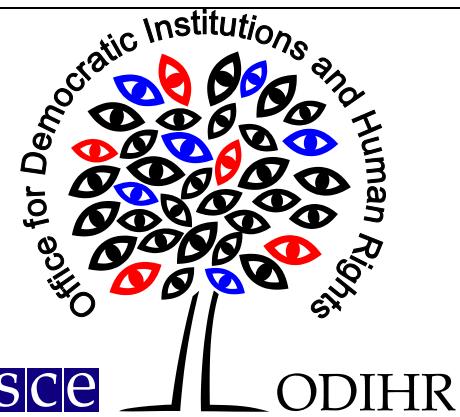


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PRELIMINARY OPINION

ON THE DRAFT AMENDMENTS TO THE LEGAL FRAMEWORK

“ON COUNTERING EXTREMISM AND TERRORISM”

IN THE REPUBLIC OF KAZAKHSTAN

**based on an unofficial English translation of the Draft Amendments commissioned
by the OSCE Office for Democratic Institutions and Human Rights**

*This Opinion has benefited from contributions made by the OSCE Action against Terrorism
Unit, Transnational Threats Department, of the OSCE Secretariat and by
the Office of the OSCE Representative on Freedom of Media*

OSCE Office for Democratic Institutions and Human Rights
Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

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OSCE/ODIHR Preliminary Opinion on the Draft Amendments to the Legal Framework “On Countering Extremism and Terrorism” in the Republic of Kazakhstan

I. INTRODUCTION

1. *On 16 September 2016, the Head of the OSCE Programme Office in Astana forwarded to the Director of the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a letter from the Secretary of the International Affairs, Defence and Security Committee of the Mazhilis of the Parliament. In this letter, the Secretary of the Committee requested the OSCE/ODIHR to review the Draft Law “On Changes and Amendments to Some Legal Acts of the Republic of Kazakhstan on Countering Extremism and Terrorism” (hereinafter “the Draft Law”).¹*
2. *By letter of 19 September 2016, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Law with international human rights standards and OSCE commitments.*
3. *In view of the urgency of the matter, as the second parliamentary reading of the Draft Law is scheduled to take place on 26 October 2016, the OSCE/ODIHR decided to prepare a Preliminary Opinion, which only provides a broad overview of some the main issues of concern.*
4. *In previous years, the OSCE/ODIHR reviewed and issued several legal reviews on draft legislation of the Republic of Kazakhstan on counter-terrorism, “extremism”, anti-money laundering, national security, freedom of religion or belief and migration.²*
5. *This Opinion was prepared in response to the above-mentioned request and in accordance with the OSCE/ODIHR’s mandate as established by the 2001 OSCE Bucharest Plan of Action for Combating Terrorism.³*

¹ The Draft Law “On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Countering Extremism and Terrorism” seeks to amend the following legal acts: (1) the Criminal Code of the Republic of Kazakhstan (3 July 2014); (2) the Code of Criminal Procedure of the Republic of Kazakhstan (4 July 2014); (3) the Penal Execution Code (5 July 2014); (4) the Code on Administrative Offenses (5 July 2014); (5) the Entrepreneurial Code (29 October 2015); (6) the Law “On Operational Search Activities” (15 September 1994); (7) the Law “On the Legal Status of Foreigners” (19 June 1995); (8) the Law “On National Security Agencies of the Republic of Kazakhstan” (21 December 1995); (9) the Law “On Housing Relationships” (16 April 1997); (10) the Law “On the Special Status of the City of Almaty” (1 July 1998); (11) the Law “On the State Control over Turnover of Certain Types of Weapons” (30 December 1998); (12) the Law “On Counteracting Terrorism” (13 July 1999); (13) the Law “On Security Activities” (19 October 2000); (14) the Law “On Local Government and Self-Government in the Republic of Kazakhstan” (23 January 2001); (15) the Law “On Tourist Activities in the Republic of Kazakhstan” (13 June 2001); (16) the Law “On the State Legal Statistics and Special Accounts” (22 December 2003); (17) the Law “On Communication” (5 July 2004); (18) the Law “On the Status of the Capital of the Republic of Kazakhstan” (21 July 2007); (19) the Law “On Counteracting Money Laundering and Terrorist Financing” (28 August 2009); (20) the Law “On Migration of the Population” (22 July 2011); (21) the Law “On Religious Activities and Religious Associations” (11 October 2011); (22) the Law “On State Services” (15 April 2013); (23) the Law “On the National Guards of the Republic of Kazakhstan” (10 January 2015); and (24) the Law “On Changes and Amendments to Some Legal Acts of the Republic of Kazakhstan On Migration and Employment of the Population” (24 November 2015).

² OSCE/ODIHR, *Opinion on the Draft Law of the Republic of Kazakhstan on the Regulation of Migration Processes*, 11 April 2011, <<http://www.legislationline.org/documents/id/16531>>; OSCE/ODIHR, *Opinion on the Draft Law of the Republic of Kazakhstan on Migration of the Population*, 24 September 2009, <<http://www.legislationline.org/documents/id/15621>>; OSCE/ODIHR, *Comments on the Law on Amendments and Additions to some Legislative Acts of the Republic of Kazakhstan on Issues of Religious Freedom and Religious Organizations*, 31 January 2009, <<http://www.legislationline.org/documents/id/15504>>; two sets of OSCE/ODIHR *Comments on the draft Amendments to Selected Legislative Acts of Kazakhstan concerning Public Order and Safety*, issued in 2006, <<http://www.legislationline.org/search/runSearch/1/country/21/rows/10/type/2/page/2>>; OSCE/ODIHR, *Comments on Draft Legislation on Anti-Money Laundering and Combating the Financing of Terrorism*, 7 March 2006, <<http://www.legislationline.org/documents/id/1934>>; OSCE/ODIHR, *Comments on Draft Legislation on Anti-Money Laundering and Combating the Financing of Terrorism*, 7 March 2006, <<http://www.legislationline.org/documents/id/1934>>; OSCE/ODIHR, *Preliminary Comments on the Draft Law “On Amendments to Some legislative Acts of the Republic of Kazakhstan on National Security Issues”*, 18 April 2005, <<http://www.legislationline.org/documents/id/1949>>; and three series of *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 counteractive measures against extremist activities”*, issued in 2004 and 2005, <<http://www.legislationline.org/search/runSearch/1/topic/5/country/21/rows/10/type/2>>.

³ See *OSCE Bucharest Plan of Action for Combating Terrorism*, Annex to the OSCE Ministerial Council Decision MC(9).DEC/1, Bucharest, 3-4 December 2001, pars 6, 18 and 22, <<http://www.osce.org/node/40515>>, which states, among others, that ODIHR “[w]ill on formal request by interested participating States and where appropriate, offer technical assistance/advice on legislative drafting necessary for the ratification of international instruments” and will “provide continued advice to participating States, at their request, on strengthening domestic legal frameworks and institutions that uphold the rule of law, such as law enforcement agencies, the judiciary and the prosecuting authorities, bar associations and defence attorneys”.

II. SCOPE OF REVIEW

6. The scope of this Preliminary Opinion covers only the Draft Law submitted for review. At the same time, given the urgency of the matter, the Preliminary Opinion focuses on some, but not all, potential key areas of concern in terms of compliance with international human rights standards and OSCE human dimension commitments. Thus limited, the Preliminary Opinion does not constitute a full and comprehensive review of the Draft Law nor of the entire legal and institutional framework on combating terrorism in the Republic of Kazakhstan.
7. The Preliminary Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements rather than on the positive aspects of the Draft Law. The ensuing recommendations are based on international standards relating to human rights and fundamental freedoms, as well as relevant OSCE commitments. The Preliminary Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Preliminary Opinion analyses the potentially different impact of the Draft Law on women and men.⁴
8. This Preliminary Opinion is based on an unofficial English translation of the Draft Law, commissioned by the OSCE/ODIHR, which is available at www.legislationline.org. Errors from translation may result.
9. In view of the above, the OSCE/ODIHR would like to make mention that the Preliminary Opinion is without prejudice to any written or oral recommendations and comments related to this and other related legislation of the Republic of Kazakhstan that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

10. While the overall objective of the Draft Law to strengthen the legal framework on countering terrorism in Kazakhstan is welcome, the Draft Law also introduces a number of new provisions which have the potential to unduly restrict freedom of movement and to choose one’s residence, and the right to freedom of expression, particularly as it relates to access to the Internet and other communication tools. Some of the amendments would even reinforce the existing restrictions on the right to freedom of religion or belief.
11. Moreover, the legal definition of “terrorism” and so called “extremism”-related offences contained in the Criminal Code of Kazakhstan would benefit from further amendments in order to comply with the principles of legal certainty, foreseeability and specificity of criminal law, and to ensure that only “violent extremism” is criminalized. This is crucial in light of recent findings of UN human rights monitoring bodies specifically noting the negative impact on human rights and fundamental freedoms that counter-terrorism measures and legislation, and other measures aimed at countering so-called “extremism”, have in the Republic of Kazakhstan.

⁴ See par 32 of the OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

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12. In order to further improve the compliance of the Draft Law with international human rights standards and OSCE human dimension commitments, the OSCE/ODIHR makes the following key recommendations:
- A. to clarify the legal definitions of terrorism and “extremism”-related criminal offences by:
 - reconsidering the criminalization of “extremism”, or, at a minimum, to clarify its meaning to ensure that only “*violent* extremism/extremist activities” are criminalized while also circumscribing more strictly the definitions of “extremism”-related offences, particularly in Articles 182, 258 and 259 of the Criminal Code; [pars 21-24]
 - deleting from Article 255 the reference to “*other actions* causing danger of human death” or “the emergence of *other socially dangerous consequences*”, and cross-referencing the specific provisions pertaining to serious crimes in Kazakhstan’s Criminal Code, while ensuring that the said actions pass a certain threshold of seriousness; [pars 25-28]
 - clarifying the wording of Article 179 by explicitly referring to “*violent*” seizure or retention of power; [par 20]
 - deleting the reference to “Promotion of Terrorism” from Article 256 of the Criminal Code and supplementing the provision by referring to the intent to incite the commission of a terrorist act while causing a danger that such an act may be committed and include defences or exceptions; [pars 29-31]
 - providing definitions for the terms “leadership”, “participation”, “recruitment” and “preparation”; [pars 34-35]
 - B. to delete the last paragraph of the new Article 14 of the Law “On Migration” and ensure that the decisions of national security agencies pertaining to visa, residency permits and applications for citizenship are provided in writing, motivated and subject to appeal; [pars 44-46]
 - C. to include in Article 12 par 5 of the Law “On Operational Search Activities” cross-references to the relevant provisions of the Criminal Code, to ensure that special investigative techniques are only used for the most serious criminal offences, while ensuring prior judicial authorization or an effective system of judicial control over the activities of prosecutors in this field; [par 50-53]
 - D. to discuss whether to maintain the proposed system of *temporary* residence registration or, at a minimum, to reconsider the very short 10-days timeline to register and introduce more flexible and simple rules regarding population registration; administrative arrests should be explicitly excluded as a sanction for failure to register one’s residence; [par 68]
 - E. to delete Article 9 pars 3 and 3-1 of the Law “On Religious Activities and Religious Associations” and Article 490 par 3 of the Code of Administrative Offences, thereby removing the requirement of obtaining an “expert opinion” prior to the use of religious material or literature and excluding administrative liability for failure to do so; [pars 76-79]
 - F. to delete administrative liability for disseminating doctrine by unregistered religious associations under Article 490 of the Code of Administrative Offences, and reconsider the introduction of the new provisions to regulate so-called “religious tourism”; [pars 80 and 83]

- G. to reconsider automatic forcible expulsion for non-nationals subject to expulsion orders and retain monitored self-arranged departure as the default procedure for such instances, while explicitly providing exceptions where such persons would be at a real risk of torture or inhuman or degrading treatment or punishment if expelled, and also in cases involving victims of trafficking, stateless persons or undue interference with private and family life, while providing for judicial review or appeal of decisions of expulsion/return with immediate suspensive effect on the expulsion procedure; [pars 86 and 91-93]
- H. to reconsider the blanket prohibition of encryption tools/equipment in the new Article 36-2 of the Law “On Communication”; [par 99] and
- I. to amend Article 41-1 of the Law “On Communication” so as to allow for only temporary suspension of network or means of communication, in strictly limited cases, and ensure that a court orders such measures, or confirm them within 24 hours in cases of emergency. [pars 106-109]

Additional recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Legal Framework on Counter-Terrorism Applicable in the Republic of Kazakhstan

- 13. International standards on the fight against terrorism are enshrined in a number of international legal instruments to which the Republic of Kazakhstan is a party and which focus on different aspects of this legal field. While the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents⁵ focuses on attacks against specific protected persons, the International Convention against the Taking of Hostages,⁶ the International Convention for the Suppression of Terrorist Bombings,⁷ as well as the Convention on the Marking of Plastic Explosives for the Purpose of Detection⁸ are aimed at the protection of the entire population. More specifically, the International Convention for the Suppression of the Financing of Terrorism⁹ focuses on the financial assets of terrorist organizations, while the International Convention for the Suppression of Acts of Nuclear Terrorism,¹⁰ and the Convention on the Physical Protection of Nuclear Material¹¹ both deal with the use of hazardous materials for the purposes of terrorism. Finally, another category of

⁵ UN, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted on 14 December 1973, <http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf>. The Republic of Kazakhstan acceded to this Convention on 21 February 1996.

⁶ UN, *International Convention against the Taking of Hostages*, adopted on 17 December 1979, <<http://www.un.org/en/sc/ctc/docs/conventions/Conv5.pdf>>. The Republic of Kazakhstan acceded to this Convention on 21 February 1996.

⁷ UN, *International Convention for the Suppression of Terrorist Bombings*, adopted on 15 December 1997, <<http://www.un.org/law/cod/terroris.htm>>. The Republic of Kazakhstan acceded to this Convention on 6 November 2002.

⁸ UN, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, adopted on 1 March 1991, <<http://treaties.un.org/doc/db/Terrorism/Conv10-english.pdf>>. The Republic of Kazakhstan acceded to this Convention on 18 May 1995.

⁹ UN, *International Convention for the Suppression of the Financing of Terrorism*, adopted on 9 December 1999, <<http://www.un.org/law/cod/finterr.htm>>. The Republic of Kazakhstan acceded to this Convention on 24 February 2003.

¹⁰ UN, *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted on 13 April 2005, ratified by the Republic of Kazakhstan on 31 July 2008, <<http://www.un.org/en/sc/ctc/docs/conventions/Conv13.pdf>>.

¹¹ Convention on the Physical Protection of Nuclear Material, adopted on 3 March 1980, <<https://www.iaea.org/sites/default/files/infirc274r1.pdf>>. The Republic of Kazakhstan acceded to this Convention on 2 September 2005.

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international legal instruments addresses particularly the hijacking of aircraft by terrorist organizations, and violent acts committed at airports,¹² on ships, or on fixed maritime platforms.¹³

14. The international framework also includes a number of UN Security Council Resolutions,¹⁴ such as Resolutions 2178(2014) on the Phenomenon of Foreign Terrorist Fighters¹⁵ and 1373 (2001) on Threats to International Peace and Security caused by terrorist acts,¹⁶ as well as several resolutions adopted by the UN General Assembly on a number of different matters related to the fight against terrorism.¹⁷
15. International efforts in the field of counter-terrorism are also governed by the framework of the United Nations’ (UN) Global Counter-Terrorism Strategy and Plan of Action (2006).¹⁸ The UN Strategy specifies that measures to ensure respect for human rights for all and the rule of law are the fundamental basis of the prevention and fight against terrorism and money laundering.¹⁹ In the case of the Republic of Kazakhstan, these obligations are in particular embodied in the International Covenant on Civil and Political Rights (ICCPR),²⁰ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²¹ the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²² the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT),²³ and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).²⁴
16. At the OSCE level, the participating States have also condemned terrorism and agreed to take effective measures to prevent and suppress it. OSCE participating States have moreover stressed that strong democratic institutions, respect for human rights and the rule of law are the foundation for such protection,²⁵ as also set out more specifically in the 2001 Bucharest Plan of Action for Combating Terrorism.²⁶ In the Athens Ministerial

¹² These include: the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, adopted on 14 September 1963, <https://www.unodc.org/lldb/en/1963_Convention_on%20Board%20Aircraft.html> (which entered into force in the Republic of Kazakhstan on 16 August 1995); the *Convention for the Suppression of Unlawful Seizure of Aircraft*, adopted on 16 December 1970, <<https://treaties.un.org/doc/db/terrorism/conv2-english.pdf>> (which entered into force in the Republic of Kazakhstan on 4 May 1995); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, adopted on 23 September 1971, <<http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf>> (the Republic of Kazakhstan acceded to this Convention on 4 April 1995); and the *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted on 24 February 1988, <<http://treaties.un.org/doc/db/Terrorism/Conv7-english.pdf>> (which entered into force in the Republic of Kazakhstan on 17 June 1995).

¹³ See the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, adopted on 10 March 1988, <<http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>> (which entered into force in the Republic of Kazakhstan on 22 February 2004); and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, adopted on 10 March 1988, <<http://treaties.un.org/doc/db/Terrorism/Conv9-english.pdf>> (which entered into force in the Republic of Kazakhstan on 22 February 2004).

¹⁴ For an overview, see <<http://www.un.org/en/sc/ctc/resources/res-sc.html>>.

¹⁵ See <[http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/2178%20\(2014\)](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/2178%20(2014))>.

¹⁶ See <<http://www.un.org/en/sc/ctc/resources/res-sc.html>>.

¹⁷ For an overview, see <<http://www.un.org/en/sc/ctc/resources/res-ga.html>>.

¹⁸ See <<https://www.un.org/counterterrorism/citif/en/un-global-counter-terrorism-strategy>>.

¹⁹ ibid. Pillar IV of the Plan of Action (Annex to the 2006 UN Global Counterterrorism Strategy).

²⁰ *UN International Covenant on Civil and Political Rights* (hereinafter “the ICCPR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Kazakhstan ratified the ICCPR on 24 January 2006.

²¹ *UN International Covenant on Economic, Social and Cultural Rights* (hereinafter “the ICESCR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Kazakhstan ratified the ICESCR on 24 January 2006.

²² *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “the CEDAW”), adopted by the UN General Assembly by Resolution 34/180 of 18 December 1979. The Republic of Kazakhstan acceded to the CEDAW on 26 August 1998.

²³ *UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter “the CAT”), adopted by the UN General Assembly by Resolution 39/46 of 10 December 1984. The Republic of Kazakhstan acceded to the CAT on 26 August 1998.

²⁴ *UN International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter “the CERD”), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965. The Republic of Kazakhstan acceded to the CERD on 26 August 1998.

²⁵ See the *Overview of OSCE Counter-Terrorism Related Commitments* (as last updated in February 2016), <<http://www.osce.org/node/26365?download=true>>.

²⁶ *Op. cit.* footnote 3 (2001 OSCE Bucharest Plan of Action for Combating Terrorism).

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Council Decision on Further Measures to Support and Promote the International Legal Framework against Terrorism (2009),²⁷ participating States further recognized the need to incorporate universal anti-terrorism conventions and protocols into national criminal, and, where applicable, also administrative and civil legislation, thereby making acts of terrorism punishable by appropriate penalties. OSCE participating States have also recently reaffirmed their commitments to respect and protect human rights while countering terrorism.²⁸

17. While the Republic of Kazakhstan is not a Member State of the Council of Europe (hereinafter “the CoE”), the European Convention on Human Rights and Fundamental Freedoms (hereinafter “the ECHR”), the case law of the European Court of Human Rights (hereinafter “the ECtHR”), and other CoE’s instruments may serve as persuasive reference documents on human rights and fundamental freedoms, and the countering of terrorism in the context of this Preliminary Opinion.
18. Other specialized documents of a non-binding nature are also relevant in this context, including, among others:
 - the OSCE/ODIHR Manual on Countering Terrorism, Protecting Human Rights (2008);²⁹
 - the OSCE/ODIHR Practical Manual for Law Enforcement Officers on Human Rights in Counter-Terrorism Investigations (2013);³⁰
 - the OSCE/ODIHR Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach (2014);³¹ and
 - the UN OHCHR’s Factsheet on Human Rights, Terrorism and Counter-Terrorism (2008).³²

2. The Legal Definitions of “Terrorism”, “Extremism” and Other Terms

19. The Draft Law introduces a number of amendments to the provisions of the Criminal Code of Kazakhstan pertaining to “terrorism” and “extremism”-related offences, which mostly increase the severity of penalties (see sub-section 3 *infra*). At the same time, it is reiterated that the existing definitions and constitutive elements of these criminal offences are at times unclear. They would thus benefit from further amendments in order to comply with the principles of legal certainty, foreseeability and specificity of criminal law, which requires that criminal offences and related penalties be defined clearly and precisely,³³ so that an individual knows from the wording of the relevant criminal provision which acts will make him/her criminally liable.
20. In particular, Article 179 of the Criminal Code addresses “Propaganda or Public Calls for Seizure or Retention of Power, as well as Seizure, Retention of Power or Violent

²⁷ OSCE Ministerial Council Decision No. 2/09 of 2 December 2009, <<http://www.osce.org/cio/40713?download=true>>.

²⁸ See e.g., OSCE Consolidated Framework for the Fight against Terrorism, adopted by Decision No. 1063 of the Permanent Council, at its 934th Plenary Meeting on 7 December 2012, <<http://www.osce.org/pc/98008>>; and OSCE Ministerial Declaration on Preventing and Countering Violent Extremism and Radicalization that Lead to Terrorism (2015), <<http://www.osce.org/cio/208216>>.

²⁹ See OSCE/ODIHR, *Countering Terrorism, Protecting Human Rights: a Manual* (2008), <<http://www.osce.org/odahr/29103>>.

³⁰ See <<http://www.osce.org/odahr/108930>>.

³¹ See <<http://www.osce.org/atu/111438?download=true>>.

³² UN OHCHR, *Factsheet on Human Rights, Terrorism and Counter-Terrorism* (2008), <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>>.

³³ UN HRC, *General Comment No. 29 on States of Emergency* (Article 4 of the ICCPR), CCPR/C/21/Rev.1/Add. 11 (2001), par 7, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en>.

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Change of the Constitutional Order”. The terms “propaganda”/“public calls” are quite general, and thus difficult to distinguish from other forms of expression protected by Article 19 of the ICCPR³⁴ (see also par 21 *infra*). Further, some sub-categories of the criminal offence (“Propaganda or Public Calls for Seizure or Retention of Power”) do not necessarily imply incitement to violence and could therefore be abused to limit critical or offensive speech, including social protests. This would not be in line with international human rights standards.³⁵ It is recommended **to clarify the wording of Article 179 by explicitly referring to “violent” seizure or retention of power.**

21. Articles 182, 258 and 259 of the Criminal Code explicitly refer to “extremism”, “extremist activities”, “extremist organizations” or “extremist groups”.³⁶ The Law “On Operational Search Activities” and the Law “On Communication” also refer to such terms. In that respect, it is noted that the OSCE/ODIHR and other international bodies have previously raised concerns pertaining to “extremism”/“extremist” as a normative legal concept and the vagueness of such a term, particularly in the context of criminal legislation.³⁷ In this context, it is reiterated that freedom of expression protects all forms of ideas, information or opinions, including those that “offend, shock or disturb” the State or any part of the population,³⁸ and even “deeply offensive” speech.³⁹ While the right to freedom of expression may in very limited cases be restricted,⁴⁰ simply holding or peacefully expressing views that are considered radical or “extreme” under any definition should never be criminalized, unless such views are associated with violence or criminal activity.⁴¹ Certain forms of expression would only be seen as threatening national security when the following three criteria are met cumulatively: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and

³⁴ See e.g., OSCE/ODIHR-Venice Commission, *Joint Interim Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of their Symbols*, 21 December 2015, pars 83-85 and 119, <<http://www.legislationline.org/documents/id/19884>>.

³⁵ See UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (AChPR) Special Rapporteur on Freedom of Expression and Access to Information (hereinafter “the International Special Rapporteurs/Representatives on Freedom of Expression”), *2010 Joint Declaration on Ten Key Threats to Freedom of Expression*, 3 February 2010, Section 8 on Security and Freedom of Expression, <<http://www.osce.org/fom/41439?download=true>>. See also International Special Rapporteurs/Representatives on Freedom of Expression, *2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism*, 3 May 2016, <<http://www.osce.org/fom/237966>>.

³⁶ Article 182 on “Formation, Leadership of an Extremist Group or Participation in Activities Thereof”; Article 258 on “Financing of Terrorist or Extremist Activities and Otherwise Aiding to Terrorism or Extremism”; and Article 259 on “Enlistment, or Preparation, or Arming of Persons for the Purpose of Organizing Terrorist or Extremist Activities”.

³⁷ See e.g., *op. cit.* footnote 2, pars 4.1. to 4.3. (2004 OSCE/ODIHR Preliminary Comments on the Draft Laws on Countering Extremist Activities in Kazakhstan); pages 5-7 (2004 OSCE/ODIHR Comments on the Draft Laws on Countering Extremist Activities in Kazakhstan); and pars 2-3 and 11-15 (2005 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 counteractive measures against extremist activities”*). See also UN Special Rapporteur on Freedom of Religion or Belief, *2014 Report on the Mission to the Republic of Kazakhstan*, A/HRC/28/66/Add.1, 23 December 2014, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_66_Add_1_ENG.doc>. See also e.g., OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), pars 100, 205 and 213, <<http://www.osce.org/odihr/119633>>; Venice Commission, *Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation*, CDL-AD(2012)016-e, 15-16 June 2012, par 30, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)016-e)>; UN Human Rights Committee (UN HRC), *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, par 46, <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, where the UN HRC has stressed the need to ensure that offences such as “extremist activity” are clearly defined to ensure that they do not lead to disproportionate interference with freedom of expression.

³⁸ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *2015 Thematic Report*, A/HRC/31/65, 22 February 2016, par 38, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A_HRC_31_65_AUV.docx>. See also e.g., the cases of *Handyside v. United Kingdom*, ECtHR judgment of 7 December 1976 (Application no. 5493/72); and *Bodrožić v. Serbia*, ECtHR judgment of 23 June 2009 (Application no. 32550/05), pars 46 and 56, <<http://hudoc.echr.coe.int/eng?i=001-93159>>.

³⁹ See *op. cit.* footnote 37, pars 11 and 38 (UN HRC General Comment No. 34 (2011)).

⁴⁰ See e.g., Article 20 ICCPR, article 4 CERD, Article 3(c) Convention on the Prevention and Punishment of the Crime of Genocide, Security Council resolution 1624(2005).

⁴¹ *Op. cit.* footnote 38, par 38 (2015 Thematic Report of the UN Special Rapporteur on Human Rights and Counter-Terrorism). See also *op. cit.* footnote 31, page 42 (2014 OSCE/ODIHR’s Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism).

the likelihood or occurrence of such violence.⁴² On the contrary, the possibility to peacefully pursue a political, or any other, agenda – even where different from the objectives of the government and considered to be “extreme” – must be protected.⁴³

22. In any case, any legal definition of a criminal offence needs to meet the requirements of legal certainty, foreseeability and specificity of criminal law, which would be difficult here given that there is no consensus at the international level on a normative definition of “extremism”.⁴⁴ It is noted however that the Shanghai Convention on Combating Terrorism, Separatism, and Extremism,⁴⁵ although binding upon a limited number of states which are members of the Shanghai Cooperation Organisation,⁴⁶ is the only international treaty containing a definition of “extremism”, which is conceived as a *violent act*.⁴⁷ Generally speaking, “extremism” may not necessarily constitute a threat to society if it is not connected to violence or other criminal acts, such as incitement to hatred, inciting or condoning criminal activity and/or violence, as legally defined in compliance with international human rights law.⁴⁸
23. This link between extremism and violence is not systematically reflected in Articles 182, 258 and 259 of the Criminal Code. On the other hand, Article 3 par 39 of the Criminal Code defines “extremist crimes” by including a cross-reference to numerous articles of the Criminal Code;⁴⁹ these provisions, at times, are circular as they refer to “extremist nature”/“extremist activities”, but fail to provide proper definitions of these terms.
24. In light of the above, it is thus recommended **to reconsider the criminalization of “extremism”, or, at a minimum, to amend and more strictly circumscribe the definition of “extremism” and “extremist activities” to ensure that only acts connected to violence or other criminal acts are criminalized.** This is all the more important in light of the latest findings by UN human rights monitoring bodies on the Republic of Kazakhstan, which express some concerns regarding the broad formulation of the concepts of “extremism” under Kazakhstan’s criminal legislation and the use of

⁴² See *op. cit.*, footnote 35, par 2 (d) (2016 UN-OSCE-OAS-ACHPR Joint Declaration on Freedom of Expression and Countering Violent Extremism); and Principle 6 of the Johannesburg Principles on Freedom of Expression and National Security (1995), <<http://www.refworld.org/docid/4653fa1f2.html>>, adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression. See also the UN Secretary General, *Report on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, A/63/337, 28 August 2008, par 62, <<http://www.un.org/Docs/journal/asp/ws.asp?m=A/63/337>>.

⁴³ *Op. cit.* footnote 38, par 38 (2015 Thematic Report of the UN Special Rapporteur on Human Rights and Counter-Terrorism).

⁴⁴ See e.g., *ibid.* pars 11 and 21, noting that “[d]espite the numerous initiatives to prevent or counter violent extremism, there is no generally accepted definition of violent extremism, which remains an ‘elusive concept’.”

⁴⁵ See <<http://www.cfr.org/counterterrorism/shanghai-convention-combating-terrorism-separatism-extremism/p25184>>.

⁴⁶ See <http://infoshos.ru/en/>. The Shanghai Convention was ratified by the Law of the Republic of Kazakhstan from 18 April 2002.

⁴⁷ Article 1 of the Shanghai Convention on Combating Terrorism, Separatism, and Extremism defines “extremism” as “an act aimed at seizing or keeping power *through the use of violence* or changing *violently* the constitutional regime of a State, as well as a *violent* encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the Parties”.

⁴⁸ *Op. cit.* footnote 38, par 38 (2015 Thematic Report of the UN Special Rapporteur on Human Rights and Counter-Terrorism). See also *op. cit.* footnote 31, pages 42-43 (2014 OSCE/ODIHR’s Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism).

⁴⁹ i.e., Incitement of Social, National, Ethnic, Racial or Religious Hatred (Article 174); Propaganda and Public Calls for the Seizure or Retention of Power, as well as Seizure or Retention of Power or Violent Change of the Constitutional Order of the Republic of Kazakhstan (Article 179); Separatist Activities (Article 180); Armed Rebellion (Article 181); Formation, Leadership of an Extremist Group or Participation in its Activities (Article 182); Sabotage (Article 184); Financing of Terrorist or Extremist Activities and Otherwise Aiding to Terrorism or Extremism (Article 258); Enlistment, or Preparation, or Arming of Persons for the Purpose of Organizing Terrorist or Extremist Activities (Article 259); Participation in Terrorist or Extremist Training (Article 260); Illegal Paramilitary Organization (267); Creation, Management and Participation in the Activity of Illegal Public Associations and Others – meaning those associations promoting racial, national, ethnic, social or religious intolerance or exclusivity, calling for the violent overthrow of the constitutional order, undermining the security of the state or attacking the territorial integrity of the Republic of Kazakhstan (Article 404); and the Organization and Participation in the Activities of a Social or Religious Association or Other Organization, after a Court Decision Banning their Activities or after their Liquidation on the Ground of Extremism or Terrorism (Article 405).

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such legislation to unduly restrict freedoms of religion, expression, peaceful assembly and association.⁵⁰

25. As regards “Acts of Terrorism”, the Draft Law seeks to amend Article 255 of the Criminal Code, which defines the said offence,⁵¹ by increasing the penalties to be imposed when the crime is committed. At the same time, given that some of the constitutive elements of the offence are relatively vaguely framed and in light of recent findings of UN human rights monitoring bodies,⁵² it may be advisable to also review this definition.
26. In the absence of an internationally-agreed definition of terrorism, the UN Special Rapporteur on Human Rights and Counter-Terrorism has noted that any definition of terrorism would require three cumulative elements to be human rights-compliant: (1) action corresponding to an offence under the universal terrorism-related conventions (or, in the alternative, action corresponding to all elements of a serious crime defined by national law); and (2) action done with the intention of provoking terror or compelling a government or international organisation to do or abstain from doing something; and (3) action passing a certain threshold of seriousness, i.e., either (a) amounting to the intentional taking of hostages, or (b) intended to cause death or serious bodily injury, or (c) involving lethal or serious physical violence.⁵³
27. The definition contained in Article 255 requires a wrongful act (*actus reus*) such as committing “arson”, causing an “explosion”, or “other actions causing danger of human death”, the “infliction of considerable material damage” or the “emergence of other socially dangerous consequences”. This must be perpetrated with a certain criminal intent (*mens rea*) – here the intent to disrupt public safety, provoke terror in the population, or influence decisions by certain state or international entities, or provoke a war or complicate international relations. Such formulation has the potential to capture a very large number of possible acts and omissions, which do not appear to be defined elsewhere in the Criminal Code. Moreover, some of the terminology used (e.g., “*other actions* causing danger of human death” or “emergence of *other socially dangerous consequences*”) appears overly broad, and does not correspond to the offences under the Universal Anti-Terrorism Instruments listed in par 13 *supra*, nor to specific serious crimes defined by the Kazakhstan’s Criminal Code. In order to ensure legal certainty, it is thus recommended **to remove this vague wording, and to cross-reference the specific provisions pertaining to serious crimes in Kazakhstan’s Criminal Code.**⁵⁴

⁵⁰ See, in this context, UN HRC, *Concluding Observations on Kazakhstan*, CCPR/C/KAZ/CO/2, 9 August 2016, pars 13-14, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/KAZ/CO/2&Lang=En>; see also UN Special Rapporteur on Freedom of Religion or Belief, *2014 Report on the Mission to the Republic of Kazakhstan*, A/HRC/28/66/Add.1, 23 December 2014, par 69 (j), <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_66_Add_1_ENG.doc>.

⁵¹ Article 255 defines “Acts of Terrorism” as the “commission of an explosion, arson, or other actions causing the danger of human death, infliction of considerable material damage, or emergence of other socially dangerous consequences, if these actions are committed for the purposes of disrupting public safety, provoking terror in the population, or influencing decisions by state bodies of the Republic of Kazakhstan, by a foreign state or an international organization, also of provoking a war or complicating international relations, as well as threatening to commit such actions for the same purposes”.

⁵² See e.g., *op. cit.* footnote 50, pars 13-14 (2016 UN HRC’s Concluding Observations on Kazakhstan).

⁵³ See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *2010 Report*, A/HRC/16/51, 22 December 2010, par 27, <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>>; and UN Security Council Resolution 1566 (2004), S/RES/1566 (2004), par 3, <[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1566%20\(2004\)&referer=/english/&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1566%20(2004)&referer=/english/&Lang=E)>. See also e.g., OSCE/ODIHR, *Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism and Prevention of Money Laundering*, 9 December 2013, pars 18-27, <<http://www.legislationline.org/documents/id/18571>>.

⁵⁴ See for instance Article 421-1 of the Criminal Code of France, <<https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIARTI000023712838&dateTexte=20111204>>. See also OSCE Representative on Freedom of the Media, *Legal Analysis of the Proposed Bill C-51, the Canadian Anti-terrorism Act, 2015: Potential Impact on Freedom of Expression* (May 2015), <<http://www.osce.org/fom/156261?download=true>>.

28. As to the criminal intent, while some of the aspects mentioned in Article 255 do correspond to the above-mentioned cumulative elements, some of the language used (e.g., “disrupt public safety”) may be subject to diverging interpretations. Moreover, the reference to the intent to “complicate international relations” is extremely vague. It would therefore be preferable to more closely align the above-mentioned elements – i.e., the criminal intent of provoking terror or compelling a government or international organisation to do or abstain from doing something, and remove other unclear terminology. Finally, Article 255 of the Criminal Code does not really require that the said actions pass a certain threshold of seriousness, and should be supplemented accordingly.
29. The Draft Law enhances penalties for the “Promotion of Terrorism or Public Incitement to Commit a Terrorist Act” under Article 256 of the Criminal Code. At the same time, the provision does not specify the legal definition or constitutive elements of such offence. To comply with international human rights law, such an offence must: (a) expressly refer to the intent to communicate a message and intent that this message incite the commission of a terrorist act; and (b) be limited to the incitement to conduct that is truly terrorist in nature; and (c) include an actual (objective) risk that the act incited will be committed; and (d) preserve the application of legal defences or principles leading to the exclusion of criminal liability in certain cases.⁵⁵ In this context, general terms such as “promoting” terrorism should be avoided.⁵⁶ Indeed, criminal liability should not be extended to simple expressions mentioning or adhering to terrorist ideologies, if these do not fulfil the above-mentioned criteria, as criminal law should punish actions, not mere declarations of thoughts.⁵⁷
30. Article 256 of the Criminal Code should be amended to reflect these principles, particularly by deleting the reference to “Promotion of Terrorism” and including appropriate reference to the intent to incite the commission of a terrorist act while causing a danger that such an act may be committed.
31. Moreover, to ensure that the criminal offence under the new Article 256 of the Criminal Code is narrowly defined and to preclude abuse or discretionary interpretation, the legal drafters could consider including, in this new provision, defences or exceptions. For instance, these could apply when the statements were intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics or some other issue of public interest,⁵⁸ including in the context of peaceful protests.⁵⁹

⁵⁵ A model offence of incitement to terrorism was also provided by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ; see UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 2010 Report on “Ten areas of best practices in countering terrorism”, A/HRC/16/51, 22 December 2010, para 29-32, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>, which states: “Practice 8. Model offence of incitement to terrorism - It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed”. See also Article 5 of the 2005 CoE’s Convention on the Prevention of Terrorism on the “public provocation to commit acts of terrorism”, defined 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”, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371c>>; op. cit. footnote 31, page 42 (2014 OSCE/ODIHR’s Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism); and op. cit. footnote 42, Principle 6 (Johannesburg Principles on Freedom of Expression and National Security).

⁵⁶ See e.g., op. cit. footnote 32, pages 42-43 (2008 UN OHCHR Factsheet on Human Rights and Counter-Terrorism).

⁵⁷ Venice Commission, Report on Counter-Terrorism Measures and Human Rights, CDL-AD(2010)022, adopted on 4 June 2010, para 33, <<http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/coe/coe-cdl-ad-2010-022-e.pdf>>.

⁵⁸ See e.g., op. cit. footnote 54, pages 9-10 (2015 OSCE RFoM’s Legal Analysis of Canadian Draft Anti-terrorism Act).

⁵⁹ See e.g., the case of *Christian Democratic People’s Party v. Moldova*, ECtHR judgment of 14 February 2006 (Application no. 28793/02), paras 62-70, <<http://hudoc.echr.coe.int/eng?i=001-72346>>.

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32. The Draft Law also increases the penalties imposed for the “Financing of Terrorist or Extremist Activities and Otherwise Aiding to Terrorism or Extremism” under Article 258 of the Criminal Code.⁶⁰ First and in line with the recommendations made in par 24 *supra*, only “*violent extremism*” should be targeted. Second, the definition contained therein, which refers to financial or any other forms of support, while overall in line with international standards,⁶¹ appears to be overly broad, as it states that such support shall be provided by a person who realizes the terrorist or “extremist” nature of the supported activities.⁶² If the reference to a vague term such as “extremism” is retained (see pars 21-24 *supra*), this may have a chilling effect on access to financial and other resources by associations or non-government organizations perceived as holding controversial views, even though not formally convicted for “*violent extremism*”. The right to freedom of association provided by Article 21 of the ICCPR also protects associations’ access to resources of different types, and from different sources, including public or private, domestic, foreign or international.⁶³
33. Therefore, it is recommended **to delete the reference to the “financing of extremist activities” from Article 258 of the Criminal Code, or alternatively specify that this only covers “violent extremism”.**
34. Articles 182 and 257, for which the Draft Law introduces increased penalties, criminalize the formation and leadership of an extremist or terrorist group respectively, as well as participation in the activities of such groups. Apart from previous comments on the potentially vague nature of the term “extremist”, other words such as “leadership”, “group”, or “participation” are similarly unclear, thus potentially giving enforcement authorities broad latitude in determining which organisations, individuals, and activities are covered by the criminal provisions.⁶⁴ It is thus recommended **to provide clearly circumscribed definitions of such terms.**⁶⁵ It must

⁶⁰ Such a criminal offence is defined as follows: “Provision or collection of money and (or) another property, property rights or proprietary benefits, as well as donation, exchange, dotation, charitable assistance, provision of information services and other types of services, or provision of financial services to an individual or a group of individuals or to a legal entity, deliberately by a person aware of the terrorist or extremist nature of his/her activities or that the provided property, information, financial and other types of services would be used for committing terrorist or extremist activities or for supporting a terrorist or an extremist group, a terrorist or an extremist organization, or an illegal paramilitary formation”.

⁶¹ Article 2 of the International Convention for the Suppression of Financing of Terrorism defines offences under the Convention as the direct or indirect, *unlawful and wilful* provision or collection of funds with the intention of or *in the knowledge* that they will be used, in full or in part, to carry out illegal acts, or any other acts intended to cause death or serious bodily injury to civilians, or other persons not taking part in an armed conflict; additionally, the purpose of such acts, by nature or context, shall be to intimidate a population, or compel a government or international organization to act, or abstain from action.

⁶² See e.g., *op. cit.* footnote 2, pars 49-50 (2005 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 counteractive measures against extremist activities”).

⁶³ See OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2015), Principle 7 and pars 102-104, <<http://www.osce.org/odihr/132371?download=true>>.

⁶⁴ See e.g., *op. cit.* footnote 53, par 26 (2013 OSCE/ODIHR Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism). See e.g., Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), *Information note by the co-rapporteurs on their fact-finding visit to Moscow and Kazan (18-21 January 2011)*, par 29, <http://assembly.coe.int/CommitteeDocs/2011/amondoc09rev_2011.pdf>. See also *Kuznetsov and others v. Russia*, European Court of Human Rights (ECtHR) judgment of 11 January 2007 (Application no. 10877/04), <<http://hudoc.echr.coe.int/eng?i=001-89066>>.

⁶⁵ For definitions of “participation” in the Criminal Codes of OSCE participating States, see e.g., Article 421-2-1 of the Criminal Code of France, which states: “The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism”; and Article 83.18 of the Criminal Code of Canada which provides a definition as well as a list of the criteria to be taken into account to assess whether such participation exists, <<http://www.legislationline.org/documents/section/criminal-codes>>. For the definition of “terrorist group”, see for instance Article 83.01 (1) of the Criminal Code of Canada, <<http://www.legislationline.org/documents/section/criminal-codes>>. See also the definitions of “Participating in an association or group for the purpose of terrorism” and “Receiving training for terrorism” in the Additional Protocol to the CoE’s Convention on the prevention of terrorism, 22 October 2015, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047c5ea>>. See also the ongoing discussions on the Proposal for a Directive on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, which also involved discussions on the definitions of “terrorist group”, “participation” and “directing a terrorist group”, and other related concepts (<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586628/EPRS_BRI\(2016\)586628_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586628/EPRS_BRI(2016)586628_EN.pdf)>). See, although in the context of a criminal offence for “membership in an armed organisation”, Venice Commission, *Opinion on articles 216, 299, 301 and 314 of the*

be highlighted that several draft provisions of the Criminal Code envision enhanced penalties for “leaders of a public association” which may have a chilling effect on civil society organizations (see pars 94-95 *infra*); this issue is distinct from the potential imposition of higher penalties for the “leaders” of a “terrorist organization” banned as such, provided that the term “leader” is defined clearly.

35. Finally, the Draft Law also enhances penalties for acts committed under Article 259, which criminalizes the “recruitment” and “preparation” of persons for the purpose of organizing terrorist or extremist activities. While criminalizing such acts is in line with international standards, **both terms also need to be more clearly defined**. Here, the definition of “training for terrorism” provided by the Council of Europe Convention on the Prevention of Terrorism could serve as a useful reference.⁶⁶

3. Criminal Sanctions for Acts Linked to “Terrorism” and “Extremism”

36. The proposed amendments to the Criminal Code mainly aim at strengthening the penalties for criminal offences pertaining to terrorism and “extremism”, by increasing the minimum and maximum duration of the respective prison sentences by one to five years. Additionally, whereas the current provisions provide the possibility to confiscate property as a complementary penalty, the draft amendments now provide for mandatory confiscation. While the alleged objective might be to enhance deterrence, such enhanced penalties render the need for precise definitions of the underlying criminal offences even more compelling in order to meet the requirements of legal certainty, foreseeability and specificity of criminal law (see par 19 *supra*).
37. The practice of providing for relatively high minimum penalties has generally been criticized at the international level where they amount to mandatory minimum penalty binding a court that may lead to the imposition of disproportionately higher sentences as the respective judges have no discretion to pronounce lower penalties.⁶⁷ At the same time, Article 53 of the Criminal Code lists a number of mitigating circumstances that may be taken into account by a judge, which suggests that the minimum penalty is not necessarily binding upon courts, although this should perhaps be confirmed by an analysis of the judicial practice.
38. In addition, it is understood that as it stands, there is still no comprehensive legal framework regulating the juvenile justice system in Kazakhstan and that not all criminal cases involving juveniles are dealt with in juvenile courts.⁶⁸ This runs the risk that disproportionate sanctions, potentially imprisonment, be imposed on children for committing acts of terrorism or “violent extremism”. Such practice would raise issues

Penal Code of Turkey, CDL-AD(2016)002-e , 11-12 March 2016, pars 95-121 and 128, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e)>.

⁶⁶ As a good practice, see Articles 6 and 7 of the Council of Europe Convention on the Prevention of Terrorism, CETS 196, adopted on 16 May 2005, <<http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm>>. Pursuant to its Article 7, “training for terrorism” means “*to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose*”. See also *op. cit.* footnote 53, par 26 (2013 OSCE/ODIHR Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism).

⁶⁷ See e.g., UN Special Rapporteur on the independence of judges and lawyers, *Mission to South Africa: Report of the Special Rapporteur on the independence of judges and lawyers* (25 January 2001), E/CN.4/2001/65/Add.2, page 4, <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2380>; and the Law Council of Australia Mandatory Sentencing Discussion Paper (May 2014), <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf>.

⁶⁸ See UN Committee on the Rights of the Child, *Concluding observations on Kazakhstan*, 30 October 2015, pars 60-61, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fKAZ%2fCO%2f4&Lang=en>.

under Article 37 (b) of the UN Convention on the Rights of the Child⁶⁹ which provides that imprisonment of children should be a measure of last resort and imposed only for the shortest appropriate period of time. The UN Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter “the Beijing Rules”) only permit deprivation of liberty if a juvenile is convicted of a serious act involving violence against another person or persists in committing other serious offences, and there is no other appropriate response.⁷⁰ Some of the contemplated criminal offences, also due to their vague formulation (see sub-section 2 *supra*) would not necessarily meet such a threshold. In other cases, **special juvenile justice provisions pertaining to “Terrorism” and “Violent Extremism” should be created.**

39. Furthermore, the maximum punishments for the different criminal offences related to terrorism and “extremism” set forth in the proposed amended provisions do not always seem commensurate to the gravity of the crime and the range of criminal sanctions for these various offences does not always appear to be coherent. For instance, the proposed sanctions for the “Formation, Leadership of an Extremist Group or Participation in its Activities” (Article 182) are the same as the ones provided for the “Formation, Leadership of a Terrorist Group or Participation in its Activities” (Article 257), whereas acts of terrorism would appear to be of a graver nature. The legal drafters should thus **consider reviewing the range of proposed sanctions, also in light of other criminal offences, to ensure the overall coherence of criminal provisions, and that the proposed penalties reflect the gravity of the respective criminal offences.**
40. The Draft Law furthermore provides for the “confiscation of property” for most of the amended provisions. Overall, the confiscation of the instruments and proceeds of crime is in line with international recommendations for combating money laundering and financing of terrorism.⁷¹ In comparison, the references to “property” in various criminal provisions could cover the confiscation of any property owned by the convicted individual, and not necessarily the means for committing the said crimes and/or the proceeds of the criminal acts only. This wide scope of the relevant provisions may unduly impact on other family members/relatives using the said property – particularly children or women, especially in rural areas, who may be financially dependent on their husbands.⁷² Also, the fact that confiscation will be automatically imposed as a sanction may also be problematic, unless the legal regime for such confiscations is clearly defined and regulated by other legislation. It is thus recommended **to clarify that confiscation concerns the instruments and proceeds of crimes, and to reconsider the automatic imposition of such sanctions.** More generally, it may be worth highlighting that confiscation requires considerable human and financial resources, including specialized personnel, and a clear legal framework to help identify property/assets, as well as transparent rules and procedures for handling the confiscated assets.⁷³ Unless already done, it may be helpful to conduct a proper financial impact assessment of the Draft Law.

⁶⁹ UN Convention on the Rights of the Child (hereinafter “CRC”), adopted by General Assembly resolution 44/25 on 20 November 1989. The Republic of Kazakhstan ratified this Convention on 12 August 1994.

⁷⁰ See par 17.1 (c) of the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), A/RES/40/33, 29 November 1985, <<http://www.un.org/documents/ga/res/40/a40r033.htm>>.

⁷¹ See Financial Action Task Force’s (FATF-GAFI) recommendations to the international community for combating money laundering and financing of terrorism, as last amended in 2016, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf>.

⁷² See e.g., UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 2009 Report Analysing Counter-terrorism Measures from a Gender Perspective, A/64/211, 3 August 2009, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/437/55/PDF/N0943755.pdf?OpenElement>>.

⁷³ See e.g. Model Code of Criminal Procedure (2008) developed by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UNOHCHR), and the UN Office on Drugs and

41. Finally, it is questionable whether imprisonment is a proportionate penalty in all provisions listed under the proposed amendments to the Criminal Code, particularly those acts that involve some forms of public speech and which are relatively broadly framed. For instance, in the absence of incitement to violence or hatred, the imposition of a sentence of imprisonment for “public calls”, “propaganda” or “promotion”(see pars 20 and 29-30 *supra*) may be disproportionate and, in the end, counterproductive.⁷⁴

4. The Role of the National Security Service in Countering Terrorism

42. The Draft Amendments to Article 187 of the Criminal Procedure Code on “Persons under Investigation” broaden the competences of the national security agencies to initiate pre-trial investigations for certain categories of offences,⁷⁵ which initially fell within the exclusive competence of bodies of internal affairs. This amendment does not contradict international standards *per se*. At the same time, it is noted that national security services are often subject to lesser controls or independent oversight than bodies of internal affairs, but may at the same time enjoy greater powers. It is thus important to ensure independent and democratic oversight of national security services to safeguard human rights and fundamental freedoms, particularly the right to liberty and security, fair trial rights and the protection of private and family life, especially during criminal proceedings.⁷⁶ While the OSCE/ODIHR has not reviewed the legal and institutional framework pertaining to the mandate and activities of national security services, **it still recommends the institution of an appropriate oversight system over security services, in line with international recommendations and national good practices.**⁷⁷

43. Additionally, the Draft Law expands the authority of national security agencies to deal with administrative offences and impose administrative penalties related to the violation of the legislation on migration of Kazakhstan (new Article 726 par 1 of the Code of Administrative Offences). Pursuant to the new Article 13 par 3 of the Law “On National Security Agencies”, such agencies now also have the possibility to take decisions regarding the refusal of entry or the expulsion from Kazakhstan of foreigners and stateless persons, whereas before, such decisions could only be taken jointly with other competent governmental bodies. Finally, the draft amendments to the Law “On Migration” substantially increase the role and powers of national security agencies in the context of applications for citizenship (new Article 14 par 6), as well as entry visas and temporary residence permits for foreign workers (Articles 36 pars 1 and 4). In that context, the last paragraph of the new Article 14 of the Law “On Migration” specifies

Crime (UNODC), Section 13 on “Confiscation of the Proceeds of Crime and Property”, <<http://www.usip.org/model-codes-post-conflict-justice-/publication-the-model-codes/english-version-volume-2>>.

⁷⁴ See e.g., in the area of political speech, the case of *Otegi Mondragon v. Spain*, ECtHR judgment of 15 March 2011 (Application no. 2034/07), <<http://hudoc.echr.coe.int/eng?i=001-103951>>. See also Venice Commission, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey*, CDL-AD(2016)002, 15 March 2016, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e)>, which states that “in the absence of incitement to violence, the imposition of an imprisonment sentence fails to meet the requirement of necessity in a democratic society”.

⁷⁵ Article 287 pars 4 and 5 on the illegal handling of various arms and explosives; Article 291 on theft and extortion of various types of arm

⁷⁶ See the *OSCE Code of Conduct on Politico-Military Aspects of Security* (1994), <<http://www.osce.org/fsc/41355>>, which states: “Each participating State will at all times provide for and maintain effective guidance to and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy”. See also the CoE’s Commissioner for Human Rights, *Issue Paper on Democratic and Effective Oversight of National Security Services* (May 2015), <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680487770>>.

⁷⁷ See e.g., UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *2010 Report and Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism*, including on their oversight, A/HRC/14/46, 17 May 2010, <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.46.pdf>>.

that bodies of national security are not obliged to explain the reasons for denying entry, refusing to issue permits for permanent residence or refusing to approve applications for citizenship.

44. Generally, under international law, states have broad discretion in the granting and withdrawal of citizenship⁷⁸ as it is generally recognized that it is up to each state to determine who its nationals are⁷⁹ – although withdrawal may be subject to certain limitations at the international level, for instance to avoid statelessness.⁸⁰ Similarly, and with the exception of cases where individuals may not be returned to other countries for human rights or humanitarian reasons (principle of *non-refoulement*),⁸¹ they have the authority to regulate the entry of non-citizens into their territories, which is considered to be a matter of national sovereignty. At the same time, OSCE participating States have entered into specific commitments aimed at simplifying entry and exit procedures for their citizens as well as citizens of other participating States.⁸² In the 1990 Copenhagen Document, they also expressed the intention “[...] to implement the procedures for entry into their territories, including the issuing of visas and passport and customs control, in good faith and without unjustified delay”.⁸³ Generally, providing detailed and comprehensive information on visa application procedures to applicants is an important first step in rendering cross-border travel more accessible, which includes informing an applicant about the possibility to appeal against a decision deemed unsatisfactory.⁸⁴
45. The fact that, under the draft amendments, bodies of national security are not obliged to explain the reasons for the denial of entry, the refusal to issue permits for permanent residence or the refusal to approve applications for citizenship would seem to render any appeals procedure or access to a legal remedy ineffective.⁸⁵ In that respect, the UN Human Rights Committee has considered that the absence of any explanation from the public authorities as to the reasons for not allowing a person to remain in a country, except for the general assertion that it was done for “compelling reasons of national security”, was not in compliance with due process of law.⁸⁶ This would also not appear to be in line with the principle of transparency in administrative and legal proceedings which OSCE participating States have committed to respect.⁸⁷ In that respect,

⁷⁸ See e.g., UN Refugee Agency, *Guidelines on Statelessness No. 1: The Definition of “Stateless Person” in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, par 48, <<http://www.refworld.org/pdfid/4f4371b82.pdf>>.

⁷⁹ See e.g., Article 3 of the European Convention on Nationality: “1. Each State shall determine under its own law who are its nationals. 2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality”.

⁸⁰ See e.g., op. cit. footnote 78, par 48 (2012 UNHCR’s Guidelines on Statelessness No. 1).

⁸¹ Pursuant to Article 33 par 1 of the 1951 Convention relating to the Status of Refugees, to which the Republic of Kazakhstan acceded on 15 January 1999, “[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

⁸² See e.g., Conference on Security and Co-operation in Europe Final Act, 1 August 1975, Helsinki, <<http://www.osce.org/helsinki-final-act>>, whereby OSCE participating States agreed, *inter alia*, “[...] to facilitate wider travel by their citizens for personal or professional reasons [...]” and to that end “[...] gradually to simplify and to administer flexibly the procedures for exit and entry [...]”, as well as “[...] gradually to lower, where necessary, the fees for visas and official travel documents [...]” and to consider “[...]the conclusion of multilateral or bilateral consular conventions or other relevant agreements or understandings – for the improvement of arrangements to provide consular services, including legal and consular assistance”. See also Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, Copenhagen (hereinafter “OSCE Copenhagen Document (1990)”), <<http://www.osce.org/odihr/elections/14304>>.

⁸³ ibid. par 19.1 (OSCE Copenhagen Document (1990)).

⁸⁴ See e.g., OSCE/ODIHR, *Baseline Study on Cross-Border Mobility in the OSCE Region* (2014), page 137, <<http://www.osce.org/odihr/118506?download=true>>.

⁸⁵ See e.g., OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), par 82, <<http://www.osce.org/odihr/119633?download=true>>.

⁸⁶ See e.g., UN HRC, *Leghaei et al. v. Australia*, Communication No. 1937/2010, 15 May 2015, pars 10.4-10.5, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/113/D/1937/2010&Lang=en>.

⁸⁷ See e.g., the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991) (hereinafter “OSCE Moscow Document (1991)”), pars 18.2 and 18.4, <<http://www.osce.org/fr/odihr/elections/14310>>, whereby OSCE participating States committed to ensure that “[e]veryone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity” and “to provide for judicial review of such regulations and decisions”. See also OSCE

transparency not only implies public access to proceedings and documents, but also that decisions include substantive reasons and explanations supporting them. As already recommended in the 2011 OSCE/ODIHR Opinion, decisions on refusals of entry and, residence permits should be provided in writing and in a language understood by the person concerned, and should include detailed references to the right to appeal.⁸⁸

46. In light of the above, **the last paragraph of the new Article 14 of the Law “On Migration” should be deleted and replaced by a provision requiring such decisions to be provided in writing, motivated and subject to appeal** (see also additional comments on the expanded mandate of National Security Agencies in population registration matters in sub-section 6.1. *infra*).

5. Special Investigation Techniques, including Surveillance Measures

47. With respect to special investigation techniques of the state, including surveillance and other covert investigation methods, it is important that the state ensures the utmost transparency when resorting to such measures, given their potential to encroach upon human rights and fundamental freedoms.⁸⁹ Moreover, such investigative actions shall, in light of their habitually intrusive character, lack of public scrutiny and the ensuing risk of misuse of power, be subject to certain conditions and safeguards.⁹⁰ In particular, the legislation should:

- be clear and accessible⁹¹ – i.e., an individual should be able to foresee the conditions and circumstances in which authorities are empowered to resort to special investigation techniques; legislation should provide clear grounds and criteria for ordering their use;⁹²
- strictly define the scope and state a limit on the duration of such monitoring/surveillance;
- identify the authorities competent to permit, carry out and supervise these surveillance measures;
- specify the procedure to be followed for examining, using and storing the intelligence/data obtained;
- detail the procedures for preserving the integrity and confidentiality of the collected data;
- include the precautions that need to be taken when communicating the data to other parties;

Maastricht 2003 (OSCE Strategy Document for the Economic and Environmental Dimension) on Promoting transparency and combating corruption, par 2.2.4, <<http://www.osce.org/odihr/76894?download=true>>.

⁸⁸ *Op. cit.* footnote 2, par 96 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes).

⁸⁹ UN Special Rapporteur on Freedom of Opinion and Expression, *2013 Report on the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression*, A/HRC/23/40, 17 April 2013, pars 91-92, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf>, which notes how important it is for States to be transparent about the use and scope of communications surveillance techniques and powers, particularly in relation to internet service providers.

⁹⁰ See par 63 of *Uzun v. Germany*, ECtHR judgment of 2 September 2010 (Application No 35623/05), <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100293#\["itemid":"001-100293"\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100293#[)>.

⁹¹ See e.g., par 27 of *Kruslin v. France*, ECtHR judgment of 24 April 1990 (Application No 11801/85), <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57626#\["itemid":"001-57626"\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57626#[)>.

⁹² In particular, it should specify the nature of offences – which should only be serious crimes – which may give rise to said surveillance measure and provide a definition of the categories of people liable to have their communications monitored, and in which circumstances); see also e.g., the ongoing discussions on the proposed amendments to the CoE Committee of Ministers Recommendation Rec(2005)10 on “special investigation techniques” in relation to serious crimes including acts of terrorism (<<http://www.coe.int/t/dghl/standardsetting/cdpc/CDPC%20documents/SIT%20Recc%20Explanatory%20Report%20170616.pdf>> and the text of Recommendation, <http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/Rec_2005_10.pdf>).

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- detail the circumstances in which data obtained may or must be erased or the records destroyed;⁹³
 - provide for a mechanism whereby the individual subject to surveillance should be informed as soon as notification can be made without jeopardizing the purpose of the surveillance after its termination.⁹⁴
48. In addition, some form of oversight of the surveillance measures should also be undertaken by an external body or official, or public reporting mechanism, which should be independent.⁹⁵ In this context, the UN Special Rapporteur on Freedom of Opinion and Expression noted how important it is for states to be transparent about the use and scope of communications surveillance techniques and powers, particularly when dealing with internet service providers.⁹⁶
49. The proposed amendment to Article 12 par 5 of the Law “On Operational Search Activities” expands the material scope of such activities to the “obtaining [of] information for the purpose of ensuring the security of protected persons”. It is assumed that the term “protected person” is defined elsewhere in the Law. If not, then such a definition should be included in the Law.
50. As to the grounds for ordering such measures, it is noted that Article 12 par 5 is quite vaguely framed, for instance when referring to “subversive activities [...] of foreign organizations and individuals” or “counter[ing] extremism and terrorism”. This fails to fulfill the above-mentioned requirement of legal certainty. It would therefore be advisable to include express cross-references to the relevant provisions of the Criminal Code, to ensure that such intrusive measures are only used for the most serious criminal offences.
51. Article 12 par 5 also refers to some form of oversight or supervision by the Prosecutor General of the Republic of Kazakhstan. In this context, Article 83 of the Constitution of the Republic of Kazakhstan on the Prosecution⁹⁷ reveals that the prosecution service of Kazakhstan is still construed, first and foremost, as an organ of general “supervision”. While such a “supervisory” prosecution model is prevalent among a number of post-Soviet states,⁹⁸ international and regional organizations have noted that these systems often lead to over-powerful and largely unaccountable prosecution services, which threaten the separation of powers and the rights and freedoms of individuals.⁹⁹ In that respect, UN human rights monitoring bodies have acknowledged that, in Kazakhstan, there is an overall lack of judicial control over the actions of prosecutors and that judges

⁹³ See par 76 of *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, ECtHR judgment of 28 June 2007 (Application No 62540/00), <>[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81323#\["itemid":"001-81323"\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81323#[)>. See also *op. cit.*, footnote 90, par 63 (*Uzun v. Germany*, ECtHR judgment of 2 September 2010).

⁹⁴ *ibid.* par 90 (Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, ECtHR judgment of 28 June 2007).

⁹⁵ *ibid.* pars 85 and 87-88.

⁹⁶ *Op. cit.* footnote 89, pars 91-92 (2013 Report of the UN Special Rapporteur on States’ surveillance of communications and freedom of expression).

⁹⁷ Article 83 of the Constitution of the Republic of Kazakhstan states that “[t]he prosecutor’s office on behalf of the state shall exercise the highest supervision over exact and uniform application of law, the decrees of the President of the Republic of Kazakhstan and other regulatory legal acts on the territory of the Republic, legality of preliminary investigation, inquest and inspection, administrative and executive legal procedure; and take measures for exposure and elimination of any violations of the law, the independence of courts as well as the appeal of laws and other regulatory legal acts contradicting the Constitution and laws of the Republic. The Procurator’s office of the Republic shall represent interest of the state in court as well as conduct criminal prosecution in cases using procedures and within the limits, stipulated by law. 2. The procurator’s office of the Republic shall be a unified centralized system with subordination of junior procurators to their seniors and the Procurator General of the Republic. It shall exercise its authorities independently of other state bodies and officials and be accountable only to the President of the Republic.”

⁹⁸ See e.g., OSCE/ODIHR, *Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic*, 18 October 2013, par 13, <<http://www.legislationline.org/documents/id/18547>>.

⁹⁹ See e.g., OSCE/ODIHR, Venice Commission and DGI, *Joint Opinion on the Draft Law on the Prosecution Service of Moldova*, 23 March 2015, par 42, available at <http://www.legislationline.org/documents/id/19747>; and *ibid.* par 13 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic).

appear to be overly deferential to prosecutors owing to the prosecutors’ lack of independence from the executive branch.¹⁰⁰

52. In light of the above, **oversight over the special investigation techniques should not be carried out by the Prosecutor General but rather by an independent external body. At a minimum, a system of judicial control over the activities of prosecutors in this field should be set up.**¹⁰¹
53. Moreover, targeted surveillance should be used only when strictly necessary, following **judicial authorization and with independent control mechanisms in place.**¹⁰² If not already provided elsewhere, the legal drafters are strongly encouraged to include such safeguards in the Draft Law. Also, as indicated in par 47 *supra*, the relevant legislation should also require that persons subjected to special investigation techniques shall be notified about them in writing, within a certain time from the day when such actions were discontinued.¹⁰³

6. Population Registration, Freedom of Movement and to Choose One’s Residence

6.1. General Comments

54. The Draft Law introduces a number of new provisions pertaining to the registration of nationals and non-nationals. It is common practice in many OSCE participating States to oblige the population to register their place of residence with the relevant state authorities. A population registration system comprising civil and residency registration generally provides the administrative framework that enables authorities to guarantee political and civil rights of their citizens, and to provide them with relevant public services.¹⁰⁴ Legal and administrative frameworks for population registration, while not directly regulated in relevant international human rights instruments and commitments, should still be drafted and implemented in such a way as to maintain and safeguard important human rights of the population,¹⁰⁵ and to not inhibit the enjoyment of such rights, particularly the freedom of movement and the right to choose one’s residence as well and the right to protection of privacy and family life.¹⁰⁶ In 2009, the OSCE/ODIHR issued Guidelines on Population Registration,¹⁰⁷ based on good practices from the OSCE region. These Guidelines describe the criteria for the development of efficient population registration systems that correspond to the legitimate needs of the OSCE

¹⁰⁰ UN Committee against Torture, *Concluding Observations on Kazakhstan*, CAT/C/KAZ/CO/3, 12 December 2014, par 15, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/KAZ/CO/3&Lang=En>.

¹⁰¹ ibid. par 15.

¹⁰² UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2015 Report on the use of encryption and anonymity in digital communications, A/HRC/29/32, 22 May 2015, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/32>. See also *op. cit.*, footnote 35 (2016 UN-OSCE-OAS-ACHPR Joint Declaration on Freedom of Expression and Countering Violent Extremism).

¹⁰³ See OSCE/ODIHR, *Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic*, 19 June 2015, par 143, <<http://www.legislationline.org/documents/id/19834>>.

¹⁰⁴ See, for instance, the OSCE/ODIHR *Opinion on the Legal Framework Regulating Population Registration in the Kyrgyz Republic*, 14 June 2012, par 10, <<http://www.legislationline.org/documents/id/17179>>.

¹⁰⁵ See e.g., the third paragraph of the Preamble of the ICCPR: “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights [...].” See also, for instance, ibid. par 17 (2012 OSCE/ODIHR Opinion on Regulating Population Registration in the Kyrgyz Republic).

¹⁰⁶ Articles 12 par 1 and 17 of the ICCPR. See also the Concluding Document of the Third Follow-up Meeting, Vienna, 15 January 1989, Questions Relating to Security in Europe: Principles, par 20, <<http://www.osce.org/mc/40881>>.

¹⁰⁷ See <<http://www.osce.org/odihr/39496>>.

participating States and their citizens, while ensuring compliance with international human rights standards and OSCE commitments.¹⁰⁸

55. In the context of the Draft Law and in light of the above-mentioned purpose of such a system, it is questionable whether a population registration system should be deemed an appropriate means to counter terrorism or “violent extremism”, given the very different purpose of having such a system in the first place. The new obligations and requirements in this field would most likely negatively impact on the exercise of the right to freedom of movement of citizens of Kazakhstan and of foreigners residing on the territory, and may at the same time not be very helpful in deterring or countering terrorism.
56. Overall, the collection, storing and transfer of data collected in the context of population registration should be handled with the utmost confidentiality, to protect the private lives of the persons concerned; provisions guaranteeing the confidentiality of information and the right to privacy are thus an indispensable part of legislation in the sphere of population registration.¹⁰⁹ According to the new Article 726 of the Code of Administrative Offences, national security agencies will now be in charge of dealing with administrative offences pertaining to the violation of legislation on population migration regarding registration and housing matters relating to foreigners and stateless persons (Article 518 of the Code of Administrative Offences). This means that national security agencies will be processing personal data collected as part of the population registration system. Generally, full and reliable data can only be collected if there is public trust in the population registration system.¹¹⁰ Having national security agencies oversee the compliance with registration obligations by individuals or legal entities receiving foreigners or stateless persons may jeopardize public trust in the system, and may also convey the message that foreigners or stateless persons are perceived as a potential security threat. Consequently, the legal drafters **should reconsider the new competence of national security agencies in these matters.**
57. Moreover, the law on population register should specify which data is eligible for transfer to national security agencies or other entities,¹¹¹ and referrals of data from one entity to the other should follow clear and transparent rules and procedures, to ensure accountability of public entities.¹¹² An individual has also the right to know which entity and for what purpose his/her personal data was processed. Such data transfers between public entities should also be regulated in line with sectoral competencies and the division of responsibilities (starting with the separation of powers in a state¹¹³).
58. In light of the above, if not already provided by other provisions or legislation, **adequate substantive and procedural safeguards should be in place, in particular to ensure the confidentiality of such data. The data should not be used for purposes other than population registration, and the possibility to transfer it to another entity needs to be clearly and strictly circumscribed to ensure that it is adequate, relevant and not excessive.**

¹⁰⁸ In particular, the Guidelines list a range of guiding principles of population registration, including, *inter alia*, the mandatory nature of registration, the sustainability of such a system, the relevance and purpose of data, confidentiality, the principle of facilitation of the freedom of movement of people, sound administrative procedures that are consistent and not too burdensome on the individual, and a non-discriminatory approach; see *ibid.* page 18 (2009 OSCE/ODIHR Guidelines on Population Registration).

¹⁰⁹ *ibid.* pages 19-20.

¹¹⁰ *ibid.* pages 19, 36 and 41-42.

¹¹¹ *ibid.* page 42.

¹¹² *Op. cit.* footnote 104, par 75 (2012 OSCE/ODIHR Opinion on Regulating Population Registration in the Kyrgyz Republic).

¹¹³ *Op. cit.* footnote 107, page 36 (2009 OSCE/ODIHR Guidelines on Population Registration).

6.2. Registration of Citizens

59. Generally, a residency registration system will provide for different rules and procedures regarding the registration of citizens, non-citizens with residence permits, citizens living abroad and persons without documentation; visitors and travelers in transit are usually subject to a different system.¹¹⁴
60. The new Article 1 par 29 of the Law “On Migration” introduces the concept of “place of temporary residence” and its new Article 51 par 2 sub-par 1 provides that internal migrants are required to register their locations of temporary residence. Additionally, the amended Law “On Housing Relationships” defines the term “temporary residents” (new Article 2 par 45) and introduces a new obligation for the owners or holders or residential or non-residential premises to register persons residing on their property (new Article 4 par 4) or using their premises “in the manner prescribed by the laws of the Republic of Kazakhstan” (new Article 37 par 4); this allegedly would involve both temporary and permanent residents. Non-compliance by the owner/property holder with such registration requirements entails the imposition of a fine (new Article 493 pars 5 and 6 of the Code of Administrative Offences).
61. First, the general reference to compliance with “the laws of the Republic of Kazakhstan” (new Article 37 par 4 of the Law “On Housing Relationships”) fails to meet the requirement of legal certainty and foreseeability of legislation, a concern already raised in previous OSCE/ODIHR legal reviews on Kazakhstan’s relevant legislation.¹¹⁵ It is thus recommended to include specific references to the laws of Kazakhstan regulating these matters.
62. As regards temporary residence, in general, the definition contained in Article 2 par 45 of the Law “On Housing Relationships”¹¹⁶ likewise does not provide clarity as what is meant by “temporary residence” in terms of duration. Unless provided in other legislation, it is recommended that the legal drafters clarify this definition.
63. Moreover, it is debatable whether there should be an obligation for persons to register their *temporary* places of residence at all. Given the non-permanent nature of such changes of residence, this may very well constitute a disproportionate burden, both on the individuals, the owners of these residences, but also on the administrative offices in charge of such registration; this should also be considered in light of the timely provision of state services, and the preparation of accurate voters’ lists for elections.¹¹⁷ Also, this requirement may constitute an undue restriction on the freedom of movement, in particular if registration is subject to burdensome documentary requirements and in light of the possible imposition of administrative sanctions.
64. As to the time limits for registering one’s residence, these should not be excessively short and should be supported by flexible regulations (e.g. extensions of deadlines, or flexibility with regard to the submission of certain documents).¹¹⁸ Pursuant to the new Article 492 par 1 of the Code of Administrative Offences, a warning will be issued for the failure of a citizen of Kazakhstan to register his/her residence – understood as either temporary or permanent residence – within 10 days, and a fine imposed if such

¹¹⁴ ibid. page 14.

¹¹⁵ See e.g., *op. cit.* footnote 2, pars 24-25 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes); and pars 20-21 (2009 OSCE/ODIHR Opinion on the Draft Law of the Republic of Kazakhstan on Migration of the Population).

¹¹⁶ i.e., “citizens allowed to temporarily reside in residential, non-residential property by a lessor (the owner or some other person having charge of the residential, non-residential property, a member of a housing cooperative) without being charged for using the residential, non-residential property”.

¹¹⁷ *Op. cit.* footnote 104, par 42 (2012 OSCE/ODIHR Opinion on Regulating Population Registration in the Kyrgyz Republic).

¹¹⁸ ibid. par 39.

registration is not carried out within a month (as opposed to three months mentioned in the current provision). This seems to render the registration requirements more stringent, and also more burdensome, than in the existing legislation. Presumably, a large number of persons is likely to be affected by such a measure, since it is not uncommon to stay more than 10 days in another place for personal, family or business reasons. At the same time, this may also place a heavy burden on registration authorities (see par 63 *supra*). It is worth mentioning that the UN Human Rights Committee has likewise raised some concerns about the compulsory residence registration system that is currently in force in Kazakhstan, particularly regarding the administrative arrests for a period from 10 days to 3 months in case of failure to comply with residence registration obligations.¹¹⁹ Administrative arrests in such cases would appear to constitute disproportionate sanctions.¹²⁰

65. Further, any system of residency registration (regardless of whether it is temporary or permanent) can only function if all members of society are able to register. At times, this may be hindered by certain registration requirements that not all parts of the population are able to fulfil.¹²¹ For instance, if registration requires submission of a passport or identity card, then this will prevent a number of people who do not possess such identity documents from registering their place of residence, such as internally displaced persons or persons without a fixed abode, but also members of potentially marginalized groups such as national minorities and women in rural areas.¹²² In such situations, flexible solutions would need to be found to ensure that all persons are able to register their place of residence (e.g., by allowing birth certificates to suffice, or other forms of evidence if identity in cases where persons have no birth certificates or where these have been destroyed).¹²³
66. Additionally, the new Article 1 par 29 of the Law “On Migration of the Population” defines temporary residence as an “indoor space or accommodation with an address [...] where [the person] lives temporarily”. The reference to an address may mean that persons living in informal settlements without any legal address or occupying dwellings that do not meet existing health and safety standards may also *de facto* be prevented from obtaining registration, which is also a prerequisite for receiving a number of social services.¹²⁴ The legal drafters should therefore review the registration requirements to ensure that flexible and/or alternative options are possible (e.g., by allowing individuals to register their actual place of residence regardless of whether it is legally recognized or has an official address). Such flexibility is all the more important given that the proposed amendments to the Law “On State Services” provide that the failure to register a temporary or permanent place of residence will trigger the refusal to provide public services (new Article 5 par 2 sub-par 1-1). At the same time, residency registration should not be used as a means to solve the problem of illegal constructions or settlements.
67. Overall, the fear of administrative fines, accompanied by potential rigid registration requirements, are likely to act as a deterrent for freedom of movement across the country. Furthermore, in practical terms, it remains to be seen to what extent the state

¹¹⁹ *Op. cit.* footnote 50, pars 41-42 (2016 UN HRC’s Concluding Observations on Kazakhstan).

¹²⁰ *Op. cit.* footnote 107, Part 4.9. (2009 OSCE/ODIHR Guidelines on Population Registration), which states that “[v]iolations of population-registration legislation may be subject to regulatory fines”.

¹²¹ *Op. cit.* footnote 104, par 96 (2012 OSCE/ODIHR Opinion on Regulating Population Registration in the Kyrgyz Republic).

¹²² *ibid.* par 99.

¹²³ *ibid.* pars 99-100. See also OSCE/ODIHR, *Opinion on the Draft Law of the Kyrgyz Republic on the State Population Register and Draft Amendments to Related Legislation*, 22 November 2012, <<http://www.legislationline.org/documents/id/17682>>.

¹²⁴ UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 2011 Report on the Mission to Kazakhstan, A/HRC/16/42/Add.3, pars 9 and 84, <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=18080>.

administration has the administrative and human capacities to facilitate timely registration.

68. In light of the above, the legal drafters **should discuss whether to maintain such a system of temporary residence registration. If yes, it is recommended that the legal drafters reconsider the very short 10-days timeline to register (temporary or permanent) residence; they should also consider more flexible and simple rules regarding registration, including registration through mere notification of the authorities, through designated simple forms and/or via the Internet, with the possible extension of deadlines and flexibility with regard to the submission of certain documents; administrative arrest should be explicitly excluded as a sanction for the failure to register one’s residence.**
69. Article 493 par 5 of the Code of Administrative Offences introduces a new administrative offence punishable by a fine for the failure of owners or holders of property to register individuals who are residing on their premises - irrespective of the duration of their stay; the amount of the fine varies depending on whether the act is committed by individuals or by legal entities. This obligation is imposed in addition to the obligation for individual citizens to register (par 64 *supra*). It is understood that such registration should also be carried out within 10 calendar days. This may place a huge burden on individual owners/property-holders who may not necessarily have the legal knowledge or the means to seek legal advice in the same way as legal entities. The legal drafters **should reconsider such a system of extensive administrative liability for numerous persons, particularly insofar as it involves liability for individuals who fail to register other individuals, which could be governed by civil or other legislation instead; alternatively, consideration should be given to introducing lower sanctions for individuals, such as a warning and the possibility to rectify the omission.**

6.3. Registration of Foreigners and Stateless Persons

70. The Draft Law also seeks to increase administrative penalties for various existing offences linked to the failure to register foreigners and stateless persons. Pursuant to the new Article 492 par 3 of the Code of Administrative Offences, a fine of “10 monthly calculation indices” (as opposed to five currently) is imposed on a foreigner or stateless person for failure to register his/her permanent residence *within 10 calendar days*. As mentioned in par 64 *supra*, such a short deadline appears extremely short and should be reconsidered. In any case, a simple notification process should be contemplated.
71. Article 518 par 1 of the Code of Administrative Offences seeks to increase the fines imposed on individuals or legal entities receiving foreigners or stateless persons for failure to take measures for their timely registration; Article 518 par 2 also foresees fines for the provision of housing to a foreigner or stateless person in violation of migration legislation. As mentioned in par 69 *supra*, this may place an undue burden on individuals.

7. Restrictions to Certain Human Rights and Fundamental Freedoms

7.1. General Comments

72. As mentioned in pars 15-16 *supra*, any measures that states undertake to prevent and combat terrorism must comply with international human rights standards.¹²⁵ In this context, UN human rights monitoring bodies have specifically noted the negative impact on human rights and fundamental freedoms of counter-terrorism measures and legislation, and other measures aimed at countering so-called “extremism”.¹²⁶
73. Hence, the legal drafters are encouraged to take the on-going amendment process of the legal framework on countering “extremism” and terrorism as an opportunity to address the recommendations recently made by such UN bodies and bring key pieces of legislation into full compliance with international human rights standards and OSCE commitments.

7.2. Freedom of Religion or Belief

74. At the outset, international human rights standards state that the freedom of religion or belief may be exercised by everyone in public and in community with others, and permits state restrictions to these rights only if justified under strict conditions (Article 18 (3) of the ICCPR). This means that the freedom of religion or belief, whether manifested alone or in community with others, in public or in private, cannot be made subject to prior registration or other similar conditions imposed by the State before it can be exercised; hence, the legal prohibition and sanctioning of unregistered activities is incompatible with international standards.¹²⁷
75. The Article 490 of the Code of Administrative Offences imposes administrative sanctions for the use by any person (as opposed to only “missionaries”, as mentioned in the current version of this provision) of religious literature or other informational materials containing religious content without “a positive theological expert opinion”. This type of “positive theological expert opinion” is also required for the import of religious literature or materials (Article 9 par 3 of the Law “On Religious Activities and Religious Associations”) and is also introduced in the new Article 9 par 3-1 regarding the manufacture, production and distribution of such documents.
76. While it is unclear which entity will be responsible for issuing such an “expert opinion”, it is generally questionable whether a state body is able to or should be involved in assessing any material with religious content.¹²⁸ The rights to freedom of religion or belief, and to freedom of expression exclude any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs, including religious literature or any other materials containing so-called “religious content”, are legitimate.¹²⁹

¹²⁵ *Op. cit.* footnote 18, par 3 of the Plan of Action (Annex to the 2006 UN Global Counterterrorism Strategy).

¹²⁶ See e.g., *op. cit.* footnote 50, pars 47-48 (2016 UN HRC’s Concluding Observations on Kazakhstan); and UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on Kazakhstan* E/C.12/KAZ/CO/1, 7 June 2010, par 39, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/KAZ/CO/1&Lang=En>.

¹²⁷ See par 21 of the OSCE/ODIHR-Venice Commission, *Guidelines on the Legal Personality of Religious or Belief Communities* (2014), par 10, <<http://www.osce.org/odihr/139046?download=true>>; and UN Special Rapporteur on Freedom of Religion or Belief, 2011 Report, UN Doc.A/HRC/19/60, pars 25 and 41, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-60_en.pdf>.

¹²⁸ See also OSCE/ODIHR, *Opinion on the draft Federal Law of Austria amending the Law on the Recognition of Adherents to Islam as a Religious Society*, 7 November 2014, pars 25-27, <<http://www.legislationline.org/documents/id/19369>>.

¹²⁹ OSCE/ODIHR, *Comments on the Law on Amendments and Additions to some Legislative Acts of the Republic of Kazakhstan on Issues of Religious Freedom and Religious Organizations*, January 2009, par 60, <<http://www.legislationline.org/documents/id/15504>>.

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77. In this context, it is recalled that, at the international level, “there is a trend towards extricating the State from doctrinal and theological matters”.¹³⁰ Generally, a State should be very reluctant to involve itself in any matters regarding issues of faith, belief or the internal organization of a religious group.¹³¹ It is thus not up to the State, but rather up to the religious entity itself to assess the religious literature or any other material containing “religious content”.
78. Additionally, the term “positive theological expert opinion” is extremely vague, and thus prone to different, potentially arbitrary interpretations. As already noted in its 2009 OSCE/ODIHR Opinion on amendments to legislation pertaining to freedom of religion or belief,¹³² this provides public officials with wide discretion to evaluate publications’ contents and thus assess a religious community’s beliefs. Such general oversight *de facto* amounts to a system of authorization which appears to be an excessive, disproportionate and unnecessary limitation to the right to acquire, possess, use, produce, import and disseminate religious publications and materials, which is an integral component of the right to freedom of religion or belief.¹³³
79. For this reason, it would be advisable **to delete the new paragraph 3-1 of Article 9 of the Law “On Religious Activities and Religious Associations”** (and existing Article 9 par 3 as amended). **The amended Article 490 par 3 of the Code of Administrative Offences should likewise be reconsidered and deleted to exclude administrative liability for the failure to obtain an “expert opinion” prior to the use of religious material or literature.** This does not mean that materials and other publications inciting to violence or to the commission of criminal offences, including acts or terrorism, as defined in pars 29-30 *supra*, would be allowed; on the contrary, their prohibition and confiscation/destruction should be pronounced by a judge on the basis of the relevant criminal provision and if all the constitutive elements of the said offence are present.
80. Additionally, Article 490 of the Code of Administrative Offences imposes administrative liability for “the dissemination of doctrines of religious associations that are not registered in the Republic of Kazakhstan”. This provision restricts the rights of members of *unregistered* religious groups to freely exercise their right to freedom of religion or belief. Under international human rights law, religious or belief communities should not be obliged to acquire legal personality if they do not wish to do so; the enjoyment of the right to freedom of religion or belief must not depend on whether a group has sought and acquired legal personality status.¹³⁴ Such limitation imposed on unregistered groups would have a disproportionately negative affect on more recently established and numerically smaller religious or belief communities, in violation of international standards.¹³⁵ In that respect, UN human rights monitoring bodies have recently reiterated their concerns about undue restrictions on the exercise of the right to freedom of religion or belief imposed by the 2011 Law “On Religious Activities and

¹³⁰ OSCE/ODIHR-Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (2004), Part II - Section D, <<http://www.osce.org/odihr/13993>>. See also for instance, the cases of *Hasan and Chaush v Bulgaria*, ECtHR judgment of 26 October 2000 (Application no. 30985/96), par 62, <<http://hudoc.echr.coe.int/eng?i=001-58921>>; and *Metropolitan Church of Bessarabia v. Moldova*, ECtHR judgment of 13 December 2001 (Application no. 45701/99), pars 118 and 123, <<http://hudoc.echr.coe.int/eng?i=001-59985>>.

¹³¹ *ibid.* Part II - Section D (2004 Guidelines for Review of Legislation Pertaining to Religion or Belief).

¹³² *Op. cit.* footnote 2, par 46 (2009 OSCE/ODIHR Comments on Legislative Acts of Kazakhstan on Issues of Religious Freedom and Religious Organizations).

¹³³ See *op. cit.* footnote 106, Principles 16.9 and 16.10 (OSCE Vienna Document (1989)); and *ibid.* pars 47-49 (2009 OSCE/ODIHR Comments on Legislative Acts of Kazakhstan on Issues of Religious Freedom and Religious Organizations).

¹³⁴ See *op. cit.* footnote 127, par 21 (2014 Joint Guidelines on the Legal Personality of Religious or Belief Communities).

¹³⁵ See *OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination*, Maastricht Ministerial Council Meeting on 2 December 2003, par 9, <<http://www.osce.org/mc/19382>>. See also *op. cit.* footnote 130, Part II.B (3) ((2004 Guidelines for Review of Legislation Pertaining to Religion or Belief).

Religious Associations” of Kazakhstan, such as the mandatory registration of religious organizations, the ban on unregistered religious activities, and restrictions on the importation and distribution of religious materials.¹³⁶ To ensure full compliance with international standards, it is thus recommended to **delete the dissemination of doctrine by unregistered religious associations as an administrative offence from Article 490**. More generally, the Law “On Religious Activities and Religious Associations” should be revised to ensure that religious groups/organizations can be formed and operate freely even in the absence of registration or without the State’s prior approval.¹³⁷ This would also ensure compliance with these laws with international standards on the right to freedom of association, which also protects *unregistered associations*.¹³⁸

81. Although not directly subject to amendments by the Draft Law, it is noted that undertaking “missionary activities”¹³⁹ without registration (re-registration) remains subject to administrative liability (Article 490 of the Code of Administrative Offences). Recently, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed some concerns regarding the requirement for individuals visibly and publicly carrying out religious functions to register as “missionaries” and cases where some individuals were subjected to severe fines and seizure of documentation for unregistered “missionary activity”.¹⁴⁰ Generally, while it may be justifiable to require some sort of registration for everyone (see par 54 *supra*), including “missionaries”,¹⁴¹ subjecting missionary activities to special burdensome registration requirements would be contrary to OSCE commitments relating to access to information,¹⁴² including on religious matters or the right to freedom of religion or belief,¹⁴³ freedom of speech,¹⁴⁴ and contacts between religious communities.¹⁴⁵ The drafters should thus **review the registration requirements and ensure that they are not too burdensome**,¹⁴⁶ and do not go beyond a mere notification requirement.
82. Moreover, it is noted that missionaries are not permitted to apply for permanent residence permits (see Article 7 par 7 of the Law “On Migration”). This likewise has the potential to inhibit the implementation of the above-mentioned OSCE Commitments. It

¹³⁶ *Op. cit.* footnote 50, pars 47-48 (2016 UN HRC’s Concluding Observations on Kazakhstan).

¹³⁷ UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Report on the Mission to Kazakhstan* (2015), pars 46-47 and 96 (f), <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/25/Add.2>.

¹³⁸ See *op. cit.* footnote 63, par 69 (2015 ODIHR-Venice Commission Guidelines on Freedom of Association). See also *ibid*, pars 39, 46 and 96(d) (2015 UN Special Rapporteur’s Report on the Mission to Kazakhstan).

¹³⁹ “Missionary activities” are defined by Article 1 par 5 of the Law “On Religious Activities and Religious Associations” as “activities of citizens of the Republic of Kazakhstan, foreigners and stateless persons on behalf of religious associations registered in the Republic of Kazakhstan, aimed at dissemination of a doctrine on the territory of the Republic of Kazakhstan with the purpose of conversion”.

¹⁴⁰ *Op. cit.* footnote 137, par 50 (2015 UN Special Rapporteur on FoAA’s Report on the Mission to Kazakhstan).

¹⁴¹ *Op. cit.* footnote 2, par 59 (2009 OSCE/ODIHR Comments on Legislative Acts of Kazakhstan on Issues of Religious Freedom and Religious Organizations).

¹⁴² OSCE Helsinki Final Act (1975), Co-operation in Humanitarian and Other Fields – Part 2 on “Information”, <<http://www.osce.org/helsinki-final-act?download=true>>. See also *op. cit.* footnote 2, pars 34-35 and 85-87 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes); and pars 68-69 (2009 OSCE/ODIHR Opinion on the Draft Law of the Republic of Kazakhstan on Migration of the Population).

¹⁴³ See *op. cit.* footnote 106, Principles 16.9 and 16.10 (OSCE Vienna Document (1989)). See also Articles 6.d and 6.e of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the UN General Assembly, <<http://www.un.org/documents/ga/res/36/a36r055.htm>>; and par 4.d of Resolution 2005/40 of the Commission on Human Rights and par 9.g of Resolution 6/37 of the Human Rights Council which urges States “[t]o ensure, in particular, [...] the right of all persons to write, issue and disseminate relevant publications in these areas.” See also UN HRC’s General Comment No. 22, 27 September 1993, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f219%2fRev.1%2fAdd.4&Lang=en>, which states that “[i]n addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, [...] the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications”.

¹⁴⁴ See, e.g., *op. cit.* footnote 82, pars 9.1, 10.1 and 10.2 (OSCE Copenhagen Document (1990)).

¹⁴⁵ See *op. cit.* footnote 106, Co-operation in Other Fields, par 32 (OSCE Vienna Document (1989)).

¹⁴⁶ A mere requirement that missionaries register in the sense of giving notice of where they live and where they will be working is probably permissible, so long as the requirement is not structured in a burdensome way; see *op. cit.* footnote 2, par 59 (2009 OSCE/ODIHR Comments on Legislative Acts of Kazakhstan on Issues of Religious Freedom and Religious Organizations).

- is thus recommended to reconsider this limited approach and grant missionaries the possibility to reside in Kazakhstan for longer periods of stay.¹⁴⁷
83. Finally, the proposed draft amendments to the Law “On Tourist Activities in the Republic of Kazakhstan” introduce a new type of tourism, i.e., “religious tourism” defined as “a type of tourism, where people travel for performance of religious rites in a country (place) of temporary residence” (new Article 1 par 2-1). The amended legislation further regulates such forms of tourism by requiring tour operators to comply with the procedures established by an authorized body in the sphere of religious activity and is subject of agreement by such body (new paragraph 5 of Article 15). In this context, it is noted that OSCE participating States have committed to allow personal contacts and communication between believers, religious faiths and their representatives, including through travel to other countries to participate in various religious events – which should be further facilitated for personal or professional reasons and for tourism; the time for the consideration of applications for such travel should be reduced to a minimum.¹⁴⁸ The new provision in the Law “On Tourist Activities” could potentially encroach upon these commitments. Also, with respect to travels from Kazakhstan to other countries, it has the potential to unduly restrict the freedom of everyone to leave any country, including his/her own, as recognized by Article 12 pars 2 of the ICCPR.¹⁴⁹ **The legal drafters should therefore reconsider the introduction of this provision.**

7.3. Forced Expulsion and Detention Pending Forcible Deportation

84. The Draft Law proposes several amendments to the mechanism for expelling foreigners and stateless persons. It is welcome that the draft amendments strengthen the role of the judiciary by requiring that expulsions be based exclusively on court decisions (new Article 28 of the Law “On Legal Status of Foreigners”), whereas currently, such a decision may also be taken by authorized state bodies. According to the current version of Article 28, expulsions are at first executed by means of a “monitored self-arranged departure” from the country (meaning that the departure is voluntary, but monitored by public authorities); it is only if individuals fail to comply with the expulsion order that they are to be detained and removed from the country by force. The proposed amendment to Article 28 would introduce the possibility of “forcible deportation” as a means of enforcing expulsion orders immediately after they have been issued.¹⁵⁰ Consequently, the Draft Law provides for stricter enforcement measures than those currently in force.
85. Such expulsion procedures need to be equipped with adequate substantive and procedural safeguards (see Article 13 of the ICCPR), to avoid potential violations of the human rights of non-nationals present on the territory of Kazakhstan. Unless prevented by compelling national security concerns, these include the opportunity (i) to submit reasons against the expulsion; (ii) to have the case reviewed by the authority competent to determine whether or not the expulsion should proceed (or the person or persons

¹⁴⁷ See *op. cit.* footnote 2, par 85 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes).

¹⁴⁸ See *op. cit.* footnote 106, par 32 (OSCE Vienna Document (1989)).

¹⁴⁹ See also UN HRC, *Svetlana Orazova v. Turkmenistan*, Communication No. 1883/2009, 4 June 2012, pars 7.3-7.4, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F104%2FD%2F1883%2F2009&Lang=en>.

¹⁵⁰ In particular the new Article 51 of the Criminal Code states that “[f]oreigners or stateless persons shall be *forcibly expelled* from the Republic of Kazakhstan with prohibition of their re-entry onto the territory of the Republic of Kazakhstan for a period of five years”; and Article 70 of the Penal Execution Code provides that: “Valid court sentences for deportation of a foreigner or a stateless person out of the Republic of Kazakhstan are subject to *forcible execution*. Expulsion shall be carried out by escorting the deported migrant to the State Border of the Republic of Kazakhstan in accordance with the procedure specified by the Government of the Republic of Kazakhstan, and by prohibiting his/her re-entry for a period of five years”.

designated by the competent authority to conduct such a review); and (iii) to be represented in such a review. If not already provided in Kazakhstan’s legislation, it is recommended to supplement the Draft Law accordingly, or alternatively to include a cross-reference to relevant other legislation.

86. First, it is noted that the proposed new version of Article 28 would apply to all expulsion cases on any of the grounds provided for in its first paragraph; these grounds are broadly formulated and include, for example, any breach of domestic laws, regardless of their gravity. Second, detention and forcible removal are intrusive measures which should only be used as a measure of last resort. It is therefore recommended **to reconsider the proposed amendment and to retain monitored self-arranged departure as the default mode for non-nationals who are subject to expulsion orders**. Alternatively, at the very least, **Article 28 could provide that forcible removal may be used in lieu of monitored self-arranged departure only for expulsions on grounds of commission of serious criminal offences, such as terrorist acts**.
87. Regarding detention pending “forcible deportation”, Article 28 states that these measures are subject to a prosecutor’s approval. Following the wording of Article 9 of the ICCPR,¹⁵¹ detention to implement expulsion, deportation or extradition procedures should undergo mandatory judicial review of the decision to detain; the same applies with respect to the right to challenge the lawfulness of the ongoing detention in court. Moreover, detained persons should also have the right to be informed about the reasons for their arrest in a language which they understand,¹⁵² have access to legal counsel¹⁵³ and be subjected to detention conditions that are compatible with standards of human dignity.¹⁵⁴ Given that approval of a prosecutor is not the same as the review by an independent and impartial court, it is recommended **to supplement Article 28 by adding the above safeguards, or by adding references to relevant other legislation**.
88. Further, in light of its intrusive character, it would be worth reviewing whether the detention of all persons who are to be deported from Kazakhstan will in all cases be necessary. For instance, international bodies consider that detention of asylum-seekers should be a measure of last resort, with liberty being the default position.¹⁵⁵ **It would thus be preferable to limit such detentions to cases where the person concerned is dangerous or likely to abscond¹⁵⁶ only.** On a side note, the ongoing legal reform to strengthen counter-terrorism provisions could also be an opportunity to amend the general legal framework pertaining to arrest and detention to address the latest recommendations made to the Republic of Kazakhstan by UN human rights monitoring bodies.¹⁵⁷
89. Moreover, it is noted that the amended Article 13 par 3 of the Law “On National Security Agencies”, which provides for the competence of national security agencies to decide on the expulsion from Kazakhstan of foreign citizens and stateless persons, is not consistent with the amended version of Article 28 of the Law “On Legal Status of Foreigners” which now requires that all expulsion decisions be made by courts. Article 13 should be adapted to the new wording of Article 28.

¹⁵¹ See UN HRC, *General Comment No. 35 on Article 9 (Liberty and security of person)*, 16 December 2014, par 60, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11>.

¹⁵² See par 23.1. of the CSCE Moscow Document (1991) and Article 9 par 2 of the ICCPR.

¹⁵³ *Op. cit.* footnote 2, par 100 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes).

¹⁵⁴ This is a right granted to everyone, without distinction, by Article 10 par 1 of the ICCPR; see *ibid.* par 100.

¹⁵⁵ See UN Refugee Agency, *Detention Guidelines - Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guideline 2, <<http://www.unhcr.org/505b10ee9.pdf>>.

¹⁵⁶ *Op. cit.* footnote 2, par 99 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes).

¹⁵⁷ See *op. cit.* footnote 50, pars 27-28 (2016 UN HRC’s Concluding Observations on Kazakhstan); and *op. cit.* footnote 100, par 12 (2014 UN Committee against Torture’s Concluding Observations on Kazakhstan).

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90. Similarly, the amended Article 51 of the Criminal Code provides that, in cases set out in Article 40, foreigners and stateless persons shall be “forcibly expelled” (as opposed to the current procedure of “monitored self-departure” from the country) and re-entry into the country shall be prohibited for a period of five years. Such expulsion is envisaged as an additional form of punishment for three criminal offences (i.e., intentional unlawful border-crossing, failure to comply with an expulsion order, and participation in organizations outlawed on grounds of “extremism” or terrorism). In this context, it is noted that pursuant to the Law “On the Legal Status of Foreigners”, an expulsion order may be adopted by the executive if “national laws”, presumably including criminal law, are violated. Read together, this implies that forced expulsion could indirectly be pronounced for any crime, irrespective of its grave nature, which may be excessive.
91. Moreover, the above-mentioned provisions regarding expulsion/forced deportation do not foresee any exceptions to such expulsions and prior detention pending expulsion. While there is no right to asylum as such, turning away or expelling an individual, whether at the border or elsewhere within a state’s jurisdiction, in cases where this would put him/her at a real risk of torture or inhuman or degrading treatment or punishment if expelled, is prohibited by Article 3 of the UNCAT and would engage the responsibility of the State. Such dangers are particularly relevant in the cases of refugees and asylum-seekers.¹⁵⁸ It is thus recommended **to include in Article 51 and other relevant provisions an explicit prohibition to expel non-nationals in such cases.**¹⁵⁹
92. Similar exceptions should also be envisaged where the expulsion would entail an undue interference with private and family life¹⁶⁰ or based on other humanitarian reasons, e.g. in cases of minors, grave illness or advanced age.¹⁶¹ Additionally, regarding potential or identified victims of trafficking in human beings specifically, it is noted that they face serious risks of potential harm if they are sent back to their country of origin;¹⁶² hence, they should not be deported and should receive special protection and assistance,¹⁶³ including the possibility to obtain temporary or permanent residence permits to remain in the country, in appropriate cases.¹⁶⁴ Moreover, as recommended by the UN Human Rights Committee, **victims of trafficking brought into the country should not be charged with having violated immigration rules and should not be forcibly repatriated.**¹⁶⁵ The legal drafters should also consider **including exceptions to the automatic expulsion of stateless persons in the Draft Law, if they reside legally in**

¹⁵⁸ Pursuant to Article 33 par 1 of the 1951 Convention relating to the Status of Refugees, to which Kazakhstan acceded on 15 January 1999, “[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. See also par 6 of the UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, <<http://www.refworld.org/pdfid/45f17aa4.pdf>>.

¹⁵⁹ See, in this context, *op. cit.* footnote 50, pars 43-44 (2016 UN HRC’s Concluding Observations on Kazakhstan); and *op. cit.* footnote 100, par 16 (2014 UN Committee against Torture’s Concluding Observations on Kazakhstan), which have noted with concerns cases of forcible return despite the existence of a foreseeable, real and personal risk of torture upon return. See also e.g., UN Committee against Torture, *Tursunov v. Kazakhstan*, Communication no. 538/2013, 08 May 2015, <<http://juris.ohchr.org/Search/Details/1949>>; and *X. v. Kazakhstan*, Communication no. 554/2013, 03 Aug 2015, <<http://juris.ohchr.org/Search/Details/1970>>.

¹⁶⁰ E.g. in cases where this would separate families, e.g., the case of *Winata v. Australia*, CCPR/C/72/D/930/2000, 21 July 2001, par 7.1.

¹⁶¹ *Op. cit.* footnote 2, par 103 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes).

¹⁶² See e.g., UN OHCHR, *Fact Sheet No. 36 on “human Rights and Human Trafficking”*, pages 17-18, <http://www.ohchr.org/Documents/Publications/FS36_en.pdf>.

¹⁶³ Chapter V on Protection and Assistance of the OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2003, par 3, <<http://www.osce.org/odihr/23866>>.

¹⁶⁴ See e.g., Chapter V on Protection and Assistance of the OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2003, par 3, available at <<http://www.osce.org/odihr/23866>>; and Article 7 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2000 (hereinafter “the UN Palermo Protocol”) to the UN Convention against Transnational Organized Crime (hereinafter “UNTOC”). The Republic of Kazakhstan ratified the UNTOC on 31 July 2008, and acceded to its Protocol on 31 July 2008. See also *op. cit.* footnote 2, par 104 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes).

¹⁶⁵ *Op. cit.* footnote 50, pars 33-34 (2016 UN HRC’s Concluding Observations on Kazakhstan).

the country.¹⁶⁶ Additionally, and in general, the potentially prejudicial effects of forced on female family members and children, who may be financially dependent on the expelled person, should be borne in mind.¹⁶⁷

93. Finally, and as suggested also by the UN Committee against Torture, it is recommended to include specific reference to judicial review of decisions of expulsion/return, particularly those pronounced outside the scope of criminal proceedings.¹⁶⁸ Indeed, even non-citizens suspected of terrorism should not be expelled without allowing them a legal opportunity to challenge their expulsion.¹⁶⁹ To be effective, this also means that any review or appeal should have immediate suspensive effect on the expulsion procedure, which is particularly crucial in the context of *non-refoulement*.¹⁷⁰ According to recommendations made at international and regional levels, legal assistance should also be provided, in order to ensure the effectiveness of this remedy.¹⁷¹

7.4. Freedom of Association

94. Although not directly subject to amendments, several provisions of the Criminal Code mentioned in the Draft Law envision enhanced penalties for “leaders of a public association” – i.e., Article 182 par 3, Article 256 par 2, Article 257 par 3 and Article 258 par 2 of the Criminal Code. In these articles, penalties have been increased for two more years of imprisonment, both to the minimum and the maximum terms of punishment. Apart from the vagueness of the term “leaders”, it is unclear why leaders of public associations should be subject to aggravating circumstances for the very fact of holding such a position. As there is no apparent justification for singling out these persons merely due to their positions, these provisions could raise concerns with respect to the principle of equal treatment and non-discrimination on the basis of affiliation with an association.¹⁷²
95. Overall, such provisions may as a consequence have a chilling effect on civil society organizations and their legal representatives, managers and/or leaders, and serve as a deterrent to people taking an active role in organizations that contribute positively to society (e.g., sports clubs, academic institutions, professional associations, etc.). UN human rights monitoring bodies have likewise noted with concern the imposition of harsher penalties against “leaders” of associations as a new, separate category of offender under the Criminal Code of Kazakhstan.¹⁷³ In light of the above, the legal drafters should reconsider and delete such aggravating circumstances imposed on the basis of the leadership of public associations. As mentioned above in par 34 *supra*, this does not prevent the imposition of higher penalties for the leaders of terrorist organizations/groups providing that the terms “leaders” and “group” are defined clearly.

¹⁶⁶ Although the Republic of Kazakhstan is not a party to the 1954 UN Convention relating to the Status of Stateless Persons, it is noted that its Article 31 prohibits the expulsion of stateless persons who are lawfully on the territory of a state.

¹⁶⁷ See e.g., *op. cit.* footnote 72, par 30 (2009 UN Special Rapporteur’s Report Analysing Counter-terrorism Measures from a Gender Perspective).

¹⁶⁸ See *op. cit.* footnote 100, par 16 (2014 UN Committee against Torture’s Concluding Observations on Kazakhstan). See also UN OHCHR, “The Rights of Non-citizens” (2006), page 51, <<http://www.ohchr.org/documents/publications/noncitizensen.pdf>>.

¹⁶⁹ *ibid.* page 19.

¹⁷⁰ See *op. cit.* footnote 2, par 100 (2011 OSCE/ODIHR Opinion on the Draft Law of Kazakhstan on the Regulation of Migration Processes); and *op. cit.* footnote 103, par 163 (2015 OSCE/ODIHR Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic). See also e.g., par 67 of *Gebremedhin v. France*, ECtHR judgement of 26 April 2007 (Application no. 25389), <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":"25389/05","itemid":"001-80333"}>.](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)

¹⁷¹ See 2005 CoE Twenty Guidelines on Forced Return (Guideline 9), <http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Force_Return_en.pdf>.

¹⁷² See *op. cit.* footnote 63, Principle 5 (2015 ODIHR-Venice Commission Guidelines on Freedom of Association).

¹⁷³ *Op. cit.* footnote 50, pars 51-52 (2016 UN HRC’s Concluding Observations on Kazakhstan); and *op. cit.* footnote 137, par 43 (2015 UN Special Rapporteur on FoAA’s Report on the Mission to Kazakhstan).

96. The new Article 7 par 6-1 of the Law “on Migration” now restricts the possibility to obtain a permanent resident permit not only for persons residing in Kazakhstan for the purpose of religious or missionary activities, but also for those implementing charitable or voluntary activities. Given that such activities are often carried out by members of non-governmental organizations, this amendment has the potential to unduly affect the exercise of the right to freedom of association. Moreover, although there may be instances where some non-governmental organizations may have been misused for the purpose of terrorist financing, this is an issue separate from the issue of residence. In this context, it must be reiterated that OSCE participating States have committed to keep restrictions with respect to residence to a minimum.¹⁷⁴ It is thus recommended **to reconsider the introduction of such a blanket restriction.**

7.5. Freedoms of Opinion and Expression, Peaceful Assembly, Right to Respect for Private Life, and Restrictions of the Right to Access to Information

97. The new provisions of the Law “On Communication” introduce a system of registering mobile phone subscribers (new Article 8 par 1 sub-par 8-8) and foresee the establishment and operation of a unified database of subscribers’ identification codes by state technical services (new Article 9-1 par 1 sub-par 5-4). Additionally, the operator of this database shall provide access to the agencies in charge of operational search activities on communication networks (new Article 15 sub-par 2-2).
98. First, it is unclear from the draft amendments to the Law “On Communication” which information will be recorded in the unified database of identification codes of the mobile subscriber. While the idea of a unified system for registration of mobile device users may be legitimate, the recording and processing of data for the purposes of identification and/or the gathering of intelligence in the absence of any criminal offence and/or threat to national security raises concerns.¹⁷⁵ The public interest in conducting an investigation and preventing crimes always needs to be balanced against the protection of individuals’ rights to respect for private life. Hence, the rules pertaining to the management of such unified database should be in line with international standards pertaining to the protection of personal data.¹⁷⁶ **If not already in place, the law or other legislation should provide for substantive and procedural safeguards, in line with international standards**, to prevent undue access and use by the national authorities of any personal data recorded therein.¹⁷⁷ In any case, the processing of personal data held by other state bodies should be subject to prior authorization from a body that is independent from the security services and the executive, both in law and in practice.¹⁷⁸
99. Second, the new Article 36-2 of the Law “On Communication” explicitly prohibits “the import, production, distribution and operation of mobile devices with modified codes,

¹⁷⁴ *Op. cit.* footnote 87, par 33 (OSCE Moscow Document (1991)).

¹⁷⁵ See e.g., OSCE/ODIHR, *Opinion on the Draft Law on police of Serbia*, 7 October 2015, Section 4.6., <<http://www.legislationline.org/documents/id/19874>>.

¹⁷⁶ See, e.g., for reference, on key principles that should regulate the protection of personal data, Section III of the EU Fundamental Rights Agency (FRA) Handbook on European Data Protection Law (2014), <http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf>. Key principles in this field include: the principle of lawful processing; the principle of purpose specification and limitation; the principles of data quality, including data relevance, data accuracy, and the limited retention of data, particularly that retention shall be limited in time; the fair processing principle; and the principle of accountability.

¹⁷⁷ See, e.g., for reference, on key principles that should regulate the protection of personal data, Section III of the EU Fundamental Rights Agency (FRA) Handbook on European Data Protection Law (2014), <http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf>. Key principles in this field include: the principle of lawful processing; the principle of purpose specification and limitation; the principles of data quality, including data relevance, data accuracy, and the limited retention of data, particularly that retention shall be limited in time; the fair processing principle; and the principle of accountability.

¹⁷⁸ See e.g., *op. cit.* footnote 76, Recommendation 6 (2015 CoE Commissioner for Human Rights’s Issue Paper on Democratic and Effective Oversight of National Security Services).

as well as software and equipment designed and/or used for modification of identification codes of mobile subscriber units”, unless they are operated by good faith purchasers. Such a provision would prohibit the use of encryption technologies. At the same time, anonymity and encryption technologies have long been considered necessary to ensure safe and secure communications, in particular for journalists and human rights activists, for example with their confidential sources of information, and therefore are a prerequisite for the right to exercise freedom of opinion and expression in general.¹⁷⁹ Consequently, the **blanket prohibition of such tools/equipment in the new Article 36-2 of the Law “On Communication” should be reconsidered, as they may well be disproportionate – even in the context of counter-terrorism measures.**¹⁸⁰

100. The Draft Law also seeks to supplement the procedure for suspending the operation of networks and/or means of communication (Article 41-1 of the Law “On Communication”). The existing provision is already quite widely framed and may lead to potential abuse by public authorities. Indeed, it allows for the possibility of suspension where the networks or means of communication “are used for criminal purposes, affecting interests of individuals, the society and the state, as well as for dissemination of information that violates the election legislation of the Republic of Kazakhstan, contains calls for extremist and terrorist activity, mass disturbances, and for participation in mass (public) events conducted in violation of the established orders”.
101. In this context, it must be underlined that the right of use and access to the Internet is considered to be an integral part of the right to freedom of expression and information protected by Article 19 of the ICCPR and par 9.1 of the OSCE Copenhagen Document.¹⁸¹ Hence, denying individuals the right to access the Internet or communication networks is an extreme measure that can be justified only as a last resort, and based on a court decision.¹⁸² It may solely be restricted by the state, in line with international human rights standards, where the Internet is abused to violate another person’s rights or where it poses a serious risk to the public order (for example, through the incitement to violence against others; the promotion of national, racial or religious hatred; or the intentional communication and direct incitement to the commission of a terrorist act; see also pars 21-23 and 28-29 *supra*).¹⁸³
102. As regards efforts to prevent terrorist radicalization on the Internet more specifically (such as regulating, filtering or blocking online content deemed to be illegal under international law), such restrictions should be in compliance with international human

¹⁷⁹ See the UN Special Rapporteur on Freedom of Opinion and Expression, *Report on the Use of Encryption and Anonymity in Digital Communications*, 22 May 2015, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc>. See also *op. cit.*, footnote 35, par 2 (j) (i) (2016 UN-OSCE-OAS-ACHPR Joint Declaration on Freedom of Expression and Countering Violent Extremism); and OSCE Representative on Freedom of the Media, *Communiqué No. 6/2016 on free expression and the fight against terrorism*, 2 September 2016, <http://www.osce.org/fom/26226#_ftn5>.

¹⁸⁰ *ibid.* par 60 (2015 UN Special Rapporteur’s *Report on the Use of Encryption and Anonymity in Digital Communications*); and par 2 (j) (i) (2016 UN-OSCE-OAS-ACHPR Joint Declaration on Freedom of Expression and Countering Violent Extremism).

¹⁸¹ See the International Special Rapporteurs/Representatives on Freedom of Expression, *2011 Joint Declaration on Freedom of Expression and the Internet*, 1 June 2011, par 6 (a), <<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=848&IID=1>>, which states that “[g]iving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the [...] right to assembly and association”.

¹⁸² *ibid.* par 6 (c).

¹⁸³ See Article 20 par 2 of the ICCPR which states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”; and Article 4 (a) of the ICERD which provides that “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” shall be considered offences punishable by law. See e.g., the definition of “incitement to terrorism” provided by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *op. cit.* footnote 55, par 32 (2010 UN Special Rapporteur’s Report on Best Practices in Countering Terrorism), which reads as follows: “it is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed”.

rights standards, and should not hinder the freedom of expression and the free flow of information. Security measures should be temporary in nature, narrowly defined to meet a clearly set-out legitimate purpose and prescribed by law; these measures should not be used to target dissent and critical speech.¹⁸⁴ More generally, content restriction should only be possible if such content poses a threat to national security and if it is likely and intended to incite imminent violence, and there is a direct and immediate connection between the expression and the likelihood of occurrence of such violence (see par 21 *supra*).¹⁸⁵

103. Bearing this in mind, expressions such as “calls for extremist and terrorist activity” appear to be overly broad and vague. It is generally acknowledged that a wide variety of actions (including legal ones) could fall under this term, such as providing communications support to terrorism or “extremism”, the “promotion” of terrorism or “extremism”, and the mere repetition of statements by terrorists. These acts should not be criminalised,¹⁸⁶ unless they fulfil the above-mentioned criteria (see pars 21-23, 28-29 and 102 *supra*).
104. Moreover, the expression of calls for “participation in mass (public) events conducted in violation of the established orders” is also quite vaguely framed, and could raise issues under Article 21 of the ICCPR and par 9.2 of the OSCE Copenhagen Document, both of which protect the right to freedom of peaceful assembly. In principle, there exists a presumption in favour of holding assemblies¹⁸⁷ and in this context, a presumption of peaceful intent. Any restrictions to this right should be prescribed by law and be necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. In particular, restrictions based on public-order grounds should not be imposed based solely on a hypothetical or unsubstantiated risk of public disorder, such as interference with automobile traffic, proximity to other mass events, or the mere presence of a hostile audience; rather, limitations are only permissible in cases involving concrete threats.¹⁸⁸ Prior restrictions imposed on the basis of the possibility of minor incidents of violence are also likely to be disproportionate, and any isolated outbreak of violence should be dealt with by way of subsequent arrest and prosecution rather than prior restraints imposed on the assembly as such.¹⁸⁹ In this respect, the wording used in Article 41-1 of the Law “On Communication” would appear to be overly broad, and should thus be reconsidered.¹⁹⁰
105. Additionally, the suspension of networks or means of communication could potentially have a significant negative impact on the rights of associations.¹⁹¹ Such measures could raise serious concerns with respect to the right to freedom of association; limitations of this right are subject to the same principles of proportionality and ‘necessity in a

¹⁸⁴ See the OSCE Study “Freedom of Expression on the Internet: A study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in OSCE participating States” (2010) by the OSCE Representative on Freedom of the Media, <<http://www.osce.org/fom/80723>>.

¹⁸⁵ See *op. cit.*, footnote 35, par 2 (d) (2016 UN-OSCE-OAS-ACHPR Joint Declaration on Freedom of Expression and Countering Violent Extremism); and footnote 42, Principle 6 (Johannesburg Principles on Freedom of Expression and National Security).

¹⁸⁶ See International Special Rapporteurs/Representatives on Freedom of Expression, 2008 *Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation* (10 December 2008), Section “Anti-Terrorism Legislation”, second indent, <<http://www.osce.org/fom/99558?download=true>>.

¹⁸⁷ See Principle 2 of the OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, 2nd Edition (2010), <<http://www.osce.org/odihr/73405?download=true>>.

¹⁸⁸ ibid. par 71. See also *Makhmudov v. Russia*, ECtHR judgment of 26 July 2007 (Application No. 35082/04), <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81966>>.

¹⁸⁹ See par 94 of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, ECtHR judgment of 2 October 2001 (Application No. 29221/95), <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59689#\["itemid":"001-59689"\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59689#[)>.

¹⁹⁰ See e.g., regarding the legal analysis of almost identical provisions, OSCE/ODIHR, *Opinion on the Draft Law of Ukraine on Combating Cybercrime*, 22 August 2014, pars 71-73, <<http://www.legislationonline.org/documents/id/19323>>.

¹⁹¹ See e.g., par 47 of *Socialist Party v. Turkey*, ECtHR judgment of 25 May 1998 (Application No. 21237/93), <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58172#\["itemid":"001-58172"\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58172#[)>.

democratic society’ as limitations to freedom of peaceful assembly.¹⁹²

106. In light of the above, Article 41-1 of the Law “On Communication” should be more clearly and strictly circumscribed, so as to allow for only temporary suspension, in cases where networks/communication are misused to violate other persons’ rights or where they pose a serious risk to the public order (for example, in cases of incitement to commit terrorist acts, child pornography, incitement to hatred or to violence against others, bearing in mind the caveats outlined in pars 21, 29 and 101-103 *supra*). This would help address some of the concerns raised by the UN Human Rights Committee regarding laws and practices in Kazakhstan that violate freedom of opinion and expression, including the blocking of social media, blogs, news sites and other Internet-based resources on national security grounds.¹⁹³
107. Article 41-1 of the Law “On Communication” currently allows the Prosecutor General or his deputies to shut down or suspend a network or means of communication and access to Internet resources, without a court order. UN human rights monitoring bodies have considered this to be a particularly worrying provision.¹⁹⁴ In principle, restrictions on freedom of expression must be subject to independent judicial oversight.¹⁹⁵ Moreover, any function that the prosecution service undertakes outside of the criminal sphere, such as here, should not interfere or supplant the judicial system, and should be subject to judicial control;¹⁹⁶ this is all the more relevant given the over-powerful role of the prosecution service in Kazakhstan, as already noted in pars 51-52 *supra*. The legal drafters should thus consider amending Article 41-1 accordingly and specify instead that the Prosecutor General shall apply to a court to request such restrictive measures.
108. In cases of emergency or instances that may lead to the commission of serious crimes/crimes committed by a “criminal group”, the draft amendments to Article 41-1 go even further by allowing the agency engaged in crime detection and investigation on telecommunication networks to proceed with the suspension of networks or means of communication, also without a court order. In such cases, the Prosecutor General's Office needs to be notified of such measures within 24 hours (new paragraph 8). It is unclear whether the reference to “emergency” refers to a “proclaimed” state of emergency or to other urgent circumstances; in any case, such special measures should only be applied in exceptional circumstances, when the intensity of the potential imminent or actual danger or harm justifies it. For this reason, and to limit possibilities of abuse, it is recommended to define more clearly what is meant by “cases of emergency” in Article 41-1 par 8, unless a clear definition is provided in other legislation, in which case a cross-reference to the said provision should be included in the Draft Law.
109. Finally, to enhance clarity of the provision, it is recommended to introduce into Article 41-1 par 8 references to the relevant provisions of the Criminal Code, so that it is clear which “grave or especially grave crimes” or “crimes masterminded and executed by a

¹⁹² See 2013 Report by Ian Brown, “Report on Online Freedom Expression, Assembly and Association and the Media in Europe”, MCM(2013)007, <[http://www.coe.int/t/dghl/standardsetting/media/belgrade2013/Online%20freedom%20of%20expression,%20assembly,%20association_MCM\(2013\)007_en_Report_IanBrown.pdf](http://www.coe.int/t/dghl/standardsetting/media/belgrade2013/Online%20freedom%20of%20expression,%20assembly,%20association_MCM(2013)007_en_Report_IanBrown.pdf)>, which states that “blocking access to associations websites, and communications tools such as webmail and social networking sites, can have a significant negative impact on assembly and association”.

¹⁹³ *Op. cit.* footnote 50, pars 49-50 (2016 UN HRC’s Concluding Observations on Kazakhstan).

¹⁹⁴ ibid. pars 49-50; see also *op. cit.* footnote 137, par 57 (2015 UN Special Rapporteur on FoAA’s Report on the Mission to Kazakhstan).

¹⁹⁵ See *op. cit.*, footnote 35, par 1 (e) (2016 UN-OSCE-OAS-ACHPR Joint Declaration on Freedom of Expression and Countering Violent Extremism).

¹⁹⁶ See e.g., Venice Commission, *Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service* (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), pars 71-83, available at http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf.

criminal group” are meant. Moreover, given the seriousness of the measure, and as stated in par 108 *supra*, the decision to suspend/block internet access or means of communication should also be based on a decision imposed by a court, following appropriate court procedures.¹⁹⁷ The **provision should thus be amended to specify that after 24 hours, the extension of such restrictive measures should be pronounced by a court.** In any case, restrictions to the use and access to the Internet decided by the court should be strictly limited to what is necessary, which means that the court should always examine whether there are less far-reaching measures which could be taken.¹⁹⁸

6. Final Comments

110. It is noted positively that overall, the Draft Law uses gender neutral drafting. However, several provisions still refer to individuals occupying a certain official post or belonging to a certain category using only the male gender.¹⁹⁹ Established international practice requires legislation to be drafted in a gender neutral manner. It is recommended that, whenever possible, the reference to post-holders or certain categories of individuals be adapted to reflect both genders, or that, alternatively, the plural form of the respective noun be used instead of the singular (e.g., “a representative of a foreign state” could be replaced with “representatives of a foreign state”).²⁰⁰
111. Finally, amendments of the legislation on countering terrorism, given their potential to encroach on human rights and fundamental freedoms, should only be made after extensive, open and free public discussions, following a timeline that allows for wide and substantive debate, and involving various, also minority and religious or belief groups/communities, and public associations even if they are critical of the government.²⁰¹ The transparency, openness and inclusiveness of the process are generally considered to constitute key elements needed to adopt a sustainable text widely accepted by society as a whole, and representative of the will of the people.

[END OF TEXT]

¹⁹⁷ *Op. cit.* footnote 181, par 6 (c) (2011 UN-OSCE-OAS-ACHPR Joint Declaration on Freedom of Expression and the Internet). See also *See op. cit.* footnote 37 (UN HRC General Comment No. 34 (2011)).

¹⁹⁸ See e.g., *op. cit.* footnote 190, par 76 (2014 OSCE/ODIHR Opinion on the Draft Law of Ukraine on Combating Cybercrime). See also, for instance, *Ahmet Yildirim v. Turkey*, ECtHR judgment of 18 December 2012 (Application No. 3111/10).

¹⁹⁹ See e.g., the Prosecutor General referred to in Article 41-1 of the Law “On Communication”; and “a representative of a foreign state or a staff member of an international organization” referred to in Article 173 of the Criminal Code.

²⁰⁰ For further reference, see e.g., the UN Economic and Social Commission for Western Asia (ESCWA), *Guidelines on Gender-Sensitive Language*, developed by Nouhad Hayek, <https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf>.

²⁰¹ *Op. cit.* footnote 87, par 18.1 (OSCE Moscow Document (1991)), which provides that “legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives”. See also *OSCE Decision No. 3/13 on Freedom of Thought, Conscience, Religion or Belief*, adopted on 6 December 2013 in Kyiv, <<http://www.osce.org/mc/109339>>, which calls on OSCE participating States to “[e]ncourage the inclusion of religious and belief communities, in a timely fashion, in public discussions of pertinent legislative initiatives”; OSCE HCNM, *Ljubljana Guidelines on Integration of Diverse Societies* (2012), Principle 2 on page 9 and Principle 23 on page 32, <<http://www.osce.org/hcnm/96883?download=true>>; and *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (April 2015), <<http://www.osce.org/odihr/183991>>.