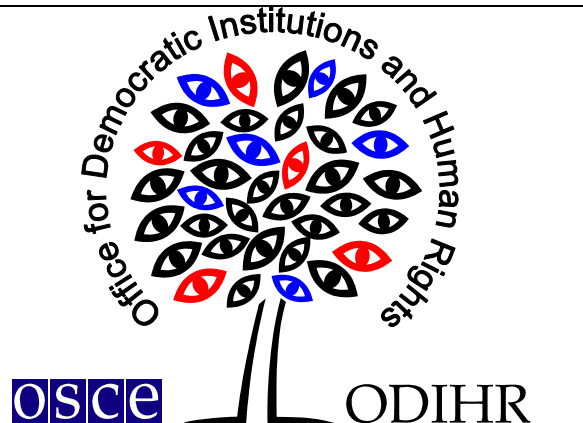


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N O N P A P E R

Preliminary Comments
on the Draft Law
“On Amendments to Some Legislative Acts of the
Republic of Kazakhstan on National Security Issues”

For the sections of the comments hereafter that relate to the freedom of religion or belief, this report has been prepared on the basis of comments provided by the OSCE ODIHR’s Panel of Experts on Freedom of Religion or Belief. For the sections of the comments that relate to political parties, this report has been prepared on the basis of comments provided by Jeremy McBride (Reader in International Human Rights Law, University of Birmingham, Co-founder and Deputy Chair of Interights).

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1. INTRODUCTION

1. In March 2005, the OSCE ODIHR was requested by the OSCE Center in Almaty to provide review of the draft amendments (hereinafter referred to as the “Draft”) to the Law of the Republic of Kazakhstan on Making Amendments to Several Legislative Acts Concerning National Security, in particular with regard to the potential implications of the Draft for the right to freedom of association and assembly, freedom of religion and belief, freedom of opinion and expression.

2. The Draft was submitted to the Mazhilis for consideration on 24 February 2005.

2. SCOPE OF REVIEW

3. These Preliminary Comments do not purport to provide a comprehensive review, but give an overview of the Draft in the light of international standards pertaining to the right to freedom of association, freedom of religion and belief, freedom of opinion and expression. They identify the main concerns in this regard and make recommendations. The international standards referred to by the Comments are not only those legally binding for the Republic of Kazakhstan, but also include international instruments not binding upon Kazakhstan as well as documents of declarative or recommendatory nature which have been developed for the purpose of being used by the legislator as a source of guidance. The Comments may also refer to best practices from other OSCE participating States.

4. The OSCE ODIHR would like to mention that the comments provided herein are without prejudice to any further comments or recommendations that the ODIHR may wish to make on the draft legislation under consideration. No comment on a particular provision of the Draft does not imply that the OSCE ODIHR is satisfied that it is in compliance with international standards, but merely that it was not possible within the narrow timeframe available to examine the whole text in all its ramifications across the entire legal system of Kazakhstan. It is therefore possible that not all aspects of the Draft with regard to human rights and fundamental freedoms are covered by these comments.

3. EXECUTIVE SUMMARY

5. The Draft is primarily concerned with amending a wide range of legal acts with a view to enhancing and expanding the state powers under the law of Kazakhstan for the protection of “national security” interests. The Draft has implications in criminal, civil and administrative law and more specifically, on legislation governing or affecting the freedom of assembly and association, the freedom of expression, the freedom of religion, the right to liberty and security as well as the right to respect for private life and family life. Some of the amendments relate to issue of terrorism. There are also amendments that stem from the recent law “On Counteractive Measures Against Extremist Activities” in respect of which the OSCE ODIHR had expressed serious concerns¹.

¹ See OSCE ODIHR Comments on the Draft Laws of the Republic of Kazakhstan “On counteractive measures against extremist activities” and ‘On Amendments to several legislative acts with regard to

6. The Draft is mostly about restricting human rights and fundamental freedoms protected under the Constitution of Kazakhstan², which is permissible under both international and Kazakhstani law provided the restrictions are necessary in a democratic society, pursue a legitimate goal, are proportionate to that goal and respond to a pressing public or social need. Furthermore, “national security” may be invoked to justify such restrictions, but only when they are taken to protect “*the existence of the nation or its territorial integrity or political independence against force or threat of force*”³. The draft however does not provide and does not attempt to provide any justification in support of the restrictive measures considered. It contains a series of amendments in respect of which it is reasonable to assert that their impact would either exceed what is permissible under international human rights protection systems or be open to abuses when enforced. The envisaged measures are often out of proportion with the aim pursued by the Draft. These shortcomings primarily stems from the vagueness of the definitional language used in the envisaged amendments.

7. Among the fundamental freedoms affected by the Draft the freedom of religion and belief requires particular attention. The over-restrictive thrust of the Draft is further compounded by the fact that international law does not permit imposing any limitations on the exercise of this freedom on the ground of national security⁴. “National security” may only justify restrictions on freedom of movement and the free choice of residence, the exclusion of the press and public from all or part of a trial, freedom of expression and freedom of association and assembly. Therefore, the amendments proposed which affect the freedom of religion or belief should not be considered in the context of legislation dealing with “national security” issues. The comments hereafter that pertain to the freedom of religion or belief must all be considered in the light of this position principle.

8. In terms of legislative drafting techniques, another concern is the lack of thematic focus of the Draft. Although the Draft by nature does not seek internal consistency, which is not objectionable in itself, some of the amendments envisaged have no clear and direct connection to the matters involved in the protection of national security interests and thus raise concern. In the absence of explanatory notes, it would be advisable that a provision or some introductory statement be inserted in the text of the Draft in order to define its purpose and scope. A definition of “national security” interests would be particularly welcome. It would be sufficient though to include a reference to the relevant

counteractive measures against extremist activities’ – Opinion Nr. TERR 001/2005 (DP/TK), 11 February 2005, Rev. 22.03.

² Full Text of the 1995 Constitution of Kazakhstan in Russian and English available at <http://www.legislationline.org/view.php?document=62097>.

³ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle VI. For more details, see note 7.

⁴ Neither Article 18 of the International Covenant on Civil and Political Rights (hereafter “ICCPR”) nor Article 9 of the European Convention on Human Rights (hereafter “ECHR”) includes ‘national security’ among the legitimate grounds for subjecting the freedom of thought, conscience and religion to any limitations. International law expressly prohibits derogation from the freedom of thought, conscience or religion in time of public emergency (article 4.2). It can only be restricted upon with regard to its external manifestations and only on the following grounds that do not include “national security”: public safety, public order, public health or morals and the fundamental rights and freedoms of others.

legislation, if any, on the matter. These additions would provide guidance on interpretation of the Draft.

9. Below follows the full list of recommendations:

1. It is recommended that amendments to Article 273 of the Civil Procedure Code (which is concerned with the adjudication of election disputes) as well as the proposed new Articles 102-2 and 102-3 of the Administrative Code (which is concerned with election rights and other related issues) be removed from the Draft. This recommendation is not an opinion on the content of these amendments as it is solely justified by the need for consistency. [see para 11⁵]
2. It is recommended that the Draft include and/or refer to a definition of “national security” interests and set out the purpose and scope of the Draft. [see para 12] The Draft should demonstrate that the limitations envisaged respond to a pressing public or social need and are necessary to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
3. The provision banning the operation of informal groups curtails the right to freedom of association and needs to be reconsidered. [see para 16]
4. It is recommended that the draft provisions requiring that the associations with foreign funding sources present reports to the tax bodies on the use of the funds received be reconsidered. [see para 21]
5. It is recommended that the requirement of personal presence at the constituent conference of the political party be deleted from the Draft. [see para 27]
6. It is recommended that the provisions requiring structural units of political parties to be registered be repealed. [see para 31]
7. It is recommended that suspension of political party activities be made clearly a measure that is exceptional and not an automatic consequence of the violations cited. It is further recommended that a possibility be afforded to political parties to take corrective action and therefore reduce the term of suspension. [see para 36]
8. It is recommended that the provisions that allow for the prohibition of political parties for reasons other than unconstitutionality be repealed. [see para 37]
9. It is recommended that the power to prohibit activities of a political party be deleted from Article 374, para 6, of the Administrative Code. [see para 41]
10. It is recommended that Articles 337 of the Criminal Code and 374, para 4, of the Administrative Code be amended to make provisions for proportionate penalties. [see para 42]

⁵ This note as all notes in square brackets after each recommendation refer to paragraphs as numbered in the present Report. The analysis on which ground the recommendation is made can be found in the paragraphs preceding the one specifically referred to in square brackets.

11. It is recommended that Article 374, para 6, of the Administrative Code be amended to include reasonable steps defense. [see para 42]
12. It is recommended that the provision for confiscation in Article 2, para 2, of the Law on Political Parties be made proportionate. [see para 44]
13. It is recommended that the Law on Political Parties specify the deadline for publishing financial statement. [see para 45]
14. It is recommended that the possibility of suspension of activities for non-publication of the annual financial statement required under the amendment introduced in Article 18 of the Law on Political Parties be reconsidered. It is recommended that political parties be afforded the possibility to take corrective action and thus avoid suspension or reduce its term [see para 46]
15. It is recommended that the provision, which contains a prohibition on facilitating the nomination and election of candidates, etc to be introduced at Article 102, para 3, of the Administrative Code be repealed. [see para 47]
16. With regard to content restrictions on the publication or broadcasting of materials in mass media, it is recommended that the law be brought in line with the three-pronged test provided for by the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. [see para 49]
17. It is recommended that the law narrowly define the instances of speech which do not enjoy the level of protection afforded to free speech. Moreover when penalizing hate speech, the law should make the applicability of the offense limited to the instances which constitute incitement to discrimination, hostility or violence. [see para 50]
18. It is recommended that the provisions concerning the prohibition of the disclosure of information classified as state secret contain reference to relevant legislative acts. [see para 51]
19. It is advisable that the draft amendments be reviewed to clearly delineate what constitutes “justification of terrorism,” as well as to make (a) intent and (b) real and clear danger of commission of a terrorist offense the necessary preconditions for the applicability of the offense of “justification of terrorism.” [see para 57]
20. It is recommended that the draft be amended to include a range of graduated sanctions for unlawful conduct listed in Article 13, and to make it clear that closure of mass media can only be the measure of last resort. [see para 61]
21. The law should define narrowly the unlawful conduct which may justify the imposition of sanctions on the media outlet. [see para 62]
22. It is recommended that the law adopt a higher standard by making the court the only body authorized to order any interference with freedom of opinion and expression. This can be done by expedient or simplified court procedure. [see para 64]

23. It is recommended that the draft be amended to specify the scope of terrorist and “extremist” financing, as well as to ensure that the offense only apply when committed willfully, and with the intention or in the knowledge of the alleged offender that the funds will be used for terrorist or “extremist” activities or by terrorist or “extremist” organizations⁶. [see para 70]
24. It is recommended that the provisions concerning liability for participants in unlawful assemblies be reconsidered. In case the legislator opts for not abolishing liability for participants, the legislation of public assemblies needs to be amended to include a clear and unambiguous definition of a participant of a public assembly, as well as the provisions on liability need to be reviewed to ensure that the participants benefit from the “reasonable excuse” defense. [see para 75]
25. It is recommended that the requirement of mandatory registration for religious groups be repealed. [see para 84]
26. It is recommended that the amendments concerning the regulation of missionary activities be repealed. [see para 97]
27. It is recommended that the provisions concerning the religious instruction of a child be repealed altogether or, alternatively, detailed by providing exact criteria of assessing damage and including references to the relevant legislation. [see para 106]
28. It is recommended that the provisions concerning suspension, reorganization, and dissolution of religious associations be reconsidered. [see para 110]
29. It is recommended that offenders sentenced for “*crimes containing extremism features*” be not included in the list specifying categories of offenders subject to post-release supervision. [see para 114]
30. It is recommended that the legislator consider providing for supervised parole in the case of crimes committed as part of an organized criminal group. [see para 116]
31. It is recommended that the existing classification between general and special “operative-investigative” measures be reconsidered in the light of internationally recognized standards (particularly those referred to under note 80 of these Comments) so that all measures that constitute a serious interference with the respect for private life, including the protection of personal data, be subject to prior prosecutorial authorization. [see para 119]
32. It is recommended that the sentence “*which violate the inviolability of private life, secrecy of letter exchange, telephone conversations, telegraph messages and postal parcels, as well as the right to inviolability of housing*” be deleted. [see para 121]

⁶ This recommendation needs to be seen against the backdrop of the OSCE ODIHR Comments “On Counteractive Measures Against Extremist Activities” and “On Amendments to Several Legislative Acts with regard to Counteractive Measures against Extremist Activities” [for exact reference, see note 1, page 4].

4. ANALYSIS AND RECOMMENDATIONS

4.1 INTRODUCTORY OBSERVATIONS

10. The Draft is primarily concerned with amending a wide range of legal acts with a view to enhancing and expanding the state powers under the law of Kazakhstan for the protection of “national security” interests. The Draft has implications in criminal, civil and administrative law and more specifically, on legislation governing or affecting the freedom of assembly and association, the freedom of expression, the freedom of religion, the right to liberty and security as well as the right to respect for private life and family life. Among the legal acts affected by the Draft are the Criminal Code, the Code of Criminal Procedure, the Code of Civil Procedure, the Administrative Code, the Law on Political Parties, the Law on Mass Media, the Law on Non-Commercial Organizations and the Law on Religious Freedom and Religious Associations. Other rights such as the right to an education and the right to elections are also affected by the changes proposed. Some of the amendments contained in the Draft complement the recent law “On Counteractive Measures Against Extremist Activities” by providing criminal penalties for the conduct of, or participation in “extremist” activities. Other proposed changes are specifically concerned with the fight against terrorism.

11. From the title of the Draft one may infer that the thematic focus of the Draft is on the protection of “national security” interests. Therefore, one may question the opportunity of introducing amendments that have no clear and direct relevance to these interests. For the sake of clarity and coherence, all of the amendments proposed should be clearly centered around the purpose of the Draft. The amendments proposed to article 273 of the Civil Procedure Code (which is concerned with the adjudication of election disputes) as well as the proposed new articles 102-2 and 102-3 of the Administrative Code (which is concerned with election rights and other related issues) do seemingly have no connection to “national security” matters. **Therefore, it is recommended that these amendments be removed from the Draft. This recommendation is not an opinion on the content of these amendments, but is justified by the need for consistency.** Alternatively, such amendments would need to be proposed and considered within the context of election reform specifically.

12. The Draft does not provide or refer to a definition of the “national security” interests which it purports to strengthen. Whereas the Draft may be viewed as essentially expanding the scope of permissible human rights restrictions on the ground of national security, the lack of definition runs against the requirements of legality, certainty and foreseeability in the application of the law. Typically, the national security concept can be broadly defined as a system of views on ensuring the security of the individual, society and the state from external and internal threats in all spheres of life in a given state. From a human rights perspective, it is noteworthy that the definition of the term “national security” often begins with “freedom from danger, risk, etc” and this emphasis is somehow reflected in the universal recognition of a right to security, which goes hand in hand with the right to freedom. Clearly, the appropriate function of “security” is as the means to another quality – freedom, no less – and not as an end in itself. In this regard, the notion of “national security” must be interpreted restrictively and all limitations clauses based on that notion need to be seen in the light and context of the particular right or freedom at issue. Most importantly, “national security” may be invoked to justify such limitations “*only when they*

are taken to protect the existence of the national or its territorial integrity or political independence against force or threat of force”⁷. Isolated threats to law and order are not sufficient *per se* to justify such measures⁸. **In light of these considerations, it is recommended that the Draft include and/or refer to a definition of ‘national security’ interests and set out the purpose and scope of the Draft.** These insertions would provide guidance on interpretation of the Draft. **It would be sufficient though to include a reference to other relevant legislation, if any, on the matter. The Draft should demonstrate that the limitations envisaged respond to a pressing public or social need and are necessary to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.**

4.2 FREEDOM OF ASSOCIATION

4.2.1 The right to associate informally.

13. The Draft under consideration bans informal associations from operating in the territory of the Republic of Kazakhstan.⁹

14. It is a well-recognized principle that freedom of association includes the right to associate informally and that no one can be required to join an association. The Fundamental Principles on the Status of Non-Governmental Organizations in Europe (hereinafter referred to as the Fundamental Principles) provide that “NGOs can be either informal bodies, or organizations which have legal personality.”¹⁰ Acquisition of legal status should not be a prerequisite for the exercise of rights to association¹¹. The fact that non-governmental organizations may be formed as legal entities does not mean that individuals are required to form legal entities in order to exercise their freedom of association.

15. Furthermore, the notion of “association” has an autonomous scope and does not depend on the classifications resulting from national law. The freedom of association would be of a very limited and theoretical scope if it were not accompanied by a guarantee of being able to share one’s beliefs or ideas in community with others. The

⁷ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle VI, para 29. The “Siracusa Principles” were adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human rights, and the International Institute of Higher Studies in Criminal Sciences. Though not legally binding, these principles provide an authoritative source of interpretation of the ICCPR with regard to limitations clauses and issues of derogation in a public emergency.

⁸ *Id.* 7. Principle VI, para 30.

⁹ Draft amendments to the Code of Administrative Violations, Article 374-1.

¹⁰ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Council of Europe, para 5 [full text in English and Russian available at http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Civil_society/, last visited on 10 March 2005]. It is worth mentioning that the Fundamental Principles, although not legally binding in general and with regard to the Republic of Kazakhstan in particular, still provide a valuable source of guidance in this regard as they allow to interpret the provisions of relevant binding international instruments.

¹¹ As well as the rights to expression and peaceful assembly.

classifications operated in national law can only be a starting point, but in no way may result in banning informal associations on the sole ground of their not having legal personality¹². However, certain privileges (such as state contracts or access to tax preferences) may be legitimately conditioned on the establishment of a formal association.

16. In light of the above, it is recommended that the provision banning the operation of informal associations or groups be reconsidered.

4.2.2 Responsibility for non-commercial associations

17. The Draft supplements the Law on Non-Commercial Organizations by a provision that “*non-commercial organization carrying out its activities at the expenses of finances provided on gratuitous basis by foreign governments, international and foreign organizations, foreign citizens, stateless person shall provide report to tax bodies on the using such finances according to the legislation of the Republic of Kazakhstan.*”¹³

18. Generally, the legal rules for foreign and domestic funding should be the same. A formal non-governmental organization that is properly established in one country should be allowed to receive cash or in-kind donations, transfers, or loans from sources outside the country so long as all generally applicable foreign exchange and customs laws are satisfied. The ability to solicit, receive and utilize financial contributions, including those from foreign sources, is central to maintaining a non-profit’s operational capacity and is recognized and protected by standards such as the OSCE commitments.¹⁴ This does not necessarily inhibit a state to regulate and monitor funding of criminal activities. Whatever regulation may be necessary should however never be indiscriminate in its form or effect.

19. In this regard, the Draft does not make clear what kind of information is to be included in the “reports”. Neither does it specify the form and effect of these reports. Furthermore, it does not indicate whether they differ - and if so, how - from the information required to be presented to the tax authorities under the Tax Code¹⁵. By prescribing a further reporting requirement for organizations receiving foreign subsidies exclusively, the Draft introduces an element of discrimination for which no justification is advanced or can be inferred from other provisions of the Draft. Unless the information required under the envisaged new procedure exceeds what is required under the ordinary procedure under the Tax Code, which would be a concern in itself, the proposed provision duplicates the already existing provisions in the Code, which oblige the taxpayer to present the necessary information in the order provided for by the Code. Finally and most importantly, the draft amendment in question provides the tax body with

¹² See *Chassagnou and Others v. France*, judgment of the European Court of Human Rights (ECHR), 29 April 1999; *The United Communist Party of Turkey and Others v. Turkey*, judgment of the ECHR, 30 January 1998; *Artico v. Italy*, judgment of ECHR, 13 May 1980.

¹³ Draft amendments to the Law of the Republic of Kazakhstan on Non-Commercial Organizations, Article 41, para 2.

¹⁴ See Document of the Copenhagen Meetings of the Conference on the Human Dimension of the CSCE/29 June 1990, para 10.4 (“[The participating States express their commitment to] allow members of such groups and organizations ... to solicit, receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.”)

¹⁵ Tax Code of the Republic of Kazakhstan, adopted in 2001.

functions that go beyond its mandate and contradict the legislation, in accordance to which tax bodies should only be mandated to ensure the payment of taxes.

20. The proposed amendments with respect to regulation of freedom of association, as well as freedom of conscience and activity of religious associations (since religious associations fall in the category of non-commercial organizations) raise certain concerns with regard to both the relevant international standards and to the extant domestic law. Note that the lack of coordination with other normative legal acts of the Republic of Kazakhstan, as well as vagueness in the proposed amendments which present opportunities for unlimited discretion and grounds for abuse in the sphere of freedom of association, religion and church-state relations.

21. It is recommended that the draft provisions requiring that the associations with foreign funding sources present reports to the tax bodies on the use of the funds received be reconsidered .

4.3 POLITICAL PARTIES: FREEDOM OF ASSOCIATION AND THE RIGHT TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS

4.3.1 Establishment of political parties

22. The Draft¹⁶ introduces a requirement of personal participation by citizens at the constituent conference of a political party, specifically precluding the use of a power of attorney.

23. The only possible justification for such requirement would seem to be an objective of ensuring that all individuals concerned with the formation of a political party are fully involved in the process leading up to this event. Although such a requirement is undoubtedly a restraint on the freedom of association of such individuals in that they cannot choose how they will express their willingness to be founding members, it is at least arguable that both the significance of a political party for public affairs and the need to ensure that the genuineness of a person’s support for a particular set of policies is sufficient to warrant an attempt to ensure that the commitment is given at the actual time the decision is taken and not before all the debate concerning this has taken place.

24. However, even if it is possible to conceive of such a restriction being required by certain abuses, its acceptability in the present context still looks problematic as it has to be seen in the light of the need for at least one thousand citizens representing two thirds of provinces, the city of the Republic’s importance and the capital city to convene the constituent conference of a political party. Such a requirement could itself be seen as interfering unduly with the right to freedom of association and the right to take part in the conduct of political affairs, although there might not be a problem if the requirement operated only as a qualification for obtaining financial support as opposed to the ability to operate since depth of support would be a material consideration in granting any such support.

25. The difficulties with this requirement stem firstly from the fact that the two parts of the threshold – numbers and breadth of representation - curtail the ability of those who

¹⁶ Draft amendment to the Law on Political Parties, Article 6, para 1.

wish to associate to decide on the objectives of an association without any evident pressing need on the part of the State. In addition the second element imposes an unreasonable restriction on the formation of political parties since these must be national at inception which does not necessarily reflect the way in which political movements can develop. The problematic nature of these two elements will be severely exacerbated by the addition of a requirement of personal participation in the constituent conference and it is difficult to envisage a sufficiently compelling State interest that could justify its imposition.

26. The insertion of the specification that the lists of both the initiative groups of citizens for the creation of a political party and the party’s members to be submitted to the registration agency must be in both paper and electronic form¹⁷ does not as such seem problematic, although it would be desirable that the electronic version be in a format that cannot be altered so that its integrity is at least as secure as a paper version. However, there might be grounds for concern as to whether there are adequate of controls on further disclosure of these lists – submission is needed once citizenship is accepted as a condition for formation of a political party - since the risk of this occurring might discourage persons from providing support for the formation of a political party and thus be an effective limit on freedom of association.¹⁸ Onward transmission of an electronic document is particularly easy and it would be clarify the extent to which the disclosure of information received by registration agency is regulated.

27. It is recommended that the requirement of personal presence at the constituent conference of the political party be deleted from the Draft.

4.3.2 Registration of political parties

28. The proposed amendment to the Law on State Registration of Legal Entities¹⁹ makes its provisions apply to political parties and it is not known whether there was previously some other law governing the registration of political parties or they were not subject to such a requirement.

29. The need for registration is not inherently incompatible with Articles 22²⁰ and 25²¹ of the ICCPR and not enough detail has been provided to judge whether either the law or its application does improperly interfere with the rights guaranteed under these provisions.

¹⁷ *Id.*, Articles 6, para 2, and , para 4.

¹⁸ Thus in Appl No 28910/95, *National Association of Teachers in Further and Higher Education v United Kingdom*, 93 DR 63 (1998) the European Commission “accepted that there might be specific circumstances in which a legal requirement of an association to reveal the names of its members to a third party could give rise to an unjustified interference with the rights under Article 11 or other provisions of the Convention” (p 71).

¹⁹ Draft amendments to the Law Regarding State Registration of Legal Entities, Branches and Representative Offices, Article 6.

²⁰ Article 22 (“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.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

30. However, the importance of prompt, judicial control over such a process is of the utmost importance and it is essential that this is available – as Article 11, para 3, being introduced into the Law on Political Parties envisages - over and above the stipulation introduced to Article 9 of this Law that registration of political parties be carried out within a month. Such control must, of course, comply with all the requirements set out in Article 14 of that instrument, notably as regards fair procedure, independence and impartiality. The deadline of one month for a registration decision is probably longer than really required for the process but is nonetheless unlikely to be regarded as unduly long and thus in violation of Articles 22 and 25 of the ICCPR.

31. The grounds for rejection of the registration of a political party set out in the amended Article 11, para 1, of the Law on Political Parties are not in principle problematic as they relate to the legal conditions governing the formation of a political party. However, it might be doubted whether there is really a pressing need for structural units to be subject to registration since these are essentially a matter of the internal organization of a party. Such a requirement could, insofar as it imposed an undue burden in practice on the operation of political parties, thus constitute an unjustified interference with Articles 22 and 25 of the ICCPR. **It is recommended that the provisions requiring structural units of political parties to be registered be repealed.**

32. There is a need to clarify whether or not the registration agency referred to in the amended Article 11 of the Law on Political Parties is the body responsible for validation of the list of citizens’ initiative groups dealt with in the addition to Article 12, para 3, particularly given the concern already mentioned about disclosure of membership. There is also a need to clarify what is meant by “validation”; is it restricted to establishing citizenship or does it entail some form of approval? It is doubtful if the latter is intended but there can be no doubt that, if it were, it would not be compatible with Articles 22 and 25 of the Covenant.

4.3.3 Suspension of activities and dissolution

33. The Draft allows to suspend the political party activities “*by the court decision for the period of three to six months or by the Prosecutor till the court decision is made*” on the following grounds:

- 1) *violation of the Constitution and the legislation of the Republic of Kazakhstan;*
- 2) *systematic performance of the activity that contradicts the charter of the political party;*

3. *Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”)*

²¹ Article 25 (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) *To have access, on general terms of equality, to public service in his country.”)*

- 3) *public call and statements of the heads of the political party aimed at the violent change of the constitutional order of the Republic of Kazakhstan, violation of the integrity of the Republic of Kazakhstan and its sovereignty, seizure or holding of the power, undermining of the state security, the creation of illegal paramilitary formations, and also rousing the social, national, racial, religious, class or generic discord;*
- 4) *discrepancy in the number of party members with the requirement set forth in paragraph 6 of Article 10 of the present Law.*²²

The Draft also allows to dissolve a political party by a court decision on the following grounds:

- 1) *pursuant to the resolution of its supreme body;*
- 2) *pursuant to the proposal of not less than fifty one percent of its members that represent not less than a half of regions;*
- 3) *pursuant to a decision of the court.*²³

34. The introduction into the Draft of a clear judicial element into decisions suspending the activities of a political party is undoubtedly a step towards meeting the procedural safeguards required for such a substantial interference with freedom of association. However, it should not be assumed that this will necessarily be adequate to prevent a violation of Article 22 of the ICCPR from occurring. Not only must the court concerned satisfy all the requirements set out in Article 14 of that instrument, notably as regards fair procedure, independence and impartiality but a suspension decision would still need to be a proportionate measure in the specific circumstances of the case so that neither of the reasons for suspension given in the existing text of Article 13 could ever afford an automatic justification for such a draconian measure.

35. In many instances, particularly where breaches of the law are concerned, lesser sanctions will be more than an appropriate response, particularly as the fact that the power is only one of suspension necessarily means that the infraction cannot be sufficient to call into question the legitimacy of the political party as such. Suspension is likely to be especially disproportionate if it prevents a party taking part in an election and such a consequence would undoubtedly infringe the right of citizens under Article 25 to choose their representatives.

36. It is recommended that suspension of political party activities be made clearly a measure that is exceptional and not an automatic consequence of the violations cited. It is further recommended that a possibility be afforded to political parties to take corrective action and therefore reduce the term of suspension.

37. Although the amendment envisages a brief suspensive power for the prosecutor, its use should still be exceptional as, without a full judicial examination of the facts, there is a grave risk of the party suffering excessive pressure from such a measure.

38. The issue of prohibition of political parties as a particularly far-reaching measure merits special attention. For example, reliance on “*systematic performance of the activity that contradicts the charter of the political party*” could well be problematic in most

²² Law on Political Parties, Article 13.

²³ *Id.*, Article 14.

circumstances as it gives scope for the authorities to determine the legitimacy of a party’s political choices when that should be essentially one for its membership and organizational structure. Although not binding for Kazakhstan in any respect, the Venice Commission Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures²⁴ can still provide a valuable source for the legislator seeking to bring the political parties law in line with the international standards in this regard. The Guidelines emphasize that “*prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.*” **It is therefore recommended that the provisions that allow for the prohibition of political parties for reasons other than unconstitutionality be repealed.**

4.3.4 Financing and facilitating election

39. The imposition of restrictions on the source of a political party’s funds will not engage either Article 22 or Article 25 of the ICCPR unless the effect is to make the operation of political parties impossible or they entail some differential treatment for which there is no rational and objective justification. Neither objection can be raised to the prohibition of the receipt of funds from outside the country, from state bodies and religious associations and charitable organizations found in Article 18, para 2, of the Law on Political Parties. Nor would either provision of the ICCPR be in principle infringed by the imposition of a penalty for breach of this prohibition, either upon those making the donations or those receiving them.

40. However, the penalties being introduced by the addition to Article 374, para 4, of the Administrative Code and the creation of a new Article 374, para 5 – it is assumed that “financing” in the former is meant to be the same as “contributions” in the latter but this ought to be clarified - would appear to be disproportionate given the sums involved, the confiscation of the donations in question and, in the case of some, the liability to deportation, as well as the absence of any apparent discretion as to the penalty and of any obligation to consider the circumstances in which the donation was received or made.

41. Furthermore, the imposition of liability envisioned in the new Article 374, para 6, of the Administrative Code for the receipt of illegal donations, regardless of actual involvement, on the heads of political parties seems unreasonable and disproportionate. Thus the liability to a penalty seems to exist notwithstanding that all reasonable steps had been taken to establish that the person making the impugned donations could lawfully make them. In addition, Articles 22 and 25 of the ICCPR are also not being observed by the inclusion in Article 374, para 6, of the possibility of imposing as a penalty the prohibition of activities of the political party concerned. Not only is this excessive when there is already provision for sanctioning the person directly involved in receiving the illegal donations but there is no limit on the prohibition as regards scope or duration. Moreover, the impact of such a penalty is extremely grave for the members of the party

²⁴ Full text available at [http://www.venice.coe.int/docs/1999/CDL-PP\(1999\)006rev-e.asp?PrintVersion=True&L=E](http://www.venice.coe.int/docs/1999/CDL-PP(1999)006rev-e.asp?PrintVersion=True&L=E) (last visited on 5 April 2005).

and its supporters, as well as for any employees of the party. **It is recommended that the power to prohibit activities of a political party be deleted from Article 374, para 6, of the Administrative Code.**

42. It is possible that the penalties prescribed in Article 337 of the Criminal Code for creating a political party financed from prohibited sources are disproportionately high but in any event it would be inappropriate to impose criminal responsibility notwithstanding that all reasonable steps had been taken to establish that the person making the impugned donations could lawfully make them (reasonable steps defense). **It is recommended that Articles 337 of the Criminal Code and 374, para 4, of the Administrative Code be amended to make provisions for proportionate penalties. It is also recommended that Article 374, para 6, of the Administrative Code be amended to include reasonable steps defense.**

43. It is not entirely clear what is being added to the existing provision by the introduction into Article 14, para 5 (7) of the Law on Political Parties of the possibility of liquidating a political party that has accepted “*donations ... prohibited by the present Law*” but there can be no doubt that in many, if not all instances imposing such a consequence would be a disproportionate measure and thus entail violations of Articles 22 and 25 of the ICCPR.

44. The effect of introduction into Article 18, para 2, of the Law on Political Parties of the statement that “[*d*]onations from persons defined in the present paragraph shall be entered into the state account according to the court decision” appears to be a measure confiscating all funds received in breach of this law. This could well be a disproportionate response, depending on the circumstances in which the money was received. **It is recommended that the provision for confiscation in Article 2, para 2, of the Law on Political Parties be made proportionate.** Moreover, the reference to “*the court decision*” needs to be clarified as it is not evident how this will be given or sought.

45. There is nothing inherently objectionable in the requirement introduced as Article 18, para 5, of the Law on Political Parties that an annual financial statement be published, particularly given that the financing of parties is being regulated. However, the requirement that it be published “annually” is in need of clarification; does it mean within an exact period of a year or is there any flexibility in the period involved? **It is recommended that the Law on Political Parties specify the deadline for publishing financial statement.**

46. Moreover, the penalties for non-publication of such a statement that it is proposed to add to Article 374, para 7, of the Administrative Code seem at risk of being highly disproportionate. It is not known what the actual significance of “*one hundred to hundred monthly rated indicators*” is for an individual, although it seems substantial, but the possibility of suspension of activities for six months is undoubtedly excessive; it is doubtful whether this could ever be an appropriate penalty when the failure to meet the publication requirement arises from an individual failure and the impact on the rights of members and of supporters under Articles 22 and 25 of the ICCPR would be extreme. Moreover there is no scope in the application of the penalties to distinguish between a publication just a matter of days after the deadline – which itself has been noted as being

imprecise – and the absence of any publication at all. In addition it is not clear whether any reasonable excuse for delayed publication could operate as a defense. As a result, the provision on penalties cannot be regarded as meeting international standards governing freedom of association and the right of political participation. **It is therefore recommended that the possibility of suspension of activities for non-publication of the annual financial statement required under the amendment introduced in Article 18 of the Law on Political Parties be reconsidered. It is recommended that political parties be afforded the possibility to take corrective action and thus avoid suspension or reduce its term.**

47. The prohibition on facilitating the nomination and election of candidates, etc to be introduced at Article 102, para 3, of the Administrative Code is a restriction on the freedom of expression and association under Articles 19 and 22 of the ICCPR of foreigners and stateless persons. Although the rights protected under Article 25 of the ICCPR are citizen’s rights exclusively, they need to be considered in the broader context of the rights to freedom of association and expression, which do not contain any such restriction. Article 25 can not be construed as limiting the political participation of foreigners and stateless persons at the expenses of their rights to freedom of association and expression. This would actually be in contradiction with Article 5, para 1 of the Covenant, which stipulates that “*nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant*”²⁵. The right to participate in public affairs has broader connotations and may be exercised through the rights of freedom of expression and association. Additionally, the vagueness of the term “facilitate” in this particular instance may open the door to abusive and arbitrary enforcement. There is too much imprecision in the term “*activities that facilitate*”; expressing views of a general character but of direct and legitimate concern to the foreigner outside an election context could still facilitate any of the objectives listed without this being the aim of the foreigner or stateless person concerned. Also, the penalty of deportation in the circumstances of a particular case could well be disproportionate as well a potential interference with the person’s family contrary to Article 17 of the ICCPR. Finally, the prohibition considered is even less justified in the case of local elections, a distinction which is actually not made in the Draft. General Comment 25 makes it clear that the rights under Article 25 may be exercised by foreigners and stateless persons in case of local elections²⁶ and the right to political participation for foreigners and stateless persons under certain conditions has now risen to the level of an internationally well recognized standard²⁷, which has an increasingly

²⁵ In this regard, it is significant to note that the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) refers to “citizens” in respect of the right to seek political or public office (para 7.5), but to “individuals and groups” in respect of the right to establish, in full freedom, their own political parties or other political organizations (para 7.6).

²⁶ General Comment 25, 12 July 1996, CCPR, Fifty Seventh Session, 1996, Para 3: “*State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions*”.

²⁷ See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 42, para 3; Council of Europe Convention on the Participation of Foreigners in

stronger normative impact on the legislator across the OSCE region and beyond. **It is recommended that the provision, which contains a prohibition on facilitating the nomination and election of candidates, etc to be introduced at Article 102, para 3, of the Administrative Code be repealed.**

4.4 FREEDOM OF OPINION AND EXPRESSION

4.4.1 Content restrictions on the publication or broadcasting of materials in mass media.

48. The draft bans “*the use of mass media to promote or advocate for the violent overthrow of the constitutional order, breach of the integrity of the Republic of Kazakhstan, subversion of national security, war, social, racial, ethnic, religious, class or clan superiority, cult of cruelty and violence, pornography, as well as disseminate information classified as state secret of the Republic of Kazakhstan or other protected data.*”²⁸ The draft also prohibits “*disclosure of information classified as state secret or other protected data, advocacy or justification of terrorism or extremism, dissemination of information on technique or tactics of counterterrorist operations in the Republic of Kazakhstan, promoting narcotic drugs, psychotropic substances or their precursors, as well as promoting pornography.*”²⁹

49. These amendments are problematic on a number of accounts. First, although international standards allow for the imposition of restrictions on the exercise of the right to freedom of opinion and expression for the protection of national security³⁰, these restrictions must be construed strictly and be established convincingly. From the Johannesburg Principles³¹ that are internationally accepted and cited as the definitive standards for the protection of freedom of expression in the context of national security laws, it

Public Life at Local Level, Article 6(1), which “*grant[s] to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections*”.

²⁸ Draft amendments to the Law on Mass Media, Article 2, para 3.

²⁹ *Id.*, para 4.

³⁰ International Covenant on Civil and Political Rights (ICCPR), Article 19, para 3(b) (“*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”); full text of ICCPR available at <http://www.ohchr.org/english/law/ccpr.htm>, last visited on 23 March 2005.]

³¹ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996) [full text available at <http://www.article19.org/docimages/511.htm>, last visited on 23 March 2005]; these Principles were adopted on 1 October 2005 by 37 international experts. They have been drafted with the purpose to inform the drafting and the implementation of security laws around the world. They are based on international and regional law and standards relating to the protection of human rights as well as evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

may be inferred that expression may be punished as a threat to national security

only if a government can demonstrate that

(a) the expression is intended to incite imminent violence;

(b) it is likely to incite such violence; and

*(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.*³²

It is therefore recommended that the law be brought in line with the three-pronged test provided for by the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

50. Second, the provisions in question do not define the notions listed as grounds for the imposition of restrictions, e.g. the notions of “cult of cruelty and violence” or of “social, racial, ethnic, religious, class or clan superiority.” The vagueness of the language of the law creates a danger of overbroad interpretation and runs contrary to the principle of legality. It may be argued that Article 20 of the Constitution of the Republic of Kazakhstan lists precisely the same notions as instances of unprotected speech.³³ However, it is a universally accepted principle that the more specific the legislation is, the more precise its language needs to be, and constitutional provisions, because of their general nature, do not have to maintain the same level of precision as the specific laws.³⁴ To ensure certainty and foreseeability in application, **it is recommended that the law narrowly define the instances of speech which do not enjoy the level of protection afforded to free speech. Moreover, when penalizing hate speech, the law should make the applicability of the offense limited to the instances which constitute incitement to discrimination, hostility or violence.**³⁵ For example, it may be appropriate to detail the phrase “*to promote or advocate for ... social, racial, ethnic, religious, class or clan superiority*” by adding “where such conduct constitutes incitement to discrimination, hostility or violence.”

51. Third, to ensure specificity and clarity of the law in accordance with the principle of legality, **it is recommended that the provisions concerning the prohibition of the disclosure of information classified as state secret contain reference to relevant legislative acts.** This would help bring the law in question in compliance with the principle of narrow designation of security exemption, which requires that the state “*designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.*”³⁶

³² *Id.*; Principle 6.

³³ Constitution of the Republic of Kazakhstan, Article 20, para 3 (“*Propaganda of or agitation for the forcible change of the constitutional system, violation of the integrity of the Republic, undermining of state security, and advocating war, social, racial, national, religious, class and clannish superiority as well as the cult of cruelty and violence shall not be allowed.*”)

³⁴ See European Court of Human Rights, *Rekvényi v. Hungary*, Judgment of the Court, 20 May 1999, para 34.

³⁵ International Covenant on Civil and Political Rights (ICCPR), Article 20, para 2 (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

³⁶ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 12.

52. The issue of “justification of terrorism” is a particularly complicated one and deserves especially serious consideration as a source of potential tension with the right to freedom of expression. For the purposes of this comment, an increasingly accepted term “*apologie du terrorisme*” will be used, which is generally understood as the public expression of praise, support or justification of terrorists and/or terrorist acts.

53. While at this stage the lack of international standards pertaining to the criminalization of “*apologie du terrorisme*” still persists, there is a growing consensus that there exists a limited list of consequences that the criminalization of “*apologie*” should aim at preventing. Namely, these are (a) the recruitment of terrorists and the creation of new terrorist groups; (b) fuelling ethnic and religious tensions which can provide a basis for terrorism; (c) the dissemination of “hate speech” and the promotion of ideologies favorable to terrorism.

54. Other factors that need to be accounted for by the legislator seeking to criminalize “*apologie du terrorisme*” are the causality links – direct or indirect – with the perpetration of a terrorist act, and temporal connections with the perpetration of a terrorist act.

55. The draft European Convention on the Prevention of Terrorism is the first attempt to give shape to the emerging legal concept of “*apologie*.” Provisions of the draft Convention concerning “*public provocation to commit a terrorist offence*,” although not yet a source of law in the strict sense of the word, can still provide valuable guidance for the legislator. The draft Convention defines “*public provocation to commit a terrorist offence*” as “*the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.*”³⁷ The draft makes it clear that “public provocation to commit a terrorist offense” shall be criminalized “*when committed unlawfully and intentionally.*”³⁸

56. It is obvious from the draft Convention provisions that the crime of “public provocation,” although not equated with direct incitement to commit an offense, nevertheless becomes applicable only when it contributes to the execution of the criminal act.³⁹

57. It is advisable that the draft amendments be reviewed to clearly delineate what constitutes “justification of terrorism,” as well as to make (a) intent and (b) real and clear danger of commission of a terrorist offense the necessary preconditions for the applicability of the offense of “justification of terrorism.”

³⁷ Draft European Convention on the Prevention of Terrorism, Article 5, para 1 [full text of the draft Convention available at http://www.coe.int/T/E/Legal_affairs/Legal_cooperation/Fight_against_terrorism/CODEXTER%202004_%2027%20final-2.pdf, last visited on 23 March 2005].

³⁸ *Id.*, para 2.

³⁹ Cp “*causes a danger that one or more such offences may be committed.*”

4.4.2 Suspension of operations and closure of mass media.

58. The draft amendments allow for the suspension of operations of print and broadcast media by a decision of the court or the prosecutor⁴⁰ on the following grounds:

*[...] disclosure of information classified as state secret of the Republic of Kazakhstan or other protected data, propaganda of or advocacy for the cult of cruelty and violence, social, racial, ethnic, religious, class or clan superiority, dissemination of information on technique or tactics of counterterrorist operations in the Republic of Kazakhstan, promoting narcotic drugs, psychotropic substances or their precursors, distribution of TV, radio or video production of pornographic or sexual-erotic character, violation of the provisions of Article 2, para 3, Article 3, Article 10, para 3(2), as well as repeat violation of the provisions of Article 14 para 3(1), Article 15 of the present Law within the one year.*⁴¹

59. Furthermore, mass media can be shut down by a court decision if at least one of the following grounds is present:

*[...] promotion of or advocacy for violent overthrow of the constitutional order, breach of the integrity of the Republic of Kazakhstan, subversion of national security, war, advocacy or justification of terrorism or extremism, as well as failure to eliminate the grounds for suspension of mass media.*⁴²

60. The comments made above in para 49 with regard to the necessity for the law to comply with the Johannesburg Principles fully apply here.

61. Furthermore, the provisions in questions raise serious concerns with regard to the proportionality of the measures proposed to the aims pursued. A sanction may only be imposed to an extent which is no more than absolutely necessary. The law should make available a range of sanctions, closure or revocation of license being the measure of last resort. Although the discussion of media regulatory framework goes beyond the scope of these Comments, note that there is a growing consensus internationally that closure of mass media should not be practiced as a sanction at all. An increasingly large number of countries use exclusively use as penalties administrative fines and criminal sanctions applicable of individuals to achieve any legitimate regulatory goals. The inclusion of “*failure to eliminate the grounds for suspension of mass media*” as a ground justifying closure of mass media also presents a problem, since it is unclear how media can take corrective action when its operations have already been suspended. **It is recommended that the draft be amended to include a range of graduated sanctions for unlawful conduct listed in Article 13, and to make it clear that closure of mass media can only be the measure of last resort.**

⁴⁰ *Id.*, Article 13, para 1 (“*Publication (broadcasting) of mass media may be terminated by the decision by owner or the court. Publication (broadcasting) of mass media can be suspended by the decision by the owner, the court or the prosecutor. In the case of suspension by the prosecutor, the prosecutor shall lodge his/her petition for suspension with the court within three days.*”)

⁴¹ *Id.*, Article 13, para 3.

⁴² *Id.*, para 4.

62. Moreover, the proposed grounds for the suspension of operations and closure of mass media are overbroad and raise serious concerns as potentially encroaching on media freedoms. Their adoption would have a chilling effect on the independent media and would run contrary to Kazakhstan’s international obligations, including the OSCE commitments.⁴³ The vagueness of the language of the provisions has implications similar to those discussed in para 11 above, and needs to be addressed in a similar way, i.e. **the law should narrowly define the unlawful conduct which may justify the imposition of sanctions on the media outlet** (e.g. by detailing the phrase “*propaganda of or advocacy for ... social, racial, ethnic, religious, class or clan superiority*” by adding “where such conduct constitutes incitement to discrimination, hostility or violence”).

63. It is to be noted as rather disturbing that some types of illegal conduct listed by the draft provisions in question are not at all related to national security. An example may be “*distribution of ... production of pornographic or sexual-erotic character.*”

64. Finally, the prosecutorial power to order the suspension of operations of a media outlet is problematic. It is welcome that the suspension order is subject to mandatory judicial review within three days from the time it is issued, however, **it is recommended that the law adopt a higher standard by making the court the only body authorized to order any interference with freedom of opinion and expression. This can be done by expedient or simplified court procedure.**

4.5 COUNTER-TERRORISM AND HUMAN RIGHTS

4.5.1 Suppressing of terrorist and “extremist” financing.

65. The draft amendments include provisions introducing the offense of “financing of terrorist and extremist activities” and making it punishable by 5 years of imprisonment.⁴⁴

66. The draft provisions in question are vague and therefore present a problem in terms of their enforcement.

67. First, the scope of illegal conduct covered by the crime of “financing of terrorist and extremist activities” is unclear. Relevant international standards adopt a very clear stance as to which activities fall within the scope of terrorist financing. Thus, the Financial

⁴³ See Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991, para 26 (“*They further recognize that independent media re essential to a free and open society and accountable systems of government and are of particular importance to safeguarding human rights and fundamental freedoms.*”), para 28.9 (“*The participating States will endeavor to maintain freedom of expression and freedom of information, consistent with their international obligations and commitments, with a view to enabling public discussion on the observance of human rights and fundamental freedoms as well as on the lifting of the state of public emergency.*”); Istanbul Document, 19 November 1999, para 26 (“*We reaffirm the importance of independent media and the free flow of information as well as the public’s access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic , free and open society.*”)

⁴⁴ Draft amendments to Criminal Code, Article 233-3 (“*1. Financing of extremist of terrorist activities shall be punished by imprisonment for a period of five years. 2. The same act committed repeatedly shall be punished by imprisonment for a period of three to eight years.*”).

Action Task Force (FATF) Special Recommendation II,⁴⁵ sets as a standard the criminalization of financing terrorism, terrorist acts and terrorist organizations. In order to comply with the principle of legality, the law also needs to define precisely the conduct which can be qualified as “financing of terrorist and extremist activities.”

68. In this regard, it needs to be mentioned that a certain level of imprecision is inherent in the very notion of “extremism,” since is not defined in any international instrument and thus can not meet the requirements of legality, certainty and foreseeability in the application of the law. The definition of “extremism” would gain in precision if it were linked to a means rather than focused on so-called “extremist goals.” It should depart from the emphasis inherent in such a term on the nature of opinions and beliefs. Instead, a clear connection should be made to the threat of, incitement to, or use of violence.

69. Second, the issue of intent is very relevant in regard of terrorist and “extremist” financing. It is essential that the law make the offense applicable only when committed willfully and with the intention or in the knowledge that the funds provided or collected will be used to further a prohibited aim. This will help ensure compliance with the International Convention for the Suppression of the Financing of Terrorism, which makes it an offense to provide or collect funds “*directly or indirectly, unlawfully and **willfully** ... **with the intention** that they should be used or **in the knowledge** that they are to be used” in order to carry out the enumeratively listed acts.*⁴⁶ (Emphasis added.)

70. It is therefore recommended that the draft be amended to specify the scope of terrorist and “extremist” financing, as well as to ensure that the offense only apply when committed willfully, and with the intention or in the knowledge of the alleged offender that the funds will be used for terrorist or “extremist” activities or by terrorist or “extremist” organizations.

4.6 FREEDOM OF ASSEMBLY

4.6.1 Liability for participation in unlawful assembly

71. The Draft seeks to introduce administrative liability for the “*participation in illegal meeting, processions, pickets and demonstrations and other public events*”⁴⁷ (the extant

⁴⁵ FATF Secretariat, Special Recommendations on Terrorist Financing, [available at http://www.fatf-gafi.org/document/21/0,2340,en_32250379_32236947_34030933_1_1_1_1,00.html, last visited on 22 March 2005].

⁴⁶ International Convention for the Suppression of the Financing of Terrorism, Article 2 (“*Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and **willfully**, provides or collects funds **with the intention** that they should be used or **in the knowledge** that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*” [Emphasis added.]) Full text of the Convention is available at <http://www.un.org/law/cod/finterr.htm> [last visited on 22 March 2005.]

⁴⁷ Draft amendments to the Administrative Code, Article 373, para 1 (“*Violation of legislation concerning the procedure for organizing and conducting peaceful assemblies, meetings, processions, pickets, and*

law only penalizes the organizers). The draft amendments to the Administrative Code have to be analyzed in conjunction with the Law on Organizing and Conducting Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations, which is the primary legislative act governing the regulation of freedom of assembly in Kazakhstan.

72. While the criminalization of participation in unlawful assemblies in general does not contradict the international law and indeed many countries’ laws do include provisions criminalizing participation in illegal events, the Draft still presents a concern from the freedom of assembly viewpoint.

73. First, in order to comply with the principle of legality, the law must provide for a clear and unambiguous definition of a “participant” of a public event to ensure that accidental bystanders or persons present as observers are not included. However, Kazakhstan’s Law on Organizing and Conducting Peaceful Assemblies, Meetings, Processions, Pickets and Demonstrations does not provide for such a definition. In combination with liability for participants in unlawful assemblies this may open a door for abuse.

74. Second, participants should benefit from the “reasonable excuse” defense. This means, in this particular case, that participants in unlawful assemblies should be exempted from liability when they had no prior knowledge that the assembly had not been authorized. There may be a number of ways in terms of legislative technique to provide for the “reasonable excuse” defense in the law, but the general best practice would be to ensure that words such as “without reasonable excuse” are clearly identified as a defense to the offense where it applies and not as an element of the offense which would have to be proved or disproved by the prosecution.

75. It is recommended that the provisions concerning liability for participants in unlawful assemblies be reconsidered. In case the legislator opts for not abolishing liability for participants, the legislation of public assemblies needs to be amended to include a clear and unambiguous definition of a participant of a public assembly, as well as the provisions on liability need to be reviewed to ensure that the participants benefit from the “reasonable excuse” defense.

4.7 FREEDOM OF RELIGION OR BELIEF

4.7.1 Mandatory registration of religious associations

76. The Draft proposes to amend the Law on Religious Freedom and Religious Associations by providing that “*activity of religious associations that are not registered in accordance with established procedure shall not be permitted.*”⁴⁸ It also proposes to supplement the Administrative Code by a provision establishing responsibility for

demonstrations, or any other public event, or impediment to organizing and holding those events, as well as participation in illegal meeting, processions, pickets and demonstrations and other public events unless they are identified as penal actions, shall entail a warning or a fine in the amount up to twenty monthly calculation indicators imposed on citizens and in the amount up to fifty monthly calculation indicators imposed on official persons.”)

⁴⁸ Draft amendments to the Law on Religious Freedom and Religious Associations, Article 4. The current legislation of the Republic of Kazakhstan does not provide for mandatory registration of religious groups.

supervision or participation in activity of non-registered religious associations, as well as financing their activity.⁴⁹

77. International standards guarantee the right of every person to freedom to profess one’s own religion or convictions, alone or in community with others, and do not connect group manifestation with registration.⁵⁰ The extant legislation of the Republic of Kazakhstan is consistent with the international standards in this regard, as it does not provide for mandatory registration of religious groups.

78. For the purposes of this analysis it is important to first understand what the right to freedom of religion or belief specifically includes. First of all, freedom of religion or belief is geared to protect the absolute inviolability of the “*forum internum*,” i.e. the inner mind.⁵¹ It is only the external manifestations of a religion or belief (“*forum externum*”) that may be restricted, and only as far as prescribed by law and necessary “*to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*”⁵²

79. Association with others for the purposes of professing a religion is clearly concerned with the manifestation of a religion. However, any state intervention seeking to impose limitations on such association must be proportionate and meet at least one of the above cited internationally permissible conditions for restriction, i.e. should be necessary “*to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*” It important, however, that, in contrast with other limitations clauses found in international treaties, national security is **not** listed as a permissible ground for imposing

⁴⁹ Draft amendments to the Administrative Code of the Republic of Kazakhstan, Article 374-1

⁵⁰ See Universal Declaration of Human Rights, Article 18 (“*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*”) [full text in Russian and English available at <http://www.unhchr.ch/udhr/index.htm>, last visited on 5 April 2005]; ICCPR, Article 18 (“*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*”); Declaration on Elimination of All Forms of Intolerance Based on Religion or Belief, Article 1 (“*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice. 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*”) [full text available at <http://www.un.org/documents/ga/res/46/a46r131.htm>, last visited on 5 April 2005].

⁵¹ Note that the international law expressly prohibits derogation from the freedom of thought, conscience and religion in time of public emergency (see International Covenant on Civil and Political Rights, Article 4, para 2).

⁵² International Covenant on Civil and Political Rights, Article 18, para 3.

restrictions on the exercise of freedom of religion or belief.

80. The draft provisions banning unregistered religious groups do not comply with the international standards since they fail to provide for a clear linkage with any of the permissible grounds for restriction and are essentially aimed at restricting the exercise of freedom of religion or belief in the name of national security, which in general is not permissible (see para above). Moreover, should the law prohibit unregistered organizations, it will in essence deprive the people of the right to freedom of religion or belief since for many believers conduct of religious worship outside of a religious organization would not be possible.

81. Government registration, according to Kazakhstan’s law, does not imply permission to conduct activity, but rather acquisition of the status of a legal entity, which, in its turn, has no bearing on the possibility for the group to communally profess a religion but rather on the eligibility of the group for certain benefits. This is in line with the international standards and best practices, which do not preclude the possibility that certain institutional forms may be required if particular benefits are to be enjoyed. It is essential, however, that the decision regarding the necessity of acquiring a formal status should be decided by no one else but the believers themselves. Some religious groups do not meet the criteria for the government registration required by the extant legislation, for example, because they may not have enough members or lack financial opportunities for the payment of registration fees. Prohibition on the activities of such groups only because they lack government registration contradicts the international as well as the domestic law.⁵³

82. Accordingly, establishment of administrative responsibility for supervision or participation in the activity of unregistered organizations is not justified by necessity.

83. It may be added that mandatory registration is also problematic from the viewpoint of its practicality in the context of preventing genuinely dangerous group activities. It is unlikely that mandatory registration may help restrain such groups, since listing them as illegal will just force them to operate underground, thus obtaining the aura of victimization, while the government will need to exert even greater efforts to discover and resist them.

84. It is recommended that the requirement of mandatory registration for religious groups be repealed.

⁵³ The fundamental fact is that current legislation in Kazakhstan directly allows the existence of unregistered groups (see on Religious Freedom and Religious Associations, Article 6, para 1). The Law on Religious Freedom and Religious Associations, in provisions regarding the competency of the authorized government organ responsible for religious associations, establishes that this organ will conduct a study and analysis of the activities of small-numbered religious groups formed on the territory of the Republic of Kazakhstan which do not have the signs of legal entity status. The same law delegates to local executive organs the authority to keep tally of small-numbered religious associations which do not have the signs of legal personality. The proposed amendments do not amend Article 6, paras 1 and 2, which would result in a contradiction between the articles of this law. Moreover, the reasons for such an expedited amendment to legislation remain unclear.

4.7.2 Regulation of missionary activity

85. The Draft supplements the Law on Religious Freedom and Religious Associations by a provision that:

Citizens of the Republic of Kazakhstan, foreigners and persons that do not have citizenship (henceforth, a missionary), shall fulfil missionary activity on the territory of the Republic Kazakhstan after registration in an authorized agency.

*Fulfilment of missionary activity without registration shall entail liability established by the laws of the Republic of Kazakhstan*⁵⁴

Further, the draft Article 4-2 provides for the procedure of registration of missionaries.⁵⁵ “Missionary activity” is defined by the Draft as “preaching and dissemination of any religion teaching and dogmas through religious and enlightenment activities.”⁵⁶

The Draft also amends the Administrative Code by providing that “[f]ulfilling missionary activities by citizens, foreign citizens and stateless persons without registration shall entail a fine for citizens in the amount up to fifteen monthly rated indicators, for foreigners and stateless persons in the amount up to fifteen monthly rated indicators with administrative deportation from the Republic of Kazakhstan...”⁵⁷

86. The draft amendments raise certain concerns both in regard of the definition proposed and in that of the way of regulation of missionary activity and the closely related concept of proselytism.

87. First, the definition of “missionary activity” proposed by the Draft is imprecise. On the one hand, it unjustifiably narrows the scope of missionary activity, which may include not only religious enlightenment activities, but also humanitarian or educational activities, to name just a few. On the other hand, the proposed definition is too broad,

⁵⁴ Draft amendments to the Law on Religious Freedom and Religious Associations, Article 4-1.

⁵⁵ *Id.*, Article 4-2 (“Registration of persons who fulfill missionary activity shall be executed by local executive offices.

Missionaries on the territory of the Republic of Kazakhstan are liable to undergo re-registration with the local executive offices one year after starting missionary activities.

To undergo the registration missionaries shall present the following documents and materials to a local executive office:

- 1) *an application that specifies religious affiliation, territory and period of missionary activity;*
- 2) *a copy of power of attorney or other document issued by a religious organization that certifies the right to fulfill missionary activity;*
- 3) *a copy of certificate of registration or other documents that certifies that the religious organization, which this missionary represents, is officially registered in accordance with the legislation of its country;*
- 4) *an invocation of a religious organization registered in the Republic of Kazakhstan;*
- 5) *literature, audio and video materials and/or other subjects of religious use designed for missionary activity. Additional use of religious materials after registration shall be submitted to the approval of local executive offices.*

Along with the listed documents and applicant shall present a passport or other document that identifies the holder, and is registered in accordance with established procedure.

Registration of persons who fulfil missionary activity shall be executed by a local executive office within the period that does not exceed seven days from the day the documents were submitted.”)

⁵⁶ *Id.*, Article 1, para 1.

⁵⁷ Draft amendments to the Administrative Code, Article 375, para 3.

since any sermon in a mosque or a church would fall within the meaning of missionary activity.

88. Second, the Draft is problematic from the viewpoint of the freedom “to manifest ... religion or belief in ... teaching,” as guaranteed by the ICCPR⁵⁸ and further reaffirmed by the OSCE commitments.⁵⁹

89. As already discussed in para 72 above, external manifestations of a religious belief such as religious teaching, as opposed to “*forum internum*,” may be restricted, however, the permissible grounds for such restriction are strictly limited. Restrictions may only be imposed “to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” National security concerns may not be invoked as a ground to limit the exercise of the freedom of religion or belief.

90. Understanding of the intricate relationship between the right to religious teaching, including missionary activity and proselytism, and other human rights is central to assessing the legislation seeking to regulate it. While missionary activity and proselytism are clearly protected under Article 18 of the ICCPR, this protection is not absolute. As proselytism may implicate the right to privacy as guaranteed by Article 17 of the ICCPR,⁶⁰ it may be legitimately restricted on the ground of protecting “the fundamental rights and freedoms of others.” However, proselytism is also protected under Article 19 of the ICCPR⁶¹ which enshrines the right to “impart information and ideas of all kinds.” It is generally accepted that the mere fact that proselytism may annoy its intended targets is not sufficient to justify restrictions. However, it has been held that proselytism may be legitimately restricted as an invasion of privacy where the listeners are a “captive audience,” including cases where those proselytized are in a subordinate position to the one proselytizing.⁶² It is also compliant with the international law to limit the right to disseminate religious views where it is exercised with the involvement of material enticement, which has been widely regarded as a form of coercion and therefore considered to exceed the area of freedom of opinion and expression.

91. The proposed amendments, however, are not linked to any of the above discussed categories of cases where the dissemination of religious views may be justifiably

⁵⁸ International Covenant on Civil and Political Rights, Article 18, para 1.

⁵⁹ See Concluding Document of Vienna – The Third Follow-up Meeting, 15 January 1989, para 16.6 (*[The participating States will] respect the right of everyone to give and receive religious education in the language of his choice, whether individually or in association with others.*)

⁶⁰ International Covenant on Civil and Political Rights, Article 17 (“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”)

⁶¹ See *id.*, Article 19 (“1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”)

⁶² See ECtHR, 24 February 1998, *Larissis and Others v. Greece*.

restricted. Mandatory registration of missionaries is neither aimed to prevent abuse of the position of power nor intends to prevent other forms of coercion.

92. Apart from the pure human rights concerns, the proposed amendments are problematic in terms of their enforceability. It is well known that missionary activity is common to an overwhelming majority of religious organizations. In a few religious organizations all members are missionaries. Missionary activity in this sense would potentially include speeches of leaders of religious associations on television and by other means of mass communication, as well as, in terms of the law, sermons in churches, mosques and other buildings of worship. Therefore, this language applies to thousands, if not to tens of thousands of citizens of the Republic of Kazakhstan, as well as nationals of other states. This raises a significant doubt about whether government bodies would be able to cope with the administrative burden of registering the missionaries.

93. Notwithstanding that the proposed amendments establish the obligation of missionaries to register — citizens of the Republic of Kazakhstan, foreign nationals and stateless persons, the list of documents and materials required for receipt of registration seem to be primarily targeted at foreign missionaries. In any case, it remains unclear why a Kazakhstani missionary would be required to present an invitation from a religious organization registered in the Republic of Kazakhstan (No. 4 in the list of documents and materials). The requirement to present a copy of the certificate of registration or other documentation certifying that the religious organization which the missionary represents is officially registered in accordance with the legislation of his own country (No. 3 in the list of documents and materials) is evidence that the authors of the amendments are not fully aware of other countries’ legislation, since in many jurisdictions the government does not require religious associations to register, but nonetheless recognizes their existence and even accommodates them.

94. The requirement to present literature, audio-, and video- materials and (or) other objects of religious significance intended for religious activity (No. 5 in the list of documents and materials) is detached from reality since it is going to result in the government bodies being swamped with religious texts, attire and other objects accompanying missionary activity.

95. Similarly problematic is the requirement of receiving the approval of local executive bodies for the additional use of materials of religious content after having already received registration. The amendments do not set forth any procedures or guidelines for such approval. Approval itself is nothing more than interference of government organs in questions of direction of worship. Moreover, the language in the beginning of Article 4, para 2, is about literature and other materials that must be presented for registration and not for receiving permission to for their use, but at the end of the article it turns out that after registration the materials of religious content should be presented for approval of their use.

96. The proposed articles are unclear on whether a government body can refuse registration, and if so, then on what grounds. Additionally, there is no set duration on which the registration comes into force. The provision that missionaries are obligated to re-register in the local executive bodies each year after the beginning of missionary activity only confuses the question and does not allow a determination of whether or not

there is in fact a general duration of validity of such registration.

97. It is recommended that the amendments concerning the regulation of missionary activities be repealed.

4.7.3 Religious education of children

98. The Draft recommends addition of the suggestion that “*religious training of a child shall not damage the child's all-round development, physical or moral health.*”⁶³

99. Such an amendment, at the first glance, is wholly appropriate. However, it raises a number of concerns in terms of both its suitability to pursue the legitimate aim of protecting the child and its potential far-reaching implications for the parents’ right and responsibility for the upbringing of their children as well as for the child’s and the parents’ right to freedom of religion or belief.

100. The international law does recognize the liberty of parents or legal guardians to ensure the religious education of their children. Thus, the International Covenant on Economic, Social and Cultural Rights (ICESCR) obliges the States Parties to “*undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.*”⁶⁴ The OSCE commitments, and the Vienna Concluding Document specifically, reaffirm the priority of respecting “*the right of everyone to give and receive religious education*”⁶⁵ and “*the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.*”⁶⁶

101. The Convention on the Rights of the Child (CRC)⁶⁷ further develops this concept by requiring the States Parties to “*respect the right of the child to freedom of thought, conscience and religion,*”⁶⁸ as well as to “*respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*”⁶⁹ Note one fundamental step forward made by the CRC in this regard – while making reference to the right of the parents or legal guardians to provide direction to the child, it makes the child the subject, rather than an object, of the right (“*to provide direction to the child in*

⁶³ Draft amendments to the Law on Religious Freedom and Religious Associations, Article 5, para 2 (“Parents or custodians have a right to train their children according to their beliefs, but coercive involvement of children in religion is not allowed. Teaching of religious disciplines may be done on voluntary basis in non-government educational facilities. Religious training of a child shall not damage child’s all-round development, physical or moral health.”)

⁶⁴ ICESCR, Article 13, para 3 [full text available at <http://www.ohchr.org/english/law/cescr.htm>, last visited on 5 April 2005].

⁶⁵ Concluding Document of Vienna – The Third Follow-up Meeting, 15 January 1989, para 16.6 ([*The participating States will] respect the right of everyone to give and receive religious education in the language of his choice, whether individually or in association with others.*)

⁶⁶ *Id.*, para 16.7

⁶⁷ Ratified by Kazakhstan on 12 Aug 1994.

⁶⁸ Convention of the Rights of the Child, Article 14, para 1 [full text available at <http://www.ohchr.org/english/law/crc.htm>, last visited on 11 April 2005].

⁶⁹ *Id.*, para 2.

*the exercise of **his or her** right”* – Emphasis added). Furthermore, the CRC notes that direction should be provided “*in a manner consistent with the evolving capacities of the child.*” As we can see, the provision, to some extent, interprets the principle of the “best interest of the child”⁷⁰ as enshrined in Article 18 of the CRC. However, note that in upholding the priority of the best interest of the child, the CRC makes a very important mention that it is parents or legal guardians who “*have the primary responsibility for the upbringing and development of the child.*”

102. Since the responsibility for the child’s development rests first and foremost with the child’s parents or legal guardian, the State should refrain from undue intrusion in the family affairs. Although the parents’ right to provide religious education of their children in accordance with their personal convictions may in certain cases give rise to a conflict with the child’s best interests, simply making a provision in the law that religious education provided by the parents shall not harm the child is hardly a suitable solution to pursue the legitimate aim of protecting the child. First, it lacks specific mechanisms for enforcement, since it remains unclear from the draft provision who and by what criteria shall determine the damage to the child’s welfare. The Draft is also silent on what kind of liability the breach of the envisaged provisions may entail. Second, the vagueness of the language creates the danger that the Draft, if adopted, may open door to abusive practices, where parents would be punished for their beliefs under the disguise of punishment for damaging the child’s well-being, to the point of terminating⁷¹ or limiting⁷² their parental rights or awarding custodial rights to the non-religious or “conventionally religious” divorcing parent without the assessment of what would be in the best interest of the child.

103. One more point in favor of not adopting the amendment is the fundamental delusion that the draft amendment seems to be based upon, namely, the substitution of the **illegal consequence** that the law legitimately seeks to prevent or punish for (in this case, harm to children) by the **motive** (religious beliefs). It also shifts the emphasis from safeguarding the best interest of the child to the parents’ personal characteristics.

104. A better solution to protect the child while respecting the liberty of the parents to raise the child in their belief would be to look at the general legislation pertaining to the monitoring, prevention and treatment of child abuse and neglect, without making any revisions in the laws concerning freedom of religion or belief. Kazakhstan’s Law on Rights of Children⁷³ may already include some essential protections. The CRC can serve as a source of valuable guidance for a legislator seeking to improve child protection law by providing that

⁷⁰ *Id.*, Article 18, para 1 (“1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern”).

⁷¹ The Law on Marriage and Family of the Republic of Kazakhstan provides for the termination of parental rights on the ground of “abuse of parental rights” (Article 67, para 3).

⁷² The Law on Marriage and Family of the Republic of Kazakhstan provides for the possibility of limiting parental rights if “the parent’s conduct presents a threat for the child, where the evidence is not sufficient to terminate parental rights” (Article 71, para 2(2)).

⁷³ Law of the Republic of Kazakhstan on Rights of Children in the Republic of Kazakhstan, Article 35.

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.⁷⁴

105. Note that the international standards emphasize the comprehensive nature of approach to combating child maltreatment as well as the paramount importance of social measures in addressing the issue.

106. It is recommended that the provisions concerning the religious instruction of a child be repealed. Instead, revision of the general legislation pertaining to the monitoring, prevention and treatment of child abuse and neglect may be undertaken, without making any revisions in the laws concerning freedom of religion or belief.

4.7.4 Suspension and dissolution of religious associations

107. The Draft amends the Law on Religious Freedom and Religious Associations by including provisions on the procedure of suspension and dissolution (liquidation) of religious associations. It allows to suspend the activities of a religious association by the decision of a court or a prosecutor in the case of:

- 1) *defiance of the Constitution and the law of the Republic of Kazakhstan;*
- 2) *systematic fulfilment of activity that contradicts the Charter (the Bylaws) of a religious association.*⁷⁵

It also allows to prohibit a religious association by a court decision on the grounds of:

- 1) *not following the requirements of the present Law;*
- 2) *not removing violations that were basis for suspension of activity of religious association, by the time affixed by the court;*
- 3) *systematic fulfilment of activities that contradict the Charter (the Bylaws) of the religious association;*
- 4) *fulfilment of activities prohibited by legislative acts of the Republic of Kazakhstan, or in the even of a reiterated (not less than twice) or gross violation of the legislation of the Republic of Kazakhstan;*
- 5) *invalidation of state registration of religious association upon establishment of inauthenticity of information contained in the documents submitted for state registration, or in the even of withdrawal of state registration of religious association;*
- 6) *in other cases provided by legislative acts of the Republic of Kazakhstan.*⁷⁶

⁷⁴ Convention on the Rights of the Child, Article 19.

⁷⁵ Draft amendments to the Law on Religious Freedom and Religious Associations, Article 10-1, para 1.

108. The prosecutorial power to order the suspension of activities of a religious association is problematic. It is welcome that the suspension order is subject to mandatory judicial review within three days from the time it is issued, however, it is recommended that the law adopt a higher standard by making the court the only body authorized to order any interference with freedom of religion or belief.

109. The draft amendments also present a concern because of their inconsistency with the norms of the domestic law. Issues of suspension or liquidation of a legal entity are regulated in the Republic of Kazakhstan by the Administrative and Civil Codes, respectively. The procedures for suspension and liquidation of religious associations contradict the provisions of the Administrative Code⁷⁷ and the Civil Code,⁷⁸ whereas, in accordance with the Law on Normative Legal Acts,⁷⁹ provisions of a code take precedence over the provisions of a law.

110. It is recommended that the provisions concerning suspension and dissolution of religious associations be reconsidered.

4.8 RIGHT TO PRIVACY AND FREEDOM OF MOVEMENT.

4.8.1 Supervision of newly released offenders

111. The Draft adds offenders sentenced for “*crimes containing extremism features*”⁸⁰ to the list specifying categories of offenders subject to post-release supervision.

112. The proposed amendments are problematic both on the account of the vagueness of their language and their potential effectiveness in terms of improving security.

113. First, “*crimes containing extremism features*” is an extremely vague category of offenses and it is therefore highly probable that the provision, if adopted, could be applied arbitrarily. Moreover, rewording the provision without deleting the word “*extremism*” would not remedy the situation, since as already mentioned in these Comments, “*extremism*” is not a legal concept and inherently possesses the threat to certainty and foreseeability if used in legislation. In this respect, it is essential that these Comments as far as they concern the issue of extremism be read in conjunction with the OSCE ODIHR Comments Draft Laws of the Republic of Kazakhstan “On Counteractive

⁷⁶ *Id.*, Article 11, para 5.

⁷⁷ Administrative Code of the Republic of Kazakhstan, Article 53.

⁷⁸ Civil Code of the Republic of Kazakhstan, Article 3, para 2.

⁷⁹ Law of the Republic of Kazakhstan on Normative Legal Acts, Article 4.

⁸⁰ Draft amendments to the Law on Administrative Control over Persons Released from Jails, Article 2 (“*Administrative control shall be established over persons who committed the following crimes:*

a) *crimes committed under “specially dangerous recidivism” as well as crimes containing extremism features;*

b) *grave crimes and specifically grave crimes or by those convicted to imprisonment for intended crimes for two or more times in cases when during the punishment period their behavior demonstrated that they are persistently reluctant to correction and remain dangerous to the society.*

c) *grave crimes and specifically grave crimes or convicted for intended crimes for two or more times, in case if they systematically breach the public order and rights of other citizens and commit other offences, upon completion of sentence service or in case of parole grant, in spite of warnings of interior authorities.”)*

Measures against Extremist Activities” and “On Amendments to Several Legislative Acts with Regard to Counteractive Measures against Extremist Activities.”

114. It is recommended that offenders sentenced for “crimes containing extremism features” be not included in the list specifying categories of offenders subject to post-release supervision.

115. Second, the potential effectiveness of the draft amendments in terms of actually improving security and public safety is questionable, since the category of crimes proposed for inclusion does not necessarily imply higher risk for repeat offense or for public order or public safety. At the same time, the provisions in question do not mention high-risk crimes such as crimes committed as part an organized criminal group. Although crimes committed in complicity with others may already be covered under points (b) and (c) of Article 2, the legislator may still wish to consider the explicit reference to organized crime, since the enforcement of points (b) and (c) of the provision in question is only triggered by the offender’s being “*persistently reluctant to correction and remain[ing] dangerous to the society*” during detention, or his/her “*systematic breach of public order and rights of other citizens and commission of other offences, upon completion of sentence service or in case of parole grant.*” However, from the viewpoint of criminal justice policy, in the case of the prior involvement in organized crime parole may be legitimately conditioned on other terms not amounting to breach of public order or commission of an offense, such as prohibition to associate with the criminal group. However, such conditions may not be justifiably imposed if the offender has fully served his/her term, since this would present an undue restriction of the right to privacy and freedom of movement, and being imposed after a punishment has been served, would amount to double jeopardy.

116. It is recommended that the legislator consider providing for supervised parole in the case of crimes committed as part of an organized criminal group.

4.9 OTHER ISSUES

4.9.1 Power to authorize certain investigative measures.

117. The Draft adds the word “*special*” to the beginning of the provision that reads “*operative investigative measures which violate the inviolability of private life, secrecy of letter exchange, telephone conversations, telegraph messages and postal parcels, as well as the right to inviolability of housing, which are protected by the law, shall be exercised exceptionally for detection, prevention and solution of grave and especially grave crimes as well as crimes prepared and committed by criminal groups, only with the sanctions of the procurator.*”⁸¹

118. While it may be assumed that the proposed amendment merely intends to ensure better consistency of the Law on Operative Investigative Activity with the Code of Criminal Procedure, it may as well be interpreted to narrow down the scope of the provision in question making only special investigative measures subject to prosecutorial authorization where these measures “violate” the rights enumerated under that paragraph.

⁸¹ Draft amendments to the Law on Operative Investigative Activity, Article 12, para 4.

It may only be deemed appropriate to subject special investigative measures to prosecutorial authorization given the type of measures categorized under ‘special investigative measures’⁸² which constitute serious interferences with the respect for private life⁸³. It is assumed that the idea behind creating a distinct category of "special measures" within the general category of "operative-investigative" measures, was that the "special measures" are those that will require the adoption of special procedures in order for their instigation and use to be legal and legitimate, as they are considered to particularly significantly interfere with the right to privacy. Therefore, it logically follows that the use of such "special measures" must be on the prior authorization of the prosecutor. Therefore, the addition of the word “special”, which clarifies the intention of the legislator and improves the text of the Law considered, is welcome.

119. However, this addition also means that all other measures (in contrast to special measures) can not be subject to prior authorization of the prosecutor no matter how serious the interference with the right to privacy might be. A close examination of the type of measures that fall under the category of general or other investigative measures show that it can not be assumed that the interference caused by all of these measures would not be serious enough to justify closer supervision. This is for instance the case with regard to “undercover agent”. **It is therefore recommended that the existing classification between general and special “operative-investigative” measures be reconsidered in the light of internationally recognized standards (particularly those referred to under note 80 of these Comments) so that all measures that constitute a serious interference with the respect for private life, including the protection of personal data, be subject to prior prosecutorial authorization.**

120. Nevertheless, the amendment considered under the Draft leaves unresolved another concern in respect of the Article 12, para 4 of the Law on Operative Investigative Activity. This provision as amended requires that “special measures” “*which violate the inviolability of private life, secrecy of letter exchange, telephone conversations, telegraph messages and postal parcels, as well as the right to inviolability of housing*” as protected under the law of Kazakhstan be subject to prosecutorial authorization. This means that the decision of whether or not a particular measure constitutes a serious interference with privacy is at the discretion of the investigator. A case-by-case assessment is required

⁸² See Article 11, para 3.

⁸³ Under international standards, such measures may interfere with the respect for private life only if they are governed by appropriate provisions of domestic law, are proportionate to the aim pursued by these measures and may be subject to supervision or judicial review. Privacy rights have been addressed by the OSCE in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (3 October 1991, para 24): “*the participating States reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communication. In order to avoid any improper or arbitrary intrusion by the State in the realm of the individual, which would be harmful to any democratic society, the exercise of this right will be subject only to such restrictions as are prescribed by law and are consistent with international recognized human rights standards. In particular, the participating States will ensure that searches and seizures of persons and private premises and property will take place only in accordance with standards that are judicially enforceable*”. Article IV, para 1, Council of Europe Guidelines on Human Rights and the Fight Against Terrorism: “*Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided by law. It must be possible to challenge the lawfulness of these measures before a court.*”

from the investigator. It is not appropriate though to leave a decision with such far-reaching implications to the investigator. This is a matter of concern.

121. It is assumed that the idea behind creating a distinct category of "special measures" within the general category of "operative-investigative" measures was to avoid case-by-case assessments and, instead, to rely on an objective criteria in order to determine the instances in which prior authorization of the prosecutor is required by law. **It is therefore recommended that the sentence “*which violate the inviolability of private life, secrecy of letter exchange, telephone conversations, telegraph messages and postal parcels, as well as the right to inviolability of housing*” be deleted.**

END OF TEXT