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ICJ Submission to the Universal Periodic Review of Kazakhstan

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Introduction

The International Commission of Jurists (ICJ) welcomes this opportunity to submit its comments to the Universal Periodic Review (UPR) of Kazakhstan. In this submission, the ICJ wishes to draw the attention of the Working Group to issues of judicial independence, restrictions of the right to a fair trial, including the right of defence by a lawyer of choice and undue impediments to lawyers in the exercise of their professional functions; and to failures in legal and practical protection against torture and other cruel, inhuman or degrading treatment.

Right to fair trial: judicial independence and the right to a lawyer

Although reforms of the judiciary of 2008 have advanced the structural independence of the judiciary, the exercise of judicial independence continues to be hampered by executive influence, corruption, and the dominant role of the Prosecutor's office in the judicial process.¹ Under the domestic law of Kazakhstan, the prosecutor can intervene in criminal and civil cases and has decisive powers in pre-trial detention; may appeal against a court decision even when the case is already closed; and may suspend the execution of a court decision or sentence for up to two months.² By contrast, the defence cannot appeal against a court decision when a case is closed. These discrepancies contravene the principle of equality of arms which is indispensable to the obligation to ensure the right to a fair trial, including under article 14 of the ICCPR. In September 2009, particular fair trial concerns were raised by defence lawyers and NGOs regarding the trial, conviction and sentence to four years imprisonment of Yevgeny Zhovtis, on charges of vehicular manslaughter, in which defence lawyers were allegedly given inadequate time to prepare their case, key

¹ Constitutional Law of the Republic of Kazakhstan on the judicial system and the status of judges N 132-II, of 25 December 2000, as amended 17 November 2008 ; Report of the Special Rapporteur on the independence of Judges and lawyers, Leandro Despouy, Mission to Kazakhstan, 11 January 2005, E/CH.4/2005/60/Add.2, para. 34; Concluding Observations of the Committee Against Torture on Kazakhstan, 12 December 2008, CAT/C/KAZ/CO/2, paras.25 and 26; Strengthening the Rule of Law in Kazakhstan, Kazakhstan Judicial Assistance Project, Chemonics International, 27 August 2007 p.3; Judicial Reform Index for Kazakhstan, ABA/CEELI, February 2004, p.16.

² Law of the Republic of Kazakhstan, *On the Procuracy of the Republic of Kazakhstan*, December 21 1995 N2709, as amended as of 5 July 2008; Report of the Special Rapporteur on the independence of Judges and lawyers, op cit, para. 47

evidence was allegedly disregarded, and the judgment, which was issued very soon after the conclusion of the trial, appeared to have been prepared in advance.³

As noted by the former Special Rapporteur on the Independence of Judges and lawyers, fair trial rights are also undermined by the weakness of the legal profession.⁴ The ICJ is particularly concerned at attempts by the Kazakh authorities to restrict the activities of defence lawyers, notably through the National Security Committee's initiation of disbarment proceedings against defence lawyer Daniyar Kanafin in July 2009, following public comments in which he criticised the Kazakh law on state secrets as contrary to international law.⁵ The application for disbarment was rejected by the Bureau of the Almaty City Bar Association.⁶ Such attempts at disbarment are contrary to rights of freedom of expression protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR) as well as Principle 23⁷ of the UN Basic Principles on the Role of Lawyers.

This case further illustrates the misuse of the state secrecy law to prevent independent lawyers, such as Mr Kanafin, from representing a client in a high profile criminal case which has been classified as secret. Although Kazakh legislation makes no provision for limitations on legal representation in classified cases, in practice lawyers may be refused permission to represent the defendant, on the grounds that they do not have the security clearance required for access to state secrets.⁸ This practice undermines the right to defence by independent legal representation for detainees and criminal defendants, guaranteed by Article 14 3(d) ICCPR, which the UN Human Rights Committee has affirmed is not fulfilled by imposition of a state-appointed lawyer.⁹

The Working Group should recommend that the Human Rights Council call on the Government:

- **To take measures to limit the powers of prosecutors and protect the right to equality of arms in criminal cases in accordance with Article 14 ICCPR;**
- **to protect the rights of defendants to legal representation of their choice;**
- **to take measures to ensure that the law on state secrets is not implemented so as to prevent access of defendants in criminal cases to legal representation of their choice;**
- **to refrain from interference with defence lawyers in the exercise of their professional functions, and from instituting disbarment proceedings against lawyers for the legitimate exercise of their right of freedom of**

³ Human Rights Watch, *Kazakhstan: Review Rights Defender's Harsh Sentence*, 3 September 2009; www.zakon.kz, *Yevgeny Zhovtis sentenced to four years of settlement colony*, 3 September 2009.

⁴ *ibid*, para. 48

⁵ ICJ Press Release, *Kazakhstan: ICJ calls for withdrawal of disbarment proceedings against defence lawyer*, 9 July 2009

⁶ Press Release, Bureau of the Almaty City Bar Association, 27 July 2009; *Almaty Attorney's CBN conflict*, <http://www.interfax.kz> 27 July 2009. At the time of writing there was still the possibility of an appeal by the National Security Committee.

⁷ Principle 23 affirms the right to freedom of expression of lawyers.

⁸ See in relation to a another similar case: *Freedom House, Update on Freedom of the Media in Kazakhstan*, June 2009

⁹ *Vianna Acosta v. Uruguay* No.110/1981. The UN Basic Principles on the Role of Lawyers (principle 16) also affirm the right of lawyers to appear before a court on behalf of their clients, unless the lawyer has been disqualified in accordance with law.

expression.

Torture and Ill-treatment

Consistent and reliable reports indicate that torture and other forms of ill-treatment remain widespread in Kazakhstan.¹⁰ There are consistent allegations of mistreatment, including torture, to extract self-incriminating “confessions” to be used as evidence in criminal proceedings;¹¹ such evidence has been found admissible by Kazakh courts in at least 40 per cent of cases.¹² This practice is contrary to obligations under Article 15 of the Convention Against Torture, as well as under the ICCPR.¹³

The Committee against Torture in its recent Concluding Observations found that, despite the prohibition on admitting torture evidence in Kazakh law,¹⁴ such evidence is often in practice admitted in court, in violation of Article 15 of the Convention Against Torture (CAT), since courts proceed with trials without adequately addressing complaints of torture and ill-treatment of detainees, and without ordering independent medical examinations.¹⁵

Ill-treatment often takes place in the period following arrest before formal registration of an apprehended suspect is required.¹⁶ During this period, which is formally set at three hours,¹⁷ but which in practice often lasts for longer, suspects may be effectively held in incommunicado detention, without legal safeguards against ill-treatment including access to lawyers and medical assistance.¹⁸ In addition, in “exceptional circumstances” notification of the relatives of a detained person of his or her detention may be postponed for up to 72 hours.¹⁹ Although a constitutional amendment of May 2007 placed the authority to issue arrest warrants exclusively with the courts,²⁰ there is no mechanism for a detainee to challenge the lawfulness of his or her detention, such as through *habeas corpus*, as required by Article 9.4 ICCPR.²¹

¹⁰ Concluding Observations of the Committee against Torture, op cit paras.7 and 8; Amnesty International, *Amnesty International Report 2009 - Kazakhstan*, 28 May 2009; Torture in Kazakhstan, Briefing paper, Kazakhstan International Bureau for Human Rights and Rule of Law, Charter for Human rights and others, April 2009.

¹¹ Concluding Observations of the Committee against Torture, op cit, para. 7; *Memorandum on Legal Safeguards against Application of Torture and Other Cruel, Inhuman or Degrading Treatment by the Law Enforcement Agencies in Kazakhstan*, Nilkolia Kovalev, Legal Policy Research Center, http://www.lprc.kz/en/index.php?option=com_content&task=view&id=104; Freedom House, *Freedom in the World 2009 - Kazakhstan*, 16 July 2009, <<http://www.unhcr.org/refworld/docid/4a6452a928.html>>

¹² Results of Trial Monitoring in the Republic of Kazakhstan 2005-2006, http://www.osce.org/documents/cia/2007/02/23411_en.pdf, pp.81-86

¹³ Article 15 CAT; Human Rights Committee, *General Comment No. 20 on Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 10 March 1992, para. 12].

¹⁴ Article 116 Code of Criminal Procedure

¹⁵ Concluding Observations of the Committee against Torture, 12 December 2008, CAT/C/KAZ/CO/2, para. 29; US Department of State, 2008 Human Rights Report: Kazakhstan, Bureau of Democracy, Human Rights, and Labor, February 25, 2009, < <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119135.htm>>

¹⁶ Concluding Observations of the Committee against Torture, op cit, para. 9; Special Rapporteur of the UN Human Rights Council on Torture and other forms of cruel, inhuman, degrading treatment or punishment, UN Expert of Torture Concludes Visit to Kazakhstan, 13 May 2009.

¹⁷ Article 134 Criminal Procedural Code

¹⁸ Amnesty International, Kazakhstan, *Summary of Concerns on Torture and Ill-treatment*, November 2008, EUR 57/001/2008,, para. 1.3

¹⁹ Article 138 Criminal Procedure Code; Committee Against Torture Concluding Observations para.10.

²⁰ Article 16 of the Constitution

²¹ Amnesty International, Kazakhstan, *Summary of Concerns on Torture and Ill-treatment*, op cit, para. 2.1

The Working Group should recommend that the Human Rights Council call on the Government:

- **To take immediate and practical measures to ensure the effectiveness of the absolute prohibition of torture and cruel inhuman or degrading treatment, in particular during the interrogation of suspects, including in the initial hours of detention, in line with national and international law obligations, and to implement the recent recommendations of the Committee Against Torture in this regard;**
- **To amend the law to guarantee the right of access to a lawyer from the time of arrest, and to require that detainees be immediately informed of this right; to respect the right to medical attention from the time of arrest, and to require that information should be provided to families as to the detention, including the identification of the place of detention;**
- **To refrain, in line with international standards, from admitting as evidence in any proceedings information derived by means of torture or other ill-treatment.**

Definition and Crime of torture

Torture is a criminal offence under Article 347.1 of the criminal code. However, the Criminal Code's definition of torture does not encompass all the elements of torture as included in Article 1 CAT. Article 347-1 of the Criminal Code limits the definition of torture to acts of "public officials" without mentioning other persons acting in an official capacity or acts that result from instigation, consent or acquiescence of a public official, as required by the Convention. The purpose of the explanatory note to article 347-1 saying that "physical and mental suffering as a result of lawful acts of officials" is not to be considered to amount to torture, is not clear, and can potentially hamper criminalization of an act of torture. The limitations on the criminal code's definition of torture are contrary to the obligation to criminalise conduct amounting to torture under Article 4 CAT.²² Furthermore, as the Committee Against Torture has noted, clear and comprehensive domestic law definitions of torture, combined with specific criminal law offences, also have an important preventative and deterrent effect, and are therefore also necessary for compliance with Article 2 CAT.²³

Penalties prescribed by the criminal code for the crime of torture are not commensurate with the gravity of the offence, as required by Article 4.2 CAT.²⁴ There is a maximum sentence of five years of imprisonment for the crime of torture,²⁵ seven years for aggravated torture²⁶ and ten years for torture resulting in death.²⁷

In practice, despite the criminalisation of torture, law enforcement agents alleged to have committed crimes of torture continue to be charged with lesser offences, such as excess of authority or official power (articles 308 of the Criminal Code) or coercion

²² Concluding Observations of the Committee Against Torture *op cit* para.6.

²³ Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/2/CRP.1/Rev.4, paras.9-10.

²⁴ Concluding Observations of the Committee Against Torture, *op cit* para.17

²⁵ Article 347.1, Kazakhstan Criminal Code

²⁶ Article 347.1.2 Criminal Code This includes where the offence is committed in conspiracy with others, repeatedly, with infliction of bodily harm or in respect of pregnant women or juveniles.

²⁷ Article 347.1.3 Criminal Code

to make a confession (Article 347 of the Criminal Code).²⁸ Allegations of torture and other ill-treatment are often investigated internally by the police, whose investigations lack independence and transparency.²⁹ Such internal investigations do not satisfy international human rights law obligations of independent and effective investigation of allegations of torture.³⁰

The Working Group should recommend that the Human Rights Council call on the Government:

- **to amend the crime of torture under Kasakh law in accordance with international standards, including Articles 1 and 4 CAT;**
- **to amend the law to make these offences subject to penalties appropriate to their gravity;**
- **To provide for independent, thorough investigations into allegations of torture or ill treatment, leading, where appropriate, to prosecutions and punishment.**

The right of *Non-refoulement*

The ICJ is concerned at reliable reports of extraditions and forced returns of asylum seekers from Kazakhstan to countries including Uzbekistan and China, in violation of the absolute prohibition on *refoulement* to face a risk of torture or other inhuman or degrading treatment or other serious violations of human rights.³¹ The ICJ is particularly concerned at the consequences for *non-refoulement* of co-operation with other CIS countries, within the framework of the Shanghai Co-operation Organisation. The Organisation and its Conventions have provided the framework for increased co-operation between law enforcement and intelligence services of its Member States, often in contravention of the rule of law and without adequate human rights safeguards. The Shanghai Convention on Combating Terrorism, Separatism and Extremism of 2001 requires Member States to exchange information, develop joint legal frameworks and share “practical assistance” including through extradition of suspects.³² The treaty on long-term good neighborliness, friendship and cooperation, ratified by Kazakhstan on 15 January 2009, requires that states parties: “strengthen cooperation in the search for, arrest, extradition and transfer of persons suspected, accused or convicted of crimes related to terrorist, separatist, extremist activities, as well as other crimes.”

²⁸ Amnesty International, Summary of Concerns, op cit, para.1.1; Committee Against Torture Concluding Observations, para.18

²⁹ Torture in Kazakhstan, Briefing paper, Kazakhstan International Bureau for Human Rights and Rule of Law, Charter for Human rights and others, April 2009; United Nations Press Release, Special Rapporteur of the UN Human Rights Council on Torture and other forms of cruel, inhuman, degrading treatment or punishment, UN Expert of Torture Concludes Visit to Kazakhstan, 13 May 2009.

³⁰ Article 12 CAT; Human Rights Committee, General Comment 31, *The nature of legal obligations imposed on states parties to the Covenant*, CCPR/C/21/Rev.1/Add.13.para.15.

³¹ Article 3 CAT; Article 7 ICCPR, Human Rights Committee, General Comment 20, *Replaces General Comment 7 concerning prohibition of torture or cruel treatment or punishment*, para.9; General Comment 31, *The nature of legal obligations imposed on states parties to the Covenant*, CCPR/C/21/Rev.1/Add.13.para.12; *Kindler v Canada*, Communication No.470/1991, para.12. The European Court of Human Rights held in *Ismoilov and Others v Russia*, that the applicants’ extradition to Uzbekistan would violate Russia’s obligations under the European Convention on Human Rights.

³² See further, Declaration of Heads of Member States of Shanghai Cooperation Organisation, section III, 05.07.2005.

In a number of cases, Uzbek citizens wanted by the Uzbek authorities on charges of extremism or terrorism have been extradited from Kazakhstan to Uzbekistan.³³ Reports also indicate that asylum-seekers forcibly returned to Uzbekistan and China have subsequently disappeared, been held in incommunicado detention and subjected to ill treatment.³⁴ These violations are facilitated by the lack of any mechanism in the Kazakhstan legal system to challenge extradition or deportation on grounds of *non-refoulement*.³⁵ Under international standards, including under the CAT and the ICCPR, anyone threatened with *refoulement* must be able to challenge the decision relating to return before an effective, independent and impartial body.³⁶

The Working Group should recommend that the Human Rights Council call on the Government:

- **to respect the the obligations of Kazakhstan in respect of non-refoulement, particularly that it desist from transferring any person to a country where there is a real risk of torture, other inhuman or degrading treatment or other serious violation of human rights and to ensure full and fair judicial process prior to return in cases where such a risk exists;**
- **to ensure that co-operation with other Shanghai Co-operation Organisation Member States takes place in full accordance with its obligations under international human rights law.**

³³ Memorial and Civil Assistance Committee, *Refugees from Uzbekistan in CIS Countries*, September 2007; *Uzbek Citizen Extradited from Kazakhstan*, Ferghana.ru news agency, 29 October 2004; Chechen Fighter Extradited from Kazakhstan to Russia, Vesti.kz News Agency, 14 August 2009 <http://vesti.kz/society/22497/>;

³⁴ Concluding Observations of the Committee against Torture, 12 December 2008, CAT/C/KAZ/CO/2, para. 14, 15

³⁵ Amnesty International, Kazakhstan, *Summary of Concerns on Torture and Ill-treatment*, op cit, para. 1.2.1

³⁶ *Agiza v Sweden*, Communication No.233/203, paras.13.7-13.8; *Arkauz Arana v France*, Communication No. 63/1997, paras.11.5 and 12