

I. Relationship between the norms of international treaties and the national legislation

1. The State has not implemented the recommendation of the UN HR Committee: “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.”¹

2. Relationship between the norms of international treaties and the national legislation of the Republic of Kazakhstan is determined by Article 4 of the Constitution of the Republic of Kazakhstan which, as amended on 10 March 2017, sets forth as follows: “1. The law in force shall include the provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaties and other commitments of the Republic as well as regulatory resolutions of the Constitutional Council and the Supreme Court of the Republic of Kazakhstan (...)

3. International treaties ratified by the Republic shall have priority over its laws. The procedure and the terms for the operation of international treaties, to which Kazakhstan is a party, in the territory of the Republic of Kazakhstan shall be determined by the legislation of the Republic”.

2. Accordingly, pursuant to this article international treaties including those on human rights are not applied directly, and the procedure and the terms of their operation are defined by a different legislation of the Republic of Kazakhstan.

3. Despite the fact that the norms of international treaties ratified by the Republic of Kazakhstan are given priority in the national legislation, the resolution of the Constitutional Council of the Republic of Kazakhstan No.2 dated 18 May 2006 “On the Official Interpretation of sub-paragraph 7) of Article 54 of the Constitution of the Republic of Kazakhstan” causes serious concern. In the declarative part of said resolution, the Constitutional Council made a reference to its own resolution No. 18/2 dated 11 October 2000 in which it said that the Vienna Convention on the Law of Treaties “does not define the procedure for implementation of treaties. This is the constitutional and legislative prerogative of the states and follows from the commonly accepted principle of international law—sovereign equality of the states.” Further, “based on this, the Constitutional Council believes that should an international treaty signed by the Republic of Kazakhstan, in whole or in any part, be duly recognized as contradicting the Constitution of the Republic of Kazakhstan, which under Article 4.2 of the Principal Law has the highest legal force in the Republic of Kazakhstan, such treaty recognised as not compliant with the Constitution, in full or in part, is not enforceable.”

3. In the declarative part of the said resolution, the Constitutional Council of the Republic of Kazakhstan asserts the following: “4. If an international treaty signed by the Republic of Kazakhstan has been duly recognized, in full or in part, as contradicting the Constitution of the Republic of Kazakhstan, such treaty or its relevant provisions shall not be enforceable.”

4. In our opinion, the said resolution of the Constitutional Council of the Republic of Kazakhstan contradicts the 1969 Vienna Convention on the Law of Treaties¹, in particular article 27 of the Convention, which states the following: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Recommendation:

1) Ensure legal clarity regarding the status and applicability of international treaties on human rights that have been ratified by the State party, by recognizing their complete priority over the national legislation, as established by the international obligations of the Republic of Kazakhstan with respect to recognition of the law of international treaties.

¹ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §5-6.

II. National Human Rights Institutions

1. In March 2017, the institution of the Ombudsman for Human Rights was enshrined in the Constitution and now it is elected by the Senate of the Parliament of the Republic of Kazakhstan to strengthen its independence. In early September 2017, the first elections of the Ombudsman for Human Rights were held.

2. Nevertheless, at the moment there is no special legislation on the Ombudsman, this institution is not represented in the regions of the country and does not have sufficient resources to perform the functions of the national human rights institution in accordance with the Paris Principles, despite the fact that this was already recommended to Kazakhstan by the HR Committee in 2016.²

It should be taken into account that Kazakhstan has a population of more than 18 million, the country has 17 large administrative and territorial units and a territory exceeding 2.5 million square kilometres. The solution of this problem is included in the Government's Action Plan for the implementation of the recommendations of the UN States parties in the framework of the Universal Periodic Review of Human Rights for 2015–2020, establishing the deadline for its execution until 2018.

3. However, up to date this institution has not been brought in line with the Paris Principles, which is confirmed by the fact that the International Coordination Committee of the National Human Rights Institutions has accredited the institution of the Ombudsman of the Republic of Kazakhstan under category "B," which means it does not fully comply with the Paris Principles. One of the main factors affecting the expansion of the mandate and strengthening of the Ombudsman is the lack of financial resources, which has been reiterated by the government representatives as well as the HR Committee³.

4. 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 Kazakhstan (Ombudsman) plus», and according to the process of its formation and representation of civil society activists and human rights defenders it is more in line with the Paris Principles.

5. However, lack of the powers of the NPM for monitoring of such places of deprivation of liberty as the police departments, premises of the National Security Committee of Kazakhstan, orphanages, special boarding schools, nursing homes for the elderly and disabled people, and military barracks is a source of concern; lack of material resources and inability to carry out urgent and unscheduled inspections of places of detention, upon relevant request, without coordination with the Commissioner for Human Rights of the Republic of Kazakhstan; inability to publish their findings and recommendations immediately after the inspections, and not solely on an annual basis.

6. In 2016 the Children's Ombudsman was established by a Presidential decree. However, it exists on a pro-bono basis, does not have sufficient legislative support to ensure its independence, sufficient staff or material resources to be able to perform its functions properly; therefore, it does not comply with the Paris Principles.

Recommendation:

1) Ensure full compliance of the national human rights institutions with the Paris Principles, including by legislative support of their independence, providing them with sufficient personnel and financial resources, to enable them to perform their functions properly.

² 2 Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §7-8

³ 3 Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §7-8.

2) *Take further measures to bring the Ombudsman institution into full compliance with the Paris Principles (General Assembly resolution 48/134, annex), including by strengthening further its independence and by providing it with adequate financial and human resources commensurate with its expanded role as also a national preventive mechanism.*

III. Independence of the judicial branch and guarantees of a fair judicial process

1. An analysis of the procedure of “election” and appointment of judges, from the point of view of democracy and transparency, gives rise to certain doubts. For example, in fact the Senate of the RoK can only choose candidates to become a judge of the Supreme Court among those who have been presented by the President; i.e. the “elections” of the judges of the Supreme Court in fact are conducted on a “non-alternative” basis, which basically constitutes a procedure of approving the proposed candidates and deprives the senators of freedom of choice when dealing with this matter. The concern about independence of the judicial selection process was also reiterated by the HR Committee in their Concluding Observations in 2016: it was in particular concerned about undue influence from the executive branch, owing to the President’s involvement in the appointment of members of the Supreme Judicial Council.⁴

2. However, not only through their status being assigned by the executive branch do the judges become dependent on it. The currently existing system of management of the judicial process limits the judges in their independence. The system of appraisal of the judges by the number of overturned judgments that currently exists inside the judicial community may have an impact on a judge’s career, and is a disguised form of manipulation of the action of judges. The judges are afraid of issuing judgments that are not desirable for the higher instances, because overturned judgments are considered as shortcomings in a judge’s work and may result in negative appraisals, with all ensuing consequences. In addition, when power is concentrated in the hands of chairmen of courts who are appointed by the executive power, that also limits the independence of the judges. Practically, the recommendations of the UN Special Rapporteur on the Independence of Judges and Lawyers based on the results of the mission to Kazakhstan in 2004 remained unfulfilled. Recommendations to strengthen the independence of the judiciary system are included in the Government’s Action Plan for the implementation of the recommendations of the UN States parties in the framework of the Universal Periodic Review of Human Rights for 2015-2020, but to date no significant changes have been made.

3. A Romano-Germanic law system, which Kazakhstan is a part of, could be characterised by a court system wherein the state’s prosecution, very strong traditionally, can draw support from a strong investigative and police apparatus. In this regard, it is very important to overcome the remnants of a repressive criminal-procedural past and balance out the authorities of the prosecution with those of the defence.

4. Unfortunately, to this date the criminal justice keeps being unnecessarily harsh and almost inquisition-like, producing very low numbers of acquittal verdicts. It should be admitted that in a criminal process, the authorities of defence are infinitely smaller compared to the authorities of the prosecution. The expanded rights of advocates to collect evidence, stipulated by the new Code of Criminal Procedure of the Republic of Kazakhstan, are surely positive but unfortunately clearly insufficient to ensure true contentiousness of the process. For example, the procedure for conducting expert checks following an advocate inquiry is regulated extremely sparsely; the law does not provide any guarantees for this provision to be actually implemented. The same can be said of the procedure of an advocate questioning a person who might have information relating to the case. Unfortunately, the Code of Criminal Procedure does not contain a direct prohibition to conduct searches at

⁴ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §37-38.

advocates' offices, and still wide open remains the issue of advocates having access to the premises of law-enforcement bodies and, more recently, even courthouses. The HR Committee shared our concerns in 2016: "the prosecution retains wide powers in the judicial process, in relation to both civil and criminal proceedings, which adversely affects the equality of arms."⁵

5. One of the most painful issues in the criminal procedural practice remains the limitations on the access to an advocate of one's choice, due to the advocate not having a special clearance for state secrets. Moreover, in 2018 the new Law on Advocate Practice and Legal Assistance was adopted, which further restricts the independence of the advocacy. The draft law was heavily criticized by the UN Special Rapporteur on the independence of judges and lawyers, the International Commission of Jurists, and the OCE Office for Democratic Institutions and Human Rights; however, it was adopted virtually with no changes. This issue was also a specific concern for the HR Committee in 2016, when it recommended to ensure that the right to a fair trial is respected, including access to counsel of one's own choice.⁶

Recommendations:

1) *Establish in the law clear grounds for disciplinary responsibility of judges (including dismissal) and criteria for a judge's non-compliance with the position she/he occupies, which would exclude his/her responsibility for a fair interpretation of the law that does not align with the opinion of the higher authority. The law should regulate the disciplinary procedure based on the principles of competition and equality while respecting the judges' rights to defend and appeal the ruling in a court of law.*

2) *Limit the powers of the chairmen of the courts to the function of representation and control over the court's office. Eliminate the personnel powers the court chairmen have with respect to judges, on initiation of disciplinary responsibility, on organization of legal proceedings in court, on taking anti-corruption measures, and on respecting the standards of judicial ethics.*

Take all measures necessary to safeguard, in law and practice, the independence of the judiciary and guarantee the competence, independence and tenure of judges. Eradicate all forms of undue interference with the judiciary by the executive branch and investigate such allegations effectively. Strengthen efforts to combat corruption in the judiciary and prosecute and punish perpetrators, including judges who may be complicit therein. Ensure that the Supreme Judicial Council established to govern the judicial selection process is fully independent and operates with full transparency and, to that end, consider revising the membership of the Council with a view to ensuring that most of its members are judges elected by judicial self-government bodies. Ensure that an independent body is responsible for judicial discipline, clarify the grounds for disciplinary action, including dismissal, and guarantee due process in judicial disciplinary proceedings and independent judicial review of disciplinary sanctions.

3) *Exclude from the Code of Criminal Procedure the exclusive powers of prosecutors who violate the principle of equality of parties before the court, such as the authority to request case materials from the court, power to protest against court judgments, including those that have entered into legal force, power to suspend a court judgment from being executed, etc. Introduce a legislative requirement that any interference with human rights, including the rights to protection, inviolability of the home, privacy of correspondence, etc., would only be exercised following the sanction of a court of law based on objective criteria established by the law.*

Review the powers of the Office of the Prosecutor General to ensure that the independence of the judiciary is not undermined and the equality of arms principle is strictly observed.

4) *In the Code of Criminal Procedure, provide to the maximum possible extent equal possibilities for prosecution and defence to collect evidence. Provide that evidence would be recorded by an*

⁵ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §37.

⁶ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §39-40.

independent (investigative) judge and eliminate dependence on the law enforcement agencies in matters of appointing judicial expert examinations.

5) Develop and implement qualitatively new indicators of efficiency of the law enforcement agencies and courts with a view to eliminating the accusatory bias in the process of administration of justice. An acquittal ruling should not be used as the basis for holding a prosecutor or a judge to disciplinary liability.

6) Revise the provisions of the new law on advocacy and legal assistance from the point of view of ensuring independence of advocates in accordance with the recommendations of the UN Special Rapporteur on the independence of judges and lawyers, the International Commission of Jurists, the International Bar Association, and the OSCE Office for Democratic Institutions and Human Rights.

Ensure sufficient safeguards to guarantee, in practice, the independence of lawyers, refrain from taking any actions that may constitute harassment or persecution or undue interference in their work, and bring to justice those responsible for any such actions. Ensure that any restrictions or limitations on fair trial guarantees that are imposed to protect State secrets are fully compliant with its obligations under the ICCPR, and particularly that the rights of affected individuals, including equality of arms, are strictly observed

7) Implement the recommendations issued by the UN Special Rapporteur on the independence of judges and lawyers following his visit to the Republic of Kazakhstan in 2004.

8) Implement the recommendations adopted by the HR Committee in 2016.

IV. Right to life

1. Altogether, Kazakhstan does not implement and does not take effective measures to implement the recommendations of the UPR's first and second cycle regarding the exclusion of the death penalty from the legislation. In particular, Kazakhstan is not planning on changing its legislation in this respect any time soon, and neither does it plan on taking steps toward signing and ratifying the Rome Statute of the International Criminal Court, as well as the Second Optional Protocol to the ICCPR, which was recommended by the HR Committee in 2016.⁷

2. On 21 May 2007 changes were made to the Constitution of the Republic of Kazakhstan according to which the death penalty may be imposed for crimes of terror which involved human casualties and for especially grave crimes committed during the time of war. This norm prevents Kazakhstan from being able to ratify the Second Optional Protocol to the Covenant, since Article 2.1 of the Protocol only provides for one possible case of using the death penalty as a permissible reservation: "in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime."

3. On 3 July 2014 Kazakhstan adopted a new Criminal Code of the Republic of Kazakhstan which provides for 17 elements of crimes where the death penalty is defined as a measure of punishment. According to the amendments made to the criminal legislation of the Republic of Kazakhstan the imposition of punishment in the form of the death penalty became possible not only for crimes involving human casualties and for especially grave crimes committed during wartime, but also for other crimes that are not covered by the wording defined by international standards and Article 15 of the Constitution of the Republic of Kazakhstan. Those changes contradict international standards that concern the right to life and are not consistent with the general international practice which limits the scope of the death penalty.

4. At the same time, the Republic of Kazakhstan continues to adhere to the moratorium on the execution of death sentences. In 2016, one person was sentenced to death, however, due to the moratorium, the sentence was not carried out. The recommendations of the UPR relating to the death

⁷⁷ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §15-16.

penalty were included in the Government's Action Plan for the implementation of the recommendations of the UN States parties in the framework of the Universal Periodic Review of Human Rights for 2015-2020, but no steps towards a complete ban on the death penalty were made.

Recommendations:

Retain the moratorium on the death penalty and review the list of capital crimes with a view to limiting them to the most serious crimes only.

1) Exclude the possibility of applying the death penalty from the Constitution of the Republic of Kazakhstan.

2) Exclude the death penalty as a form of punishment from the criminal legislation of the Republic of Kazakhstan.

3) Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.

4) Ratify the Rome Statute of the International Criminal Court.

V. Right to liberty and personal inviolability

1. The existing procedure for judicial authorization of detention does not fully comply with the principles and objectives of the institution “*habeas corpus*” and does not guarantee the protection of the rights of persons from torture and unlawful detention. The lawfulness and reasonableness of the detention in each case is not subject to judicial review. The suspects (accused) under a preliminary arrest are not questioned by the court about possible violations of their rights and freedoms. The functions of the court are limited to examination, in a closed process, of the materials of the circumstances taken into account when selecting a measure of restraint (severity of the crime of which the person is suspected (accused), presence of a permanent place of residence, establishing a person’s identity, information on violations of previously selected measures of restraint, any attempts to escape the investigation suspects may have been taken). Detention is sanctioned by the courts of first instance, the same instance in which the criminal case is subsequently reviewed on its merits.

The HR Committee expressed concern regarding several aspects of the right to liberty in their Concluding Observations: the date and time of arrest should be correctly registered and fundamental safeguards should be in place, in compliance with article 9 and 14 of the ICCPR.⁸

2. The 1995 Law of the Republic of Kazakhstan on Forced Treatment of Patients with Alcoholism, Drug Addiction and Substance Abuse provides grounds for placing such patients in places of confinement: “at the initiative of the patient’s relatives, labour collectives, public organizations, agencies of internal affairs, prosecution, and guardianship, only based on a medical opinion” (Article 4 of the law). Although rulings on compulsory treatment are rendered by courts of law, it appears the law does not provide sufficient guarantees against possible abuse, and internal regulations at the drug treatment organizations and the rights and responsibilities of patients stipulated in the law seem more like those used for suspects and accused persons who are detained as a preventive measure or placed under an administrative arrest, arrested or imprisoned.

3. There is a whole other set of questions with respect to the Law of the Republic of Kazakhstan on the procedure and conditions of detention of persons in special institutions (Law on detention) that provide temporary isolation from society. In addition to persons subjected to administrative arrest, the Law on detention provides for the detention in custody of persons who do not have a specific place of residence or registration at the place of residence or domicile in the territory of the Republic of Kazakhstan (Article 2.4 of the law). Restriction of their freedom and personal immunity in this Law is defined as “preventive restriction of freedom of movement as a measure of individual prevention of offenses in relation to persons that have no specific place of residence and/or documents

⁸ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §25-30.

confirming their identity, which consists in [such persons'] temporary isolation in a special internal affairs establishment.”

4. Absence of identification documents or a place of residence does not constitute a criminal or administrative offense, unless it involves other crimes or administrative offenses that entail imprisonment or administrative arrest as the basis for detention. Despite this, such persons are placed in custody into special establishments as a measure of temporary isolation. Essentially, this law defines the grounds, procedure and timeframes for keeping persons at temporary isolation establishments, despite the fact those persons are not suspected and accused of committing a criminal or administrative offense. Although the decision to place a person in a reception centre is sanctioned by a court of law, it is obvious this law largely contradicts international standards of following the presumption of freedom. The HR Committee asked Kazakhstan already in 2016 to bring its practices in this regard in compliance with the ICCPR.⁹

5. It suffices to have a look at the rights and responsibilities of those persons as they are defined in Article 46-5 of the Law on detention:

Those persons have the right:

- to an eight-hour sleep during night-time;
- to a daily walk of no less than two hours every day;
- they must follow the internal rules, they may be punished, and they may be subjected to special-purpose means and physical action.

6. In general the legal norms pertaining to restriction of freedom and personal inviolability are “spread across” a whole number of regulatory legal acts, while those restrictions are equipped with various procedures none of which guarantee against arbitrary application.

7. Despite certain positive developments in the Kazakhstani legislation that provide for the right to freedom and personal inviolability, the law enforcement agencies quite often restrict the rights of detainees and suspects by:

- refusing to document the exact time of detention¹⁰, a concern that was also expressed by the HR Committee;
- falsifying an administrative offense in order to carry out an administrative arrest which substitutes the detention of the suspect;
- failing to respect the right of detainees to inform their relatives and have access to an advocate and doctor, another concern that was reiterated by the HR Committee during Kazakhstan’s review in 2016.¹¹

8. The excessive use of pre-trial detention is a serious problem, including a) rulings selecting this measure of restraint are not sufficiently justified, b) detention is applied toward persons who have committed minor crimes; c) timeframes of keeping persons in detention during a preliminary investigation and trial are still too long, as pointed out by the HR Committee in 2016: the State should ensure that, in practice, the recorded date and time of arrest is that of the actual apprehension.¹²

9. The following measures are applied unjustifiably toward persons who are suspected of committing administrative offenses:

- detention for a period of three hours without any paperwork whatsoever;
- forced fingerprinting and mugshots full face and half-face;

⁹ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §29-30.

¹⁰ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §25-26.

¹¹ Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §27-28.

¹² Concluding Observations adopted by the HR Committee, 9 August 2016, CCPR/C/KAZ/CO/2, §25-26.

- forcing the detainees to write up explanatory notes, which is not something provided in the law, etc.

Recommendations:

1) *Revise, adopt and publish by-laws (rules, instructions, instructional guidelines) that are in line with international standards and that set forth stringent procedures for detaining, delivering and bringing in persons who have been detained as a matter of a criminal or administrative process, including those persons who are subject to deportation or expulsion or whose status of a refugee is still being defined, and individuals who are detained and placed in custody in order to prevent infectious diseases from spreading, as well as mentally ill, alcoholics, drug addicts or vagrants.*

Bring the legislation and practices into compliance with article 9 of the ICCPR.

Ensure that, in practice, the recorded date and time of arrest is that of the actual apprehension and that those responsible for any falsification of such information are appropriately sanctioned.

Ensure that, in practice, all persons deprived of their liberty are informed promptly of their rights and are guaranteed all fundamental legal safeguards from the very outset of detention, including prompt access to counsel of their own choosing and confidential meetings with counsel.

Ensure that failure to do so constitutes a violation of procedural rights entailing appropriate sanctions and remedies.

Bring its administrative detention practices into full compliance with articles 9 and 14 of the ICCPR and ensure that due process rights are fully respected, including an effective right of appeal, and that the principles of legality and proportionality are strictly observed in any decisions restricting the right to liberty and security of individuals.

Abolish the practice of preventive detention of activists, which is inconsistent with the State party's obligations under articles 9, 14, 19 and 21 of the ICCPR.

2) *Introduce into judicial practices of rendering rulings on compulsory treatment of psychiatric illnesses the internationally-adopted method of "tripe-test approach" whereunder a person may not be sent to compulsory treatment in the conditions of confinement if at least one of the following three conditions is met: first, the person must be objectively recognized as mentally ill; second, mental illness must be of such nature and such degree that justifies compulsory treatment in the conditions of confinement; third, the lawfulness of an extended compulsory treatment in the condition of confinement must be commensurate with the duration of mental illness.*

3) *In order for a person to be objectively recognized as mentally ill, an objective medical expert examination is required. In this regard, any person in whose respect a ruling of compulsory treatment of a mental disorder might be issued must be provided free and efficient access to independent psychiatric expert examination.*

4) *Determine that compulsory treatment in the conditions of confinement, based on the nature and degree of the psychiatric disorder, may be justified only when other, less stringent measures, have been already considered and deemed insufficient for the protection of private or public interests.*

5) *Introduce changes and amendments to the legislation on the procedures and conditions of detention of persons in special-purpose establishment that provide temporary isolation from society, and on compulsory treatment of persons suffering from alcoholism, drug addiction and substance abuse, with a view to bringing it in line with international standards.*