communication network operation) on 21 November 2015.

54. Another popular online portal, Zonakz.net also became inaccessible for Kazakhstani users as of 9 September 2015. Similarly to in the case of Ratel.kz, no reasons for this blocking are known. The hosting company found no technical issues, which could impede access to the site, and all official bodies denied involvement in the blocking.

55. Both sites were unblocked on 2 February 2016 without any explanation for the reasons for this. At the same time, other sites, including the *Respublika* information and analytical portal at www.respublika-kz.info; the Fergana International News Agency site at www.fergana.ru, the Kazakhstan Socialist Resistance site at www.socialismkz.info, the site of the International Committee of Human Rights Organisation and Civil Society Movements for the Protection of Political Prisoners and Persecuted Civil Society, Trade Union and Socialist Activists at www.npravo.org, and a number of other sites remain blocked.

56. During the last two years, social media users have also increasingly been persecuted for expressing their opinions and exercising their freedom of expression.. Only a few examples are described below.

57. Bulat Satkangulov is a lawyer from Rudniy in the Kostanai Oblast. In November 2015, he was sentenced to 6 years of imprisonment on charges of propagating and calling for terrorism through the use of social media (Part 2 of Article 256 of the Criminal Code). According to the charges, Satkangulov stored and distributed documents related to the activities of DAISH through social media (*Odnoklassniki*, *Vkontakte*, and *Mail.ru*) in January-February 2014. He was also accused of sending audio messages allegedly "justifying terrorist activities" to his acquaintances through WhatsApp. The defence attorney noted that all information in Satkangulov's possession was freely accessible on the Internet and even broadcast on TV, when DAISH was not yet prohibited in Kazakhstan. The defence attorney stressed that Satkangulov had insisted on the need for reconciliation when discussing issues concerning religion with his friends.¹¹⁹

58. Tatiana Shevtsova-Valova is a resident of Almaty. On 31 March 2015, the Alatau District Court of Almaty gave her a suspended four-year prison sentence on charges of "inciting ethnic discord" on Facebook (Article 174 of the Criminal Code). The criminal case was initiated on the basis of complaints submitted by 11 Facebook users. According to the charges, Shevtsova-Valova insulted people on the basis of their ethnic background in her Facebook posts by allegedly asserting that some parts of Kazakhstan may voluntarily join Russia. Shevtsova-Valova herself asserted that somebody had created a fake account and was distributing information in her name.¹²⁰

59. Saken Baikenov is an environmental activist from Astana. On 13 April 2015, the Sary Arka Regional Court No. 2 sentenced him to 2 years of restricted freedom on charges of "inciting ethnic discord" on Facebook

¹¹⁹ See: Kazakhstan: Persecution of Newsmen and Bloggers. // Open Dialogue Fund Site. URL: <http://ru.odfoundation.eu/a/7229,kazakhstan-presledovaniya-zhurnalistov-i-bloggerov>

¹²⁰ Ibid.

(Part 1 of Article 174 of the Criminal Code). He was arrested on 9 March 2015. Baikenov did not contest being the author of the posts on his Facebook page, but it is not known for which posts he was sentenced.¹²¹

60. Mukhtar Suleimenov is a resident of the West Kazakhstan Region. He was sentenced to 3 years of restricted freedom in July 2015 on charges of “inciting ethnic discord” on Facebook (Article 174 of the Criminal Code). According to the investigation, Suleimenov, using the nickname Mukhtar Aizhan, had “incited ethnic discord” by expressing his opinion about Russian nationalism and speaking about the destruction of Russia.¹²²

61. Alkhanashvily (no first name is known) is a resident of the city of Petropavlovsk in the North Kazakhstan Region. In July 2015, he was sentenced to 3 years’ imprisonment on for “inciting ethnic discord” on social media (Article 174 of the Criminal Code). According to the investigation, Alkhanashvily had published materials that insulted the national feelings of other ethnic groups¹²³.

62. Igor Sychev, a resident of Ridder in the East Kazakhstan Region, was one of the administrators of the *Vkontakte* page, “Overheard in Ridder”. On 18 November 2015, he was sentenced to 5 years’ imprisonment for making public calls for violating Kazakhstan’s territorial integrity” on the *Vkontakte* page (Part 2 of Article 180 of the Criminal Code). He was arrested on 30 September 2015.¹²⁴

63. Investigators accused Sychev of allowing the publication of a survey concerning the possibility that the East Kazakhstan Region may join Russia on the *Vkontakte* page he administered. A total of 506 people took part in this survey, and the majority of them were in favour of joining Russia. The prosecutor considered that such a publication may encourage separatist sentiments in the region. Referring to the Ukrainian precedent, the prosecutor stated that “the civil war in the Ukraine” was “an awful example of separatism”, which “should serve as a warning to everyone”.

64. It should be noted that Sychev was not the author of the survey, that he did not take part in it himself and that he immediately deleted it after complaints were made. He asserted that he accidentally published the survey, which was suggested by an unknown user. The Adil Soz Foundation did not find any signs of separatist propaganda in Sychev’s actions.

65. Ermek Taichibekov is a blogger and businessman from the Zhambyl Region. On 11 December 2015, the Kordai Regional Court sentenced Taichibekov to four years’ imprisonment on charges of “inciting ethnic discord” in posts on Facebook (Part 1 of Article 174 of the Criminal Code). The criminal case was initiated on 30 June 2015 by the National Security Committee on the basis of complaints submitted by individual Facebook users.¹²⁵

66. In his Facebook posts, Taichibekov expressed support for the unification of Russia and Kazakhstan into one state to be headed by Kazakhstan’s President Nazarbaev, as well as for the economic and political unification of the EU and Eurasian Union.

67. In July 2015, Taichibekov was made to undergo an examination at the Zhambyl Regional Psychoneurologic Dispensary, where doctors found that he exhibited “indications of paranoiac syndrome, characterized by ideas of reformation and grandeur”, as well as “indications of disturbances in his thinking pattern (...)”. Later a psychiatric examination in Almaty deemed him “capable of answering for his actions”. Taichibekov was arrested on 19 September 2015. Journalists were prohibited from carrying out audio and video recording and taking photos at the trial.

68. Boltabek Blyalov is head of the NGO Democracy and Human Rights Institute, an environmental activist,

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

and an advocate of the rights of Astana residents who do not agree with low compensations for the demolitions of their houses.¹²⁶ On 21 January 2016, Blyalov was sentenced to 3 years of restricted freedom after being found guilty of “inciting social and ethnic discord” through mass media and social media (Part 1 of Article 174 of the Criminal Code). The investigation pointed to posts on Facebook and YouTube interviews, where Blyalov harshly criticized Russia’s policy towards Ukraine, using terms such as “Russian fascism”. According to the illogical wording used in the indictment, Blyalov posted this information “deliberately, with intentions of indications of inciting social and ethnic enmity or discord”. Before the verdict was handed down, Blyalov made a declaration “confessing his guilt”.

70. Ermek Narymbaev is an activist from Almaty. He made public calls under the slogan “Away with [President] Nazarbaev” in 2010, after which he was sentenced to four years’ imprisonment. He was amnestied and released in February 2012. In 2015, he was arrested for participation in an unauthorized protest action. Serikzhan Mambetalin is another activist from Almaty, who was previously a member of the *Rukhaniat* environmental party.

71. On 22 January 2016, Narymbaev was sentenced to three years’ imprisonment and Mambetalin to two years’ imprisonment on charges of “inciting ethnic discord” on Facebook on “previous agreement” (Part 2 of Article 174 of the Criminal Code)¹²⁷. The court also prohibited both activists from engaging in public or political activities for five years.

72. Police opened a criminal case against the two activists on 10 October 2015 on the basis of a telephone call from an unknown person, who reported “illegal” posts on Facebook. Narymbaev and Mambetalin were arrested on 15 October 2015. The investigation claimed that Narymbaev and Mambetalin, acting as a group of persons on previous agreement, had used the internet to distribute information from a book entitled “The Wind from the Street” “aimed at inciting ethnic discord and insulting the national honour and dignity of the Kazakh nation”.

73. Mambetalin posted extracts from the book in question, which was authored by Murat Telibekov, on his Facebook page early on 8 October 2015. When doing so, he criticised the book, saying that “it makes you want to vomit”. Later the same morning, Narymbaev reposted Mambetalin’s post. He, in his turn, assessed the book favourably, saying that: “Murat Telibekov is close to the truth in many cases”. According to investigator Alexey Chapurin, the two activists “colluded” since Narymbaev visited Mambetalin’s Facebook page, where the latter published his post. (The investigator admitted, though, that he “could not fully prove” the collusion).

74. The Almaty City Court reviewed the appeals of Narymbaev and Mambetalin on 30 March 2016 and changed the sentence of Mambetalin to one year of restricted freedom and prohibition to engage in public activities for five years and that of Narymbaev to three years of restricted freedom and prohibition to engage in public activities for five years. The appeal court stated that the prohibition on engaging in public activities also includes taking part in the activities of public associations, attending peaceful protests and signing petitions.

75. Kazakhstan’s criminal law does not provide for any punishment (additional to the major one imposed) in the form of prohibition to engage in public and political activities. This punishment does not comply with the principle of legal certainty and predictability, it is disproportionate and, as such, denies civil liberties. We believe it should be abolished.

76. Lawful professional activities of journalists are protected by Article 158 of the Criminal Code. However, as far as we know, this article has never been applied since it was introduced in 1998.

77. On the basis of the information provided above, we would like to make the following recommendations:

¹²⁶ Ibid.

¹²⁷ Ibid.

- Provision should be made to ensure that the right to freely receive and distribute information through any means not prohibited by law, which is protected by the Constitution and other legal acts of Kazakhstan, applies irrespective of state boundaries;
- Defamation and insult should be decriminalised. Under no circumstances should legal provisions concerning violations of the honour and dignity of individuals provide for special protection for representatives of the authorities, irrespective of their ranks or official positions;
- The country's civil law should be revised so as to balance the protection of the right to freely express opinions with the protection of other personal non-property rights. A limitation period should be established for cases concerning the protection of honour and dignity, and mass media and journalists should not be held responsible for unintentionally inflicting moral damage;
- Restrictions imposed on the right to freedom of expression for the purpose of protecting the rights of individuals with respect to personal images should be strictly limited to comply with generally accepted criteria, and the right to privacy should not apply in this case if there is a more substantial public interest;
- Issues related to enjoying access to and distributing publicly relevant information should be detailed by law. No information of public interest should be classified;
- In accordance with the criteria spelled out by the UN Human Rights Committee, it would be important to abolish the requirement to re-register mass media in case their thematic focus or the frequency of their publications change. Mass media should retain the right to publish information for at least one year after the date of registration. Mass media should be exempt from legal responsibility when citing open sources and publishing information from officials of state authorities or other organisations, which are legal entities;
- The Law on Mass Media and the Code on Administrative Offenses should be brought in compliance with the Informational Kazakhstan-2020 Programme. Monopolistic ownership of mass media should be legally restricted. The Communications, Informatisation and Information Committee should provide a list of all registered mass media, as well as information about their owners on its site;
- Proportionate sanctions should be introduced for procedural violations of mass media legislation. Sanctions in the form of confiscation of media outputs and equipment or suspension of the activities of mass media for procedural violations are not consistent with the criteria for permissible restrictions on fundamental rights and freedoms and contradict international standards.

Article 21

1. An analysis of national legislation regulating the right to freedom of peaceful assembly and related law enforcement practice show that they both largely fail to comply with principles and provisions of international law. The main objective of both legislation and law enforcement practice in this area is to maintain law and order -- mainly in relation to imaginary threats – rather than to safeguard and protect the constitutionally protected right to freedom of peaceful assembly.

2. Guarantees for the right to freedom of peaceful assembly are set out in Article 32 of the Constitution¹²⁸: *“Citizens of the Republic of Kazakhstan shall have the right, peacefully and without weapons, to gather and hold meetings, rallies, demonstrations, processions and pickets. The enjoyment of this right may be restricted by law in the interest of state security, public order, the protection of health, or the protection of rights and freedom of other persons”*.

3. In addition to the above, article 39 of the Constitution¹²⁹ establishes: *“1. The rights and freedoms of individuals and citizens may only be limited by law and only to the extent needed to protect the*

¹²⁸ See: Republic of Kazakhstan Constitution. Adopted by the Republican Referendum of 30 August 1995 (as amended and added as of 2/02/2011) // Adilet Information Legal System of Republic of Kazakhstan Regulatory and Legal Acts. URL: http://adilet.zan.kz/rus/docs/K950001000_

¹²⁹ Ibid.

constitutional order, maintain public order, and protect human rights and freedoms, health and morality... ”.

4. Legal regulation of the right to freedom of peaceful assembly commenced in Kazakhstan with the adoption of a resolution by the Supreme Council of the RoK in 1992.¹³⁰ Currently this right is regulated by the 1995 Law on the Procedure for Organizing and Holding Peaceful Assemblies.¹³¹ Individual provisions on the legal regulation of freedom of peaceful assembly can also be found in the Law on Internal Affairs Bodies¹³², the Law on Counteracting Extremism¹³³, the Law on Political Parties¹³⁴, the Law on Public Associations¹³⁵ and the Law on Trade Unions¹³⁶.

5. Subordinate legislation that regulates freedom of peaceful assembly in Kazakhstan includes: Regulations for Organizing the Work of Sub-Divisions of Internal Affairs Bodies to Ensure Maintenance of Public Order and Security during Actions Organized by Public Associations in Streets and Other Public Places¹³⁷ and Guidelines for Organizing Patrol and Sentry Service of Internal Affairs Bodies to Maintain Public Order and Safety¹³⁸.

6. The organization of peaceful assemblies in particular geographical locations is most widely regulated in resolutions adopted by local representative bodies. In the last few years, s dozens of resolutions devoted to the regulation of the procedure for holding peaceful assemblies have been adopted by such bodies..¹³⁹

7. Kazakhstan's Code on Administrative Offenses¹⁴⁰ and its Criminal Code¹⁴¹, which were in force until the end of December 2014, provided for sanctions for violations of the legislation on the procedure for holding peaceful assemblies (including rallies, processions, pickets and demonstrations) ranging from warnings, fines and administrative detention for a period of up to 15 days (for repeated violations) to restricted freedom or even imprisonment for a period of up to one year. Administrative responsibility was also foreseen for “other public actions”, aside from for the types of peaceful assembly set out by law, which was not consistent with the principle of legal certainty and predictability.

8. The new Code on Administrative Offenses¹⁴² and the new Criminal Code¹⁴³, both of which entered into force as of 1 January 2015, preserve the above-mentioned provisions. At the same time, the Administrative Code provides for harsher sanctions in some cases. . Thus, previously, a single violation of legislation on peaceful assemblies could only result in a warning or fines, but now individuals holding official positions may be sentenced to administrative detention of up to 10 days. In the Criminal Code, sanctions were mitigated.

¹³⁰ See: Republic of Kazakhstan Supreme Council Decree of 4 July 1992, On Provision of Compliance with the Laws Regulating the Procedure and Holding of Meetings, Rallies, Street Processions and Demonstrations // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/B920005900_

¹³¹ See: Republic of Kazakhstan Law No. 2126 of 17 March 1995, On the Procedure of Peaceful Meetings, Rallies, Processions, Pickets and Demonstrations Arrangement and Holding in the Republic of Kazakhstan (as amended and added as of 20/12/2004) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/U950002126_#z6

¹³² See: Republic of Kazakhstan Law No. 2707 of 21 December 1995, On the Republic of Kazakhstan Internal Affairs Bodies (as amended and added as of 29/09/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/U950002707_

¹³³ See: Republic of Kazakhstan Law No. 31 of 18 February 2005, On Extremism Opposition (as amended and added as of 3/07/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z050000031_

¹³⁴ See: Republic of Kazakhstan Law No. 344 of 15 July 2002, On Political Parties (as amended and added as of 7/11/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z020000344_

¹³⁵ See: Republic of Kazakhstan Law No. 3 of 31 May 1996, On Public Associations (as amended and added as of 27/06/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z960000003_#z0

¹³⁶ See: Republic of Kazakhstan Law No. 211-V ZRK of 27 June 2014, On Trade Unions // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z1400000211_

¹³⁷ See: Order of the Republic of Kazakhstan Minister of Internal Affairs No. 665 of 6 December 2000, On Approval of Regulations for Internal Affairs Body Sub-Divisions Work Arrangement to Ensure Maintenance of Public Order and Security of People during Actions Taken by Public Associations in the Streets and Other Public Places // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan . URL: http://adilet.zan.kz/rus/docs/V000001368_

¹³⁸ Order of the Republic of Kazakhstan Minister of Internal Affairs No. 475 of 5 July 2002, On Approval of the Republic of Kazakhstan Internal Affairs Bodies Patrol and Sentry Service Arrangement Guidelines to Maintain Public Order and Safety (as amended and added as of 23 August 2006), http://adilet.zan.kz/rus/docs/V020001938_

¹³⁹ See e.g.: Resolution of the Almaty Maslikhat XVII Session of 29/07/2005, Some Issues of the City Infrastructure Facility Effective Use

¹⁴⁰ See: Republic of Kazakhstan Administrative Violation Code of 30 January 2001, Articles 362, 373 (as amended and added as of 7/11/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/K010000155_

¹⁴¹ Cm. Republic of Kazakhstan Criminal Code No. 167 of 16 July 1997, effected on 1 January 1998, Article 334 (as amended and added as of 3/07/2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/K970000167_

¹⁴² See: Republic of Kazakhstan Administrative Violation Code of 5 July 2014. Effected on 1 January 2015 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/K1400000235_

¹⁴³ See: Republic of Kazakhstan Criminal Code of 3 July 2014 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/K1400000226_

According to the current wording, sanctions in the form of corrective work, public service or administrative detention for a period up to 75 days may be applied for violations of legislation on peaceful assemblies, which resulted in considerable damage to the rights and legal interests of people or organisations, or to public or state interests protected by law. Previously such violations could result in restricted freedom or imprisonment.

9. The authorities actively apply administrative and criminal law provisions against the initiators, organisers and participants in peaceful assemblies in all regions of the country. Civil society activists are fined or placed under administrative arrest for several days. In almost all cases, no indications of violence or calls for violence have been recorded. However, police often apply force when apprehending people in connection with assemblies.

10. Taking into account international standards on freedom of peaceful assembly, the provisions set forth by the ICCPR, other international human rights treaties, decisions of the UN Human Rights Committee, and the OSCE and Venice Commission Guiding Principles on Freedom of Peaceful Assembly (2nd edition), it is possible to make a number of conclusions regarding current Kazakhstani legislation and law enforcement practice in this area.

11. The definition of peaceful assemblies set out by national legislation does not correspond to internationally recognized categories of peaceful assemblies since the relevant legislation uses the term “assembly” separately, aside from speaking of rallies, processions, demonstrations and pickets (hunger strikes held in public places, and the mounting of yurts and tents as defined by national law may be considered a specific form of protest action similar to pickets). Thus, Kazakhstani legislation regulates not only peaceful assemblies understood as public actions held in an open public space, but also gatherings as such.

12. Current legislation does not provide any interpretation of the notion of “assembly”, and also not of the notions of “demonstration”, “procession”, “rally”, “picket” and “other public acts”. This infringes the principle of legal certainty and predictability and provides an opportunity, in a completely arbitrary fashion, to consider any gathering, group or action held jointly by people as an illegal assembly or picket. As a result, in a number of cases, when authorities have considered initiatives to be of political character, people have been held accountable, for example, for laying flowers at monuments or submitting petitions.

13. The organization of all types of peaceful assemblies covered by the law requires permission from authorities, rather than simple notification and the same rules applies to all assemblies, irrespective of their nature.

14. Thus, a written application to hold peaceful assemblies, including pickets should be submitted to the relevant local executive authorities at least 10 days prior to the planned date of the event. The application should specify the objective of the assembly, its form, the venue or route of it, the expected starting/ending time, the expected numbers of participants, the names and place of residence/work/study of the organisers, as well as the individuals responsible for maintaining public order during the assembly, and the date the application is submitted. An application is considered to have been submitted from the day it is registered with the local executive authorities. The local executive authorities should review the application and notify the organisers about the decision made at least five days prior to the day of the assembly as set out in the application.

15. This procedure applies to all types of peaceful assemblies identified in national legislation: assemblies, rallies, processions, demonstrations and pickets. This makes it practically impossible to hold spontaneous protests or other spontaneous public manifestations in response to events that give rise to urgent public reactions.

16. Article 10 of the Law on the Procedure for Organizing and Holding Peaceful Assemblies provides that *“local representative bodies may additionally regulate the procedure for holding assemblies, rallies, processions, pickets and demonstrations taking into account local conditions, in accordance with the*

requirements of this law”.

17. Using this provision, local representative authorities have adopted resolutions designating one or two venues for holding assemblies. Although these resolutions are only recommendatory in nature, local executive authorities and law enforcement authorities are directly guided by them in their activities. As a result, it is practically impossible to carry out peaceful meetings in the form of parades, processions or demonstration as they imply movement from one public place to another. These resolutions also violate the principle that it should be possible to organize assemblies within “the sight and sound” of the target audience.

18. In accordance with Article 7 of the Law on the Procedure for Organizing and Holding Peaceful Assemblies, local executive authorities may prohibit an assembly, rally, procession, picket or demonstration if its objective is the incitement racial, ethnic, social or religious intolerance, or class superiority, the forced overthrow of the constitutional order, undermining Kazakhstan’s territorial integrity, or violating other provisions of the Constitution, laws and other regulatory acts of the Republic of Kazakhstan. Likewise an assembly may be prohibited if it threatens public order and safety. This wording allows for such extensive and arbitrary interpretations that it is often difficult to predict what particular threats to public order, safety, etc. may be deemed as grounds for rejecting an application to hold an assembly or picket.

19. Contrary to international standards, current legislation does not make any distinction between participants in assemblies and passers-by, who happen to be present at the venue of assemblies and observers (journalists, human rights activists and others) from the point of view of holding them responsible for unlawful assemblies. As a result, journalists, incidental observers, onlookers etc. have been held responsible in a number of cases.

20. Current legislation does not contain the notion of counter-demonstration and does not protect the right to organize such assemblies. . It also does not regulate the actions of relevant authorities with respect to maintaining public order and protecting the rights of the participants in both the main event and the counter-demonstration. However, Article 6 of the Law on the Procedure for Organizing and Holding Peaceful Assemblies, which provides that “*state authorities, public associations and people shall have no right to impede assemblies, processions, pickets and demonstrations held in compliance with the procedure established by this law*”, may be interpreted as prohibiting counter-demonstrations.

21. Current legislation does not contain any provisions obliging state authorities, above all law enforcement authorities to assist people in the implementation of their right to peaceful assembly and to protect participants in lawful peaceful assemblies.

22. In accordance with Article 2 of the Law on the Procedure for Organizing and Holding Peaceful Assemblies, individuals authorised by labour groups, public associations or separate groups of people, who have reached the age of 18, may submit applications to hold an assembly, rally, procession, picket or demonstration. On the basis of this wording, it can be concluded that individuals have no right to submit applications on their own for holding pickets or assemblies. This clearly contradicts international standards since they guarantee freedom of peaceful assembly for every person, including children (with the possibility for certain restrictions that do not undermine human rights), in accordance with the UN Child Rights Convention.

23. In accordance with Article 11 of the Law on the Procedure for Organizing and Holding Peaceful Assemblies, “*the procedure for holding assemblies and rallies provided for by this law shall not apply to assemblies and rallies of labour groups and public associations, which are held indoors in accordance with the law, and the charters and provisions of these organisations*”. It follows from this wording that the procedure provided for by the law applies to any other assemblies and rallies held indoors, such as events held by individual citizens, groups of people, commercial organisations, or foundations or institutions.

24. As already noted above, the sanctions set out for violations of the procedure for holding peaceful

assemblies was amended in the new Criminal Code¹⁴⁴: to up to 75 days of detention instead of up to one year of imprisonment). At the same time, similarly to in the Code on Administrative Offenses, the legally unclear term “*other public event*” is used and the organization, holding and participation in an unlawful event of this kind may result in criminal responsibility. However, existing legislation does not contain any provision explaining what is understood by a “*legal other public event*”.

25. All law enforcement practice based on the legislation described above leads to mass denials of the right to hold peaceful assemblies, and to persecution, fines and administrative detentions of organisers and participants in unauthorised peaceful pickets and rallies, as well as the laying of flowers, flash mobs and gatherings of groups of who people who attempt to submit petitions to or meet high-ranking officials.

26. The authorities widely use so-called preventive measures by warning supposed organisers and participants in upcoming peaceful meetings of the consequences of potential violations of the law (it is primarily public prosecutor’s offices that issue such warnings); holding individuals who distribute information about upcoming assemblies on social media responsible ; and apprehending supposed organisers and participants in peaceful meetings well ahead of the these events.

27. A recent example of these tactics is that dozens of civil society activists planning to take part in a peaceful rally on the issue of land reforms on 21 May 2016 were detained on 17-19 May 2016 and sentenced to administrative detention for up to 15 days.

28. The authorities have recently started imposing bans on engaging in public and political activities on civil society activists convicted on criminal charges e.g. for allegedly inciting social discord. This punishment includes a prohibition to participate in peaceful assemblies for a period of up to five years.

29. A fundamental reform of current national legislation and law enforcement practice on peaceful assemblies are needed required to bring them into compliance with international standards. This should include the adoption of a new law protecting the right to freedom of peaceful assembly, as well as other new legal acts regulating the relations between peaceful assembly organisers and participants, on the one hand, and authorities, including law enforcement authorities, on the other hand. In this new legislation, it is important to:

- Clearly and unambiguously establish a presumption in favour of the freedom to organise and hold peaceful assemblies;
- Lay down the principle of non-discrimination with respect to the exercise of the right to hold peaceful assemblies;
- Introduce clear notions regarding the types of peaceful assemblies that are subject to regulation;
- Establish a notification procedure for holding peaceful assemblies;
- Identify the types of peaceful assemblies that do not require any notification in view of the number of participants;
- Provide for the possibility to hold spontaneous assemblies;
- Provide a comprehensive list of places in which where holding peaceful assemblies is prohibited or restricted, with the assumption being that peaceful assemblies are allowed in all other public places;
- Establish clear procedures for agreeing the location, time and procedure for holding peaceful assemblies, with participation of the organizers of peaceful assemblies and representatives of the relevant authorities;
- Establish procedures allowing for a quick and efficient review, including by court of appeals against refusals to hold peaceful assemblies or other restrictions imposed in this context;

¹⁴⁴ See: Criminal Code of the Republic of Kazakhstan of 3 July 2014, Article 400 // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000226>

- Establish basic principles for law enforcement officials on upholding order during peaceful assemblies, including standards on training law enforcement officials on alternatives to using force and firearms, such as peaceful conflict settlement, understanding crowd behaviour, and also methods of persuasion, negotiation and mediation, as well as the use of technical aids to restrict the use of force and firearms.

Article 22

1. Paragraph 1 of Article 23 of the Constitution of the RoK¹⁴⁵ establishes that citizens shall have the right to freedom of association. The activities of public associations shall be regulated by law.

2. Kazakhstan's legislation in this area is based on the understanding that the right to freedom of association is the right to unite in public associations which, in their turn, constitute one of the organisational legal forms of non-profit organisations (legal entities).

3. As was stated in the first National Human Rights Action Plan of the RoK¹⁴⁶: *"If the first phrase of the given paragraph [Paragraph 1 of Article 23] is interpreted strictly, the Constitution of the RoK guarantees the right of citizens to unite with other citizens for the purpose of establishing public associations in full accordance with international law. However, based on the sense of the second phrase of Paragraph 1 of Article 23 and Article 5 of the Constitution of RoK, only one form of associations is supported – public associations, the activity of which are regulated by law"*.

4. Article 5 of the Constitution prohibits the establishment and operation of public associations, the objectives or activities of which are aimed at the violent change of the constitutional order, violation of the integrity of the country, undermining state security, inciting social, racial, national, religious, class or tribal enmity, or the establishment of unauthorised paramilitary units. Similar prohibitions are contained in Article 5 of the Law on Public Associations of 31 May 1996 (as amended on 16 November 2015). However, in addition, this law prohibits the activities of unregistered public associations. This prohibition contradicts international standards.

5. Kazakhstan's Constitution and legislation do not recognize the rights of citizens to unite in so-called informal organisations, i.e. organisations that do not need to be registered as legal entities.

6. According to 22 of the ICCPR: *"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests"*. The word *"everyone"* in this article means that freedom of association belongs to everyone regardless of his or her citizenship.

7. In the Constitution of the RoK, the comprehensive term *"everyone"* is used in some cases, such as: *"1. Everyone shall have the right to be recognized as a subject of law and to protect his/her rights and freedoms with all means not contradicting the law"* and *"2. Everyone shall have the right to legal defence of his/her rights and freedoms"* (Article 13). However, in other cases, the term *"citizen"* is used. This is in particular the case regarding the right to freedom of association: *"Citizens of the Republic of Kazakhstan shall have the right to freedom of association"* (Article 23). Although, no other limitations are foreseen for non-citizens (foreign citizens, refugees, and individuals without citizenship) with regard to membership or participation in NGOs, except for in terms of the establishment of and membership in political parties, this raises questions regarding the equality of citizens and non-citizens to exercise the right to freedom of association.

8. Based on the provisions of international human rights documents and foreign experience, the following conclusions may be drawn: no restrictions exist for foreign citizens, refugees and individuals without citizenship with respect to the creation, membership or participation in the activities of non-profit

¹⁴⁵ See: The Constitution of the Republic of Kazakhstan. Adopted at the republican referendum on August 30, 1995. (as amended as of 02.02.2011) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K950001000>

¹⁴⁷ See: National Human Rights Action Plan of the Republic of Kazakhstan 2009-2012. Under the general editorship of Abishev T.D., Tursinov S.T.– Astana, 2009. - 136 pages.

organisations, except for a few restrictions on their political activities (especially, their participation in the activities of political parties, financing of voting campaigns, etc.). Equally, there is no limitation on the rights of non-citizens to lead non-profit organisations or their branches (representations). The provisions of Kazakhstani legislation on freedom of association would need to be explained to avoid that they are interpreted by law enforcement authorities in ways that infringe the rights of individuals who are not citizens of the Republic of Kazakhstan.

9. There is a registration system for obtaining the status of a legal entity in Kazakhstan. Regarding the registration of non-commercial organisations, the legislation of the RoK does not contain any direct prohibition on the activity of NGOs without registration (i.e. those that do not have legal status). Such a direct prohibition, as previously noted, is established only in relation to public associations.

10. However, from the law-enforcement practice of judicial authorities and prosecutors, it follows that in a series of incidents, NGOs created by a group of citizens that have not claimed the status of public associations or obtained legal status have been considered as non-registered public associations and its organisers have been subject to administrative penalties. Similar problems arise with unregistered religious associations.

11. It is important to note that there are a series of problematic issues related to the registration procedure of non-profit organisations in Kazakhstan.

12. The first problem is the amount of the registration fee. Public non-profit organisations are equated with commercial organisations in this respect. Kazakhstan's NGOs have pointed out this injustice in the course of many years, but the issue has not yet been solved.

13. The second problem is the differentiation of activities of one of the organisational legal forms of non-profit organisations – public associations – by territorial criteria: local, regional and state. To register regional public associations, it is necessary to have branches in more than one region of the country, and to register state associations – in more than half of the regions of Kazakhstan, including the capital and city of state significance (Astana and Almaty).

14. If regional or state status would grant public associations any additional rights, advantages or powers, the requirement to have branches in a certain number of administrative-territorial units would be understandable. However, this status does not give any such advantages.

15. In order to bring Kazakhstani legislation into compliance with international human rights standards with respect to attaining legal status for non-profit organisations, it is necessary to:

- Provide for a simplified notification procedure for the registration of non-profit legal entities, in law and in practice;
- Lower the registration fee for non-profit organisations with the goal of making it easier for them to obtain legal status and to promote the development of civil society;
- Establish by law which additional rights or privileges to which public associations are entitled if they register as regional or state associations or exclude these provisions from the legislation on public associations.

16. An analysis of current Kazakhstani legislation also gives ground to conclude that a number of provisions of legislative acts relating to the right to freedom of association do not pass the test for necessity, reasonableness of purpose and proportionality and thus contradict international standards.

17. If we turn to the Constitution of the RoK, paragraph 3 of Article 5 prohibits certain goals and activities of associations of citizens. They include: violent change of the constitutional order, violation of the integrity of the Republic, undermining the security of the state, inciting social, racial, national, religious, class and tribal enmity, as well as formation of unauthorised paramilitary units.

18. However, Article 489 of the Code on Administrative Offences of the RoK¹⁴⁷ contains a number of other grounds for bringing leaders and members of public associations to responsibility.

19. As a whole, in current administrative legislation, a public association is the only form of legal entity that is threatened with a ban on its activities for repeated violations within the entire framework of existing legislation regarding public associations. The legislation of the RoK on public associations is based on the Constitution of the RoK and consists of the Law on Public Associations and all other relevant legislative acts. In other words, a public association may face a ban on its activities for two violations of the law, even if these are small and may entirely differ in nature. It is evident that this may result in disproportionate or inadequate responses by authorities to violations committed by public associations.

20. Paragraph 2.4 of Article 49 of the Civil Code of the RoK¹⁴⁸ states that any legal entity may be liquidated for repeated or gross violations of the law. It should be noted that prohibition of its activities is the most extreme sanction that may be applied to any legal entity, and this is why it is important that the necessity, reasonableness and proportionality of such a measure are determined in law and in practice. Small violations, even if committed repeatedly, must not result in the suspension or prohibition of the activities of legal entities.

21. According to paragraph 2.4 of Article 49 of the Civil Code of the RoK¹⁴⁹, the systematic implementation of activities that contradict the statutory purposes of a legal entity may constitute a ground for closing it down. This provision that allows for holding non-profit organisations accountable for activities that fall within the law, but *"go beyond their statutory purposes and tasks"* allows for broad, arbitrary interpretation and does not appear to be consistent with requirements of reasonableness and proportionality of restrictions. This is in particular the case when taking into account that a non-profit organisation may be liquidated for these reasons.

22. It is also necessary to pay attention to the provisions of Kazakhstan's criminal law relating to the responsibility of the heads and members of public associations.

¹⁴⁷ See: Code of the Republic of Kazakhstan On Administrative Offences № 235-V dated July 5, 2014 (as amended as at 14.01.2015) Article 389. Violation of the legislation of the Republic of Kazakhstan on public associations, as well as leadership, participation in activities of unregistered in the settled by the legislation of the Republic of Kazakhstan order for public, religious associations, financing of their activities. «1. *Commission of the actions by the heads, members of a public association or by the public association that are beyond the purposes and tasks determined by the charters of these public associations, shall – entail a notification or fine on legal entities in amount of one hundred monthly calculation indices.*

2. *Commission of the actions by the heads, members of a public association or by the public association breaching the legislation of the Republic of Kazakhstan, shall – entail a notification or fine on legal entities in amount of one hundred monthly calculation indices with the suspension of the activity of a public association for the term from three to six months.*

3. *The action provided by a part one of this Article committed repeatedly second time within a year after imposition of the administrative sanction, shall – entail a fine on legal entities in amount of one hundred fifty monthly calculation indices with the suspension of the activity of a public association for the term from three to six months*

4. *The action provided by a part two of this Article committed repeatedly second time within a year after imposition of the administrative sanction, and equally failure to eliminate the violations provided by a part three of this Article, shall – entail a fine on legal entities in amount of two hundred monthly calculation indices with the prohibition of the activity of a public association.*

5. *Financing of political parties by foreign legal entities and international organisations, legal entities with foreign participation, state bodies and organisations, charitable organisations, shall – entail a fine on civil servants in amount of four hundred, on legal entities – in amount of two thousand times the monthly calculation index, with the confiscation of illegal donations.*

6. *Acceptance of illegal donations by a political party, shall – entail a fine in amount of four hundred times the monthly calculation index with the confiscation of the illegal donations and prohibition of the activity of the political party.*

7. *Failure to publish annual accounts on financial activity of a political party within the terms and volume established by the legislation of the Republic of Kazakhstan, shall – entail a fine in amount of two hundred times the monthly calculation index with the suspension of the activity of the political party for the term up to six months.*

8. *Carrying out of the activity of a political party, its structural subdivisions (branches and representatives) without reregistration in the cases provided by the legislation of the Republic of Kazakhstan, shall – entail a fine in amount of two hundred times the monthly calculation index with the prohibition of the activity of the political party.*

9. *Management of the activity of public, religious associations not registered in the manner established by the legislation of the Republic of Kazakhstan, and equally the activity of which is suspended or prohibited, shall – entail a fine in amount of one hundred times the monthly calculation index.*

10. *Participation in the activity of public, religious associations not registered in the manner established by the legislation of the Republic of Kazakhstan, and equally the activity of which is suspended or prohibited, shall – entail a fine in amount of fifty times the monthly calculation index.*

11. *Financing of the activity of public, religious associations unregistered in the manner established by the legislation of the Republic of Kazakhstan, and equally the activity of which is suspended or prohibited, shall – entail a fine in amount of two hundred times the monthly calculation index.»* // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000235>

23. The new edition of the Criminal Code of the RoK¹⁵⁰, which entered into force in 2015, contains a number of articles (3, 146, 174, 182, 256, 257 and 403), where “a leader of a public association” is treated as a separate category of offender. According to the wording used, *the head of a public association, as well as any other participant in a public association who, given his/her influence and authority, is in a position to control the activities of this association*” may be considered “a leader of a public association”.

24. The introduction of the concept of “a leader of public associations” into criminal legislation provides for discrimination of leaders and participants of public associations on the grounds of their public status, which directly violates the principle of non-discrimination laid down in Article 14 of the Constitution of the RoK, as well as in Article 26 of the ICCPR. Broad interpretation of this concept may result in the prosecution of any members of public associations, including political parties. According to the logic of the lawmakers and those who elaborated this legislation, “*leaders of public associations*” are considered a separate category of offenders with respect to the equality of citizens (Article 145 of the Criminal Code of the RoK). However, singling out leaders of public associations as a separate category in itself undermines equality.

25. In this case, we are dealing with an extremely artificial separation of public associations from the general mass of non-profit organisations and with the development of their image as a priori requiring additional state control and a stricter approach than other NGOs or groups of citizens that are “not united”.

26. The administrative and criminal legislation of the RoK relating to the responsibility of public associations, their leaders and member needs to be developed and improved:

- on the one hand, with the goal of removing “disparities” between public associations and other legal organisational forms of non-profit organisations or commercial organisations,
- on the other hand, in order to bring provisions on restrictions and sanctions into compliance with international standards and criteria permissible restrictions.

27. Kazakhstan’s legislation allows for different sources of financing of nongovernmental organisations. In particular, NGOs can receive donations and contributions from the members of the organisation itself. Another source is grants from international organisations, nongovernmental organisations and foundations. Lately state financing of NGOs through the so-called state social order has been actively developed.

28. At the end of 2015, substantial changes were introduced into the Law on the State Social Order from April 2015¹⁵¹ and the Law of on Non-profit Organisations from January 2001¹⁵². The concepts of NGO grants and NGO bonuses were introduced. A new institution was also created: an operator in the sphere of grant financing of nongovernmental organisations, which is a non-profit organisation as determined by the Government of Kazakhstan that has powers to allocate grants. In addition, a database of nongovernmental organisations was created to which all nongovernmental organisations must submit reports on their activity in the past year by 31 March each year.

29. In accordance with these amendments, NGOs may still receive financing from foreign sources without the need to obtain special permission from the authorities. However, the changes nevertheless represent a new attempt to place civil society organisations under strict control than commercial organisations, as UN Special Rapporteur on Freedom of Association and Assembly Miana Kiai noted in his report following his 2015 visit to Kazakhstan.

¹⁴⁹ See: Civil Code of the Republic of Kazakhstan (General part), adopted by the Supreme Council of the Republic of Kazakhstan dated December 27, 1994 (as amended as of 29.12.2014). Adopted by the Supreme Council of the Republic of Kazakhstan on December 27, 1994. Published: Gazette of the Supreme Council of the Republic of Kazakhstan, 1994, No. 23-24 (appendix); 1995, № 15-16, art. 109; № 20, art. 121; Gazette of the Parliament of the Republic of Kazakhstan, 1996, No. 2, Art.187

¹⁵⁰ Ibid.

¹⁵¹ See: Criminal Code of the Republic of Kazakhstan dated July 3, 2014 № 226-V (as amended as of 07.11.2014). Published: «Kazakhstan’s Pravda» of July 9, 2014 № 132 (27753); Gazette of the Parliament of the Republic of Kazakhstan, 2014, July, No. 13 (2662), Art. 83.

¹⁵² See: Law of the Republic of Kazakhstan № 36 dated April 12, 2005 «On the State Social Order» (as amended as of 02.12.2015) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z050000036_

¹⁵³ See: Law of the Republic of Kazakhstan of January 16, 2001 «On Non-profit Organisations» (as amended as of 02.12.2015) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z050000036_

30. It is also important to mention the new Law of the RoK on Trade Unions¹⁵³, which was adopted in mid-2014 and enacted in mid-2015 with respect to the re-registration of trade unions. This law significantly impedes the registration of new, especially independent trade unions and has met with strong criticism by the International Labour Organisation and international trade unions.

31. It is relevant to separately highlight problems concerning the registration and activities of political parties. Current national legislation on political parties contains excessive, unreasonable requirements that do not meet international standards on the creation, registration and activities of political parties.

32. In 2009, shortly before Kazakhstan took up the OSCE Chairmanship, amendments¹⁵⁴ were made to the legislation on political parties. While these amendments were described as improvements, they had no real impact on the conditions for establishing and carrying out activities of political parties. For example, changes regarding the number of members required for the registration of political parties were purely cosmetic. Instead of 50,000 members, including at least 700 in each region of the country, political parties are now required to have 40,000 members, including 600 in each region. In neither case were any objective reasons provided to justify these figures.

33. Some legislative changes made in 2009 worsened the situation. For example, an additional procedural regulation applicable to the creation of a political party was introduced. Under the current law, a political party must be created at the initiative of a group of citizens consisting of no less than 1,000 people, who are required to convene a founding congress and who should represent two thirds of the country's regions, the city of state significance and the capital. For the preparation and holding of the founding congress, an organising committee consisting of at least 10 people should be formed by members of the initiative group of citizens. The organising committee must undergo a registration procedure by way of notification, which differs little from that of the registration of the political party itself in terms of the applicable requirements. The organising committee must thereafter hold a founding congress within 2 months and ensure that 1,000 citizens are personally present, and then, within 4 months, submit a list of 40,000 members (including no less than 600 members in each region, the capital and city of state significance) for the registration of the party.

34. The only positive innovation resulting from the 2009 reform can be considered to be that the procedure for verifying the lists of political party members was elaborated. Thus, for registration purposes, it is currently sufficient that the party can show that it has the number of members required by law, and invalid membership data is simply excluded from the calculation.

35. The provisions of Kazakhstani legislation and law enforcement practice regarding the suspension of the activities of political parties, as well as their liquidation do not conform to international standards or best foreign practice and require serious revision.

36. Kazakhstani legislation contains broad grounds for suspending the activities of political parties, such as "violation of the Constitution and the legislation of the RoK", "systematically carrying out activities that are inconsistent with the charter of the political party", "public appeals and statement of the heads of a political party aimed at extremism". As a result, these provisions may be arbitrarily applied to activities of political parties, especially opposition parties and their leaders and be abused by authorities to suspend the activities of political parties.

37. In a similar manner, according to paragraph 5 of Article 14 of the Law on Political Parties¹⁵⁵, a political party may be liquidated by court in the following cases:
- failure to comply with requirements of this law;

¹⁵⁴ See: Law of the Republic of Kazakhstan of June 27, 2014 № 211-V «On Trade Unions» (as amended as of 23.11.2015) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/Z1400000211>

¹⁵⁵ See: Law of the Republic of Kazakhstan of February 6, 2009 № 122-IV «On Introduction of Amendments into the Law of the Republic of Kazakhstan «On Political Parties». Published: «Kazakhstan's Pravda» of February 12, 2009 № 33-34 (25777-25778)

¹⁵⁶ See: Law of the Republic of Kazakhstan №344 dated July 15, 2002 «On Political Parties» (as amended as of 07.11.2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z020000344_

- *failure to remedy violations that constitute a ground for suspending the activities of a political party for the period prescribed by court;*
- *systematic conduct of activities that are inconsistent with the statutes of the political party;*
- *carrying out activities that are prohibited by the legislative acts of the Republic of Kazakhstan, either repeatedly (at least twice) or involving serious violations of the legislation of the Republic of Kazakhstan;*
- *invalidation of the registration of the political party due to invalid information contained in the documents submitted for the registration, or cancellation of the registration of the political party;*
- *non-participation of the political party in the elections of deputies of Majilis (lower house) of the Parliament of the Republic of Kazakhstan two times in a row;*
- *financing by foreign legal entities and citizens, foreign states and international organisations, or accepting donations prohibited by this law;*
- *activities carried out by the political party or its structural subdivisions (branches and representative offices) without reregistration in cases provided for by the legislation of the Republic of Kazakhstan;*
- *in other cases, provided for by legislative acts of the Republic of Kazakhstan.*

38. There are also serious problems with respect to the access of political parties, in particular opposition parties to national mass media and restrictions on their access to voters.

39. In practice, abusive treatment of political parties frequently occurs at the stage of registration of the party, and in particular during the verification of signatures of party members. For example, a list provided by one party may be carefully studied, while other lists will be accepted without any checks. This is due to the fact that existing legislation does not provide for any clear and transparent procedures for verifying signatures. Also, no timeline has been established within which the registration authorities should make a decision on whether to approve or reject an application for registration. As a result, the verification of signatures may continue for an indefinite period of time, as was the case when the Alga! opposition party was in the state of registration for several years. Finally, in 2012, the party was liquidated (although it had never been registered) for alleged extremist activities, and its leader Vladimir Kozlov has been serving a 7.5-year sentence for allegedly inciting social discord since the beginning of 2012.

40. The most typical cases of limitation of freedom of association in Kazakhstan are:

- refusal to register a non-profit organisation;
- refusal to register a political party;
- suspension of political party activities;
- liquidation of a political party or organisation by court ;
- holding citizens responsible for the creation or participation in the activities of unregistered public associations; and
- recognition of an organisation as extremist and prohibition of its activities.

41. On the basis of the information provided above, the following recommendations can be made:

- Bring Article 23 of the Constitution into compliance with Article 22 of the ICCPR and ensure that the right to freedom of association applies to “everyone” regardless of his or her citizenship;
- Recognize the right to establish and carry out activities of informal public associations;
- Provide for a simplified notification registration procedure for non-profit legal entities, in law and in practice, and abolish additional requirements for the registration of such entities depending on regional or state status;
- Decrease the state fees for the registration of non-profit organisations;
- Abolish provisions that use the terms “statutory” and “non-statutory” activities of NGOs and proceed from the position (set out by law) that non-profit organisations have the right to engage in any kind of activities that are not prohibited by current legislation and do not require special permission;
- Revise the administrative and criminal legislation of the RoK with respect to the administrative and criminal responsibility of public associations, their heads and members in order to bring provisions on restrictions and sanctions into compliance with international standards and criteria for the admissibility of restrictions and repeal the discriminatory provisions regarding “leaders of public associations” in the Criminal Code;
- Bring legislation on trade unions into compliance with international standards;

- Revise the legislation on political parties by decreasing the required number of members for registration to 3,000 people (which was the requirement established by the Law on Political Parties before it was changed in 2002), and establish a simplified registration procedure for political parties;
- Decrease the 7-percent election threshold for obtaining representation in the *Majilis* for the purpose of ensuring effective realization of the right to take part in public affairs protected by Article 25 of the ICCPR.

Article 25

1. According to Kazakhstan's legislation¹⁵⁶, citizens who have a conviction, "*which has not been cancelled or remitted by the time of registration in the order established by law*" does not have the right to run in elections. Thus, citizens are deemed ineligible to stand for election in case they have been convicted of *any* crime, regardless of the nature of the crime. As concluded by the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE/ODIHR)¹⁵⁷, this represents a questionable exercise of state power, which violates the principle of proportionality recognized in paragraph 24 of the 1990 OSCE Copenhagen Document.¹⁵⁸

2. The OSCE/ODIHR has repeatedly recommended introducing amendments to Kazakhstan's legislation on elections and ensuring that citizens may only be denied the right to be elected in cases when the severity of the crimes for which they have been committed is proportionate to the denial of political rights¹⁵⁹. "*The forfeiture should be for an established period of time, likewise proportionate, and restoration of political rights should occur automatically after the expiration of this period of time. Legal barriers to candidacy should always be scrutinized as they limit voter choice and may prevent qualified candidates from seeking public office based on disqualifying conditions*"¹⁶⁰.

3. Kazakhstan has a two-chamber Parliament: the lower chamber – the *Majilis* constituted of 107 deputies and the upper chamber – the Senate constituted of 47 deputies. Ninety-eight deputies of the *Majilis* are elected for five years in direct elections held under a proportional system using party lists in a single national constituency. The remaining nine members of the *Majilis* are elected by the Assembly of People of Kazakhstan (APK). This provision contradicts paragraph 7.2 of the 1990 OSCE Copenhagen Document, which provides that "*all seats in at least one chamber of the national legislature should be freely contested in a popular vote*". In addition, members of the APK also have the right to vote in the direct elections to the *Majilis*. Therefore, members of the APK actually have two votes in the same election, which violates the principle of equal suffrage¹⁶¹.

4. In accordance with Kazakhstan's Constitution, a candidate for presidency should have lived in Kazakhstan for the last fifteen years (paragraph 2 of Article 41). A deputy of the Parliament of Kazakhstan may be a person, who has been a citizen of the RoK and permanently resided in the county during the last ten years (paragraph 4 of Article 51). These residency requirements are not consistent with the international obligations of Kazakhstan and international good practice¹⁶².

¹⁵⁶ See: Constitutional Law the Republic of Kazakhstan №2464 dated 28 September 1995 «On Elections in the Republic of Kazakhstan» (with amendments and addendums as of 04.07.2014) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: http://adilet.zan.kz/rus/docs/Z950002464_#z56

¹⁵⁷ See: OSCE/ODIHR - «Assessment of the Constitutional Law on Elections in the Republic of Kazakhstan» (24.08.2004), p. 5 at <http://www.osce.org/odihr/elections/35971?download=true>

¹⁵⁸ Paragraph 24 of the Copenhagen Document states: "Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law".

¹⁵⁹ OSCE/ODIHR has already recommended more restricted application of Article 4 – «only in case of committing severe crimes».

See: «Review of the Election Legislation for Parliamentary Elections of the Republic of Kazakhstan» (18.01.2001), P.4; «Preliminary assessment of the draft law on elections in the Republic of Kazakhstan» (18.09.2003), P.5.; «Assessment of the Constitutional Law On Elections in the Republic of Kazakhstan» (24.08.2004), P.6-7. Besides, the Law on elections must contain a list of particular crimes, which shall be considered so serious that deny one of human rights – suffrage.

¹⁶⁰ See: OSCE/ODIHR - «Assessment of the Constitutional Law on Elections in the Republic of Kazakhstan» (24.08.2004), P.6.

¹⁶¹ See: Article 25 (b) of International Covenant on Civil and Political Rights (ICCPR), as well as Paragraph 7.3 of the 1990 OSCE Copenhagen Document, which say that participating countries «guarantee universal and equal suffrage to adult citizens».

¹⁶² See: Paragraph 15 of UN Human Rights Committee General Comment № 25 states, in particular, that «Any restrictions on the right to stand for election ... must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation».

See, as well: Paragraph 1.1 (c) Code of Good Practice in Electoral Matters Кодекс of Venice Commission of Council of Europe, that specifies that «a length of residence requirement may be imposed on nationals solely for local or regional elections» // Website Venice Commission of Council of Europe. URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023-e.pdf),

5. The legal base of the RoK also contains disproportionate provisions concerning the grounds on which political parties and candidates may be denied registration or have their registration cancelled. The application of these provisions before and during elections have resulted in restrictions on the right to stand for election of some parties and a number of candidates.

6. Paragraphs (2) and (4) of Article 50 of the Constitutional Law on Elections in the RoK permit the cancellation of decisions on the registration of candidates as punishment for exercising the right to freedom of speech in connection with statements “*discrediting the honour and dignity of a candidate or political party*”. These provisions violate the right to freedom of speech and expression and contradict OSCE commitments, international standards and national constitutional principles.¹⁶³

7. Several articles in the Constitutional Law on Elections contain provisions permitting the cancellation of registration of candidates as punishment for mistakes made in financial reporting. Such examples can be found in Articles 34, 59, 73, 89, 104 and 118. In accordance with paragraphs (9) and (10) of Article 34, the submission of the required financial report one day late (although it is legally sufficient in all other aspects) may result in the cancellation of the decision on registration.

8. Under Articles 59, 73, 89, 104 и 118 decisions on cancellation of candidate registration can be made, “*if it is found that information as to income and property declared by such candidate or his/her spouse...is not true.*” The OSCE/ODIHR has concluded that this wording is “vague, subject to abuse and can result in politically motivated decisions” and “should be omitted from the law”.¹⁶⁴

9. In many regions of the country, the registration of a number of candidates for deputies of local representative bodies was cancelled in March 2016 due to mistakes in financial reporting, not even exceeding 1 tenge (less than 1 US cent). The penalty for such a violation, even if it took place, should not include cancellation of the registration of the candidate, but should provide for the imposition of a fine, in accordance with the principle of proportionality. According to the OSCE/ODIHR: “*Instead of relying on a severe cancellation regime, it would be more appropriate to authorize the imposition of a monetary fine based on consideration of several factors, including: (a) the amount of the financial error, (b) whether there was one or numerous errors, (c) whether and to what degree there was an effort to conceal the errors, (d) the attitude and conduct of the violator upon discovery of the violation, (e) whether government authorities or public officials or resources were involved in the violation, and (f) the potential harm to free, fair, democratic, and transparent elections in the future*”¹⁶⁵.

10. Paragraph (5) of Article 97-1 of the Constitutional Law on Elections provides that “*in case of the reorganisation or liquidation of a political party, deputies of the Majilis elected from this party shall give up their mandates*”. This provision is contrary to the obligation contained in paragraph 7.9 of the 1990 OSCE Copenhagen Document: “*candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures*”. Although Article 97-1 is a legal provision, this legal provision does not comply with democratic parliamentary and constitutional procedures.¹⁶⁶

11. The Constitution provides for imperative mandates: deputies lose their mandates in case they give up their membership in a party or are expelled from it, or in case the activities of the party are terminated. This is contrary to paragraph 7.9 of the 1990 OSCE Copenhagen Document¹⁶⁷.

¹⁶³ Compare OSCE/ODIHR - «Assessment of the Constitutional Law on Elections in the Republic of Kazakhstan» (24.08.2004), p. 5.

¹⁶⁴ OSCE/ODIHR - «Assessment of the Constitutional Law on Elections in the Republic of Kazakhstan» (24.08.2004), p. 7

¹⁶⁵ OSCE/ODIHR - «Assessment of the Constitutional Law On Elections in the Republic of Kazakhstan» (24.08.2004), P.8.

¹⁶⁶ Compare OSCE/ODIHR - «Assessment of the Constitutional Law On Elections in the Republic of Kazakhstan» (24.08.2004), p.8.

¹⁶⁷ Paragraph 7.9 of the 1990 OSCE Copenhagen Document demands that participating countries «ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures».

12. Paragraph (5) of Article 97-1 also provides that *“the political parties has the right to change the order of candidates on the party lists by submitting to the Central Election Commission an appropriate application to this effect with the extract from the minutes of the meeting of the supreme body of the political party”*. This provision allows post-election change in the order of candidates on the political party lists. This provision is contrary to the commitment in paragraph 7.9 of the 1990 OSCE Copenhagen Document, domestic constitutional principles, and international standards. Post-election change in list order misleads voters and abrogates the candidate choice made by voters on Election Day.¹⁶⁸

13. In 2004 OSCE/ODIHR recommended introducing amendments to the Constitutional Law on Elections to reflect ownership of mandates by elected candidates. In particular, an elected candidate should not forfeit a mandate due to a change in political affiliation, or liquidation of the party, or due to a post-election decision of a political party, regardless of the concrete formula used to allocate seats according to the number of votes (election system)¹⁶⁹. However, this recommendation has not been implemented.

14. The grounds for which an election may be declared invalid are not clearly set out by law. As recommended by OSCE/ODIHR, *“The law should give a precise definition of the grounds for invalidating the elections, in particular (1) at what stage of electoral process the violation was committed, (2) who committed the violation (election commissions, voters, candidates, or their authorized persons), (3) whether the violation bears the features of a crime, (4) whether the violation influenced or might have influenced the outcome of the elections, (5) whether the quantity of the same type violations committed at a polling station is significant (polling stations by-polling-station or country-wide assessments), etc.”*¹⁷⁰

15. The results of parliamentary and presidential elections are determined by the Central Election Commission (CEC) and announced in mass media no later than 10 days after the election, while the results of *Maslikhat* elections, as well as of local elections are determined by regional election commissions and published in mass media within 7 and 4 days after the election, respectively (Article 44 of the Election Law). Herewith, the law does not require the CEC and other election commissions to ensure and publish as soon as possible a summary of the voting results by all divisional, district and regional election commissions across the country. OSCE/ODIHR has repeatedly expressed its concern about lack of transparency of the process of publishing election results, including the results of observation of the previous parliamentary elections: *“The CEC announced preliminary results the day after the elections and approved final results two days after the elections, on 17 January. The overall processing of results lacked transparency as the ability to verify PEC protocol information was limited. According to the CEC’s interpretation of the Election Law, publication of election results is only required for the CEC and not for the lower-level commissions, including the PECs. The CEC only published summaries of final results for all regions and the cities of Astana and Almaty on its website. It did not publish results by polling station, nor did it make available summary tables from TECs, REC’s, or the CEC. In addition, election commissions were not obliged to provide copies of summary tables to observers.100 Thus the observers were not able to fully conclude whether the votes were “counted and reported honestly” as required by p7.4 of the 1990 OSCE Copenhagen Document. Moreover, the CEC decision on the final results was approved prior to all election complaints being reviewed and adjudicated”*¹⁷¹.

16. Since the adoption of the first Constitution of Kazakhstan in 1993, no presidential elections in the country Kazakhstan have been held in accordance with the terms established in the Constitution. All this occurred against the background of the adoption of amendments both to the Constitution and electoral legislation.

17. With the adoption of the Law on Introduction of Amendments to the Constitution of the Republic of Kazakhstan of 2 February 2011, paragraph 3-1 was added to Article 41 of the Constitution as follows: *“3-1. Early presidential elections shall be announced at the decision of the President of the Republic and shall be held in accordance with the procedure and terms established by the Constitutional Law”*¹⁷².

¹⁶⁸ OSCE/ODIHR - «Assessment of the Constitutional Law On Elections in the Republic of Kazakhstan» (24.08.2004), p.8.

¹⁶⁹ OSCE/ODIHR - «Assessment of the Constitutional Law On Elections in the Republic of Kazakhstan» (24.08.2004), P.9

¹⁷⁰ OSCE/ODIHR. «Review of the Election Legislation for Election Disputes, Appeals and Penalties. Republic of Kazakhstan». Warsaw 26.04.2001., P.6.

¹⁷¹ Republic of Kazakhstan. Early Parliamentary Election, 15 January 2012. OSCE/ODIHR Election Observation Mission Final Report. P.33.

¹⁷² See: Law of the Republic of Kazakhstan № 403-IV dated 2 February 2011 «On introduction of Supplement to the Constitution of the Republic of Kazakhstan»

18. These amendments were used as the basis for again holding early presidential elections. This approach is contrary to the OSCE standards for democratic elections: *“2.5 A clear and detailed legislative framework for conducting elections must be established through statutory law, either in a comprehensive code or through a set of laws that operate together consistently and without ambiguities or omissions. Except in extraordinary cases – in which serious deficiencies have been revealed in the legislation or its application and when there is an effective political and public consensus on the need to correct them – amendments to the law may not be made during the period immediately preceding elections, especially if the ability of voters, political parties, or candidates to fulfil their roles in the elections could be infringed”*¹⁷³.

19. The frequent adoption of amendments to election legislation, especially in the case of the 2011 amendments upsets the balance of political competition and makes it impossible for political parties and independent candidates to carry out their role in society and a proper election campaign.

20. The amendments adopted in February 2011 also violate another principle (p.7.1) of the OSCE Copenhagen Document: *“2.2. To ensure that the will of the people serves as the basis of the authority of government, the participating States will hold free elections at reasonable intervals, as established by law”*¹⁷⁴.

21. The best recipe for ensuring reasonable periodicity of elections would be to define by law the cases in which it is possible to hold early elections.

22. The new Code on Administrative Offences (CAO)¹⁷⁵ and Criminal Code¹⁷⁶ adopted in 2014 contain a number of articles establishing responsibility for violations of the right to suffrage and the electoral procedure in Kazakhstan. However, reports by international and domestic observers, candidates and mass media representatives about gross violations of electoral legislation and the lack of adequate, transparent and fair investigations into such allegations during each election campaign point to the absence of effective criminal and administrative legislation protecting the electoral process. Particularly puzzling is the fact that such violations as multiple voting (Article 108 of CAO of the RoK) and giving one person two or more ballots for voting (Article 110 of CAO of the RoK) are only administrative offenses.

23. In order to effectively protect the electoral rights of citizens, candidates and political parties, as well as to protect the legality of electoral procedures, we propose criminalizing a number of actions. At the same time, we believe that the criminalization of actions encroaching on democratic elections and the electoral rights of citizens should take place in two ways – by criminalizing CAO articles and by introducing new criminal offenses not previously covered by either the CAO Criminal Code. Also, we believe it is necessary to decriminalize CAO articles that restrict freedom of expression and the competition of candidates and parties, as well as mass media.

24. Election commissions are the state election management bodies that organize the preparation and holding of elections in the country. The term of office of election commissions is five years¹⁷⁷.

A unified system of election commissions is made up by:

- The CEC ;
- regional election commissions;
- district election commissions ;
- precinct election commissions .

// Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/Z1100000403>

¹⁷³ OSCE/ODIHR, «Existing Commitments for Democratic Elections in OSCE Participating States». Warsaw, 2003. P.14.

¹⁷⁴ OSCE/ODIHR, «Existing Commitments for Democratic Elections in OSCE Participating States». Warsaw, 2003. P.12.

¹⁷⁵ See: Code on Administrative Offences of the Republic of Kazakhstan dated 05 July 2014. Enacted 01 January 2015, Article 92 (with amendments and addendums as of 14.01.2015) // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000235>

¹⁷⁶ See: Criminal Code of the Republic of Kazakhstan dated 3 July 2014. Enacted 01 January 2015. // Adilet Information and Legal System of Normative Legal Acts of the Republic of Kazakhstan. URL: <http://adilet.zan.kz/rus/docs/K1400000226>

¹⁷⁷ See: Website of the Central election committee of the Republic of Kazakhstan. URL: http://election.kz/portal/page?_pageid=73,47394&_dad=portal&_schema=PORTAL

25. The CEC heads the unified system of election commissions and is a permanent body, whereas the CEC Chairperson and two members are appointed by the President of Kazakhstan, two members – by the *Majilis* (the lower chamber of the Parliament of Kazakhstan) and two members – by the Senate (the upper chamber of the Parliament).

26. Regional, district and precinct election commissions operate on a voluntary basis and are elected by the corresponding *maslikhats* (local representative bodies) based on proposals of political parties. Each political party is eligible to nominate one candidature to the corresponding election commission. If within the deadlines set by *maslikhats*, there were no proposals from political parties, the *maslikhat* shall form the election commission upon proposals of other public associations and higher election commissions.

27. The higher election commission is eligible to appoint a member of an election commission instead of a retired one until a new member has been elected by the *maslikhat* in the order established in the Law on Elections. A political party may nominate election commission candidates, who are not members of this political party. Political parties, which are not represented in the election commission, are eligible to delegate to the relevant election commission their representative with advisory vote for the period of election campaign¹⁷⁸.

28. OSCE/ODIHR Election Observation Missions have repeatedly criticized elections in Kazakhstan in connection with the failure of election commissions to demonstrate their independence and impartiality. Back in 1999, the OSCE/ODIHR Election Observation Mission stated: “*The appointment of the election commissions at each level are controlled by the President and appointed local officials. The method of appointment and the makeup of the commissions do not encourage public trust in the electoral process. The election commissions need to be more independent and representative*”¹⁷⁹. Since then, the situation has hardly changed, the political opposition is practically not represented in election commissions, and the commissions themselves are most often made up of employees of public institutions and enterprises and their activities are actually controlled by local executive authorities. Therefore, the task of reforming the system of establishing election commissions to ensure their independence and the representation of all political forces in the country remains on the agenda.

29. According to the current Constitution, Kazakhstan is characterized by a mixed system, in which the Constitutional Council carries out limited constitutional proceedings to review legislation that has not yet been adopted or laws that already have been adopted that are referred to it by courts (Article 78 of the Constitution). The President of Kazakhstan, the Chairperson of the Senate, the Chairperson of *Majilis*, not less than one fifth of the total number of deputies of the Parliament and the Prime Minister may also appeal to the Constitutional Council.

30. Citizens of the Republic of Kazakhstan cannot appeal to the Constitutional Council directly.

31. The acting Council has significantly fewer authorities than the Constitutional Court, the existence of which was determined by the previous Constitution. It has no right, at its own initiative to check that any draft laws comply with the Constitution, and it is not allowed to consider the constitutionality of subordinate and regulatory acts. In addition, three of the seven members of the Council, including the Chairperson are appointed directly by the President of Kazakhstan, who also has the right to veto decisions made by the Council. Although the Council can override the veto, considering the composition of the Council, this would be extremely difficult in practice as it would require a two-thirds majority of the members of the Council.

32. Control of the correctness of the electoral process is carried out by observation of generally accepted rules governing constitutional control. Thus, such control cannot be considered as cassation appeals of decisions of courts or electoral authorities on matters relating to elections. This constitutes a separate jurisdiction, which is not accessible for citizens, candidates and political parties, but only for a limited number of significant

¹⁷⁸ Ibid.

¹⁷⁹ THE REPUBLIC OF KAZAKSTAN. PRESIDENTIAL ELECTION. 10 JANUARY 1999. ASSESSMENT MISSION. P.20

political figures, including the President of Kazakhstan. The weakness of the Constitutional Council may appear even more tangible with regard to such significant political processes as elections or referendums.

33. Based on the above, it is possible to make a number of recommendations:

- Amend Article 4 of the Constitutional Law on Elections and deny the right to be elected only in cases when an individual has been convicted of a crime, the severity of which is proportionate to the measure of denying his or her political rights;
- Develop and amend the Constitutional Law on Elections to introduce fair and objective standards for determining the level of proficiency of the state language so that the candidate knows how his(her) level will be determined and so that voters and observers are able to assess whether the candidate is treated fairly, according to objective standards set forth by the law;
- Ensure that provision on elections to the *Majilis* are brought into compliance with the principle of equal suffrage;
- Eliminate possibility of forfeiture of a deputy's mandate (imperative mandate) in case his or her party is liquidated or he or she leaves the party and prohibit changes in the order of candidates on party lists after elections;
- Eliminate the requirement with respect to the length of residency as a condition for the registration of candidacy in presidential and parliamentary elections, leaving it only for local elections;
- Provide a precise definition of the reasons to declare elections invalid;
- Cancel disproportionate provisions of the Law on Elections on the cancellation of the registration of political parties and candidates, and introduce an alternative system of penalties for violations;
- Introduce a legal requirement to immediately publish detailed election results for each polling station, as well as protocols and summary tables of the CEC and all other election commissions on the CEC website and in mass media;
- Introduce legislative limitations as regards the cases in which it is possible to hold early elections;
- Toughen criminal responsibility for violations of electoral legislation by criminalizing a number of articles of CAO (at least Articles 108 and 110), as well as by introducing new articles to Criminal Code;
- Reform the system for establishing election commissions for the purpose of ensuring their independence and the representation of all political forces;
- Consider the possibility of recovering the institution of the Constitutional Court, with broad powers with respect to the administration of constitutional justice, or expand the powers of the Constitutional Council in cases on elections and grant it the right to deal with complaints of all candidates regarding the constitutionality of elections rather than the "correctness" elections;
- Establish methods and standards for hearing cases relating to elections conducted by the Constitutional Council by adopting relevant amendments to the Constitutional Law on Elections. A simple reference to the Constitution is not sufficient when there are no legal precedents on these issues. Neither the Constitution nor the Constitutional Law on Elections set any deadlines for appeals to the Constitutional Council regarding the correctness of holding presidential elections and elections to the Senate and the *Majilis*. These omissions should be addressed by introducing amendments and additions to Articles 68, 84 and 100 of the Constitutional Law on Elections.