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Submission on the list of issues

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Introduction

The International Commission of Jurists (ICJ) welcomes this opportunity to submit its comments to the Human Rights Committee for the preparation of the list of issues for the first Periodic Report of Kazakhstan. In this submission, the ICJ focuses on questions arising under article 14 of the Covenant concerning inadequate protection of the right to a fair trial. Among the fair trial concerns are those related to judicial independence; the right of defence by a lawyer of choice; and undue impediments to lawyers in the exercise of their professional functions. This submission will also address concerns arising under article 7 of the Covenant related to deficiencies in legal and practical protection against torture and other cruel, inhuman or degrading treatment.

Article 14, Right to a fair trial: judicial independence and the right to a lawyer

Although reforms of the judiciary instituted in 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 decision-making powers in pre-trial detention; may appeal against a court decision even when the case is already closed; and may

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.

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. As this Committee has underscored in General Comment 32, “[t]here is no equality of arms if ... only the prosecutor, but not the defendant, is allowed to appeal a certain decision.”³ These discrepancies as a whole contravene the principle of equality before courts and tribunals, including the equality of arms, which is indispensable to the obligation to ensure the right to a fair trial under article 14 of the ICCPR.

The Case of Evgeniy Zhovtis

The trial and conviction in 2009 of the prominent human rights defender and lawyer Evgeniy Zhovtis, on charges of vehicular manslaughter, is illustrative of the failure of Kazakhstan to respect its obligations under article 14. The ICJ observed the appeal hearing in that case and expressed concern over a number of inadequacies in the criminal process which were not remedied at the appeal stage. (The full report is annexed to this submission):

- Evgeniy Zhovtis was misinformed about his actual legal status during the investigation and interrogation;
- At the appeal hearing, there were attempts to prevent witness from testifying on behalf of Evgeniy Zhovtis;
- Very few members of the public seeking access were allowed to attend the hearing and most were prevented from attending, in contravention of the guarantees of public trial;
- Almost all of the motions submitted by the defence were dismissed, in contrast to those of the prosecution, which indicated a lack of equality of arms;
- The text of the judgment had been amended, which is prohibited under Kazakhstan’s criminal law;
- The appeal hearing was held in the absence of the defendant, in spite of the fact that the appellate Court was considering critical new submissions of fact.

The observers concluded that the above inadequacies as well as the overall manner in which the proceedings were conducted gave rise to doubts regarding the guarantees of presumption of innocence, equality of arms, and the impartiality of the Court.⁴ Further appeals of the defense of Mr. Zhovtis, including to the Supreme Court of Kazakhstan, were rejected.

The Case of Daniyar Kanafin

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.⁵ The ICJ is particularly concerned at attempts by the Kazakh

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

³ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) at para. 13.

⁴ The full report of the appeal hearing of the case of Evgeniy Zhovtis following the observation mission is attached to the present submission.

⁵ Report of the Special Rapporteur on the independence of Judges and lawyers, Leandro Despouy, op cit, para. 48

authorities to restrict the activities of defence lawyers. A notable example is 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.⁶ The application for disbarment was eventually rejected by the Bureau of the Almaty City Bar Association.⁷ Such attempts at disbarment are contrary to rights of freedom of expression protected by Article 19 of the Covenant as well as Principle 23⁸ 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 Daniyar 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.⁹ This practice undermines the right to defence by independent legal representation for detainees and criminal defendants by a counsel of their choosing, guaranteed by Article 14 3(d) ICCPR, this Committee has affirmed is not fulfilled by imposition of a state-appointed lawyer.¹⁰

The Human Rights Committee should raise questions regarding safeguards to ensure Kazakhstan's compliance with Article 14 ICCPR, including measures:

- **to ensure independence of the judiciary;**
- **to limit the powers of prosecutors;**
- **to protect the right to equality of arms in criminal cases;**
- **to protect the rights of defendants to legal representation of their choice;**
- **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 protect defence lawyers from interference in the exercise of their professional functions, and from instituting disbarment proceedings against lawyers for the legitimate exercise of their right of freedom of expression.**

⁶ ICJ Press Release, *Kazakhstan: ICJ calls for withdrawal of disbarment proceedings against defence lawyer*, 9 July 2009

⁷ Press Release, Bureau of the Almaty City Bar Association, 27 July 2009; *Almaty Attorney's CBN conflict*, <http://www.interfax.kz> 27 July 2009.

⁸ Principle 23 affirms the right to freedom of expression of lawyers.

⁹ See in relation to another similar case: *Freedom House, Update on Freedom of the Media in Kazakhstan*, June 2009

¹⁰ *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. See also General Comment 32, paragraph 32.

Article 7: Freedom from torture and cruel, inhuman or degrading treatment or punishment

Consistent and reliable reports indicate that torture and other forms of ill-treatment remain widespread in Kazakhstan.¹¹ There are allegations of ill-treatment, including torture used to extract self-incriminating “confessions” to be used as evidence in criminal proceedings.¹² Such “evidence” has been found admissible by Kazakh courts in at least 40 per cent of cases.¹³ This practice is contrary to obligations under Article 7 ICCPR, as well as the Convention Against Torture.¹⁴

The Committee against Torture in its recent Concluding Observations found that, despite the prohibition on admitting torture evidence in Kazakh law,¹⁵ such evidence is often in practice admitted in court, since courts proceed with trials without adequately addressing complaints of torture and ill-treatment of detainees, and without ordering independent medical examinations.¹⁶

Ill-treatment often takes place in the period following arrest before formal registration of an apprehended suspect is required.¹⁷ During this period, which is formally set at three hours,¹⁸ 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.¹⁹ 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.²⁰ Although a constitutional amendment of May 2007 placed the authority to issue arrest warrants exclusively with the courts,²¹ there is no mechanism for a detainee to challenge the lawfulness of his or her

¹¹ 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.

¹² 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;

¹³ 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

¹⁴ 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. See also article 14, Convention against Torture.

¹⁵ Article 116 Code of Criminal Procedure

¹⁶ 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>>

¹⁷ 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.

¹⁸ Article 134 Criminal Procedural Code

¹⁹ Amnesty International, *Kazakhstan, Summary of Concerns on Torture and Ill-treatment*, November 2008, EUR 57/001/2008, para. 1.3

²⁰ Article 138 Criminal Procedure Code; Committee Against Torture Concluding Observations para.10.

²¹ Article 16 of the Constitution

detention, such as through *habeas corpus*, as required by Article 9.4 of the Covenant.²²

The Human Rights Committee should question the government as to the measures in place 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 particular, it should ask what measures are in place:

- **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;**
- **to require that information should be provided to families as to the detention, including the identification of the place of detention;**
- **to exclude from 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 is unduly limited, falling short of the scope of criminal law specified by the Human Rights Committee in its General Comment 20 on Article 7 ICCPR, which refers to acts of torture or cruel, inhuman or degrading treatment "whether committed by public officials or other persons acting on behalf of the State, or by private persons."²³ 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 indicating 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.

Penalties prescribed by the criminal code for the crime of torture are not commensurate with the gravity of the offence, and therefore provide insufficient protection against torture to satisfy Article 7 ICCPR.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 to make a confession (Article 347 of the Criminal

²² Amnesty International, Kazakhstan, *Summary of Concerns on Torture and Ill-treatment*, op cit, para. 2.1

²³ Human Rights Committee, General Comment, No 20, op cit para.13. See further Article 1 CAT

²⁴ Concluding Observations of the Committee Against Torture, op cit para.17; Human Rights Committee, General Comment No.20, op cit para.13.

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

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 obligations of independent and effective investigation of allegations of torture under the ICCPR.³⁰

The Human Rights Committee should inquire of the Government as to whether steps are being undertaken or contemplated

- **to amend the crime of torture under Kazakh law in accordance with international standards;**
- **to amend the law to make these offences subject to penalties appropriate to their gravity;**
- **to provide for prompt, independent, and 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 Committee Against Torture Concluding Observations, para.18; Amnesty International, Summary of Concerns, op cit, para.1.1.

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 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; Article 12 CAT

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 ICCPR, anyone threatened with *refoulement* must be able to challenge the decision relating to return before an effective, independent and impartial body.³⁶

The Human Rights Committee should request the Government to provide information on the implementation of the obligation of Kazakhstan in regard to non-refoulement. The Committee should request information as to steps taken:

- **to ensure desistance 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