European Instrument for Democracy and Human Rights

European Union – Kazakhstan
Civil Society Seminar on Human Rights

Judicial System and Places of Detention: Towards the European Standards

Almaty, 29-30 June 2009

Final Report: Annexes

September 2009

Contract n°2009/208316

This seminar is funded by
The European Union

This seminar is organised by
Cecoforma

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EUROPEAN UNION - KAZAKHSTAN
CIVIL SOCIETY SEMINAR ON HUMAN RIGHTS

JUDICIAL SYSTEM AND PLACES OF DETENTION: TOWARDS THE EUROPEAN STANDARDS

Final Report: Annexes
September 2009

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TABLE OF CONTENTS

ANNEX I: INTRODUCTORY REMARKS FROM THE PLENARY SESSION I: LEGISLATIVE REGULATION OF THE ADMINISTRATIVE RESPONSIBILITY

PLENARY SESSION: LEGISLATIVE REGULATION OF THE ADMINISTRATIVE RESPONSIBILITY

Speaker 1: ***Professor Alan Page****, Dean of the School of Law, Dundee Law School, UK*

In my opening remarks I want to address two issues.

What are the relevant international standards?

What points should we bear in mind in discussing the application of those standards in Kazakhstan?

Before I turn to these issues, however, let me say something about the concept of 'administrative responsibility', which appears in the title of this plenary session. At first, I had not been clear what this meant but listening to Professor Golovko I now understand that what we are talking about is a form of *individual* responsibility which takes its place in post-Soviet systems alongside more familiar notions of individual criminal and civil responsibility. As such it falls to be contrasted with the responsibility of the *administration,* which is the sense in which we are more accustomed to talking about administrative responsibility in the European tradition. Clearly, however, if the question of human rights is to be addressed in Kazakhstan and other post-Soviet system then the question of the responsibility of the administration has to be addressed as part of that.

Turning to the relevant international standards, these are to be found in the International Covenant on Civil and Political Rights (ICCPR), which Kazakhstan ratified in November 2005, and the European Convention on Human Rights (ECHR).

ICCPR

Article 9 guarantees the liberty and security of the person, which is one of the most fundamental rights guaranteed by the Convention. The substantive guarantee is to be found in Article 9(1), which provides that everyone has the right to liberty and security of the person. 'No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' The remaining paragraphs of the Article provide a series of procedural guarantees of the substantive guarantee in Article 9(1). Article 9(2) thus provides that anyone arrested must be informed, at the time of his arrest, of the reasons for his arrest, and must be promptly informed of any charges against him. Article 9(3) provides that anyone arrested or detained on criminal charges must be brought promptly before a judge or other judicial officer with power to decide whether or not their detention should continue; as a general rule, persons should not be detained in custody awaiting trial. Article 9(4) provides that anyone who has been arrested or detained for whatever reason must be able to challenge lawfulness of his

detention before a court – this is the habeas corpus provision of the Convention. Article 9(5) finally provides that anyone who has been unlawfully arrested or detained must have a right to compensation

ECHR

The equivalent European standards are to be found in Article 5 ECHR, on which Article 9 ICCPR is based. Article 5(1) thus provides that 'everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty save ….in accordance with a procedure prescribed by law.' Where Article 5(1) differs is in comprehensively listing, in paragraphs (a) to (f), the grounds on which a person may be lawfully deprived of his liberty. As with Article 9 ICCPR, the remaining provisions of Article 5 guarantee 'a corpus of substantive rights which are intended to minimize the risk of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act' (*Kurt* v *Turkey*). Article 5(2) requires that anyone arrested must be informed promptly of the reasons for his arrest, and of any charge against him; Article 5(3) provides that anyone arrested or detained on criminal charges must be brought promptly before a judge or other judicial officer with power to decide whether or not their detention should continue, and is entitled to trial within a reasonable time or to release pending trial; Article 5(4) provides that anyone who is arrested or detained is entitled to speedy determination by a court of the lawfulness of his detention and to be released if their detention is not lawful; while Article 5(5) provides that anyone who has been arrested or detained contrary to Article 5 must have an enforceable right to compensation.

Points to bear in mind

Given our focus on 'administrative responsibility', breaches of which it is clear may be attended by consequences no less serious for the individual than breaches of criminal responsibility, the first point to be borne in mind is that these guarantees are not confined in their application to the criminal law narrowly or properly defined, as the catalogue of circumstances in which the state may detain an individual in Article 5(1) ECHR makes plain. They apply whenever anyone is detained against their will or without their consent. The Human Rights Committee has thus pointed out (in General Comment 8) that paragraph 1 'is applicable to all deprivations of liberty, whether in criminal cases, or in other cases such as for example, mental illness, vagrancy, drug addiction, educational purposes , immigration control etc. It is true that some of the provisions of article 9 … are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.' Likewise, although most cases that have arisen before the European Court of Human Rights have concerned arrest and detention in the context of criminal proceedings, there have been many other important cases on such matters as the detention of minors, the mentally disordered and persons being deported or extradited.

The second point is that lawfulness alone is not enough. Both Article 9 ICCPR and Artic5 ECHR contemplate that the individual may be deprived of his or her liberty in accordance with the law, but it is not enough that the arrest or detention be in accordance with domestic law. The law itself must conform to international standards so that in the 'language of the ICCPR the law must not provide a cover or cloak for 'arbitrariness'. The Human Rights Committee has consistently emphasised that 'arbitrariness' is not to be equated with 'against

the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. The European Court of Human Rights has likewise explained that the overall purpose of Article 5 is to ensure that no one should be deprived of his liberty in an 'arbitrary fashion'. The applicable national law must therefore meet the standard of 'lawfulness' set by the Convention as regards the 'quality of the law' in question, which test requires that all law, whether written or unwritten, be public and sufficiently precise to allow the citizen to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail, and so as to avoid 'all risk of arbitrariness'.

My third point is that the law has to be more than mere words on paper. It has to be observed in practice. Reading the papers to which were helpfully referred by way of preparation for this seminar I was struck by the number of references to officials behaving 'with impunity'. If human rights are to be at all meaningful in Kazakhstan then that must cease to be the case. That in turn takes us to the question of the separation of the powers and the role of the courts as a check on administration, which is one of the major themes of the first series of workshops.

The standards applied by the courts, however, like the standards applied by Parliaments in the European tradition - and this is my final point - , are external to the administration. The most important check on the abuse of power, we should not forget, are the standards the administration applies to itself. Unless they embody and reflect the standards external bodies seek to apply those standards are likely to have little real impact. Administrative responsibility in the European tradition means not just the subjection of government to law but the responsibility of the administration to give effect to the law.

*Speaker 2: **Professor Leonid Golovko**, Faculty of Law, Moscow State University, Russia*

Administrative Responsibility, Administrative Detention, Administrative Arrest: Conceptual Deformation of Notions in Kazakhstan's Legal System

The major problem faced by European and post-Soviet lawyers (including Kazakhstan, of course) in communicating with one another is an absolutely different understanding of such a notion as *administrative responsibility*.

In the classic European legal doctrine, administrative responsibility implies the responsibility of public administration in front of private citizens, or, in other words, the ***responsibility of the state before an individual***. This understanding of *administrative responsibility* underlies the contemporary European administrative law in its substantive and procedural aspects (grounds for compensating damage caused to private citizens by the state, administrative justice, administrative procedures, etc).

The post-Soviet doctrine stems from the Soviet understanding of law, which was far from the idea of a law-governed state, rejecting possible state responsibility before private citizens. In this situation, without having any ideological or political opportunity to develop the notions of *administrative law* and *administrative responsibility*, preserved in the Soviet Union at a very formal level, similarly to how this has been done in Europe over the last fifty years, the Soviet

doctrine started adding another meaning to them, a totally opposite one. Administrative responsibility was perceived not as responsibility of public administration before private citizens, but rather as responsibility of private citizens before public administration, or, in other words, as ***responsibility of an individual in front of the state*** for committing the so-called "minor offenses."

In order to move away completely the legal thinking of Soviet lawyers from the Western concept of administrative responsibility and to legitimize the legal concept of "administrative responsibility of an individual for committing a minor offense," the Soviet legal doctrine started treating the latter as the ultimate good. Such "administrative responsibility of an individual" was presented as by far the major way of decriminalizing criminal offenses. In other words, an individual had to face only a mild administrative responsibility in lieu of a grave criminal responsibility, which was supposed to demonstrate liberalism of the Soviet legal policy.

As a result, some sort of a *parallel* criminal law emerged and started to develop, a law of administrative offenses, which was, at the conceptual level, separated from the criminal doctrine and then perceived as the core of the Soviet administrative law. It is worth mentioning that the notion of an *administrative offense* is well known to many legal systems in Europe (Germany, Italy, etc). Furthermore, it is also used at the level of the EU law.
However, at the doctrine level, administrative offenses in Europe are still part of the criminal law in a broad sense, which largely has to do with the judicial practice of the European Court of Human Rights in Strasbourg that a few decades ago developed a *criminal matter theory* (*matière pénale* in French). They did it in order to make all forms of repressive actions by the state (no matter what they were called, *administrative*, *disciplinary* or something else) serve the idea of human rights guarantees, envisaged by Article 6 and other articles of the European Convention on Human Rights. The Soviet doctrine did not know anything of the kind, and this could not be otherwise. As a result, all proceedings on the so-called *administrative offenses* did not include appropriate human rights guarantees. This *parallel* criminal law, in a sense, was even more dangerous than the *real* criminal law, since it enabled the state to strengthen repressions and do it clandestinely.

The post-Soviet lawyers, whose legal thinking was, for the most part, moulded in Soviet universities, were raised, due to the reasons beyond their control, based on the above-mentioned understanding of *administrative responsibility* which is a far cry from the European notion. As a result, the post-Soviet (including Kazakhstan's) legal doctrine inherited fully this Soviet approach, which continues to affect the development of legislation, as well as the judicial and legal practices, in the Republic of Kazakhstan.

This Soviet understanding of Soviet administrative responsibility has two extremely negative consequences for the development of Kazakhstan's legal system:

1) it impedes the development of the true administrative justice as it should be understood, *limiting conceptually* the responsibility of the state before an individual, which does not comply with contemporary legal values;
2) it enables the *parallel* criminal law to grow (masked state repressions), which does not ensure the respect of human rights to the full extent.
It is the second trend that underlies my analysis, and therefore, I will speak in greater detail about this issue.

The notions of *administrative detention* and *administrative arrest* are direct outcomes of a *deformed* Soviet understanding of administrative responsibility inherited from the Soviet legal doctrine.

As a matter of fact, *administrative arrest* is a type of criminal punishment, which so far has been denied, without any justification, by authorities and many lawyers working in former Soviet countries. In order to see the criminal nature of administrative arrests, it would suffice to compare Article 44 of Kazakhstan's Code of Administrative Responsibility defining the notion of administrative penalty and Article 38 of Kazakhstan's Criminal Code defining criminal punishment. These two notions are not only similar with respect to their meaning, but almost identical as regards the wording of both articles. Moreover, *administrative arrest* which implies a possible deprivation of liberty up to 15 days, and in some cases 30 days (Article 55 of Kazakhstan's Code of Administrative Responsibility), is in fact a much stricter penalty that many other penalties envisaged in Kazakhstan's Criminal Code (e.g. fines). However, the level of guarantees provided in case of an administrative penalty in the form of arrest is not consistent with that provided in case of any other, even very mild, punishment, e.g. in the form of a fine. This clearly illustrates the deformation of Kazakhstan's legal system.

The notion of administrative detention, enabling the police to arrest an individual for up to three hours and in some cases up to 48 hours (Article 622 of Kazakhstan's Code of Administrative Responsibility), is yet another outstanding example of this deformation. In fact, we are talking about legal ways of circumventing guarantees envisaged in Article 16 of the Constitution of the Republic of Kazakhstan, since the police acquire the right of some additional *parallel* detention which is not regulated by the criminal and procedural legislation. There is no legal logic in this case whatsoever.

According to the official position, administrative offenses are *less dangerous* violations of the law, which is why they were removed from the criminal legislation and grouped in a separate law, the Code of Administrative Responsibility. It is well known that police detention may be used *not in every single case* of a criminal offense, but only those offenses "which may lead to deprivation of liberty as the type of punishment" (Article 132 of Kazakhstan's Criminal Code). In other words, there are certain actions prohibited by Kazakhstan's Criminal Code, which, if committed, do not allow arresting a person. Therefore, we may conclude, immediately and *a priori,* that if an administrative offense is committed, which is *less dangerous* than *any* criminal offense (including those which do not presume any detention), ***there can***, *ex natura sua,* ***be no detention whatsoever***. In this case, how should we understand Article 622 of Kazakhstan's Code of Administrative Responsibility and the official theory, according to which all administrative offenses are less dangerous than criminal offenses? How should we understand a lower level and number of human rights guarantees in administrative proceedings? Any further development of administrative detention and administrative arrest which, unfortunately, is taking place in Kazakhstan, aggravates the conceptual deformation of Kazakhstan's legal model and thus hampers its modernization.

To overcome such conceptual distortions in Kazakhstan's legal system which have been inherited from the Soviet era the following steps are required:

- developing the concept of *administrative responsibility* exclusively as responsibility of public administration before an individual;

- developing all forms of coercive measures taken by the state in response to illegal actions committed by an individual, irrespective of what they are called (administrative or criminal offenses), within the concept of *criminal responsibility* in a broad sense or the *criminal matter theory* (*matière pénale)*; difference in terms referring to various illegal actions is possible, but it shouldn't, irrevocably, take certain offenses out from the criminal law and criminal proceedings, and remain marked by a full set of criminal and procedural *guarantees*;

- any deprivation of liberty should be viewed exclusively as *criminal punishment*; if legislators deem it appropriate to retain a short deprivation of liberty (15 to 30 days), the norms on such deprivation of liberty should be incorporated not in the Code of Administrative Responsibility, but in the Criminal Code, and they should be viewed as punishment only for those actions which are considered a *crime* by the state;

- it is important to abandon completely the notion of the so-called *administrative detention* as a construct which is logically and conceptually vicious and dangerous; detention as a short deprivation of liberty by the police may, if there are appropriate grounds, be used only in case of finished or non-finished actions which are considered a *crime* by the state; all norms on police detention should be envisaged exclusively by the *criminal and procedural legislation* and be exclusively of *criminal and procedural nature*. In this situation, legislators are free, provided there is a need to do so, to distinguish in the criminal and procedural legislation between various mechanisms of detention depending on the gravity and danger of an offense, including from the viewpoint of the detention period (within limits envisaged in Article 16 of Kazakhstan's Constitution).

Speaker 3: ***Mr. Olexandr Banchuk****, Director of Criminal and Administrative Justice Projects, Centre of Political and Legal Reforms, Ukraine*

Proceedings in Cases on Administrative Offences
and Guarantees of Human Rights and Fundamental Freedoms

At some point in time the procedure for bringing actions became a basis for the creation of administrative tort law in the Western European countries. The essence of these transformations was in vesting administrative authorities including police, with the power to impose monetary penalties for the committal of a certain number of minor offences. The relative lightness of such wrongful acts determined the distinctive simplicity of administrative proceedings, in the course of which administrative authorities cannot use a large number of restrictions in respect of private individuals.

The situation which existed in the Soviet Union and still remains in the post-Soviet republics is quite different. Administrative proceedings here has a large number of compulsory signs and its results may be wrongfully used in criminal prosecution of an individual.

That is why administrative tort procedure in the Republic of Kazakhstan needs to be analysed in terms of its compliance with the following guarantees.

The inviolability of property is guaranteed by the provisions of paragraph 3 of Article 26 of the Constitution stating that "no one may be deprived of his property other than upon a court decision". Notwithstanding these constitutional requirements, the Code on Administrative Offences ("**CoAO**") permits seizure of property and documents, detaining vehicles and small

vessels without a court decision (Articles 628, 630). Despite the fact that such dispossession of property is of temporary nature and may be disputed in court, such measures still do not prevent the deprivation of ownership rights for months without a court decision.

This problem may be efficiently dealt with by fixing in the legislation a short term (24, 48 hours) for consideration of cases where such interim relief is used. Alternatively, the lawfulness and reasonableness of interim relief should be affirmed within a short period of time.

The presumption of innocence (Article 12 of the CoAO) contemplates that an individual is being considered innocent until proven guilty in due course. Other provisions of the Code refer to individuals as "those who committed administrative offences" (paragraphs 4, 4-1 of Article 635, paragraph 2 of Article 638, paragraph 1 of Article 639) or "wrongdoer", "offender" (Articles 21, 619, 627-2, 638) at the early stages of proceedings even without proof. The question arises whether it is expedient to try a case if the lawmaker treats an individual as an "offender" at the moment of preparing a report of administrative offence.

The privilege against self-incrimination is recognised by the European Court of Human Rights as being based on the provisions of Article 6 of the Convention on Human Rights and Fundamental Freedoms. The authorities' ability stipulated by the CoAO to freely inspect and seize documents from individuals and legal entities (Articles 627-2, 628, 631, 632) infringes the right of such individuals to refrain from giving testimony against themselves. In this case it should be understood that such activities of administrative authorities may result in further criminal prosecution against the individual concerned. Thus, compelling an individual to supply information, give evidence, even in the course of administrative inquiry, is regarded as compelling to self-incrimination. In criminal proceedings, it is prohibited to use as evidence any information involuntarily provided by individuals during the previous administrative proceedings. The European Court found an infringement of the respective right if a person is threatened with levying of a fine or short-term arrest as the measures of procedural coercion for refusal to provide information (documents) involuntarily in the course of administrative proceedings.

To protect individuals from self-incrimination, it is necessary:
- to give administrative authorities the right of access to documents or things only on the basis of an individual's voluntary consent, court decision or in exceptional cases when it is necessary to save human life and property;
- to establish an express prohibition against use in criminal proceedings any results (information/evidence received as a result of administrative activities without observance of human guarantees (rights) for privilege against self-incrimination).

Inviolability of residence is the right guaranteed by Article 8 of the Convention to respect for private and family right. In the proceedings related to an administrative offence, administrative authorities have the right to *freely* use any interim relief: examination of vehicles, small vessels (Article 627 of the CoAO), inspection of area (Article 627-2 of the CoAO), inspection of territories, premises, goods, other property belonging to a legal entity (Article 631). The survival of such unlimited powers of public administration to nowadays is due to the Soviet heritage. At that time, the territories of enterprises constituted state property and housing was not privately owned by citizens.

The European Court considers that the concept of "private residence" covers not only individuals' residences. In its opinion, it may extend to office premises owned by individuals, as well as offices of legal entities, their branches and other premises.

The powers of free access to "residences" may be used by an investigating authority trying to inquire into a criminal case bypassing the complicated procedure (requiring a court sanction). Thus, information may also be received "at the request" of a prejudicial inquiry authority. It means that information obtained through administrative inquiry may be used in prejudicial inquiry and judicial examination of criminal cases. The major danger for individuals is that such facts would be gathered without respect to the fundamental guarantees of the protection of their rights in criminal proceedings. The widening of judicial control in criminal proceedings would result in the administrative tort procedure becoming a somewhat "loophole" for potential abuse on the part of state authorities, which would gather evidence in criminal proceedings with the help of administrative rules that do not provide for a proper judicial control.

Therefore, state representatives should have access to residences or private premises of individuals and legal entities only with the proprietors' consent, upon a court decision or in case of emergencies.

Procedural rights of individuals are subject to Recommendation of the European Council No. R (91) 1 on administrative sanctions and Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, which provide for the possibilities:
- *to be heard*, i.e. to put forward facts and arguments and express his opinion, which must be taken into account by the administrative authority;
- *to receive information* in relation to evidence in the case collected against him (to have access to information in the case);
- *to receive a reasoned* decision in the case.

The implementation of the above procedural rights which are raised to the rank of principles is complicated under the provisions of the CoAO. It only declares the rights of individuals against whom the proceedings are conducted to see the protocol and other case files, give explanations, comment on the substance and form of the protocol, provide evidence, present motions and objections (Article 584), but no specific procedure for the exercise of these rights is in place. One short Article 648 of the CoAO does not meet the requirements to the completeness of procedure regulation. In the circumstances, the danger remains that these provisions are only the declarations.

Paragraph 2 of Article 651 of the CoAO lacks sufficient guarantees that decisions in cases on administrative offences must be well-grounded.

The fact that protocols are regarded as the means of establishing evidence in cases on administrative violations (Article 604 of the CoAO) compels the authorities, being interested in the results of proceedings, to "create" evidence.

Payment of a fine at the scene of the offence (Article 710 of the CoAO) is common in many foreign countries. But in the Republic of Kazakhstan these regulations create such a situation where an individual is left face to face with inspector(s) without explicit information about the amount of the fine, collection and appeal procedure and is put under moral coercion due to the

possibility of being brought to a body of internal affairs. This mechanism of levying fines also makes it possible for dishonest officials to get money from offenders with no receipts issued.

It should be noted that fines are not high. But in view of the above conditions in which these sanctions are applied and given lack of information, the size of unofficial payments may be significant. It is often beneficial for private individuals to enter into informal relationships, because they perceive the fact of malefaction and are unwilling to stand before any bodies of internal affairs. It means that the proposed mechanism makes it possible for officials to gain unlawful gratifications.

Therefore, administrative authorities must be denied the power to collect fines on the scene of offences. A procedure should be put in place which requires payment of fines through banking institutions only.

ANNEX II: INTRODUCTORY REMARKS FROM THE WORKSHOP I: JUDICIAL SYSTEM

SESSION 1: INDEPENDENCE OF THE JUDICIARY AND STATUS OF JUDGES

*Speaker 1: **Professor Tania Groppi**, Research Centre for European and Comparative Public Law, Department of Economic Law, University of Siena, Italy*

Outline of the Power Point Presentation
Independence of Judiciary and Status of Judges

Judicial independence as…

1. guarantee of fundamental rights
2. an aspect of the separation of powers
3. a necessary element of the democracy

International Law
Art. 10 of UDHR
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Art. 14. 1 ICCPR
All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Art. 6, par. 1 of ECHR
In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Comparative Law
- ✓ Art. 97 of the German Fundamental Law: "judges are <u>independent</u> and subject only to the law"
- ✓ Art. 87 of the Austrian Const.: "judges are <u>independent</u> in the exercise of their judicial office"
- ✓ Art. 117, par. 1 of the Spanish Const.: "Justice emanates from the people and is administered in the name of the King by Judges and Magistrates who are members of the

judicial power and are independent, irremovable, responsible, and subject only to the rule of the law"

- ✓ Art. 30, par. 1 of the Const. of Switzerland of 1999: "Every person whose case is to be judged in judicial proceedings has the right to a court established by law, with jurisdiction, independence, and impartiality. Exceptional tribunals are prohibited"
- ✓ Art. 101 of the Italian Const. of 1947: "Judges are subject only to the law"
- ✓ Art. 104 of the Italian Const. of 1947: "The judiciary is an autonomous and independent branch of government not subject to any other".
- ✓ Art. 64 of the French Const.: the President of the French Republic shall be the guarantor of the independence of the Judiciary.
- ✓ Art. 151 of the Belgian Const.: "Judges are independent in the exercise of their jurisdictional power (…)"
- ✓ Art. 173 of the Polish Const. of 1997: "The courts and tribunals shall constitute a separate power and shall be independent of other branches of power ".

Concepts of Judicial Independence

- Functional independence
- Personal independence

Functional independence is referred to the activity of judging

Independence means absence of hierarchy and of instructions

- ➢ Independence from instructions coming from the executive power: this is the basic requirement of independence
- ➢ Independence from instructions coming from the legislative power. From the functional point of view, judicial independence is the other side of the subordination to the law
- ➢ Independence from instructions coming from the same judicial power: superior judges cannot instruct inferior judges; they can intervene on the cases decided by them only hearing the same case in appeal

Personal Independence

Personal independence means specially impossibility to remove and to substitute the judge. It serves the functional independence of the judge, that is in danger not only when the Judge receives instructions, but also when he must fear disadvantages for his personal legal position because of his decisions

The source of the legal regulation of the judiciary:

- this regulation is reserved to the law of Parliament, in the form of a "organic law" (e.g. art. 122, par. 1 of Spanish Const.; art. 64, par. 3, of French Const.) or of an ordinary law (art. 108 of Italian Const.; art. 146 and 151 of Belgian Constitution)
- Parliament finds sufficiently clear guidelines in the Constitution
- A Constitutional Court can strike down parliamentary laws not respecting the constitutional standards

Aspects of judicial independence

- Selection of judges
- Judicial salary
- Judicial career

Selection of Judges

Who selects:
The formal power to select judges can be conferred to different types of authorities:
- Executive power (Britain, Belgium till 1991)
- Legislative power (in the Swiss Cantons and for some superior judges in Switzerland at the federal level
- The same judiciary (cooptation)
- An Independent authority (Judiciary Council)

Which criteria:
- Alternative between
- a system of public examinations and
- selection on the base of previous activity in legal professions
- In the first case the judge is a civil servant

Judicial Salary
- Salary as the first material guarantee of judicial independence
- Determination by the law of Parliament
- A Consolidated Fund (UK)
- Impossibility for the government to reduce the salary of judges in general
- Impossibility for the government to reduce the salary of judges in specific cases
- Automatic increase (revalorization) of the salary of judges (inflation, pay increases for other civil servants): the reserve to the legislator of the fixation of the salary is a guarantee in front of the executive (art. 154 Belgium Const.), but it is a disadvantage because the reevaluation ("revalorization") procedure is more flexible and rapid

Judicial Career
- Security of tenure (Act of Settlement, 1700: tenure "during good behaviour" and not "during pleasure")
- Possibility to remove the judge only on the base of a judicial decision (art. 152 of Belgian Const.; art. 97, par. 2, of German fundamental law)
- Tenure as judge and tenure in a specific judicial position
- Conditions for removing or transferring a judge
- Appointments to specific judicial positions
- Promotions

A best practice to guarantee the independence?

The judiciary council model
- Conseil superieur de la magistrature (France 1883, then 1946, 1958, reformed many times)
- Consiglio superiore della magistratura (Italy, 1908, then 1947 Const. and law 158/1958)
- Conselho Superior da Magistratura (Portugal, 1976)
- Consejo general del Poder Judicial (Const. 1978; L.O. 1/1980, 6/1985, 2/2001)
- Conseil superieur de la Justice (Belgium 1999)
- Judiciary Councils in Eastern Europe:
  - Rumania: art. 132-133 of 1991 Const.

- Poland: art. 187 of 1997 Const.
- Lithuania: art. 112, par. 5 Const. 1991
- Bulgaria (art. 129-130 Const. 1991)

- ✓ The general end that is pursued with the institution of an authority like the Judiciary Council is to deprive the Executive of (all or some of) the competences concerning the legal status of the Judges
- ✓ In some cases the Council is created to foster the independence of the Judiciary after a long period of authoritarian rule (Italy, Spain, Portugal and Eastern Europe)
- ✓ In some cases the Council is created to legitimize the Judiciary after a major scandal (Affaire Dutroux, Belgium)

What's a Judiciary Council?

- ✓ Its constitutional position can be compared to that of an Independent administrative authority (in France or Italy) or of a "quango" (in UK)
- ✓ Its functions can be very different but are usually administrative in their character
- ✓ Administration of the Judicial System ("amministrazione della giurisdizione": A. Pizzorusso

Number of members: great variations:

- 44 Belgium
- 27 Italy
- 25 Poland
- 20 Spain
- 5 Netherlands

Membership and election/appointment of members of a Judiciary Council1

I.Self-government of the judiciary:

- In this case, the Judiciary Council should be appointed by the judges themselves, through elections;
- Another possibility is to give this function to the Supreme Court (France 1883, but with competences limited to the disciplinary jurisdiction

II. Mixed composition

- with majority of judges and a minority of non judges : Italy (non judicial members are law professors or barristers), Poland (the non judicial members are MPs), France 1993
- with minority of judges: France 1946
- with equal composition of judges and non-judges: Belgium (Conseil Superieur de la Justice: art. 151 of the Const., introduced in 1998)
- It is also relevant the majority for the adoption of decisions of the Judiciary Council: in Belgium 2/3

Membership and election/appointment of members of a Judiciary Council 2

III. Internal membership but external appointment: Spain (Ley orgánica 6/1985)

- election by Parliament;
- only judges can be elected;
- Election with qualified majority (3/5)

IV. Political composition:
- parliamentary election (simple or qualified majority)
- appointment by the Government

Powers of the Judiciary Councils
- advisory powers (France - CSM section for prosecutors; Lithuania)
- decision powers (Italy, Spain, France - section for judges)
- Final decision (France 1883, because the Judiciary Council was the Supreme Court) or appeal to the judiciary (if the Council is an Administrative authority, Italy)

Competences of the Judiciary Councils
- Selection of Judges
- Appointment of Judges
- Training of Judges (initial and continual)
- Promotions
- Transfer from one judicial position to another
- Disciplinary responsibility
- Removal
- Self-regulation?
- Power to bring a constitutional question before the Constitutional Court
- Control of the Judiciary
- Preparing a Draft budget for the Judiciary
- No Judicial Council possesses ALL these functions
- The Functions depend from the historical circumstances of the institution of the Council

Whose independence?
- The judiciary Council guarantees the independence and governs the career of ordinary judges.
- Which independence for "special judicial authorities"? In many European Countries there is not a unitary Judiciary, but beside the jurisdictional power is divided between "ordinary judges" and "special judges", who are instituted to deal with specific – albeit sometimes broad - matters: it is usually the case of Administrative judges and Fiscal judges, but sometimes also of other corps of judges, separated from the ordinary.
- In some Countries (Italy, France) the Judiciary Council is empowered only with the task of granting the independence of the ordinary judiciary.
- More recent Constitutions provide for Judiciary Councils with the responsibility to guarantee the independence of all judges, included administrative judges: Bulgaria (art. 130 Const.), Poland (art. 187 Const.)
- Only in a recent phase mechanisms to guarantee the independence of "special judges" have been created, usually not at the constitutional level (this is the case of Portugal, where we find three Judiciary Council: for judges, for public prosecutors and for administrative or tax judges), but by the ordinary legislation (the Council of Presidency of the Administrative Judiciary created in Italy in 1982 and the similar authorities created for the other special judges in the following decades).

Judiciary Council and public prosecutors

1. A single Judiciary Council both for judges and public prosecutors, who enjoy the same guarantees enjoyed by judges (Italy)

2. A single Judiciary Council with two "sections" one responsible for judges, the other for public prosecutor (France)
3. Two Judiciary Councils, one responsible for judges, the other for public prosecutor (Portugal, Spain)

The Judiciary: a power without control?
This set of measures – or some of them – should ensure the independence of the judiciary and of the judge.

Is there a limit to independence?
Does independence require that the judge should be free from every responsibility for his acts?

Forms of responsibility:

- Disciplinary → actions or omissions corresponding to judicial duties
- Civil → responsibility for damages in exercising judicial duties (limitations?)
- Criminal → crimes committed by the judge in the exercise of his duty
- Political → only in the form of subjection to criticism

Accountability
- Evaluating judicial performances
- Fostering continual (life-long) judicial training
- Checking the efficiency of the judiciary system, promoting internal self control (controls of the quality of the judicial service does not infringe upon independence)
- This profile has been strongly developed by the Belgian Judiciary Council that is competent also on hearing complaints concerning the functioning of the judicial system (the judiciary can examine complaints itself or transmit complaints to competent authorities). The Belgian Council can also organize inquiries on the working of the Judicial System. Doing this, the Council must respect the independence of the Judiciary and cannot intervene in specific judicial cases

Legal rules and culture
- Independence is not only a matter of legal regulation
- Importance of "culture of judicial independence", both in the judiciary, in the political power and in the public opinion
- England till 2005 is a case of a country with a very imperfect system of guarantee of the independence of judges, but with a high respect for it in the practice
- Strict legal rules are sometimes necessary in countries where the political power has the tendency to try to influence judicial decisions (this can be said e.g. of some European Latin countries).

SESSION 2: EFFICIENCY OF COURTS

Speaker 1: Mr. Ignazio Patrone, Deputy General Prosecutor of the Italian Supreme Court, Italy

1. Efficiency of Justice – general remarks

It is quite easy to talk about the qualities and failings of justice. In each country both the public and professionals (judges, lawyers, and prosecutors) have their views on the subject drawn from their personal experience or based on reactions to deficiencies in the judicial system.

The failings repeatedly cited include
- slowness,
- cost,
- remoteness,
- complexity.

Sometimes the system is acknowledged to be independent and effective.
But more than once citizens think that justice is not reliable because of the lack of *real* independence of judges from the political and/or the economic power or because the courts are not open-minded when examining issues like gender inequality, different sexual orientations, protection of linguistic or religious minorities. The lack of confidence on judges (and prosecutors) might undermine the rule of law.

An equal, efficient, reliable justice is a pillar of a modern democracy. But the definition of the concept of quality of justice is difficult. This is because the concept of quality of justice combines a wide range of factors from different areas which cannot all be measured with the same tools[1].

First of all: courts are neither factories nor department stores. We have the duty to take into account the specific nature of justice, which cannot be considered as a simple delivery of services: as a specific and unique public service, justice may produce social links or social troubles. There should also be an acceptable degree of public trust in the judiciary, as well as legitimacy. A high degree of quality of the judiciary is reflected by a high degree of public trust in the judiciary.

We cannot consider the efficiency of justice only on numerical values and we should examine a national system also on different bases like:
- the quality of decisions and of Judges' opinions;
- the possibility to have real appeals (and, where available, applications to Supreme Courts or Constitutional Courts);
- in criminal cases, the role played by Prosecutors; in their relations with the police, public prosecutors should scrutinise the lawfulness of police investigations at the latest when

[1] EUROPEAN COMMISSION FOR EFFICIENCY OF JUSTICE (CEPEJ) Checklist for promoting the quality of justice and the courts adopted by the CEPEJ at its 11th plenary meeting (Strasbourg, 2-3 July 2008).

deciding whether a prosecution should commence or continue. In this respect, public prosecutors should also monitor the observance of human rights by the police[2].

The level of *access to justice* plays a crucial role too: the international human rights standards consider:
- the existence of a legal aid service;
- the possibility to enjoy alternative measures to the regular dispute resolution,
- the practical information on how courts are operating;
- a particular attention to victims and vulnerable persons in general;
- for linguistic minorities and strangers, an effective right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court"[3]. That means to have equality of arms before the Court.

2. Trial within reasonable time

Justice delayed is justice denied:

"22. The Court notes at the outset that Article 6 § 1 of the Convention [European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950] imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet the requirements of this provision (Salesi v. Italy judgment of 26 February 1993, Series A no. 257-E, p. 60, § 24). It wishes to reaffirm the importance of administering justice without delays which might jeopardise its effectiveness and credibility (Katte Klitsche de la Grange v. Italy judgment of 27 October 1994, Series A no. 293-B, p. 39, § 61). It points out, moreover, that the Committee of Ministers of the Council of Europe, in its Resolution DH (97) 336 of 11 July 1997 (Length of civil proceedings in Italy: supplementary measures of a general character), considered that "excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law" [4].

Also the high level of access to Justice may cause delays: in all European Countries in late decades we have seen a larger number of civil litigations and criminal cases before Courts. In some countries the overload has been studied and Governments have introduced reforms and remedies; unfortunately, in other Countries (like in mine) the Justice policy makers have done (more or less) nothing and there is an increasing number of judgements of the European Court of Human Rights condemning the contracting States in front of this kind of applications.

The delay is a main issue in the European Justice system and there is no general solution; in the case Law of the European Court we can find some criteria, applicable in all member States, **for assessing whether the duration of proceedings was reasonable**:
– *Complexity of the case* (complex cases need longer time to be completed, but complexity as such is not always sufficient to justify the length of proceedings);

[2] Recommendation Rec(2000)19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000, prepared by the Committee of Experts on the Role of Public Prosecution in the Criminal Justice System (PC-PR), set up under the aegis of the European Committee on Crime Problems (CDPC). See § 21-23.
[3] International Covenant on Civil and Political Rights, art. 14, § 3 (f). European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, 3 (e).
[4] European Court of Human Right, case of Bottazzi v. Italy (Application no. 34884/97), Judgment of the 28 July 1999.

– *The applicant's conduct* (this is the only criterion that led the Court to conclude that Art. 6 of the Convention was not violated even if the length of proceedings was manifestly excessive)
– *The conduct of the competent authorities* (if the authorities have taken prompt and appropriate remedial action to manage the temporary unpredictable overload of the courts, the longer processing time of some cases may be justified)
– *What is at stake for the applicant* - some cases need to be expedited; **such "priority cases"** include: labour disputes involving dismissals, recovery of wages and the restraint of trade; compensation for victims of accidents; cases in which applicant is serving prison sentence; police violence cases; cases where applicant's health is critical; cases of applicants of advanced age; cases related to family life and relations of children and parents; cases with applicants of limited physical state and capacity.

In addition to individual criteria, the Court also makes *an overall assessment of the circumstances of the case*. It may establish that 'reasonable time' is exceeded, if in such a global assessment, the Court finds that total time is excessive, or if it finds long periods of inactivity by competent authorities [5].

However, the reasonable time issue is not only a matter of a better Law; it is also (sometimes it is particularly) a matter of the conduct by persons involved in Justice like: court managers, court presidents, judges and other judicial practitioners (and Lawyers too, of course) who should face, at their own level, their responsibilities vis-à-vis the improvement of the quality of services offered by the judicial system. In this point of view, best practices should be studied both at national and international and comparative levels, because we share the same problems and we might find the same solutions.

3. Material conditions of courts conducive to proper administration of justice

This is, of course, a matter of State Budget.
It is crucial to underline the interaction between the quality of justice and the presence of adequate infra-structures and support personnel.

In many European Countries Justice is like a *child of a lesser God*.
In its 2005 Opinion, the CCJE [6] noted (like it made in its Opinion No. 2 (2001) that in numerous countries the judges have insufficient means at their disposal. In some countries, for example, judges do not have a room in the courthouse, or a personal PC, or an assistant, with substantial qualifications in the legal field ("clerks" or "referendars"), to whom the judge may delegate, under the same judge's supervision and responsibility, the performance of specific activities such as research of legislation and case-law, drafting of easy or standardised documents, and contact with lawyers and/or the public.

The material conditions of the Courts is a main concern for Judges, Prosecutors and Lawyers in many European countries. This Seminar might be a good opportunity to compare our situation with yours.

[5] EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) - Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights - by Ms Françoise Calvez, Judge (France). The Report has been adopted by the CEPEJ at its 8th plenary meeting (Strasbourg, 6 -8 December 2006).
[6] Consultative Council of European Judges, a consultative Council of the Council of Europe.

A question: do you have problems of fund shortage in the late period, especially due to (or justified with) the present financial crisis?

4. Public access to court hearings, court information and documents

As to Art. 6 of the European Convention [7]:
1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and **public hearing** within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent **strictly necessary** in the opinion of the court in **special circumstances** where publicity would prejudice the interests of justice.

The European Court held:
"… the Court reiterates that **the holding of court hearings in public constitutes a fundamental principle** enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, among other authorities, the Szücs v. Austria judgment of 24 November 1997, Reports of Judgments and Decisions 1997-VII, p. 2481, § 42; and the Diennet v. France judgment of 26 September 1995, Series A no. 325-A, pp. 14-15, § 33).
73. The Court also notes that the principle that hearings should be held in public may be subject to qualifications, particularly to protect the parties' private lives or in the interests of justice, as provided for in Article 6 of the Convention (see the Diennet judgment cited above, p. 15, § 33, in fine). ECHR Case of Guisset v. France (Application no. 33933/96) 26 September 2000.

The question we could examine is:
When and where we can recognize that there are *interests of morals, public order or national security in a democratic society*?

Speaker 2: ***Mr. Jiri Kopal****, Chair, League or Human Rights, Czech Republic and Deputy Secretary General, International Federation for Human Rights (FIDH), France*

International Human Rights and Domestic Courts: Certain Aspects

I would like you to thank the organizers for the invitation on behalf of the International Federation for Human Rights based in Paris, representing 155 human rights NGOs all over the world. I was appointed by the International bureau of the FIDH in 2007 to work on Europe and Central Asia and it is my pleasure to be here and present to this audience my

[7] The same has been written in art. 14 of the International Covenant on Civil and Political Rights.

paper on three main international issues which are particularly important for the role of the judiciary.

These broad issues include:
- direct application of international treaties by domestic courts,
- practice of taking into account jurisprudence of relevant UN treaty bodies when deciding on cases, and
- the role of the court in investigating allegations of ill-treatment of participants in criminal proceedings during pre-trial stages.

Coming from a post-communist country which is based on the post-soviet educational system that formally educated people on a very high level but with a lot of fear to interpret law independently, I have direct experience with judges who are afraid to apply international law at all or in a very strictly formalistic way. It is clear that they have learned to be afraid to interpret broader principles beyond the scope of the sovereignty doctrine and that human rights obligations have not been put into their flesh and blood during education. This is only natural as the mindset of people changes more slowly than the changes in international law and its ways of interpretation. Therefore, I think I am in a position to understand how difficult this issue is in all countries that have opened to the international human rights obligations. To apply the international treaties directly, and taking into account jurisprudence of the relevant UN bodies, a real paradigm shift needs to be addressed and discussed from many angles in the broader legal community and together with civil society.

The reason for applying international law is still often seen from the side of some judges in the new EU countries as something forced from abroad and not natural for their decision-making. However, a majority of those sitting at the supreme level of the judiciary came to the conclusion that such an application could be, in many cases, important for the strengthening of the independence and integrity of judiciary. Additionally, many judges felt the application of international law could be a helpful tool for giving clear measures to a scope of particular human rights issues and increase the trust in courts and feelings of legal certainty by ordinary people.

Beside this, some international law scholars doing long term research in this regard have also started to argue that the newly evolving approach to international law is a useful way for national states and judiciaries to face globalization and renew the authority of national institutions. Sometimes states are pressed by international institutions, including financial and economic, to implement these and other policies. Looking at the international human rights standards interpretation by UN treaty bodies, including the implementation in the decisions of national courts of European countries, could be an important support for courts in Kazakhstan that are open to dynamic approaches. By adopting this approach, courts of different countries that look to one another while interpreting international law, are able to create a very legitimate counter reaction when their countries face pressure from certain international institutions.

By applying international treaties, the judiciary could play a favorable role in implementing human rights standards that could serve then as guidance in further promoting different policies. An example could be women, minorities or children rights. In this way, at the EU level, the very starters of the debate have proved to be mostly the Supreme and Constitutional Courts in the countries of Western Europe, with the most prominent positions coming from the German Constitutional Court, Constitutional Court of Spain and Scandinavian and Dutch

courts. These courts often make reference to human rights bodies, most commonly to the Human Rights Committee, which is seen as the most important entity. The French courts and *Conseil d'Etat* tend to be more laconic in interpreting international treaties. From among the Eastern countries of the European Union also the Czech, Slovenian and Polish Constitutional Court started with some isolated cases in the nineties. More recently, these courts have taken into account some cases or recommendations mostly of the Human Rights Committee or the Committee on the Rights of the Child. Although from a viewpoint of international or human rights lawyers, the quotation of different recommendations could have been even more frequent in the last three mentioned post-communist countries - one has to take into account both the otherwise naturally more conservative approach of judicial power anywhere in the world and also the fact that in countries falling under the jurisdiction of the European Court for Human Rights this is the primary body to refer to.

What kind of rights should be implemented directly by the courts?

Human rights bodies often recommend that judicial training should take full account of the justiciability of particular covenants. It has been accepted by the majority of the European Union states that the norms in human rights treaties should be considered self-executing. Even many of the rights composed in the Covenant on Economic, Social and Cultural Rights are in such terms which are as specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

I agree with the comment of the Committee on Economic, Social and Cultural Rights (1998 General Comment) on the domestic implementation of this Covenant, which stated that *"legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies".* It is clear that this position has been adopted recently by more courts and jurisdictions in the EU.

From my point of view, supported also by recent developments in human rights bodies and national courts, I believe it is important if economic, social and cultural rights, as well as civil and political rights, are regarded as justiciable. Nowadays there are different social concerns, such as health, housing, education, and economics apart from civil and political rights, which all fall within the ambit of international regulations. It is quite important in cases where there is an absence of precise domestic law, that the courts help set out entitlements in sufficient detail in order to enable remedies for non-compliance with international norms to be effective. This concept is clear and is supported for example in the area of children's rights by the Committee for the Rights of the Child, which recommended in its 2003 General Comment no. 5: "*For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights."*

Direct application of all international treaties is mostly linked with the debate about the doctrine of self-executing provisions of treaties. This is where exactly the courts are to play role. The determination of whether or not a treaty provision is self-executing has to be

decided by the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts have to support important roles of judicial remedies in the implementation of human rights entities' recommendations. Even when governments are involved in court proceedings, the courts should promote interpretations of domestic laws which give effect to their international obligations.

Courts and ill-treatment

In the last part when referring to the role of the court in investigating allegations of ill-treatment, I would like to focus on inspiring principles and standards established during almost 20 years of work of the CPT, the Council of Europe primary anti-torture body. This body, often quoted as a primary standard setting authority also by the European Court for Human Rights in its decisions and also in different places of detention monitoring manuals of the OSCE, has emphasized that *"when officials who order, authorize, condone or perpetrate torture and ill-treatment are brought to justice for their acts or omissions, an unequivocal message is delivered that such conduct will not be tolerated"*

The role of the courts could be strengthened in case this CPT standard is thoroughly implemented. "*In the Committee's view, even in the absence of a formal complaint, such authorities should be under a legal obligation to undertake an investigation whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred. In this connection, the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment."*

It is necessary to stress that the existence of a suitable legal framework is itself sufficient to guarantee that appropriate action will be taken in respect to cases of possible ill-treatment. Judges have to be sensitive to these important obligations which are incumbent upon them. Judges have to be particularly cautious why persons are frightened to complain about ill-treatment. For example, at the hearing with the judge, the very same law enforcement officials who interrogated the victim could cause a victim to be frightened. Thus, when persons detained by law enforcement agencies are brought before a judge, a hearing has to always be provided with an opportunity for such persons to indicate safely whether or not they have been ill-treated. Even in the absence of an express complaint by a person, courts have to be in a position to take action immediately and resolutely if there are for example visible injuries or a person's general appearance suggesting that ill-treatment might have occurred.

Following frequent visits in Council of Europe member states, the CPT itself has acknowledged that unfortunately, persons who alleged ill-treatment to prosecutors or judges, had received very little interest from their interlocutors in the matter, even when they had displayed injuries on visible parts of the body.

Also in the frame of effective investigation criteria, CPT stressed that there needed to be a sufficient element of public scrutiny of the investigation and its results in order to secure accountability in practice as well as in theory. The degree of scrutiny required may vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

All the above mentioned recommendations and standards were published by the Committee for the Prevention of Torture (CPT) in the *CPT Standards - "Substantive" sections of the CPT's General Reports* at http://www.cpt.coe.int/en/docsstandards.htm

SESSION 3: JURY TRIALS: PRACTICAL IMPLEMENTATION AND FOLLOW UP

*Speaker 1: **Mr. Fernando Piernavieja Niembro**, President of the Council's of Bars and Law Societies of Europe (CCBE), Access to Justice Committee, Human Rights and Criminal Law Committee' member, teacher of Criminal Procedure at the Master on Advocacy of Malaga's University and Bar Association, Spain*

Justice has been felt by the society far away from it, or even, against it. Justice has its own language, its own procedures and is distant from the plain and normal citizens. Magistrates, Judges, Prosecutors and Lawyers, are distant don't mix with the people. This is why, the Jury is the way in which the citizens takes part in the Justice Administration

Types of Jury:
"Escabinados": made up of nonprofessionals and professionals of the Judiciary, in variable percentage.
Technicians: composed exclusively by professionals of the judiciary.
Pure: made up of plain citizens, with a presidency of a judge-jurist.

Advantages of the Jury Trials:
Method to democratize justice. Effectiveness of the principles of the penal process. Effectiveness with respect to the practice of the evidences and the rules that govern it. Separation of the process of investigation of the practice of evidences at the trial. Priority of the immediacy principle. Effectiveness of the principles of the penal procedure. Guarantee of independence with respect to the Executive authority

Disadvantages of the Jury Trial:
Lack of motivation of the decisions of the Juries. Historical Experience of failure. Absence of interest of the juries. Ignorance of the Law. Emotionality of the juries. Process of lenity and severity. High economic Costs.

To be efficient, a Jury must consider:
A good selection processes (expert in Law and psychologists). Knowledge on the group processes and how they affect the decision-making. A neutral position on the President of the Jury. Exhibition of evidences adapted to the necessities of the jury members. Hearing Room of Jury Trials does not have to appear like a theatre. The supposed affective and/or cognitive manipulation. Pressure of mass media. Principle of orality and its implications. To focus the judgments from the Interdisciplinary.

The Jury trial in Spain:
The law reserves to the Juries its participation in those crimes where the typical action lacks excessive complexity. The effective Spanish legislation it establishes the competition of the Jury for the knowledge and failure, consequently, limits its activity the phase of oral judgment; also it excludes to him from the knowledge of the lack and those crimes that are not mentioned specifically in the law. The competition of the Jury is done taking care of the criminal fact, to the margin of the degree of execution or participation. The crimes against the

people are excepted of this principle, because it will only have competence if they are completed.

The functions of the Jury in Spain are:
Declaration of the proven and not proven facts. Declaration of culpability or non culpability of the defendant by its participation in the fact or facts. Both types of considerations will be determined previously on the part of magistrate-President, who decides what facts to include in the verdict. The verdict is read by the President of the Jury, after the vote of the jury members, but it will have to include: Narration, in separated and numbered paragraphs, of the facts that the Jury will have to declare proven or no, differentiating those that were favourable or opposite to the defendant. Of the same form the alleged facts that will be exposed they can determine an estimation of a cause of responsibility exemption and will be described the execution degree, participation and modification of the responsibility. The fact by which the defendant will have to be declared guilty or nonguilty. The President will be able to ask about the application of the benefits of conditional remission of the penalty and the request or not of pardon in the own sentence.

To become Jury member:
Incapacities: People convicted of any crimes. Defendants or in provisional prison.
I**ncompatibilities**: King and members of the Spanish Royal Family, as well as their spouses. High Autonomic authorities of the State. Members of the Judicial Power. Members of judiciary and Prosecution as well as others of the judicial system. Defender of the Town and his similar in the different autonomies. University professors of Law or legal Medicine. Penitentiary civil employees. Members of the Police and security forces. Diplomats and representatives abroad.
Excuses: Older of 65 years. People who have performed indeed functions of Jury during the four preceding years to the new designation. Serious upheaval by familiar loads. Performance of a job of general interest, whose substitution would generate important damages. Residents abroad. The military and professionals in active-duty when reasons concur on them. Allegations and accreditations of any other cause that makes difficult the performance of the function of Jury.

The verdict: decision process and sentence.
Once finalized the hearing, the process of deliberation of the Jury begins, settling down a set of conditions: Retired to an isolated and incommunicated room. The first member in to be chosen in the drawing will direct the discussion until naming spokesman. The deliberation will be always secret, without being able, the jury members, to reveal the discussion procedure. If necessary the extension of instructions will be able to be requested to the President. The votes are nominal, aloud and by alphabetical order; the spokesman has to be the last one in voting. No jury will be able to abstain to vote, anticipating the law sanctions in this sense. In the first place the facts, paragraph to paragraph, and later the culpability or non culpability.
The decision of the Jury is taken not unanimously but by majority and with the following criteria: Voting of the facts; Voting on culpability; Voting of execution and request of pardon. In case of being obtained the necessary majorities the act will be given back and the Jury will dissolve. Once finalized the process of decision and complimented the act of the verdict, this one will be given to the President, who will be able to return the Jury to him if one of the following aspects takes place: It has not been pronounced on the totality of the facts. It has not been pronounced about the culpability of the defendant. The necessary majority in some of

the points submissive verdict has not been obtained. The diverse uprisings are contradictory to each other. Serious defect in the deliberation procedure.
An entailment of Magistrate-President to the verdict exists and this one must be left patent in the imposition of the sentence, not only in the acquittal or condemns, but also in the necessary qualification with respect to the degree of execution, the participation of the condemned and the concurrence of modifying circumstances of the responsibility and, consequently, the applicable penalty. The sentence could be of two types: Absolving or Condemnatory; the imposed sentence will point out the proven facts, the crime object of sentence or acquittal and the corresponding content of the verdict.

Jurors vs Judges.
The differences between Juries and judges are numerous. The first difference is in which the Jury adopts the form of human group and for that reason he is regulated by those principles that affect the group behaviour of a person.
Specific factors of the Jury
Absence of wilfulness. Interpersonal ignorance between its members. Absence of an initial common interest. Social Representativeness. Anonymity of its components. Absence of explanation in its decision.

Influential factors in the decisions of the Jury

PERSONAL:
Psychological Factors. Sex. Age

CONTEXTUAL:
Political Ideology. Performance of the prosecutor and of the defence (connected and transmitted attitudes and feelings). Order of intervention. Influence of experts and forensics. Testimonies and evidences.

PERSONAL CHARACTERISTICS OF the DEFENDANT
Greater benevolence towards the women. Greater culpability of the defendant if belongs to a racial minority and it has criminal records. No relevance of status with the appearance of a culpability slant.

Influential factors in the decisions of the Jury

STRUCTURAL: Number of jury members; the decision rule, the beginning of the deliberation and Roll of the spokesman.

GROUP INFLUENCE: informative Influence and normative of the evidences and facts contributed during the hearing. Intentions of vote of the rest of members; "social norm". Majority influences and influences of the minority.

Style of the deliberation: Jury oriented towards the tests versus. Jury oriented towards the verdict: there are five great differences: The deliberation oriented to the evidences is more frequent in unanimous juries, whereas the oriented one to the verdict is it in cases of decisions by majority. The time of deliberation is greater in juries oriented towards the evidences. The weight of the questions related to the judged facts and of the legal aspects is greater when the jury is oriented towards the evidences. The capacity of argumentation and the number of

expressed verbal communications are smaller in juries oriented to the verdict. The Jury oriented to the evidences develops richer and deeper deliberation.

Conclusions on the studies of the Jury

Juries of a reduced size, six or less members they tend to carry out little representative decisions. The nonunanimous decisions imply barely representative decisions of low. The decisions arisen from "*escabinados*" models of juries would entail a first passage towards the eradication of the Jury by the carelessness of functions that would imply in the people when trusting its decisions to the professionals. The paper of President-magistrate of the Jury is fundamental by the direction of the case, because it facilitates an ample or slanted interpretation of the contributed evidences, but in second term causes a submission to the opinion of a person of greater experience. Finally, the application of a inquisitorial system of presentation of the judgment makes possible a unique reading of evidences.

The verdict of a Jury is the direct consequence of a double process, one initial based on an individual decision-making and another, later, derivative of a group discussion. Both appear clearly delimited and regulated legally; but a constant feedback between both is observed The process of decision of the juries does not differ absolutely from the members of the judiciary, because also they must use the logic.

Speaker 2: Ms. Tatyana Zinovich, Independent Expert, Project Coordinator of the OSCE/ODIHR Project on Jury Trials Monitoring in the Republic of Kazakhstan (2007-2008), Kazakhstan

Jury trial is the institute promoting democratization of justice. One of the commitments of the OSCE participating states is insurance of free access to courts for international and local monitors[8]. Based on this provision the Office for Democratic Institutes and Human Rights has carried out a monitoring of jury trials in the Republic of Kazakhstan in 2007 and a study of the procedure of drawing potential jurors lists in 2007-2008.

Within the monitoring project (January 1st till December 31st of 2007) specially trained monitors attended 28 hearings (193 court sessions) in 10 oblasts and the cities of Almaty and Astana. The total number of jury trials held in Kazakhstan during the same period came up to 40. In addition, the procedure of drawing potential jurors lists has been examined in 13 oblasts as well as Almaty and Astana.

Allow me to dwell upon major issues encountered during the monitoring described in the corresponding Jury Trial Monitoring Project Report.

1. The legal norm allowing the accused the opportunity to file motion for review of his/her case by the jury only upon completion of investigation limits the civil right to be tried with the participation of public representatives. This conclusion correlates with the opinion of the Constitutional Council of the Republic of Kazakhstan[9]. The opportunity to choose jury trial

[8] Clause 12 of 1990 Copenhagen document of the CSCE: "The participating States, wishing to ensure greater transparency in the implementation of the commitments (…) decide to accept as a confidence-building measure the presence of monitors sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law (…)". (www.hri.ru/docs/? content=doc&id=284).

[9] Art. 6 of the substantive section of the Enactment of the Constitutional Council of the Republic of Kazakhstan #4 «On official interpretation of clause 2 of article 12, clauses 2 and 8 of article 62, clause 1 of article 76,

procedure only upon investigation completion does not permit full realisation of the principle of judicial protection of human and civil rights and liberties[10]. In order to provide for better protection of a person's right to be tried by the jury it is necessary to incorporate into the current legislation a provision requiring giving the accused an explanation of the right to jury trial not only by the investigator upon completion of investigation but also by the court during preliminary hearing at the stage of deciding upon the main hearing. The explanation should be done in the presence of defender. The accused should have the right to file motion for jury trial on each of the mentioned above stages of legal proceedings.

Currently, a number of amendments are under review by the Parliament of the Republic of Kazakhstan. Among them are supplements providing for the possibility to file jury trial motion including before the moment of appointing substance hearing. The draft law is also supposed to expand jury trial jurisdiction for other categories of cases.

2. CPC of the RK does not regulate the procedure of random jury selection and doesn't provide any guarantees of selection's randomness as well as reliability of the generated list. Due to this fact the courts have not been applying a unified technique of selecting candidates to the preliminary jury panel – in different regions of Kazakhstan it has been carried out in absolutely different ways. The monitoring has revealed absence of selection transparency, any guarantees of its random nature, and the lack of extraneous influence on the procedure in general. Thus, it appears expedient to improve legal regulation of potential jurors selection by requiring parties' to the case to be present during voir dire examination, by application of reliable technical tools insuring selection's randomness, and by introducing liability of officials for breaching the established procedure.

3. The information on starting dates and time of jury proceedings has been placed in accessible locations only in 5 cases out of 40. The monitors were forced to require such information from court clerks, secretaries, lawyers or the project coordinator. Timely informing of the proceedings' participants of time and place of court sessions requires court schedules to contain complete and reliable data on appointed hearings, be regularly updated and placed in accessible and convenient for review locations.

Also, certain violations of the principle of proceedings' publicity in the form of restricted access to courtrooms have been registered during the monitoring. With the aim of due observance of the principle of legal proceedings' publicity it is necessary to insure free access of interested citizens to all open hearings, including jury trials. Groundless restriction of the principle contradicts the national law and the international due criminal process standards.

4. The monitors attended 30 voir dire sessions. During 11 of them insufficient appearance of potential jurors was registered. Non-appearance of potential jurors was generally related to discrepancies at the time of potential jurors' lists execution by the local executive bodies. Due to inadequate verification potential jurors lists contained citizens no longer living at specified addresses as well as citizens who had already died or had been registered in demolished houses. Insufficient awareness or irresponsibility of citizens stimulates the situation also. The procedure and ways of summoning potential jurors to court should be

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subclauses 3) and 5) of clause 3 of article 77 of the Constitution of the Republic of Kazakhstan» of April 18, 2007.

[10] Art. 12 of the Criminal Procedure Code of the Republic of Kazakhstan (*further*, CPC of the RK).

legally stipulated. Besides, to battle non-appearance of potential jurors it is necessary to improve awareness raising measures informing citizens of jury trial objectives, essence and procedures.

5. Clause 4 of art. 551 of CPC of the RK states that for the purposes of making objective decision on freeing a given candidate of jury service during the voir dire presiding judge may ask potential jurors questions provided to him/her in writing by prosecutor, victim, the accused and the defending party. The monitoring has revealed low involvement of parties to the case in voir dire sessions. It appears expedient to consider the possibility of amending legislation allowing the parties to personally present questions to potential jurors while examining their objectivity.

6. According to the procedure established by clause 3 of art. 552 of CPC of the RK potential jurors resigned from service sometimes referring to their employment or absence of a substituting worker (among the candidates who resigned on such basis there were bookkeepers, businessmen, drivers, i.e. persons who, apparently, did not wish serve for financial reasons) in 16 cases. Resignation for grounds specified above had been generally accepted by the court. In order to standardize court practice, eliminate subjective interpretation of corresponding legal provisions and to raise civil awareness of persons eligible for jury service equitable interpretations of the legal norms providing for release from jury duty should be avoided.

7. Unfortunately, no uniform courtroom setting standards had been registered during the monitoring. In some courts the manner of placing the jury did not allow for the equality of the parties to the case as well as for the exclusion of any possibility for non-procedural contacts of the jury with other trial participants. In order to create the most optimal conditions for the observance of the adversarial principle and the principle of the parties' equality as well as to increase the educational effect of criminal proceedings and to promote the solemnity of justice administration it appears necessary to establish uniform requirements as to jury courtroom setting. This will eliminate the possibility of exclusive placing of a given party in relation to the jury panel and the possibility of any other conditions which may illegally influence jury verdict.

8. During the monitoring it has been established that the practice of deciding upon admissibility of factual evidence in absence of the jury is legally inconsistent and is sometimes used by judges to restrict the right of the parties to the case to file motions. It appears that the legal requirement to remove the jury panel from the courtroom at the time of statements by defendants describing pressure imposed on them during the investigation deprives them of the opportunity to inform the panel of the reasons for altering their testimony, indirectly limits the right of defendants to witness immunity, and also does not allow to inform the jury of all cases of torture and other kinds of illegal treatment of defendants. Restriction of the defending party's right in the presence of the jury to challenge reliability and free-will nature of defendant's plea presented by the prosecution as evidence of defendant's guilt contradicts the rules of direct court examination of the merits of the case. Justification of such restriction by the requirement to have professional legal knowledge to decide upon admissibility of evidence (the argument applied in the Russian Federation) is inapplicable within the Kazakhstan's jury system since here jury court is a mixed one – legal and factual matters are reviewed by the jury and professional judges together. With the view of protecting the civil right to freedom from torture, cruel, inhuman and degrading treatment and punishment, observance of the principles of legality, presumption of innocence and

witness immunity the issue of excluding factual evidence from case materials based on its inadmissibility should be decided in the presence of juror panel.

9. Violation of the norm prohibiting examination in the presence of the jury of circumstances related to previous convictions of the defendant, recognizing him/her an alcohol or drug addict and other circumstances has been repeatedly registered by the monitors. With the aim of nondisclosure of information which may bias the jury the law should stipulate for the obligatory explanation by presiding judges to all case participants re inadmissibility of announcement in the presence of the jury panel of information regarding defendant's previous conviction or his/her alcohol or drug addiction.

10. Cases of undue restriction of jury access to the merits of the case, for example, victim-related information and circumstances positively characterising the defendant have been registered during the monitoring. In order to provide for jury examination of all facts of the case it appears reasonable to take measure to eliminate from court practice undue restriction of the jury panel right to receive information about the victim or about the defendant not causing bias against him/her.

11. In addition, the monitors have registered several cases of presiding judge not announcing or incompletely announcing questions by the jury to the participants of the case. In such instances, in order to promote the right of the jury panel to participate in the administration of justice it appears reasonable to oblige presiding judges to present grounds for refusal to announce questions by the jury to the case participants.

12. The developing practice of jury court proceedings in Kazakhstan gives grounds to assert that presiding judges administer sessions solely and do it quite effectively without the assistance of second judges. Thus, the expediency of two professional judges participation in a jury hearing is doubtful, including from the perspective of rational use of judicial resources. **The amendments referred to earlier on in my speech also provide for administration of court session by a single presiding judge.**

13. Art. 564 of CPC of the RK does not clearly state whether it is necessary to have time for remarks after each part of the argument. Clause 52 of Recommendations on application of certain norms of the laws of the RK «On jurors» and «On introduction of amendments and supplements to certain legal acts of the Republic of Kazakhstan regulating criminal court proceedings with jury participation» stipulates that remarks following the first part of the argument may be presented in the presence of jury right after statements by the parties, and remarks following the second part of the argument – in their absence[11]. The recommendation seems justified as according to the law the argument is split into two different sessions each having specific objectives. Case participants should have the opportunity to fully express their opinions. Incorporation of the recommendation in the CPC of the RK in the form of a legal norm should be considered.

14. It should be noted that the use of special legal terms to formulate questions in jury questionnaires may confuse them. At the same time the questions should not repeat the essence of indictment since, according to clause 1 of art. 565 of CPC of the RK, presiding judge shall formulate questions based on the results of court examination and the argument of

[11] Samples of documents on jury court operation organization, Supreme Court of the Republic of Kazakhstan, Astana, 2006.

the parties. It appears justified to formulate questions in a manner comprehensible for persons lacking legal training and reflecting merits of the case.

The results of the monitoring revealed certain problems with the procedure of drawing and the content of potential jury lists prepared by local executive bodies.

1.The procedure[12] prescribed by the Law leaves the issue of deadline calculation for the potential jurors' lists execution open. If preliminary lists are transferred to oblast akimats a couple days before the official deadline or on the exact same day specified in clause 1 of art. 4 of the Law they, apparently, do not always have sufficient time to execute the final list. Due to the fact that the preliminary primary list of an oblast status city should be formed simultaneously with the preliminary spare list (into which only citizens living in this given oblast center are included) "double count" of candidates in the final and supplementary lists[13] may take place. Drawing of the spare list may be considered as unjustified restriction of the civil right to participate in the administration of justice based on candidates' residence. The law «On jurors» does not provide for verification of preliminary spare list as to its conformity to the requirements of art. 10. Thus, the procedure of supplementary list execution does not ensure relevance and reliability of the information about potential jurors contained therein. Some citizens who had been initially included into this list during an expired period may have already been legally accused, officially registered in narcological or psychoneurological clinics, or even changed their address. Moreover, the Law also leaves open the question whether those citizens who had been earlier included in the final and spare lists be excluded from the preliminary spare list before random selection is done.

In this relation, it appears expedient to consider the possibility of dismissing multiple (final, spare and supplementary) jury lists and creating a single general list of potential jurors for a given territory (the capital, national status cities). With the aim of eliminating ambiguity of a number of provisions in the law «On jurors» and optimising the procedure of forming potential jurors lists a more detailed corresponding legal regulation should be considered.

2. The monitors have registered violations of the procedure and terms of forming juror lists by local executive bodies. However, the law «On jurors» does not stipulate for any liability for such violations. Therefore, it is necessary to establish such liability of officials of oblast and equal courts as well as local executive bodies for breaching the provisions of the law «On jurors» regulating the procedure and terms of executing potential jurors' lists.

3. The current legislation does not stipulate how chief judges of oblast and equal to them courts should identify the necessary number of potential jurors except for based on «the forecasted number of citizens established on the basis of the average number of cases which may be potentially reviewed in jury courts»[14]. The number of such citizens in different

[12] According to clause 1 of art. 4 of the law «On the jury» local executive bodies shall execute primary, final and spare lists of potential jurors on annual basis by December 1st of the year previous to the year when the selection of candidates shall be done.

[13] The problem was voiced by the staff of Almaty, Dzhambyl, Kyzylorda, South Kazakhstan oblasts and Almaty city akimats responsible for drawing potential jurors lists / Reports by the participants of the seminar «Drawing up jury lists: legal issues, practice and problems» organized by the American Bar Association in Almaty on April 25, 2007.

[14] The definition contained in clause 9 of art. 1 is not used further in the main body of the law «On the jury».

regions varied from 1200 to 10 000 potential jurors. Thus, it is evident that chief judges of oblast and equal to them courts perceive the principle of forecasting prescribed by clause 9 of art. 1 of the law «On jurors» quite differently. In order to simplify and rationalize the procedure of drawing potential jurors lists and also to ensure their proportional territorial formation more specific quantity criteria – for example, not less than 1 % of the citizens registered in a given oblast (or a national status city) – should be introduced to the legislation.

The law «On jurors» also does not prescribe the criteria by which local executive bodies should identify the number of potential jurors from each given district (oblast centers). Oblast akimats have independently developed such criteria. In order for the population of all oblast city districts to be proportionally represented in the final lists it is necessary to introduce a corresponding provision into the law «On jurors».

4. The law «On jurors» does not provide for a specific akimat department to be responsible for drawing potential jurors lists. On the local level various officials and bodies have been carrying this function. In this relation, the law should specify a body within akimat structure authorised to execute such lists.

5. Unfortunately, in certain cases, the lists presented to courts, were inaccurate. The law does not establish an effective verification procedure. This leads to inadequately high organizational and financial costs. With the aim of improving accuracy and completeness of potential jurors lists it appears expedient to establish a mechanism for supplementary verification of data contained in voters lists. Corresponding legislation should specifically establish the duty of local executive staff to verify voters records and, in case of necessity, to use other databases in order to be able to form most complete list of citizens living in a given district of a given oblast center.

6. In the course of the monitoring it became clear that during the process of drawing potential jurors lists akimat staff and other officials had used sources of information not stipulated by the the law «On jurors». Certain local executive bodies drew lists based on recommendations, examination of citizens' profiles, employment reputation and public merits. The liability of local executive persons authorised to form jurors lists for inaccuracy and incompleteness should be legally stipulated.

7. Due to the revealed systematic violation of lists formation deadlines prescribed in clause 2 of art. 4 of the law «On jurors» it appears expedient to consider the possibility of increasing the terms given to state bodies, organizations and citizens for the purposes of verification of potential jurors compliance with the requirements of art. 10 of the current law.

8. Based on the essence of the Instruction «On the procedure of revealing information regarding mental condition of citizens»[15] disclosure of such information or examination of citizens by psychiatrist authorized by local executive bodies is not acceptable. Due to this reason, the law «On jurors» violates the norms of the current legislation protecting the civil right to medical data confidentiality. The legal mechanism of verifying potential jurors compliance with the requirements of the law should be improved so that to provide appropriate efficiency and due confidentiality of such verification. In order to minimize

[15] Instruction «On the procedure of revealing information regarding mental condition of citizens», Appendix №11 to the Order of the Committee on public healthcare with the Ministry of Health of the RK №269 of May 13, 1998.

violation of citizens' private life it appears reasonable to consider the possibility of verifying potential jurors compliance with the requirements of art. 10 of the law «On jurors» upon completion of random selection and not during the formation of preliminary primary lists. At the same time it is necessary to establish such a verification procedure so that local executive bodies would be authorized only to refer primary potential jurors lists to special authorised institutions (clinics, prosecutorial bodies, etc.) and they, in their turn, would return the lists having excluded all those not eligible for service.

9. The law «On jurors» does not stipulate for the manner in which local executive bodies shall provide citizens with the opportunity to familiarize themselves with preliminary primary and spare potential jurors lists at the stage of executing primary lists. The monitors have registered that the civil right to be acquainted with the jury lists had not been duly observed – the specified lists were not always accessible to the public. Nonetheless, the practice of placing potential jurors lists in the local Mass Media, websites of akimats and information boards in the premises of akimats to allow familiarisation with them appears expedient and positive. Such approach promotes the opportunity for citizens to exercise their legal rights. It would be appropriate to establish legal stipulation of such practice. A specific procedure of informing citizens of their inclusion in potential jurors lists as well as the procedure prescribing free access of citizens to local executive bodies to receive information regarding their legal rights should be described in the corresponding legislation.

10. Random selection is aimed at giving every citizen a chance to become a juror. However, the law does not specifically prescribe the corresponding procedure. In particular, random selection terms and parameters, public control of the procedure, officials responsible for this work are not identified. The need for a more detailed regulation of corresponding procedures has been expressed both by akimats' staff and academicians[16]. Random selection of potential jurors according to the law should be carried out after excluding all persons not eligible for service. Verification of potential juros compliance with the corresponding requirements would make more sense upon completion of random selection. Such approach would reduce the wordload on local executive and other state bodies engaged in lists drawing. Existence of a unified, simple and open procedure of randomly selecting potential jurors from the voters lists would ensure due representation of citizens living in a given administrative and territorial unit. This may be done by developing a special uniform computer program which would ensure selection's randomness and the opportunity for the civil society to exercise control over the procedure.

SESSION 4: IMPLEMENTATION OF COURT DECISIONS

*Speaker 1: **Mr. Anton Burkov**, Doctor of Juridical Science, Cambridge UniversityDefense*

Difficulties with Enforcing Judicial Decisions against the Treasury: Experience of the Russian Federation (*The State is a Debtor: What Do We Do?)*

Regrettably, today the Russian Federation maintains the leading position with regard to the number of complaints received by the European Court of Human Rights (hereinafter the

[16] The problem was voiced by the staff of Almaty, Dzhambyl, Kyzylorda, South Kazakhstan oblasts and Almaty city akimats responsible for drawing potential jurors lists / Reports by the participants of the seminar «Drawing up jury lists: legal issues, practice and problems» organized by the American Bar Association in Almaty on April 25, 2007. *Also* see Ingo Rish. The Progressive Law // *Zanger*, №2, 2007, p.38-40 (*TAL-4-3-K*).

ECHR) against the Russian Federation. The ECHR passes around 200-300 decisions against Russia annually.[17] This number keeps growing. The majority of these cases have to do with the right to access justice, and namely, the right to timely enforcement of judgments passed by national courts. In this report, we will study the causes of the current situation.

This issue was discussed for the first time in the international arena in 2002 when the ECHR issued its first decision in the case *Burdov v. Russia*, in which it recognized a violation of the right to court after the state failed to comply with a judicial decision of the national court. This decision of the national court was related to awarding compensation in favour of a veteran who participated in emergency clean-up after the Chernobyl nuclear accident. Within the next several years, the ECHR made plenty of similar judgments (clone decisions) with regard to other complainants. The main subject of these judgments was the fact that the state had failed to enforce the decisions against the Russian Treasury passed by national courts (financial compensations adjudged for violations committed by government bodies, attempts to levy allowances and pensions on the state).

In 2009, the ECHR passed the so-called "pilot" decision in the case *Burdov v. Russia (2)*, in which it pointed out that despite its 2002 judgment in the same case *Burdov v. Russia* the situation regarding the enforcement of national judicial decisions remained the same, and the Russian Government had to take immediate steps to redress it. In particular, the ECHR reached a conclusion that the Russian judicial system is marked by "repeated non-compliance with judicial decisions by the State while victims don't have effective domestic remedies."
What is the problem with enforcing national judicial decisions in Russia?

According to the general rule, enforcing judicial acts, including coercive enforcement, is, in compliance with the Law "On Enforcement Proceedings" and Law "On Court Enforcement Officers," the prerogative of a special body which is known as the court enforcement officers service. Moreover, fairly broad authorities are vested in these court enforcement officers, such as the right to arrest finances and other valuables of the debtor; to arrest, forfeit, transfer for storage, and sell the assets that were arrested; to enter the premises and storehouses occupied by or belonging to debtors; to inspect such premises and storehouses and open them, if needed; to receive all relevant information, explanations and certificates while implementing enforcement activities; and to declare debtors or their property wanted. In accordance with Section 1, Article 4 of the Federal Law "On Enforcement Proceedings," any demands of the court enforcement officer related to the enforcement of judicial acts and acts of other bodies are mandatory to all bodies, organizations, public officials and citizens all over the country. According to this legal norm, there should be no public offices, including the Government of the Russian Federation, that enjoy preferential treatment of some sort.

However, in 2002 the legal regulation in the area of enforcing decisions on imposing financial penalties upon the Russian Government was carried out by the Russian Government itself. In particular, the Government adopted the "Regulations on Enforcing Judicial Acts by the Ministry of Finance of the Russian Federation with regard to Claims against the Treasury of the Russian Federation on Indemnifying the Damage Caused by Illegal Actions (or Negligence) on the part of Public Bodies." Thus, the Government of the Russian Federation passed a Resolution on approving the Regulations whereby the federal treasury body, the Minister of Finance of the Russian Federation that acts as the chief administrator of the

17 In 2002 the ECHR issued two decisions on the merits, in 2003 - 5, in 2004 - 15, in 2005 - 83, in 2006 - 102, in 2007 - 191, in 2008 - 245, and by June 1, 2009 - 115 decisions.

federal budget funds, was appointed as a body responsible for enforcing judicial decisions on imposing financial penalties upon the state.

As a result, if judicial decisions are enforced using the federal budget funds, such individuals are treated as an exception: writs of execution related to claims against the Russian Treasury on indemnifying the damage caused by illegal actions (or negligence) on the part of public bodies or their officials are submitted to the Ministry of Finance of the Russian Federation to be enforced, and not to the Court Enforcement Officers Service. Such writs are enforced by the Ministry as established in the law of the Russian Federation.

This Government Resolution, Ref. No. 666, was appealed in the Constitutional Court of the Russian Federation on July 14, 2005, which admitted it was partly unconstitutional. However, a little later, in December 2005, this regulation which was appealed against became reflected in the federal law, and today, in compliance with this law, the Ministry of Finance of the Russian Federation, as a respondent to claims against the Russian Treasury, makes independent decisions as to when judicial acts against the state should be enforced, and whether they should be enforced at all.

The removal of coercive authorities vested in court enforcement officers in this area of enforcement proceedings violates Russia's international obligations in compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms. Today these violations are under close scrutiny of the ECHR (case *Burdov v. Russia (2)*).

The political body of the Council of Europe, Committee of Ministers, spoke about this issue in its memorandum *Non-enforcement of domestic judicial decisions in Russia: general measures to comply with the European Court's judgments* (CM/Inf/DH(2006)19, amended on June 6, 2006) and provided its recommendations, including the need for changing the role of court enforcement officers in enforcing judicial decisions against the Russian Treasury.

In 2008, the Supreme Court of the Russian Federation initiated a draft federal constitutional law "On State Indemnification of Damage Caused by Violating the Right to Trial Proceedings within Reasonable Terms and Right to Enforcement of Judicial Acts that Came into Force within Reasonable Terms." As a result of this law, an additional category of cases is introduced in the Russian legal system aimed at protecting the right to fair trial within reasonable time limits. Higher-level courts will be studying whether or not there was a violation regarding the time for considering a case and enforcement of a judicial decision, to recognize such violations and even to adjudge compensation.

It may look as a great initiative. However, this initiative results in nothing since the respondent in cases falling under this category will be the same body, Ministry of Finance of the Russian Federation. It is impossible to collect any financial penalty from the Ministry of Finance coercively in accordance with the applicable law. Court enforcement officers do not have the relevant coercive authorities in order to collect financial penalties from the Russian Federation.

Despite the fact that this draft law was dismissed, we should point out that this attempt to solve the issue of enforcing judicial decisions was wrong. The crux of the issue is not the lack of judicial control over the enforcement of judicial decisions, but rather the lack of a coercive procedure whereby they can be enforced. This last issue has not been solved yet.

In its judgment regarding the case *Burdov v. Russia (2)*, the ECHR, apart from adjudging a compensation, held that the respondent State is, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, to establish an effective domestic remedy or a set of such measures which would ensure adequate and full restoration of violated rights in case of non-compliance, or delays in compliance, with domestic court decisions pursuant to the principles of the Convention, as envisaged by the case law of the Court." On May 4, 2009, this judgment came into force, which was the first day of the six-month period established by the ECHR aimed at taking measures. The state has four more months to solve the issue of enforcing judicial decisions against the Russian Treasury.

*Speaker 2: **Mr. Salimzhan Mussin**, Defense Attorney, Member of the Presidium of the Almaty City Collegium of Advocates, Kazakhstan*

Good afternoon dear Ladies and Gentlemen!

Thank you very much that you have found time to attend our event! I would also like to express appreciation to the organisers for the opportunity to speak to such distinguished audience.

The existing Law "On Enforcement Proceedings and the Status of Court Bailiffs" and other laws and regulations governing the relationships arising in connection with the enforcement of court judgments

In accordance with Clause 3 of Article 76 of the Constitution of the Republic of Kazakhstan, judgments, verdicts and other court resolutions are binding in the entire territory of Kazakhstan.

The Law of the Republic of Kazakhstan "On Enforcement Proceedings and the Status of Court Bailiffs", No. 253-I dated 30 June 1998, which establishes legal, organisational and economic basis for enforcement proceedings and determines the legal status of court bailiffs, is currently in force and effect.

The objectives of the enforcement proceedings include compulsory and prompt enforcement of court judgments, rulings and resolutions in civil and administrative matters, criminal verdicts and resolutions as related to property penalty, and enforcement of decisions and resolutions of other agencies to the extent required by law.

Under the Regulations on Court Administration Committee of the Supreme Court of the Republic of Kazakhstan approved by Decree of the President of the Republic of Kazakhstan No. 471 dated 12 October 2000, the Court Administration Committee of the Supreme Court of the Republic of Kazakhstan is an authorised state agency which performs organisational, logistics and other support to oblast, district and equivalent courts (the "local courts") and which ensures prompt enforcement of writs of execution, organisational supervision over the activities of court bailiffs, keeps judicial statistics in the local courts and organises recording, storage, evaluation and further use of the property appropriated (received) for certain causes into the republican ownership.

Within the Court Administration Committee of the Supreme Court of the Republic of Kazakhstan, the Department for Organisation of Enforcement Proceedings was created. At the local level court bailiffs report to the Court Administrator of Oblasts, city of Astana and the city of Almaty.

2. Problems Encountered upon Enforcement of Court Judgments

Almost all sides of Kazakhstani society, including public officials, admit that there are huge problems in the area of enforcement of court judgments.

For example, Mr I.K. Yelkeyev, the Chairman of the Court Administration Committee of the Supreme Court of the Republic of Kazakhstan, in his interview of 15 September 2008, brought forward the following figures: "As at the end of the first six months of 2008, the effective execution countrywide was only 76.2 per cent", in other words nearly one in four court judgments is not executed. Unfortunately, I do not have any up-to-date information, but I believe that the said figure more or less reflect the current objective reality.

It should be noted that the work of court bailiffs is secondary to the court work because they enforce the legally effective court judgments. And many issues that are raised when discussing the work of court bailiffs must be readdressed to courts and state agencies whose not exactly reasonable and fair judgments lead to various additional social problems.

By way of example one can remember the horrible events occurred in 2006 in the village of Shanyrak where people built houses with consent and laissez-faire attitude of authorities which were found by court to represent illegal construction, and upon enforcement of such court decisions a conflict arose which resulted in that one policeman died and several people were convicted to lengthy imprisonment.

There are a lot of such examples all of which highlight the fact that this area of public relationships requires a very balanced decisions and meticulous legal regulation, since it concerns enforcement of court judgments.

This problem has two parties: a debtor and a plaintiff! Each party is right because often the rightness is proved by many a court judgment.

When discussing this problem, we will again and again thrash over the legality, soundness and fairness of court judgments.

I cannot but address the situation around the *Taszharan* newspaper and its editor-in-chief Mr Yermurat Bapi when the trial court ordered the recovery of 3 million Tenge in moral damages and the appeal court increased that amount to 30 million Tenge! Now court bailiffs are vested with an obligation to enforce more than dubious court judgment and they have already opened a criminal case against the debtor.

3. New draft Law "On Enforcement Proceedings and the Status of Court Bailiffs"

On 17 June 2009 the members of the Majilis of the Parliament of the Republic of Kazakhstan, in second reading, unanimously approved the draft Laws of the Republic of Kazakhstan "On

Enforcement Proceedings and the Status of Court Bailiffs" and "On Introduction of Amendments to Certain Legislative Acts of the Republic of Kazakhstan in Relation to Enforcement Proceedings". The draft laws propose to introduce, in addition to the state enforcement system, an institution of private court bailiffs thus giving to plaintiffs an option to choose between a public and a private court bailiff.

In the course of discussions of a draft law it was pointed out that introduction of the institution of private court bailiffs will help ease the load off the state enforcement system without any additional budget spending and result in its improved quality as a whole.

Now the draft laws will be forwarded for review to the Senate of the Parliament of the Republic of Kazakhstan.

In the statement of opinion of the Majilis Committee for Legislation and Judicial Reform it is stated that in order to implement a cardinal reform of the enforcement system, it is suggested that in addition to the public enforcement system, Kazakhstan should have an institution of private court bailiffs. This will give to plaintiffs an option to choose between public and private court bailiffs, as well as will help ease the load off the state enforcement system without any additional budget spending and must result in its improved quality as a whole.

A private court bailiff will be vested with authorities to act in the name of the State because he/she will be appointed in the name of the State and will be required act in accordance with the effective legislation which determines the scope and nature of enforcement procedures. Therefore it is a must to establish a mechanism of the state control over the activities of private court bailiffs.

Such control should be administered directly by the authorised agency and through the governing bodies which must be created by private bailiffs themselves.

As a guarantee of observance of property rights of the parties to enforcement proceedings, a compulsory two-level professional liability insurance system (personal and general insurance) must be established.

It is also necessary to introduce a mechanism whereby the cost of activities of a private court bailiff should be borne by the debtor on the basis of tariffs for certain enforcement actions expressly set by the Government, and in the event of specific execution of a writ of execution a bailiff should be paid a percentage of the recovered sum. A legal act should also set the upper limit of the payment.

Given that the activities of private court bailiffs will be self-financed, the right of a bailiff to demand advance payment for his/her enforcement actions should be secured in the legislation. The legislation should also provide for a duty of a debtor to declare the assets (property, money, sources of income) if requested by a court bailiff.

Court bailiffs have the right to collect from a debtor the costs incurred in connection with enforcement activities, as well as the right to seek in court invalidation of transactions relating to the disposition of his/her property effectuated by the debtor in order to conceal his/her property from seizure at the stage of pre-trial inquiry, court trial or enforcement proceedings.

Such measure will help eradicate the practice of concealment of property by unscrupulous debtors.

Apart from this, the tendering procedure for the sale of attached property has been improved and refined. The procedure for levying execution against the debtor's accounts receivable, pledged property, securities has been legislated, and the notification procedure in the enforcement proceedings has been reflected as well.

Modernisation of the enforcement procedure through the introduction of the private enforcement institution alongside the improvement of the existing enforcement procedure is a reasonable and long felt need which will manifest itself in the efficiency of the enforcement proceedings and will contribute to the extirpation of corruption offences in the enforcement proceedings.

The proposed draft law is designed to reform the enforcement system cardinally through the creation of the institution of private court bailiffs, and further improvement of the legislation concerning enforcement proceedings.

The draft law "On Introduction of Amendments to Certain Legislative Acts of the Republic of Kazakhstan Concerning Enforcement Proceedings" will amend certain legislative acts of the Republic of Kazakhstan insofar as is necessary to implement the new draft law "On Enforcement Proceedings and the Status of Court Bailiffs" whereby the institution of private court bailiffs is introduced.

In order to regulate the taxation of the activities of private court bailiffs, appropriate amendments will be made to the Code of the Republic of Kazakhstan "On Taxes and Other Obligatory Payments to the Budget". The Code of the Republic of Kazakhstan "On Administrative Offences" will be amended to establish administrative liability of private court bailiffs for breach of the legislation as well as to determine a new procedure for enforcement of resolutions of agencies authorised to impose administrative sanctions.

Similarly, the Criminal Code of the Republic of Kazakhstan needs to be amended to provide for criminal liability of private court bailiffs for breach of the effective legislation upon them carrying out their activities.

By introducing appropriate amendments into the Laws of the Republic of Kazakhstan "On Banks and Banking Activity in the Republic of Kazakhstan" and "On Payments and Remittance of Money" there will be legislated the right of private court bailiffs to request, for payment and in connection with enforcement of a court resolution, information regarding bank accounts of debtors.

Likewise, it is necessary to legislate into the Law of the Republic of Kazakhstan "On Pension Security in the Republic of Kazakhstan" the right of private court bailiffs to request information regarding pension savings of debtors.

The lawmakers believe that modernisation of the enforcement system through the introduction of the private enforcement institution is a reasonable and long felt need which will manifest itself in the efficiency of the enforcement proceedings and will contribute to the extirpation of corruption offences in the enforcement system.

In broader terms, the adoption of this draft law will improve the quality of court judgments and will be instrumental to practicable and strict execution of acts of court and other agencies. Also the introduction of the private enforcement institution will lead to increased tax revenues.

4. Proposals Aimed at Improving the Quality of Execution of Court Judgments

1. To increase the number of staff of court bailiffs considering that a situation still exists where one court bailiff is in charge of up to 500 pending enforcement matters.

2. To raise wages of court bailiffs given that currently a senior court bailiff is paid only around 35,000 Tenge.

3. To expand the rights of the parties to the enforcement proceedings and their representatives (in particular, attorneys), to enable them to more efficiently participate in the process.

4. Perhaps it would be reasonable to bring back the old provisions into the Law "On Enforcement Proceedings and the Status of Court Bailiffs" concerning the execution sanction to the effect that its certain percentage should go directly to court bailiffs.

5. To create a centralised information system of natural persons and legal entities, all the more so that such but scattered systems exist, and to give court bailiffs access to such system.

ANNEX III: INTRODUCTORY REMARKS FROM THE WORKSHOP II: CONDITIONS OF DETENTION

SESSION 1: LEGAL FRAMEWORK FOR PROTECTION AND PROMOTION OF PRISONERS' RIGHTS: INTERNATIONAL COOPERATION AND BRINGING NATIONAL LAWS AND PRACTICE IN LINE WITH INTERNATIONAL STANDARDS

*Speaker 1: **Baroness Doctor Vivien Stern**, Senior Research Fellow, International Centre for Prison Studies, King's College, University of London, UK*

Legal framework for protection and promotion of prisoners' rights: international cooperation and bringing national laws and practice in line with international standards

It is a pleasure to be here with you. I have been lucky because I have been invited to visit Kazakhstan many times, the first time 16 years ago, so I have seen great changes and had the opportunity to admire the great work of the government and society of Kazakhstan in initiating a major programme of penitentiary reform.

I am also greatly privileged to be sharing the introduction to this session with the experienced, hard-hitting, very courageous campaigner for prisoner's rights who has been doing this work for so many years - Zhemis Turmagambetova.

It is a great pleasure for me to see at this conference so many people from the Public Oversight Commissions on Monitoring Human Rights in Penitentiary Institutions. We have here chairs or members of these commissions from: The Kostanai Region, Almaty and the Almaty region, from Akmolinsk and from Pavlodar. It is a great achievement of civil society organisations in Kazakhstan that these commissions exist. They are the only ones in this region and they set an example that other states could follow.

As you may know I am a member of parliament in the UK – an independent member - and the information that reaches us from our public oversight commissions is very necessary for us to do our work in making sure the Government takes seriously its duty to improve the conditions of detention and the treatment of prisoners.

Now in my short introduction to this workshop I want to concentrate on only one point, to explain it, and suggest what we might do to implement that point in all our countries. The point is this. At the heart of the international human rights framework is the requirement that penitentiary systems should operate within an ethical framework. The international community has said and international law has said that the whole process of taking away the liberty of a human being from the moment of arrest to the moment of release from the penitentiary must be done in a humane way. That means an ethical way. Throughout the whole process we have to remember the prisoner is a human being like us who is entitled to have his or her humanity respected.

The principle that should be at the beginning of all decisions about what we do in our penitentiary systems is that penitentiary treatment should be ethical treatment. That is what

Article 10 of the International Covenant on Civil and Political rights, which of course Kazakhstan has ratified, says: 'All those deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'

What does this mean? What does treatment with humanity mean? Do we each have a different idea of what humanity means? No. The European and UN systems have both developed a very clear framework setting out what "treatment with humanity" means.

Let me say a bit about that. It means first that each prisoner is a fellow human being and his or her life is precious and must be protected by providing what is needed for life and providing health care that ensures life is not threatened by illnesses that can be cured.

That is why the European Court of Human Rights said the United Kingdom was in violation of the European Convention when it gave inadequate medical treatment in prison to a woman who was a drug addict so that she died. The European Court of Human Rights said that the failure to look after the woman, the failure to take care of her and to keep her alive, was inhuman and degrading treatment.

So the requirement of the ethical framework is that prisoners are to be treated as fellow human beings; they are worth something whatever they have done and their lives must be protected. That is why the European Court has said all deaths in the care of the state must be independently investigated and that it should be in the law.

Secondly there must be respect for the human dignity of every imprisoned person. What does respect for the inherent dignity of the human person mean? What is it that helps people to keep their dignity and what takes it away and degrades and humiliates people?

We can all think of what we find degrading and humiliating - living in conditions where we cannot wash, where the toilet facilities are inadequate and not in private, where we have to wear ugly shapeless clothes that do not fit and stigmatise us as prisoners. How we are treated by the people in charge is particularly important. How do the guards behave to us? Are they insulting, abusive and use violence?

Respect for the dignity of a human being also means giving prisoners the opportunity to use their minds, keep their intellectual faculties functioning and keep as far as possible their social skills. Third it means ensuring there is justice in prison. There is something called natural justice. It is called natural justice because it is understood by all human beings. People know when a decision is unjust. If someone is ill-treated they must be able to complain about it to a higher authority. If someone is denied something that the rules allow them to have they must be able to complain about it. That is why the ruling made in February 2008 by the Constitutional Council of Kazakhstan is so important.

The Constitutional Council ruled then that a legal provision making self-mutilation by prisoners a criminal offence should be withdrawn. More than one hundred prisoners had cut themselves as a protest against ill-treatment and failure of the authorities to listen to their complaints. After they did this the authorities took a court case against the prisoners using a law that made it a crime for prisoners to mutilate themselves because it was disrupting prison operations.

If prisoners are so unhappy with their treatment that they are prepared to mutilate their own bodies then the authorities need to find out what is wrong. The Constitutional Council made the right decision to call for that law to be changed. Decisions about what happens to prisoners must be made within a framework of justice. There must be an opportunity to balance the power of the penitentiary system with the rights of the detained person.

That is why the European Committee for the Prevention of Torture criticised the Netherlands in 2008 for their system of placing prisoners in what is called a 'high-security terrorist department' in the prison. The Committee recommended that this placement should not be the automatic placement for everyone convicted of a terrorist offence. It should be based on a risk-assessment of each individual and should be reviewed.

So what do we need to do in our countries to put this ethnical framework in place, to ensure we protect life, treat prisoners with respect for their dignity and make prisons places that operate within a system of justice?

There are some answers from around the world and from here in Kazakhstan. First of all there has to be a clear message from the prison administration that all work will be done within the ethical framework. That is what they are doing in France. The prison administration has produced a booklet for all penitentiary staff called 'the ethical framework' and this booklet sets out the need for 'dignity in detention' based on the European Prison Rules.

Perhaps I should also quote the message that came from the Vice-Minister of Justice in Russia, then in charge of the penitentiary system, in a lecture he gave in London. 'The prison system should not be a tool of coercion and repression of the individual. It is essential to move away from the ideology on which the former penal system was based. We need to have as little of prison as possible in our prisons.'

It will be obvious from what I have said so far that the most important element in the ethical framework is the penitentiary personnel. If they are ill-treated by the administration, if their rights are disregarded, if their training is minimal and their pay lower than people in similar work they are not going to be enthusiastic about respecting prisoners. They are not going to see themselves as professional workers doing a difficult and important job. But that's what they are. They are professional workers doing a difficult and important job. So there has to be a proper well-paid professional prison staff and they need to be respected by the society in which they work.

The third basic measure we need to take to ensure dignity and respect for the law in prisons is to encourage oversight from the society. That is why it is such a great step forward and something to celebrate that Kazakhstan has signed the Optional Protocol to the Convention against torture and is committed to outside inspection and oversight.

In the UK we certainly have many problems with our prisons but the most dramatic change in the last twenty years, a change for the better, has been the end of secrecy, the end of cover-ups. We have the work of the penitentiary inspectorate which inspects and rates all the prison according to the following questions: Are the prisoners safe? Are the prisoners treated with respect for their human dignity? Are the prisoners able to engage in work, education, sports and cultural activities that are likely to benefit them? Are prisoners prepared for their release into the community?

All her reports are published and are on the internet - in English only I am afraid. We also have Public Oversight Commissions composed of ordinary citizens and they visit their prisons every week at least and they write annual reports that are on the website. They are appointed by the Government and yet they are very critical of the government when it is necessary. That is their job.

No-one has a perfect penitentiary system. In the UK we can be proud of our oversight system but keep working to improve many other things. In Kazakhstan you can be proud of the huge changes that have been made since I first visited you in 1993 and of your arrangements for private family visits for instance which we in England wish we could persuade our Government to introduce.

For all of us there is still a long way to go. But it is a journey that we must try and make. Why? This is why? We in Europe and you in central Asia lived through an age in the twentieth century of terrible human rights abuses. In both our histories there was a period when people, human beings, were being reduced to objects, to disposable items to be used, enslaved, made to work till they dropped dead. There was no legal framework for the protection and promotion of prisoners' rights then.

From those terrible events the human family learnt that we have to try and build a new international legal order, built on a view derived from all the great religions and philosophies of the world, a view of the intrinsic worth and dignity of each human being. That must be the basis of the law in all countries who have signed the International Covenant on Civil and Political Rights.

SESSION 2: ESTABLISHING OF A NATIONAL PREVENTIVE MECHANISM (NPM) UNDER THE UN OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE (UN OPCAT) AND CIVIL SOCIETY'S ACCESS TO ALL PLACES OF DETENTION

*Speaker 1: **Mr. Zbigniew Lasocik**, International Commission of Jurists, Polish Section, Member of the UN SPT under OPCAT, Poland*

Outline of the Power Point Presentation
Being an NPM (OPCAT requirements)

Purpose of the NPM:

TO PREVENT TORTURE
- Main issue?

People do not torture since they are bad, they do it because it is expected or tolerated

What does it mean to be an NPM?
It means to be:
- credible
- independent
- transparent

Features:
- functional independence
- independence of the personnel
- financial independence
- required capabilities (experience in prison visits)
- professional knowledge (legal matters)
- gender balance
- ethnic balance
- minority groups balance

What they can do:
- to visit places of detention
- to make recommendations (on practice)
- to submit proposals on legislation (on laws and drafts)

How do they perform:
- access to all and any places of detention
- access to all information on population
- access to all information on treatment
- private interviews
- contact with SPT

Safeguards: (Art. 21 OPCAT)
- no sanctions against any person cooperating with NPM
- confidentiality of the information
- no personal data shall be published
- state obligation to publish reports

NPM is effective when:
- it collects valuable information
- it establishes dialog with the state
- it pays attention to education
- it proposes reforms
- it combats impunity
- it sends a clear message to prisoners
- it sends a clear message to the staff
- What to know and use?
- UN Resolution 48/134 1993 on human rights institutions (Paris Principles)
- Recommendation of the Council of Europe (97) 14 on human rights institutions

Speaker 2: Ms. Anara Ibraeva, Director of Astana branch, «Kazakhstan International Bureau for Human Rights and Rule of Law», PhD, Kazakhstan

On June 29, 1998 the Republic of Kazakhstan has ratified the UN Convention against torture and other cruel, inhuman or degrading treatment and punishment. After 10 years (June 26, 2008) Kazakhstan ratified the Optional protocol to the Convention against torture and, thus, accepted the international obligations on setting up a system of regular visits by independent international and national bodies to facilities where those deprived of freedom are kept with the aim of preventing torture and other cruel, inhuman or degrading treatment and punishment. According to art. 3 of the Optional protocol each state party shall set up,

designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment referred to as national preventive mechanisms.

Upon review of the report by Kazakhstan on the performance of the Convention against tortures (November-December 2008) in clause 22 of the Concluding Remarks the UN Committee against torture recommended as soon as possible to set up or appoint the national preventive mechanism in order to prevent torture and to take all necessary measures to ensure its independent status in accordance with the provisions of the Optional protocol to the corresponding UN Convention.

Thus, according to the international commitments accepted as the result of ratification of the international human rights treatments which, according to art. 4 of the Constitution of Kazakhstan, are a part of the national law of the Republic of Kazakhstan and have priority before domestic laws, Kazakhstan is obliged to establish national preventive mechanism for the prevention of acts of torture.

At the same time, according to art. 17 of the Optional protocol setting up or appointment of the national preventive mechanism should take place not later than 1 year after the Protocol coming into force or its ratification or joining it.

In accordance with clause 2 of art. 28 of the Optional protocol it enters into force 30 days after deposition of the instrument of ratification or the joining document. Based on the date Kazakhstan deposed its instrument of ratification for our country the Protocol entered into force on November 21, 2008. This means that Kazakhstan has to set up or designate the national preventive mechanism before November 21, 2009.
Based on different jurisdictions the legislation of the Republic of Kazakshtan lists 7 types of penitentiary facilities:

- penitentiary facilities and pre-trial detention facilities under the jurisdiction of the Committee for penal enforcement system with the Ministry of Justice of the Republic of Kazakhstan (CPES with the MJ of the RK);
- investigatory isolation wards under the jurisdiction of the National Security Committee which have not been transferred under the jurisdiction of the CPES with the MJ of the RK (based on the Concluding Remarks of the Committee against torture);
- detention facilities under the jurisdiction of the Ministry of Internal Affairs of Kazakhstan;
- detention facilities under the jurisdiction of the Ministry of Defence of Kazakhstan, i.e. guardrooms (on elimination of which in the nearest future the Special Rapporteur on torture was informed at the Ministry of Defense during his visit to Kazakhstan May 5-13, 2009);
- facilities of partial personal freedom restriction under the jurisdiction of the Ministry of Healthcare, including specialized treatment-and-prevention facilities where those diagnosed with alcohol-, drug- and other substance abuse undergo forced treatment;
- facilities of partial personal freedom restriction under the jurisdiction of the Ministry of Education and Science as well as corresponding private institutions;
- facilities under the jurisdiction of local social protection bodies, including psychoneurological medical-social institutions, state medical-social institutions and non-state common-type medical-social institutions for senior citizens and disabled regulated by the Standard social service rules.

Altogether, it is several hundred facilities with different status and terms of treatment of citizens and other persons falling under the definition provided in the Optional protocol to the UN Convention against torture in relation to which the visiting system should be established.

I wish to specify that, in essence, we are talking of setting up a visiting system with the goal of preventing torture and other kinds of cruel treatment and punishment and aimed at resolving two issues:
- monitoring of general conditions of confinement, i.e. periodic examination of confinement conditions conformity to the international standards, including to the Standard Minimum Rules for the treatment of prisoners;
- reacting to complaints and statements by citizens related to specific situations, persons or groups of persons kept in restricted conditions.

Taking account of the number and varying security levels of facilities in question reaching the objectives mentioned above imposes **certain requirements with regard to the scale (number of staff), structure and territorial arrangement of the national preventive mechanism (NPM).**

Based on the NPM-related requirements identified in the Optional protocol to the UN Convention against torture and with the account of the state parties authority and obligations, quite obviously it is, first of all, necessary to choose an NPM model and to decide on the manner of setting it up, the procedure of access to facilities, the monitoring methodology, the procedures for information transfer and getting feedback from state bodies, as well as coordination mechanisms.

In this respect, the positive experience of Kazakhstan NGOs as to detention facilities monitoring should be given due attention.

Before all, I mean the system of public monitoring commissions, the project supported by one of the organizers of this conference - Penal Reform International.

On December 29, 2004 the law of the RK «On the introduction of amendments and supplements to certain legal acts of the Republic of Kazakhstan on issues of justice bodies» was passed. The law stipulated for the establishment of public control over observance of human rights, liberties and legal interests of persons kept in penal enforcement facilities and bodies.

The public control is rendered by NGOs with the aim of assisting persons confined in correctional and detention facilities to exercise their rights and legal interests with regard to detention conditions, medical-sanitary treatment, labour, leisure and training organisation prescribed by the laws of the Republic of Kazakhstan.

The State enactment of September 16, 2005 stipulates the Rules for forming oblast (national status cities) public monitoring commissions authorized to carry out corresponding public control.

In addition, according to clause 11 of the Penal Enforcement System Development Program the CPES with the MJ of the RK had developed and disseminated among all public monitoring commissions the Recommendations on monitoring observance of the rights and legal interests of suspected, charged and accused persons.

The public monitoring commissions (PMCs) have been established in practically all oblasts of the country and include representatives of human rights NGOs, lawyers, journalists, etc. For example, Kazakhstan international bureau for human rights and observance of legality (with its branches and representative offices in 11 out of 16 regions of the country) is mainly represented within the commissions by its staff lawyers.

So far, the commissions' operation is not stipulated in the national law and their staff does not have the right to sudden access to detention facilities. Nonetheless, they are an obvious prototype of the future NPM.

One more positive example is the pilot project held in Almaty aimed at public monitoring of conditions in pre-trial facilities, namely, temporary detention facilities, police stations, and other detention facilities under the jurisdiction of the Ministry of Internal Affairs. The project is operated by the Charter for Human Rights Public Foundation and exists thanks to the good will of the Minister of Internal Affairs of Kazakhstan. In other words, the project does not have any legislative support, although, it is planned to expand it on a number of other oblasts. Within the project several legal experts, mainly, professional lawyers visit, including without notice, police stations and temporary detention facilities in Almaty, meet with the detained, etc.

Firstly, this public monitoring of penal and detention facilities is the first one institutionalized to such degree on the CIS territory. Secondly, it created certain grounds for constructive cooperation between public monitoring groups and state bodies supervising facilities in question. This is true, at least, with regard to the Committee for penal enforcement system with the Ministry of Justice of the Republic of Kazakhstan and the Ministry of Internal Affairs of Kazakhstan.

Finally, in the beginning of the last year the Working Group for prevention of acts of torture has been created with the Office of the Ombudsman for Human Rights. Its activities supported by the government of Germany are aimed, including, at the development of recommendations for setting up the NPM in Kazakhstan. In fact, the current conference may, to some extent, be recognized as the Working Group extended session to develop conceptual suggestions re the NPM setting up.

Based on the experience of public monitoring of detention facilities **the most appropriate model of NPM for Kazakhstan falls within the Ombudsman + formula.**

Setting up of exactly this NPM model was recommended by the participants of the international conference «Prevention of torture in the Republic of Kazakhstan: from discussions to practical development» held February 26-27, 2009 in Astana.

The list of corresponding recommendations with regard to the national legislation also included the following:
• to pass a law regulating the legal status of the Ombudsman for Human Rights in the Republic of Kazakhstan with the aim of bringing this national institute in conformity with the Principles related to the status of national organizations involved in promotion and protection of human rights (the Paris principles);
• to develop and pass a draft law «On public control in the Republic of Kazakhstan» providing legal basis for the establishment and the operating procedure of public control in Kazakhstan, including the procedure of setting up and maintaining the National Preventive

Mechanism in accordance with the requirements of the Optional protocol to the UN Convention against torture and other cruel, inhuman and degrading treatment and punishment. This will allow to carry out systematic monitoring of restricted facilities in the broad sense of the definition stated in art. 4 of the Optional protocol - police stations and temporary detention facilities of the Ministry of Internal Affairs, investigatory isolation wards of the National Security Committee, home arrest apartments of the Agency against economic and corruption crimes (Financial police) as well as psychiatric clinics of the Ministry of Healthcare, guardrooms and disciplinary battalions of the Ministry of Defense, senior homes and medical-sanitary facilities of the Ministry of Labour and Social Protection, children homes and boarding schools, pre-school centres, specialised schools of the Ministry of Education and Science and other institutions and facilities with restricted access under the jurisdiction of corresponding agencies and local executive bodies, and other restricted facilities under the jurisdiction of state bodies and organizations;

The list of practical recommendations also included the following:
• with the aim of implementing the recommendations provided by the UN Committee against torture to establish at the Ministry of Justice an interdepartmental working group with participation of human rights NGOs representatives and experts;
• to expand the Working Group with the Office of the Ombudsman for Human Rights of the RK investigating acts of torture in order to be able to develop suggestions and recommendations on the national legislation improvement (setting up and running the National Preventive Mechanism in accordance with the requirements of the Optional protocol to the UN Convention against torture);
• until the moment of actual passing the law "On the public control in the Republic of Kazakhstan» and setting up the NPM to expand the structure and authority of Public Monitoring Commissions by supplementing clause 1 of art. 1 (General Provisions) of the Enactment of the Government of the RK "The rules of the PMC formation" of September 16, 2005 with the phrase "…temporary detention facilities and other restricted facilities under the jurisdiction of the Ministry of Internal Affairs and other agencies…» as well as to authorize PMC members to carry out off-schedule visitings (beyond confirmed schedule) in case of receiving information on violations of the rights of the detained. This will allow to carry out systematic and independent monitoring of police stations and temporary detention facilities, juvenile detention, adaptation and rehabilitation centers of the Ministry of Internal Affairs, investigatory isolation wards of National Security Committee, home arrest apartments of the Agency against economic and corruption crimes (Financial police) as well as psychiatric clinics of the Ministry of Healthcare, guardrooms and disciplinary battalions of the Ministry of Defence, senior homes and medical-sanitary facilities of the Ministry of Labour and Social Protection, children homes and boarding schools, pre-school centres, specialized schools of the Ministry of Education and Science and other institutions and facilities with restricted access under the jurisdiction of corresponding agencies and local executive bodies, and other restricted facilities under the jurisdiction of state bodies and organizations by the civil society representatives, including, with the account of the PMCs' experience which is an effective mechanism for prevention of torture and ensuring observance of human rights.
On the local level, i.e. in 16 administrative regions of Kazakhstan (14 oblasts, the capital of Astana and the national status city of Almaty) as was suggested during the conference in February, 2009 in Astana, it is necessary to establish public monitoring groups (they may be called public monitoring commissions by the analogy with the already existing PMCs and may be established on their basis). Such groups may include local representative bodies and local governments officials, representatives of human rights NGOs and legal communities, medical and social workers, and, possibly, journalists as well as regional representatives of

the Office of the Ombudsman for Human Rights. The size of such groups or commissions may vary depending on the number of restricted facilities in a given oblast or city.

On the national level it was suggested to create the National Coordination Council for Prevention of Torture that would operate based on the Working Group of the Office of the Ombudsman for Human Rights. The Council was suggested to deal with the analysis of the existing practices and the development of recommendations on improving the NPM efficiency as well as implementation of recommendations by the UN Committee against torture. The Council may be comprised of MPs, representatives of human rights NGOs and the legal community, officials of state bodies supervising facilities in question, and also independent bodies investigating acts of torture. Such approach of joint activities by state bodies and public organisations proved effective at the time of carrying out a pilot project for setting up a juvenile justice system.

Thus, the NPM structure may include public monitoring groups (public monitoring commissions) operating in the oblasts, the capital and the national status city under the regional representative offices of the national Office of the Ombudsman for Human Rights in the RK.

Such groups (commission) may carry out periodic monitoring of detention facilities, execute reports and recommendations for interested state bodies and the National Coordination Council for further analysis of existing practices and development of recommendations. In addition, the groups (commissions) may also visit facilities based on corresponding complaints and statements and take necessary measures, for example, by way of referring information to independent bodies for further investigation of acts of torture and other authorized bodies, including via the Office of the Ombudsman for Human Rights of the RK.

To effectively exercise its authority identified in the Optional Protocol to the UN Convention against torture the NPM, quite obviously, needs to be legally enforced.

In this relation and within the framework of Kazakhstan fulfilling its international obligations in accordance with the Optional Protocol, it is suggested to develop and pass **the Law on public control over detention facilities** which will identify such facilities in compliance with the Optional Protocol, describe the structure of the NPM, the procedure of its setting up, its competence and authority, the procedure of access to detention facilities, the mechanism for rotation of public monitoring groups (commissions) members, etc. Taking account of the fact that we are talking about access to restricted facilities, the law should include an exhaustive list of grounds for rejecting membership in public monitoring groups (commissions) as well as describe the procedure of approving members of groups (commissions) with the bodies supervising such facilities. It will be also necessary to issue a joint order of state agencies under which jurisdiction such facilities operate with regard to the procedure of access to them, including, sudden one, by members of public monitoring groups (commissions). Certain revision, modification and amending related to the NPM will have to be done to all legal acts regulating detention procedures and the rights and obligations of detained persons.

The need to adopt the law on the Ombudsman for Human Rights in the Republic of Kazakhstan requires separate mentioning. The issue had to be resolved a long time ago. As it was specified in Recommendations of a number of UN conventional bodies based on the analysis of Kazakhstan's reports on the performance with regard to the international human

rights instruments the currently operating institute does not comply with the Paris principles on the status of national human rights establishments. The law should stipulate for the procedure of the Ombudsman appointment (election), describe the authority and competence of this institute, as well as ensure its independence and self-sufficiency. The argument of the impossibility of passing a separate Law on the Ombudsman for Human Rights due to this institute being not prescribed by the Constitution and the Parliament lacking authority to appoint (elect) the Ombudsman seems far-fetched. According to art. 1 of the Constitution of the RK the person, his/her life, rights and liberties are of ultimate value. Thus, it is obvious that their protection is the priority task for the state. The Office of the Ombudsman is the institute promoting respect, advancement and protection of civil rights and liberties. It is not a state body in the sense of lacking any enforcement authority and its acts are only of recommendatory nature. The Constitution of Kazakhstan does not stipulate for any restrictions as to setting up institutes assisting the development and protection of civil rights and liberties. Therefore, it is our opinion that there are no legal obstacles to adoption of the law on the Ombudsman for Human Rights of the Republic of Kazakhstan. We are glad to note that this issue received positive mentioning within the new Concept of Legal Policy in the RK.

Extensive experience of seminars and trainings carried out by a number of international, foreign and local human rights NGOs both for penitentiary facilities' staff, legal experts, and members of public monitoring commissions should be applied within a series of similar trainings held in each region of Kazakhstan for the NPM members and detention facilities' staff. For the purpose of such training we could also use the pilot draft of the Guide for monitoring detention facilities already prepared by the Charter for Human Rights in association with our Bureau.

The current situation in Kazakhstan in relation to the matter in question looks as follows:
• the Ministry of Justice of the RK is intending to prolong setting up of the NPM for another year (i.e. till November of next year) – please, correct me if I am wrong;
• the staff of the Office of the Ombudsman is comprised of 14 persons – the human resources are insufficient for carrying out monitoring of general conditions of detention and reacting to corresponding complaints;
• the presidential Decree on setting up regional offices of the Ombudsman has not been signed in the spring of the current year;
• initiative on the side of the government and the Parliament of the RK with respect to development and adopting the laws on the Office of the Ombudsman for Human Rights in the Republic of Kazakhstan and public control of detention facilities is lacking.

Based on this it appears necessary and urgent to discuss and resolve issues related to the following:
a) consideration of setting up a different NPM model or continuing to work with the already functioning public monitoring commissions and including into them representatives of local representative bodies and local governments, human rights NGOs, legal communities, medical and social workers, and journalists (as of now, unfortunately, without participation of regional representatives of the Office of the Ombudsman for Human Rights);

b) legislative initiative with respect to corresponding laws.

Thanks you for your attention.

Speaker 3: ***Ms. Svetlana Kovlyagina****, Chair of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions of Pavlodar Region, Chair of Public Foundation "Human Rights Monitoring Commission", Kazakhstan*

The problems existing in the system of enforcement of punishments in the Republic of Kazakhstan which infringe the human rights and negatively affect the staff morale in penitentiary institutions, including pre-trial detention facilities.

1. In view of the transfer of detention facilities under the supervision of the Ministry of Justice, the Law "Concerning Suspected and Accused Persons Detention Procedure and Conditions" (the "Law on Detention Procedure and Conditions") requires revision. Article 16 of the Law on Detention Procedure and Conditions guarantees the right to suspected and accused persons to communicate with their relatives. By operation of Article 14 such right should be secured by the administration of the place of detention, i.e., the administration of the pre-trial detention facility, which is also liable for the violation thereof. However, according to the above law, the administration of the pre-trial detention facility has no power to ensure the exercise of the right to communicate by suspects and accused, since part 2 of Article 17 establishes that the communication is granted under a written permission of a person or body in charge of the criminal case. Thus, the law, while obligating the administration of the pre-trial detention facility to ensure the compliance with the rights of suspects and accused, including the right of communication with relatives, entrusts the body which carries on the case with the right to determine the conditions of detention. Such contradictions in the law violate the rights of prisoners to communicate with the outside world and contact relatives. It is necessary that only the prison administration determine the conditions of detention of accused and suspects in the detention facility with no interference of the police. The police should be prohibited to dictate what restrictions to the rights of accused are to be introduced.

2. The Law on Detention Procedure and Conditions contradicts the international standards. Today there is an absolutely unnecessary subdivision of prisoners into 4 categories: suspects, accused, persons on trial and convicted persons. To bring the effective legislation in compliance with the international standards, the law must expressly determine only 2 categories: persons under investigation and convicted persons. The wording of the Law on Detention Procedure and Conditions with respect to the mechanism of exercising the rights of prisoners guaranteed by Article 16 has to be revised in accordance with the Standard Minimum Rules for the Treatment of Prisoners.

3. The convicted persons also face lack of qualified legal assistance guaranteed by part 3 of Article 13 of the Constitution of the Republic of Kazakhstan and Article 10 of the Correctional Code. Advocation is not included in the list of free-of-charge legal services, and, once the judgment of conviction comes into force, the convicted person is deprived of the right to receive a qualified legal assistance if he/she has no money to pay for an advocate. This fact impairs the quality of submitted supervisory appeals which lack legal literacy and arguments, and, as a result, are often dismissed. Without the assistance of attorneys, the convicted persons experience difficulties in obtaining copies of sentences on previous convictions and copies of other necessary documents.

4. The right to health protection of the citizens who serve sentence in places of detention is not ensured to the full extent. The possibility of convicted persons to obtain timely medical consultancy and examination by narrowly focused specialists in penitentiary

institutions is limited. The procurement of medical care is affected by the availability of vacancies and low salaries of physicians resulting in the reduced motivation of the latter to perform their duties. All the above does not contribute to the qualified examination and treatment of convicted persons.

5. It is unlikely to achieve high cure rates of consumptives due to such facts as visits to places of investigatory actions and court, transfer to other institutions resulting in the interruption of medical treatment which may cause the persistent forms of tuberculosis.

6. The nature of applications of convicted persons proves their low level of information on the procedure for and terms of release on parole, including medical excuse, the procedure for and terms of appealing against the court's denial of release on parole, as well as on the right to appeal against sanctions imposed by the administration of penitentiary institutions.

7. There are cases of violation of the rights of convicted persons to the access to court in considering the matter of release on parole. In practice of specialised prosecution such cases exist when a special prosecutor refuses to grant release on parole to a convicted person without submitting the case files to the court and without issuing a procedural document which the convicted person may appeal against.

8. It is worth to note that, based on the principle that the conditions of life in prison should not serve as additional punishment and any unreasonable restrictions should be avoided, the limitations of external contacts of convicted persons to close relatives are unjustified. The effective legislation does not take into account those convicted persons who have no close relatives or are not married or married de facto.

9. Given the fact that at present the State is not able to fully procure convicted persons with personal hygiene means and living essentials, as well as complete nutrition, the practice of limiting the quantity and weight of sending and parcels cannot be found reasonable and justifiable as such limitations may not serve as corrective measures for convicted persons.

10. There is a concern related to the cases of self-injury among convicted persons in penitentiary institutions, and also defiance of convicted persons resulting in the use of force by the administration of penitentiary institutions. Undoubtedly, the basic reason of conflicts between convicted persons and the administration (personnel) of penitentiary institutions is the attitude of the administration (personnel) of penitentiary institutions to the rights and freedoms of convicted persons. Very often the convicted persons complain about abuse by the personnel, rough treatment and abasement of human dignity, unreasonable imposition of sanctions and placement in punitive confinements and solitary cells.

11. The law dated 27 March 2007 amended the Correctional Code of the Republic of Kazakhstan by adding Article 180-1 "Discharge from an Institution of Correctional Systems of Consumptives Having Infectious Form of Tuberculosis Constituting Common Nuisance". According to the said law, the treatment is prescribed to all convicted persons who have not undergone the complete course of treatment. Such approach is doubtful from the viewpoint of compliance with basic rights and freedoms and is not effective in terms of limited state resources. The lawmakers demonstrates quite a different approach with respect to other categories of citizens in part 1 of Article 3 of Law No. 496-I of the Republic of Kazakhstan "Concerning Compulsory Treatment of Consumptives Having Infectious Form of Tuberculosis" dated 10 December 1999. The amendments are clearly

discriminate against the persons released from correctional institutions.

12. The same Law amended part 1 of Article 5 of the Law of the Republic of Kazakhstan "Concerning Prevention and Treatment of HIV Infection and AIDS" dated 5 October 1994, which says that "the citizens serving sentence in correctional institutions of the justice authorities of the Republic of Kazakhstan are subject to mandatory confidential medical examination for HIV infection". Such requirement contradicts the international standards and is not the effective method of control over dissemination of HIV infection both inside and outside the correctional institutions.

13. One may not agree with the dissolution of the Public Council on Correctional Matters of the Ministry of Justice of the Republic of Republic of Kazakhstan (which was established under Order No. 54 of the Minister dated 3 March 2004). It would be easier for public supervisory commissions to advance through the Council their proposals on the improvement of the operation of correctional system.

14. The amendments to laws related to convicted persons who need to be discharged from further serving of sentence due to disease give rise to concerns. The consumptives having pulmonary form of tuberculosis were excluded from the list by Order No. 47-OD of the Committee of Correctional System of the Ministry of Justice of the Republic of Kazakhstan dated 22 May 2007. Such situation may be regarded as the impairment of human rights since the persons in places of confinement cannot be now treated with contingency medical stuff and they lose the chance to obtain such treatment out of prison. Moreover, it is inhuman to deprive patients in grave conditions of the right to release on parole, especially when we talk about the humanisation of the correction system.

15. There is a low level of special qualifications of the graduates of the Pavlodar Law College who are placed on work in penitentiary institutions. The concern is in their young age and absence of experience.

16. The vacancies of legal consultants and psychologists available in correctional institutions are often filled by incompetent specialists who have no proper training thus resulting in a poor quality of legal and psychological assistance necessary for convicted persons. Such category of employees has no possibility to improve their knowledge or exchange experience.

In order to resolve the revealed problems and secure the human rights in penitentiary institutions it is necessary to:

1. Comply with the requirements of legislation with respect of serving sentence in correctional institutions at places of residence prior to arrest and conviction.

2. Amend the effective Correctional Code with respect to lifting restrictions on quantity of sending and parcels and granting of communication not only with immediate relatives but with other reliable persons, which will allow to support and strengthen the communication of convicted persons with outside world.

3. Establish a mandatory procedure for communicating to convicted persons against their signature all documents (decisions) which affect their rights and interests, including the appeal procedure, ensure the issuance, upon request, of copies of necessary documents from personal files.

4. Develop mechanisms of control over registration and delivery of complaints and applications of convicted persons to regulatory authorities.

5. The Ministry of Justice, together with the Committee of Correctional System and RGP Enbek, should take necessary measures in order to increase job vacancies for convicted persons serving sentence which will conduct to timely discharge of claims and exercise of the right to release on parole.

6. For the purpose of minimization of unreasonable denials in release on parole under the ground of non-discharge of the claim, inform convicted persons having claims under the court sentence that it is necessary to apply in writing to the administration of the penitentiary institution seeking employment for the discharge of the claim. The availability of such application of a convicted person in his/her case file should be regarded by the court and prosecutor as taking measures for the discharge of claim.

7. Due to the amendment of the legislation with respect to the matters of release on parole, increase the funding of penitentiary institutions for postal expenses associated with the notification of complainants.

8. The Ministry of Justice and local justice authorities should develop a state programme aimed at the increase of the level of information and legal literacy of convicted persons and employees of correctional institutions with respect to the release on parole.

9. The Ministry of Justice, General Prosecutor's Office, Supreme Court should develop clear assessment criteria for correction of a convicted person – settled down to a course of correction, strongly settled down to a course of correction, proved correction. The Supreme Court to provide clear explanation of legal consequences of the discharge of claims.

10. Decide, at the level of a lawmaker, on the exclusion of the right of a prosecutor to reject submission to the court of petitions from the administration of correctional institutions seeking release on parole for a convicted person.

11. Amend Article 180-1 of the Correctional Code of the Republic of Kazakhstan "Discharge from an Institution of Correctional Systems of Consumptives Having Infectious Form of Tuberculosis Constituting Common Nuisance" and Article 5 of the Law of the Republic of Kazakhstan "Concerning Prevention and Treatment of HIV Infection and AIDS" dated 5 October 1994, with respect to compulsory examination of persons in places of detention.

12. Reconsider and increase units of personal hygiene and means to keep clean clothes for convicted persons.

13. Exercise yards for persons under investigation in detention facilities and persons in penitentiary institutions kept in punitive confinements and solitary cells are unsuitable for physical exercises in open air due to their small size. It is necessary to consider the possibility of construction of yards which are more suitable for walking and physical exercises of prisoners.

14. Open schools/training facilities for underage to receive continuing education.

15. The Ministry of Healthcare to take measure on establishing a feedback between health institutions aimed at preventing the spread of tuberculosis and correctional institutions –

prompt delivery of information to correctional institutions on consumptives discharged from correctional institutions.

16. Grant the right, at the level of a lawmaker, to the public supervisory commissions to random visits to detention facilities and penitentiary institutions, and to confidential conversations (beyond the audibility zone) with convicted persons.

17. When carrying out examinations and official investigations of self-injury cases and other actions of defiance of convicted persons, include the representatives of the public supervisory commission, as independent of the Correctional Committee and the Ministry of Justice, as members of commissions.

18. The Ministry of Education should resolve the issue and procure the correctional system with books and incidental materials at the level of civil education.

19. The Correctional Committee should reconsider the staff policy in order to resolve the vacancy issues. It should be considered necessary to increase the prestige of physicians engaged in the correctional system by increasing their salaries and provision of a social package, or by integrating the civil and prison healthcare.

20. The Correctional Committee should analyse the training programme for the specialists of the Pavlodar Law College.

21. The Correctional Committee should allocate funds in the budget for education and advanced training of psychologists, legal consultants and provide the possibility of exchange of experience.

22. The Correctional Committee should introduce a job of disinfector in its payroll in order to ensure conducting of measures for the observance of disinfection regime in accordance with the infection control requirements, especially in TB institutions.

23. The Correctional Committee should double its household staff in order to eliminate discrimination of convicted persons from the "castaway" group with respect to engaging them in heavy and dirty work. The labour of convicted persons must be paid and must be mechanised to the maximum extent, and be not abasing to human dignity.

24. The Correctional Committee should make the level of provision of dentist services similar to the level of civil healthcare, replace the out-dated dentistry equipment and ensure quality treatment and dentoprosthetic rehabilitation.

25. The Correctional Committee should increase financing to ensure upgrading of medical equipment.

26. The Correctional Committee should grant to convicted persons the right for humane treatment in connection with a disease, grant the release on parole due to the disease.

SESSION 3: FROM DEATH PENALTY TO FIXED SENTENCES: IMPROVEMENT OF THE DETENTION'S CONDITIONS FOR LONG-TERM SENTENCED DETAINEES

Speaker 1: ***PD Dr. Carmen Thiele****, Faculty of Law, European-University Viadrina Frankfurt (Oder)*

I. Conditions of detention of long-term sentenced detainees

Adequate conditions of detention for prisoners are vital for the protection of human rights. They are regulated on the universal level by UN treaties and documents and on the regional European level mainly by the Council of Europe. To Kazakhstan as a Central Asian state the standards of the UN system apply, but Kazakhstan has also expressed its interest in developing towards the European standards. Therefore emphasis is made on the European rules.
As a consequence of the abolition of the death penalty in Council of Europe and European Union member states the use of life sentences has augmented. The number and length of long-term sentences increased, which contribute to prison overcrowding and may impair the effective and humane management of prisoners. The conditions of long-term sentenced prisoners are regulated especially by the European Prison Rules of the Council of Europe (EPR)[18] and the Recommendation of the Council of Europe on the management by prison administrations of life sentence and other long-term prisoners (five years or more).[19] The EPR are in line with the requirements of international instruments including International Covenant on Civil and Political Rights (ICCPR)[20] (article 10) and the UN Standard Minimum Rules for the Treatment of Prisoners.[21]
Prison administration must provide decent living conditions for prisoners, ensure security, good order and discipline, arrange regimes that permit the constructive use of time in prison and prepare prisoners for leading law-abiding lives after release.[22]

According to the Recommendation on the management by prison administrations of life sentence and other long-term prisoners the aims of the management of life sentence and other long-term prisoners should be to ensure that prisons are safe and secure places for these prisoners, to counteract the damaging effects of life and long-term imprisonment, and to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release (No. 2 Rec(2003)23). From these objectives derive the following fields of mayor concern and interest.

1. Security and safety in prison

The security measures applied to individual prisoners shall be the minimum necessary to achieve their secure custody (Rule 51.1 EPR). The maintenance of control in prison should be based on the use of dynamic security that is the development by staff of positive relationships with prisoners based on firmness and fairness (No. 18 a Rec(2003)23). The management of dangerous prisoners should be guided by the principles embodied in the Recommendation of

[18] Recommendation Rec(2006)2 (11 January 2006).
[19] Recommendation Rec(2003)23 (9 October 2003).
[20] UNTS, vol. 999, p. 171.
[21] ECOSOC Resolutions 663 C (XXIV) (31 July 1957) and 2076 (LXII) (13 May 1977).
[22] Report accompanying the Recommendation Rec(2003)23, No. 23, p. 17.

the Council of Europe concerning custody and treatment of dangerous prisoners.[23] States should regulate procedures to ensure the safety of prisoners (Rule 52.2 EPR).

2. Counteracting the damaging effects of life and other long-term sentences

In order to prevent and counteract the damaging effects of life and long-term sentences, prison administrations should seek to provide prisoners with opportunities to make personal choices in as many of the affairs of daily prison life as possible; to offer adequate material conditions and opportunities for physical, intellectual and emotional stimulation; to prevent the breakdown of family ties (No. 21 f. Rec(2003)23). Various strategies as regards to work, education and other activities, which should be complemented by medical, psychological and community service, support this aim (Rule 103 EPR).
Particular efforts should be made to allow for the granting of various forms of prison leave, if necessary under escort, taking into account the principles set out in the Recommendation of the Council of Europe on prison leave[24] (No. 23 b Rec(2003)23).

3. Reintegration into society

All detention should be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty (Rule 6 EPR). In order to enable life sentence and other long-term prisoners to overcome the particular problem of moving from lengthy incarceration to a law-abiding life in the community, their release should be prepared well in advance, aiming at a close collaboration between the prison administration and post-release supervising authorities, social and medical services (No. 33 Rec(2003)23).

II. Conditional release

The granting and implementation of conditional release for life sentence and other long-term prisoners should be guided by the principles set out in the Recommendation of the Council of Europe on conditional release[25], which recalls the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders.[26]

Conditional release aims at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community (No. 3. Rec(2003)22). In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners (No. 4 a Rec(2003)22).

The minimum period that prisoners have to serve to become eligible for conditional release and the criteria that prisoners have to fulfil in order to be conditionally released should be clearly established by law (No. 16 and 18 Rec(2003)22).

[23] Recommendation No. R (82) 17 (24 September 1982).
[24] Recommendation No. R (82) 16 (24 September 1982).
[25] Recommendation Rec(2003)22 (24 September 2003).
[26] ETS No. 51.

III.Prospects for ratification of the UN Second Option Protocol to the ICCPR

The UN Second OP ICCPR, aiming at the abolition of the death penalty[27], was ratified by 71 states[28], between them all 27 EU member states, with the exception of Latvia and Poland (signature: 21 March 2000).[29]

Kazakhstan is a state party to the ICCPR (24 January 2006), but not to the Second OP ICCPR yet. Among the Central Asian states Turkmenistan (11 January 2000) and Uzbekistan (23 December 2008) have already joined the Protocol. States like Kazakhstan, aiming to achieve European standards, have to consider the abolition of the death penalty. Important steps are taken already by Kazakhstan. The scope of the death penalty[30] was reduced in 2008 from 10 "exceptionally grave" crimes to the offence of terrorism leading to loss of life. A moratorium on executions is in force. These are favourable conditions for a complete abolition in the near future.

Speaker 3: Ms. Anastasiya Knaus, Deputy Director of Kostanai Branch Office, «Kazakhstan International Bureau for Human Rights and Rule of Law», Chair of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions of Kostanai Region

Introduction of the moratorium on death penalty and life sentence as well as changes to the Constitution of the Republic of Kazakhstan has generated many questions with regard to safety of those imprisoned for life, conditions of their imprisonment, possible parole, etc.

The current Criminal Code of the Republic Kazakhstan provides for significantly longer maximum terms of imprisonment as compared to the earlier Criminal Code of the KazSSR of 1959. According to art. 23 of the latter the maximum imprisonment term for crimes resulting in especially heavy consequences and for especially dangerous recidivists could be not more than 15 years. In case of pardon replacement of death penalty with imprisonment the term could be more than 15 years but not more than 20.

Art. 48 of the currently enforced Criminal Code of the RK states that the maximum imprisonment sentence may not exceed 25 years while the accumulative one may not be more than 30.

Such long penal terms based on the cumulative charges or cumulative sentencing may be imposed by court without any consideration of the nature and the degree of public danger of committed crimes.

It is obvious that while establishing the maximum terms of depriving of freedom the legislator has not taken full consideration of the requirements of the international standards with regard

[27] UNTS, vol. 1642, p. 414.

[28] The Russian Federation, the USA and China as permanent member states of the UN Security Council, are not state parties.

[29] Latvia and Poland have ratified Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty (CETS No. 114).

[30] Art. 15 (2) Constitution of Kazakhstan regulates: „The law shall establish the death penalty as an extraordinary measure of punishment for especially grave crimes and grant the sentenced person the right to appeal for pardon."

to treatment of prisoners which stress that long-term imprisonment should be applied in exceptional cases and only for the most severe crimes.

Moreover, recommendations suggested by the academicians, in particular, that imprisonment for over 10 years is ineffective for the purposes of correction of criminal's behaviour and prevention of repeated crimes have not been taken into consideration also.

The results of numerous researches prove that positive effect of serving long sentences is possible approximately within the first 6 years. With longer sentences the number of positively characterised prisoners tends to decrease. Besides, in case of the negative development of the situation there appears danger of personal degradation.

At last, it appears obvious that the decision to increase the maximum level of sanctions in the form of imprisonment was made without consideration of additional expenses resulting from the need to build and maintain the sufficient number of penitentiary facilities, to increase the quantity of criminal enforcement staff, etc.

Currently, the majority of high and maximum security colonies in the Republic of Kazakhstan where criminals sentenced to life or long-term imprisonment are kept are overcrowded.

Prisoners should be contained with the account of their individual circumstances as well as in accordance with the rule of law, equality and justice principles.

The European Committee on crime problems, after thorough examination of the international standards and experience, has identified three major objectives of administering life and long-term imprisonment:

- ensuring that prisons are safe and reliable locations for prisoners and all those working in and visiting such facilities;
- neutralizing the negative effect of life and long-term imprisonment;
- expansion and improvement of opportunities for such prisoners for their successful returning to society and living in accordance with the law upon release.

According to the Criminal Enforcement Code of the RK (art. 69) persons sentenced to life imprisonment or death penalty serve time in high security colonies.

Currently, there is only one penitentiary in Kazakhstan enforcing life imprisonment – high security colony UK 161/3 in Kostanaj oblast in the north of the country.

There, in two separate sites, 70 persons initially sentenced to death penalty (for whom it was later changed to life sentence) and those sentenced to life imprisonment serve time. Two staff psychologists work with the second group of prisoners on daily basis. For them a special "Help yourself" program has been developed.

The prisoners are kept 2 per chamber which is equipped with two bunker-beds, mattresses, and bed sheets. During the day the bed has to be made "the white way", i.e. the prisoners are prohibited from lying down. This rule is stipulated by clause 12-1 of the Internal Regulations for Correctional Facilities.

Based on the order of the Ministry of Justice of the RK of December 29, 2005 subclause 4 of

clause 12-1 of the Internal Regulations that prohibited opening and closing ventilation window without the permission of administration has been excluded. Nevertheless, currently life and death penalty prisoners have no opportunity to independently open/close the ventilation window to allow access of fresh air since the window is covered with security bars. In order to be able to do so they have to ask guards who, according to the Regulations for Securing and Guarding Detained Persons, pass a 1.3m long pole (with a hook on the end) to the on-duty prisoner through the door window. The pole has to be placed on the ventilation window with its blunt end. The on-duty prisoner has to follow exactly the same procedure in order to pass the pole back to the guard after opening the window. This does not fully correspond to the Minimum Standard Rules for the treatment of prisoners.

In accordance with the recommendations of the European Committee on crime problems special effort has to be taken for prevention of breaking family ties of the prisoners sentenced to life or long-term imprisonment - such prisoners, whenever possible, should be placed in penal facilities close to where their families or close relative live.

Besides, the European Committee notes that «letters, phone calls and visits should be permitted as often as possible and with the maximum degree of privacy. For security purposes such contacts may be accompanied by such reasonable safety measures as monitoring of correspondence or searches before and after visits».

In Kazakhstan those sentenced to death penalty and life imprisonment get the right to long visits by relatives only upon their transfer from high to common security level. And this is only possible after serving not less than 10 years in high security conditions. Before that moment they are entitled to only 2 short-term visits (not longer than 3 hours) during a year. The remoteness of the facility in question and the restriction on long-term visits leads to the prisoners kept there losing their social ties. During the last year only 38 short-term visits with life prisoners took place in the UK 161/3. In this respect, it appears reasonable to reduce the term of high security imprisonment.

In addition, according to the same Regulations death penalty and life prisoners are granted the right to telephone conversations by penitentiary heads only in case of personal emergency circumstances. As the head of UK 161/3 explained to us, such circumstances may be death of close relatives, emergency situations or natural disasters in locations where relatives live, etc. It appears reasonable to remove unjustified restrictions on telephone conversations.

The Committee's recommendations also state that it is important to provide prisoners with additional opportunities of contacting the outside world, such as providing access to newspapers, radio and TV.

Death penalty and life prisoners have the opportunity to use the library; besides, in case prisoners have money on their special accounts they can subscribe for newspapers and magazines. The head of the colony has also informed us they are planning to equip all life sentence chambers with TV sets. One of the chambers already has a TV as a matter of experiment. In addition, each chamber is equipped with a radio broadcasting both local and district radio stations.

The Standard Minimum Rules for the Treatment of Prisoners stipulate that all prisoners who are not employed in outdoor work shall have at least 1 hour of suitable exercise in the open air daily if the weather permits. Life prisoners are entitled to 1½ hour daily walk in the open air.

If the general conditions permit the prisoners' walk duration may be increased to 2 hours for good conduct. Walking courtyards are equipped with chinning bars. Also, the life sentence site has a special sport chamber equipped with two new treadmills and a wall mounted ladder.

In accordance with the international standards all prisoners, including these serving life sentence, shall have access to adequate medical assistance. According to the national law the prisoners cannot be transported outside the premises of penitentiary, thus, all medical treatment has to be done on site. For this purpose, a special room in the UK 161/3 is equipped with an operation chair and a shadowless lamp. According to the head of the facility in case of necessity medical workers may be transported to the site within 1 hour. Emergency treatment may be rendered by the prison doctor. There exist certain difficulties with the tuberculosis-diagnosed prisoners. Currently, 11 prisoners are diagnosed with various forms of the disease (BK+, BK-, resistant and chronic). The UK 161/3 is not a specialised medical institution and, thus, there is neither specially equipped room for the TB-positive persons as is done in tubercular hospitals (penitentiary facilities with the medical status) nor an opportunity to purchase specialised legal drugs since there is no money allocated for this purpose. It should be noted that all other categories of prisoners, in case of positive TB diagnosis, are transferred to specialised prison hospitals. Death penalty and life prisoners, though, are eligible for TB treatment on site only which is not always effective not to mention that such situation violates Rule 22 of the Standard Minimum Rules. In this relation, it appears expedient to set up a site for life prisoners on the premises of the special antitubercular hospital which would have necessary equipment and medication to render required medical assistance and treatment as well as sufficient and professional staff.

Another problem is that due to the remoteness from the nearest city and peculiarities of the terrain (rocky soil) where the colony is located there is no opportunity to hook the facility up to the centralized sewerage system (high cost). The prisoners are forced to use plastic flanks placed in chamber as toilets. The special life sentence site has 1 equipped lavatory and, according to the facility staff, they usually take prisoners there on their request. However, the Regulations for Securing and Guarding Detained Persons specifically list 10 reasons why a life prisoner may be taken out of chamber and the need to go to the bathroom is not identified there. Such state of things violates Rule 12 of the Standard Minimum Rules.

According to the recommendations of the European Committee carrying of weapon, including firearms and bludgeons, by persons coming into direct contact with prisoners shall be prohibited on prison premises. The Regulations for Securing and Guarding Detained Persons, though, state that guards shall carry out their duties without weapon but necessarily with special means. The guards working on life imprisonment site always carry such special means (of active defence) – special rubber batons, BR-class handcuffs and "Bird Cherry"-type tear gas.

In the UK 161/3 life prisoners have no opportunity to work which, of course, is a negative factor. In the spring of this year the facility administration had made an attempt to arrange it. A separate room had been allocated for this purpose. Sewing machines and other equipment (for producing brushes) had been delivered to the site. However, due to the lack of place the room was later transformed into another chamber. As of now, life prisoners have the opportunity to do applied arts inside their chambers. One prisoner, for example, is doing sculpture; another one – likes to draw.

The life imprisonment site also has a special praying room where prisoners may worship.

Life imprisonment is a rather new type of punishment in our legislation. Inclusion of life sentence into the penal system reflects the tendency of criminal policy development as well as the overall criminal situation in the country, its dynamics and structure. Most certainly, punishment in the form of imprisonment requires balance between ensuring safety, order and discipline in penitentiary facilities, on the one hand, and issues like human treatment of prisoners, existence of active schedule and effective preparation of prisoner for release, on the other. The problem is acute and I hope to hear a lot of interesting ideas and recommendations in its respect today.

With this allow me to finish my presentation. Thank you for the opportunity to speak!

SESSION 4: HUMANIZATION OF DETENTION CONDITIONS AND EFFECTIVENESS OF COMPLAINT MECHANISMS AGAINST DETENTION CONDITIONS AND ILL-TREATMENT

*Speaker 2: **Mr. Kuat Rakhimberdin**, Dean of the Law Faculty, East-Kazakhstan State University, Kazakhstan*

Penal and Correctional System of Kazakhstan: Indicators of Unresolved Issues

Over a very significant period of time—many decades of the 20th century—the penal and correctional system of Kazakhstan as well as our country's overall penal policy were mostly of a repressive nature. Kazakhstan was called a country of camps not by accident. Many people all over the world knew about such notorious Stalin's camps as KARLAG, STEPLAG, ALZHIR, VOSTOKLAG, etc. And that is probably the fundamental reason why the state of the penal and correctional system is so grave and complicated. Over a very lengthy period of time our country was among the top countries leading in terms of the number of prisoners (after the Russian Federation and the USA). The conditions of imprisonment and detention of prisoners were often times simply inhuman.

At present, the penal and correctional system of Kazakhstan consist of 20 pretrial detention facilities and 75 institutions (19 correctional colonies of general regime, 19 correctional colonies of strict regime, 5 colonies of special regime, 1 prison, 17 settlement-colonies, 8 hospitals, 4 juvenile correctional facilities, 2 centers for social rehabilitation for people released from the places of incarceration). As of 1 June 2009, 53,359 convicts and 8,736 arrested pending investigation were kept in these facilities, which amounts to 0.3% and 0.1% of the total population of the country, respectively.[31] Kazakhstan's prison index is 382 prisoners per 100,000 population (17th place in the world by the number of prisoners per 100,000 population). This is a lot for the country with the population of 16 million.

Over the last decade, the penitentiary system of Kazakhstan has been undergoing significant changes aimed at extending the rights of arrested and convicted persons, making the conditions of detention and confinement for serving punishment more humane. To this end, numerous changes have been introduced to the Penal and Correctional Code of the Republic of Kazakhstan, the Rules on Internal Regulations of Correctional Facilities approved by Order of the Minister of Justice No. 148 dated 11 December 2001 were adopted. The penal and correctional system has been transferred to the jurisdiction of the Ministry of Justice of the

[31] According to the preliminary results of the national population census in Kazakhstan, the population of Kazakhstan is 16,304,840 people in 2009.

Republic of Kazakhstan with a goal to more fully secure the rights and legal interests of inmates. The funding for the penal and correctional system of Kazakhstan has been increased. Over the last years the amount of funding has increased significantly: over the last 5 years—by more than 3 times (e.g., 2003—KZT 7 billion, 2004—KZT 10 billion, 2005—KZT 15 billion, 2006—KZT 17 billion, 2007—KZT 22 billion, 2008—KZT 23 billion, about USD 150 million).[32] Thus, for example, according to statistics, every national of Kazakhstan pays KZT 1,410 (about USD 9) for keeping convicts in custody while an American pays USD 78. The penal and correctional system of Kazakhstan has become more costly for the society. All these institutional reforms must have had a positive effect on the prison conditions.

The higher and more advanced Kazakhstani and international standards on securing the rights of arrested and convicted persons become, the more obvious it is that no meaningful practical shift to the better has happened in this area so far. The mail received by human rights organizations in Kazakhstan (the many-year practice of Public Association "Kazakhstan International Bureau for Human Rights and Rule of Law" and its regional branches) provides evidence that the rights of arrested and convicted persons in Kazakhstani penitentiary facilities are still being violated. Thus, more specifically, the unjustified application of physical force and special devices as well as the unjustified imposition of penalties and many other violations are widely spread.

As a matter of fact, the conditions of keeping prisoners in many penitentiary institutions offense human dignity. Most of the country's correctional institutions were built in the 40s-70s of the 20th century while some pretrial detention centers were built even back in the 18th century. Many of them are in a dilapidated condition and sometimes in the state of failure, which has been highlighted by the chief officials of the Committee on the Penal and Correctional System of the Republic of Kazakhstan time and again.[33] Over the last years, the construction of modern standard correctional facilities has been almost non-existent. Those new institutions that have been commissioned were in most cases reconstructed from various facilities (for example, 4 institutions were built in the territory of the former military base of the Soviet Army in the settlement of Solnechniy in the Jarminskiy District of the East Kazakhstan Region). The colonial detachment system in which every detachment unit has 100 or more convicts serving their punishments has been preserved. It was planned in the programs on the development of the penal and correctional system of Kazakhstan that the number of inmates in one institution shall not exceed 500 people. Unfortunately, this item has not been fulfilled. Crowded conditions and over-population are one of the reasons for conflicts between inmates and the administration of institutions, for the crime rate in the places of incarceration. At correctional institutions convicts cannot keep their personal space intact, that is why they constantly experience discomfort and anxiety. The increased number of suicides at correctional institutions has become one indicator of this problem. According to the data reported by the Committee on the Penal and Correctional System of the Republic of Kazakhstan, in 2000 there were 31 cases of suicide among the inmates, in 2001—27, 2002—18, 2003—44, 2004—32, 2005—43, 2006—31, 2007—47, 2008—56. Thus, over the

[32] Kenjetaev Ye.M. Legitimacy of the Enforcement of Criminal Penalties in the Republic of Kazakhstan. Collection of Materials from the Expert Meeting regarding the Development of the Penal and Correctional System of the Republic of Kazakhstan, Astana, 14 August 2008, Almaty – p. 17

[33] Duisekeyev A.M. Contemporary State and Main Directions for Further Development of the Penal and Correctional System of the Republic of Kazakhstan. Collection of Materials from the Expert Meeting regarding the Development of the Penal and Correctional System of the Republic of Kazakhstan, Astana, 14 August 2008, Almaty – p.13

last eight years the number of suicides in the places of incarceration in Kazakhstan has more than doubled.

In accordance with the international standards, one indicator of the effective operations of penitentiary institutions is their safety. Unfortunately, the correctional institutions in Kazakhstan have not become safe; for example, 295 crimes were committed there in 2008 (199 in 2007), including 44 grave and especially grave crimes (45 in 2007).[34]

Such diseases as tuberculosis, including its drug-resistant form, are widely spread among the inmates, the number of HIV positive inmates is increasing. The number of HIV positive inmates in the places of incarceration in Kazakhstan was 446 in 2001, 531 in 2002, 525 in 2003, 598 in 2004, 705 in 2005, 1176 in 2006, 1,598 in 2007.[35] Thus, we see that the number of HIV positive inmates in the penal and correctional system of Kazakhstan has increased by 3.5 times over the seven-year period. And over all the years of monitoring, 2,334 people have contracted HIV in the institutions of the penal and correctional system. According to the data of the Republic AIDS Center, the share of HIV positive inmates in the total number of cumulatively registered cases in Kazakhstan as of 01 January 2008 was 29.3%, which means that every third HIV positive individual in the country is serving punishment in places of incarceration.

It is very important to have the government working on solving the issues of health and human rights in the penitentiary institutions as a whole to prevent the situation described in the book of European researches "Sentenced to Death" from repeating itself. Because when the state deprives individuals of liberty, it assumes the obligation to organize the enforcement of punishment in such a way which would not only preserve the lives of convicts in the course of serving their punishments, but also return these people to the society as healthy, capable of working individuals. However, the massive scale and fluidity of diseases result in the situation when a healthy person who has found himself in the pretrial detention facility becomes ill, disabled and even dies over the course of several months. Thus, the health problems in the penal and correctional system have long ago overgrown from the departmental category into the national one, as they present threats to every one of us.

It should be stressed that such a disturbing overall picture is explained not only by the poor performance of their functional duties by the staff of the penal and correctional system, but also by extremely slow changes of the principles on which this system is based. The government's penal policy is not aimed at introducing measures of punishment alternative to incarceration.

Kazakhstan needs both special measures for social rehabilitation and effective measures for social rehabilitation of people who have served their punishments. This task cannot be solved without the involvement of local authorities. A long overdue law on social rehabilitation of people released from the places of incarceration (the Republic has only 2 centers of social rehabilitation operating in the cities of Ust'-Kamenogorsk and Shymkent) has not been enacted yet. Every year, on average, up to 20,000 people are being released from the places of incarceration and detention. We should, of course, take into account so-called repetition or

[34] Isakov N.A. Statistics on Crimes in the Correctional Institutions System. Enforcement of Punishments. 2009. No.1. – p. 4

[35] Health Conditions in the Penal and Correctional System of the Republic of Kazakhstan. Materials from the 2nd Central Asia Regional Forum on Drug Use and Infectious Diseases in Prisons. Bishkek. 29-31 October 2008. http://stop-spid.kz/news/2008-11-17-10

recidivism of crimes. Of course, the interrelation between repetition of crimes and social rehabilitation measures is, by all means, direct and obvious.

Due to these reasons, the total number of people kept in the places of incarceration remains to be unreasonably high. This, in its turn, does not allow creating the necessary material and psychological preconditions for securing their rights.

One of the fundamental reasons behind the unsatisfactory situation in the area of securing rights of detained and convicted individuals is the lack of an effective mechanism for public oversight over the penal and correctional system. Despite that the public oversight is envisioned in the penal and correctional legislation of Kazakhstan and 15 public monitoring commissions (PMC) have been established in the regions and in the cities of Astana and Almaty, we observe that there are a lot of unresolved issues regarding the activities of PMCs in Kazakhstan, the issue of funding PMCs being the first one (more specifically, reimbursement of travel costs incurred by the members of the monitoring groups, their training, etc.). Second, the issue of creating a single PMC coordinating center that would perform organizational and methodological functions is still outstanding. An important issue is to allow for the PMC members' unexpected visits to correctional institutions, which, unfortunately, has not been envisioned by the legislation in Kazakhstan. The procedure for submitting final reports on the visits to correctional institutions is not clear, it is also not clear who and how must respond to the recommendations given by the public oversight representatives. Thus, unfortunately, the PMC institute does not fully perform its functions and there is almost no systematic public oversight over penitentiary institutions in the country. And this is probably not only a legal issue, but to a bigger degree—a political one.

Even after Kazakhstan ratified the Optional Protocol to the Convention Against Torture on 26 June 2008, pursuant to which the country committed to create a national prevention mechanism (NPM) to prevent torture, including in the penitentiary institutions, the NPM model has not been developed in Kazakhstan to date. And this is despite Article 17 of the Protocol which provides that a member-state shall, within one year after the Protocol comes into force, support, appoint or create one or several independent national prevention mechanisms to prevent torture at the national level.

The resolution of the above-specified issues will allow making the penal and correctional system of Kazakhstan more humane, safe and transparent.

*Speaker 3: **Ms. Monika Platek**, Professor of Law, Law Faculty, Warsaw University*

On condition and remedies for humanization prison and pre-trial conditions.

I.1. Effective remedies – guards of the human rights.

Human Rights, with the special emphasis on rights and freedoms of the individuals kept in detention facilities creates the core of international legal order that the Kazakhstan is part of. Kazakhstan is not part of Council of Europe legal order, yet many of the legal provision is introduced by UN and that is binding in Kazakhstan.

I will present both UN and European solution for making the human rights the instrument to effective legal system.

Human Rights consist of those quite limited rights and freedoms that regulate the relationship between an individual and authority, and put the limit the power an authority can exercise. The essence of these rights is ingrained in the procedures that guarantee their execution. Human rights are ensured only when procedures are available. This means that they must be clear, precise, quick, cheap/free and easy to access. The law is not ensuring rights and freedom just by the mere title of "the law". It must provide precise, clear, easy, transparent procedures and express it in language free from bias, and diverse interpretation. The draft law encompasses areas important to observing human rights but despite the evident effort it generally misses the procedures to guarantee the implementation of the recognized rights and freedoms of detained people.

The power to arrest is an essential police power. The power to deprive liberty is an essential court power, and the power to carry it out is granted to detention and prison staff. It is done for the purpose of law enforcement and the administration of justice. The right to individual liberty is a fundamental human right. It is essential for the enjoyment of other human rights, and it is prerequisite for democratic government and democratic citizenship. In order to exercise human rights the extent of state power must be clearly delineated. In order to secure the scope of power and its limit the effective remedies and procedures to observe human rights are vital. The power vested in official bodies requires also the necessary practical and tactical skills to put their powers into effect with due regards to those limits (see: *Human Rights and Law Enforcement*: UN Geneva 1997:70-71).

In democratic societies the law underpins and protects the fundamental values of society. The dignity of the human being is the most important one. The test of this respect is the declared way in which a society treats those deprived of freedom. It is expressed in art.10 of the ***International Covenant on Civil and Political Rights*** (**ICCPR**) "All persons deprived of their liberty shall be treated with humanity and with respect for their inherent dignity of the human person".

The ***European Convention on Human Rights*** (**ECHR**) which all Council of Europe countries are part of, express clearly and firmly that the right and freedoms must be accompanied in the law and in the practice with ***effective remedy***. Art.13 ECHR says *expressis verbis* that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". It is clear that art. 13 ECHR secures only the rights included in the very Convention and calls for local, adequate effective remedies. It looks to mechanisms and procedures that democratic societies can utilize to make sure that the human rights of their citizens are protected by criminal justice and are inscribed into criminal law, procedural criminal law, sentencing policy and penal policies and practice. There must be strict scrutiny of methodology accompanying the checking of measures' effectiveness. It refers to the wording of the law, institutions and procedures envisaged by the law, and the legal, cultural and political infrastructure accompanying the everyday practice exercised in the country.

In the classical text of Lon Fuller: *The Morality of Law* (Yale, 1964) the qualifications of a good law are mentioned. It should be universal, applied to all citizens equally, accessible for those who are to use it, it should be clear and free from contradiction, stable and observed by the state officials. Respectively to those rules in the British case of *Merkur Island Shipping Corp v Laughton* - where the law was clearly inaccessible because of lack of clarity - the House of Lords acknowledged that '[a]bsence of clarity is destructive of the rule of law; it is

unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.' (*Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, 612.)

The following are than the requirements that flow from the expression 'prescribed by the law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate her/his conduct: she/he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

1.2. Information, Integration and Education as mean to Human Rights' safeguard

In the ***Body of Principles for the Protection of All Persons under Any Form of detention or Imprisonment*** adopted by the UN General Assembly on December 9, 1988 (**Body of Principles**) principle 13 states that "any person, shall at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and explanation of his rights and how to avail himself of such rights". Principle 33 of the Body of Principle stressed the need for remedies: "right of the person or her/his counsel to make a request or complaint regarding the treatment of the person, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities, when necessary, to appropriate authorities vested with reviewing or remedial powers. This right should be vested in the member of family when the person or the counsel can not exercise it."

The Body of Principle stress the need for confidentiality, the need to deal with a request or complaint promptly and to reply without undue delay and the need to secure freedom from suffering the prejudice for making a request or complaint (Principle 33.2-4).

This is also strongly stressed in the Principle 2 on the ***Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Execution***. It states: "In order to prevent extralegal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command, over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms".

The language of the law plays a vital role. It is important for the words used in the law to create a concrete picture of how the law is to be applied. It is necessary to do it in order to avoid a flow of diverse interpretations or non-action as a result of lack of vision how the law should be implemented. The control procedures that ensure the application of it should help to introduce the practice which is congruent with the letter and the spirit of the text of the law. It is to be done by different measures that reaffirm transparency and quality of the service.
Transparency calls for legal and social control. The quality of service is to be reached by setting up high professional standards, congruent with the Kazakhstan Constitution and International Covenants and Recommendation and achieve them through training and re-training of staff, personnel and specialists in any area of criminal justice.
Council of Europe countries have additional specific instrument, namely European Prison Rules. ***The European Prison Rules of January*** 11, 2006 (**EPR-2006**) state clearly that prison work as a public service is operated with high professional and personal standards (rule 72.4).

It sets up the condition needed to achieve transparency and excellence of staff working in any detention facilities.

The prison authorities shall continually inform the public about the purpose of the prison system and the work carried out by prison staff in order to encourage better public understanding of the role of the prison in society (rule 90.1). This is just the first step to transparency. An independent control system is the next one. Introducing people to the opportunity of volunteering to provide services in prisons (rule 90.2) secure visibility of quality of work performed by staff. It also enables the society to know the nature of the detention places. Prison administrations should encourage prison directors to meet regularly with groups in civil society, including non-governmental organizations, and where appropriate to let them run a variety of programs (just to mention few possibilities: Street law programs run by the Polish law students in prisons for inmates and detainees, *Alcoholics Anonimus* groups, programs where ex-inmates share their success stories of life free of crime with inmates serving sentences, religious groups, "guardian-angel" programs of ex-inmate helping the incarcerated people to prepare for the freedom, mediation programs – where mediator are running mediation between inmates and victims to help inmates to compensate for their deeds etc. not forgetting schooling, social work in cooperation with outside organization and others).

At the same time the basic principle states that all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty (rule 6). That is why co-operation with outside social services and as far as possible the involvement of civil society in prison life is encouraged (rule 7). And above all prisons and places of detention shall be subject to regular government inspection and independent monitoring (rule 8).

Quality standards call also for strict limits to use both the remand in custody and imprisonment. Most abuse tends to happened while in police and remand custody. ***Council of Europe Recommendation Rec(2006)13 On the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*** (**Rec(2006)13**) impose an obligation to ensure that the persons remanded in custody are held in conditions and subject to a regime appropriate to their legal status, which is based on the presumption of innocence. It also requires ensuring the establishment of effective safeguards against possible breaches of the rules. It is up to the state to build effective mechanism to protect these rights. ***Rec(2006)13*** indicates judicial authorization and review in the not longer than a month interval of the need of remand continuation (rule 17). It also calls speedy complaint procedures both within and outside the remand institution, and to confidential access to an appropriate authority mandated to address the grievances. These avenues shall be in addition to any right to bring legal proceedings (rule 44 Rec(2006)13).

Effective remedies are also secured through the proper, professional performance of the staff in all criminal justice instances with the special emphasis on detention. EPR-2006 states that clearly: Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisons (rule 8). It is therefore necessary to select staff carefully and take care of proper training, both at the outset and on a continuous basis. (rules 76-83).

1.3. Effective remedies in the European Court of Human Rights decisions

The European Court of Human Rights in Strasbourg give in its decision a perfect illustration on relation between law and practice. The law on paper is just on paper as long as there is no effective measures to implement it.

The effective remedies should be available in the country. The person should not be sent off to apply to European Court or other international bodies. The requirements to exhaust the local procedures are in fact oriented on strengthening the local procedures and legal instruments, in order to take care of the quality of the binding country law.

The aim of the rule of exhaustion of domestic remedies referred in ECHR (art. 35 § 1) is to afford Contracting States an opportunity to put matters right through their own legal system before having to answer before an international body for their acts (see, among many other authorities, *Egmez v. Cyprus*, no. 30873/96, § 64, ECHR 2000-XII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004). Where there is a choice of remedies, the exhaustion requirement must be applied to reflect the practical realities of the applicant's position, so as to ensure the effective protection of the rights and freedoms guaranteed by the Convention (see *Allgemeine Gold-und Silberscheideanstalt A.G. v. the United Kingdom*, no. 9118/80, Commission decision of 9 March 1983, Decisions and Reports (DR) 32, p. 165, and, more recently, *Krumpel and Krumpelová v. Slovakia*, no. 56195/00, § 43, 5 July 2005). Moreover, an applicant who has used a remedy which is apparently effective and sufficient cannot be required to have also tried others that were also available but probably no more likely to be successful (see *Wójcik v. Poland*, no. 26757/95, Commission decision of 7 July 1997, DR 90-A, p. 28; *Assenov and Others v. Bulgaria*, 28 October 1998, § 86, *Reports of Judgments and Decisions* 1998-VIII; *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III; and *Günaydin v. Turkey* (dec.), no. 27526/95, 25 April 2002) (*Wiktorko v. Poland*; 14612/02).

EC stresses that Art. 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, among other authorities, *Kudła*, cited above, § 157) (*Krasuski v. Poland*; 61444/00; Kangasluoma v. Finland; 48339/99).

The need for accessible, clear, easy, cheap, secure, quick remedies is expressed in the many decisions of the ***European Court of Human Rights*** (hereinafter: EC). EC stated that where an individual claimed that his rights and freedoms under the Convention had been violated, Article 13 guaranteed a remedy before a national authority in order to have his claim decided and, if appropriate, to obtain redress (*Klass and others v. Germany*; 5029/71).

Such 'authority' need not necessarily in all instances be judicial in the strict sense. But it must have competence to deal with the case and there must be a guarantee of securely reaching the instance and obtaining a chance for redress. Article 13 has been consistently interpreted by

the Court as requiring a remedy in domestic law in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, *Boyle and Rice v. the U.K* judgment of 27 April 1988, Series A no. 131, § 54).

The Court determines each time whether the particular State legal system afforded the applicant an "effective" remedy, allowing the competent "national authority" both to deal with the complaint and to grant appropriate relief (see *Camenzind v. Switzerland*, 16 December 1997, § 53, *Reports* 1997-VIII).

This is to ask the question how to do it, how to get to know how to do it, when to get an answer? Each time it demands the visualization of the process which must have clear procedures and remedies to execute the rights and freedoms inscribed in the law.

The Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V, §§ 55-63). In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (*AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; and *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV, *mutatis mutandis*). In circumstances such as those such a procedure should guarantee to the involved one at least a possibility to be heard in person and to have his/her views considered. The competent body should also issue written grounds for its decision (*Tysiac v. Poland*; 5410/03).

The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI). Moreover, there is a close affinity between the requirements of Article 13 of the Convention and the rule on exhaustion of domestic remedies in Article 35 § 1 of the Convention. The latter's purpose is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V)(*Borzhonov v. Russia*; 18274/04).

It is not enough to have an option to appeal to EC, the immediate body in the country must be available (*Silver and others v. UK*). The denial of effective domestic remedies in respect to ill-treatment by the police violates the ECHR (*Chitayev and Chitayev v. Russia*; 59334/00). Absence of a remedy in domestic law permitting a detainee to context his placement in solitary confinement violates art. 13 ECHR (*Ramirez Sanchez v. France*; 59450/00). It refers to basic rights like the right to effective investigation to allegation of ill treatment that often leads to violation of the basic rights to be free from torture, inhuman or degrading treatment (*Mammadov (Jajaloglu) v. Azerbaijan;* 34445/04). The lack of effective remedies reviewing and questioning the length of criminal proceedings violates ECHR (*De Clerc v. Belgium*; 34316/02).

Art 15 of ECHR is violated when there is no provision in domestic law for non-pecuniary damage even if civil liability of police were to be established (*Bubbins v. UK*; 50196/99). The means available to an applicant in domestic law for raising a complaint about the length of the proceedings are "effective", within the meaning of Article 13 of the Convention, if they

"prevent the alleged violation or its continuation, or provid[e] adequate redress for any violation that has already occurred". Article 13 thus offers an alternative: a remedy is "effective" if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays that have already occurred. The fact that a given remedy is of a purely compensatory nature is not decisive, regardless of whether the proceedings in question have been terminated or are still pending (see *Kudła*, cited above, §§ 158-159; *Caldas Ramirez de Arrellano v. Spain* (dec.), no. 68874/01, ECHR 2003-I; *Mifsud v. France* (dec.) [GC], no. 57220/00, ECHR 2002-VIII; and *Paulino Tomás v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII) (*Krasuski v. Poland*; 61444/00).

Speaker 4: ***Ms. Tatiana Chernobil****, Associate Legal Officer, Open Society Justice Initiative, Kazakhstan*

Effectiveness of Presenting Complaints against Cruel Treatment in Places of Confinement

1. Conditions in places of confinement may be regarded as inhuman or degrading treatment or punishment.

2. Treating convicts by causing them severe pain or inflicting suffering, using their clearly dependent status, which is done by the staff of a facility with their knowledge or acquiescence, and sometimes with their encouragement or instigation, in most cases, for the purpose of punishing a person for disciplinary violations, i.e. when convicts violate the rules of conduct, or disobedience or insubordination may be regarded as torture.

3. We can provide the following example of torture in penal institutions of Kazakhstan: Sviridenko Viktor Stanislavovich, AIDS positive, 50 years old, Group 2 disability, wheelchair bound, a convict; January 2009. To make **S.** obedient, the staff of the colony used torture against him. They pulled him down from his wheelchair, made him bend over the bench, inserted a hose into his anus and started pumping water inside his body until **S.** fainted because of pain. After this, **S.** was placed in a special housing unit. When **S.** asked for a doctor and bed sheets, he was beaten by 7 or 8 officers until he fainted again. Later, when **S.** asked to invite a prosecutor, the deputy head of the facility said he was a prosecutor there, and told **S.** it was more likely that he would die than complain to someone. Complaints were submitted on behalf of **S.** to the Penal System Committee, Commissioner for Human Rights, and province-level prosecutor, with no further response from any of these bodies.

4. Another example dates back to March 2009, when a convicted man was tortured as a way of punishing him for disobedience (His disobedience boiled down to using obscene language and damaging furniture). As a result, this inmate (Semenikin Andrei) was exposed to beating by several officers, after which was hospitalized with broken ribs and a skull fracture. Human rights activists submitted their requests to the Prosecutor-General's Office and Commissioner for Human Rights, and none of these offices responded.

5. Rarely do complaints of inmates against torture result in a full-fledged criminal investigation. As a rule, everything boils down to internal inspection, and complaints of inmates are announced to be ungrounded.

6. Inmates say they do not see any point to complain, since their complaints are not further investigated, and they become more convinced in the arbitrariness and impunity of officers.

They say they fear prosecution on the part of the administration, and that it is very difficult to prove cases of torture and the guilt of those who use torture (in some rare cases inmates are able to capture signs of torture or cruel treatment or ensure timely visits of public supervisory commissions). Inmates also complain about medical workers in their facilities who are indifferent and unwilling to act; they are medical workers who inmates may rely on in order to record signs of torture and other types of cruel treatment or torture.

7. The UN Special Rapporteur on Torture, after visiting Kazakhstan in May this year, concluded that "*de facto* there is no effective complaints mechanism."

8. In this regard, an effective mechanism for reviewing complaints by inmates and those in custody is a crucial measure of protecting inmates and detainees from any violation of their private liberty and dignity.

9. Inmates should enjoy the right of submitting confidential complaints to external bodies, as envisaged in the European and international norms (Standard Minimum Rules for the Treatment of Prisoners, European Prison Rules).

10. Every complaint should be reviewed without any delays. All responses to complaints should be well grounded, allowing the same motivated appeal if there is any further need to so.

11. When people do not know their rights, these rights may be violated. Therefore, when arriving at places of confinement, all inmates and detainees should be notified, in writing, about the rules of treating inmates, duties of inmates, rules of accessing information, submitting complaints, etc.

12. Therefore, violations of the right to freedom from torture that inmates and detainees should enjoy can be handled by creating a mechanism that would allow inmates and detainees to submit complaints against torture or cruel treatment freely, and provide for the effective and expeditious review of these complaints, as well as appropriate punishment of those who are guilty.

13. As we view it, a body investigating complaints against torture should be transparent in its work and independent from those agencies that have a propensity to use torture, even hypothetically.

14. Kazakhstan should make it clear whether this will be one body for all cases of torture used by government agencies, or cases of torture in places of confinement will be investigated separately. Most importantly, this body should be easily accessible, and let me stress once again, transparent in its work. Also, cases of torture that become known should result in punishing those who are involved.

ANNEX IV: INTRODUCTORY REMARKS FROM THE PLENNARY SESSION II: DEVELOPING AND APPLYING IN PRACTICE ALTERNATIVES TO IMPRISONMENT: THE EUROPEAN EXPERIENCE AND OUTSTANDING PRIORITIES FOR THE REPUBLIC OF KAZAKHSTAN

Speaker 1: ***Baroness Doctor Vivien Stern****, Senior Research Fellow, International Centre for Prison Studies, King's College, University of London, UK*

Developing and applying in practice alternatives to imprisonment: the European experience and outstanding priorities for the republic of Kazakhstan

It is a pleasure to be here in Kazakhstan. I have been visiting Kazakhstan since 1993 and I have been privileged to see many changes, many developments and I have always been impressed by the growth of the civil society movement in Kazakhstan. Civil society in Kazakhstan is very impressive, very well-organised and mature and very dedicated.

It was on my first visit to Kazakhstan in 1993 that I met Ninel Fokina and Zhemis Turmagambetova. 16 years later they are still working to support human rights and make Kazakhstan a better society, and Ninel is a great-grandmother. This dedicated and effective civil society is one of the great strengths of Kazakhstan.

Kazakhstan has also made considerable reforms in criminal justice, set an example to other countries in the region, and given them considerable support for example in dealing with the terrible epidemic of tuberculosis in prisons.

Now the topic for this session is "developing and applying in practice alternatives to imprisonment". Since the purpose of our seminar is to discuss human rights the first question we must ask is this: Does the introduction of alternatives to prison enhance and protect human rights? The answer to that question – so far – based on the European experience is not 'no' always. It is also not 'yes' always.

The answer is sometimes 'yes' and sometimes 'no'. The introduction of alternatives can certainly enhance human rights or it can lead to a reduction in human rights compliance. So I will say very briefly what we must be aware of, what we must think about when we try and find alternatives to prison, and how it can be that alternatives to prison do not increase human rights.

We must be careful for two reasons:

In many countries – England is an example – there are many alternatives to prison. We have bail for people who have been charged and are waiting for their trial. We have hostels for people who have been charged and are waiting for their trial and have no-where else to go. We have community service as a sanction - convicted people have to do work for the benefit of the community. We have supervision. We have electronic monitoring surveillance. We have orders for people to undertake treatment for drug addiction. We have a probation service

with 20,000 employees. But in the last six years the number of prisoners has gone up by twenty per cent.

So if alternatives are not used as alternatives to prison but are just used to give more punishments for less serious crimes than before and we have more of our fellow citizens under penal control that is not a good human rights development.

Secondly we must be aware of new developments in alternative penalties involving technology, involving electronic and satellite surveillance. Governments buy these systems from commercial companies. That is not good for human rights either. I hope my dear friends in the European Commission always consider carefully whether the money they are giving to help countries introduce alternatives to prison is being used in a way that enhances rather than threatens human rights.

But if we do it in a different way introducing alternatives to prison can enhance human rights. Deprivation of liberty is the most severe punishment available in all countries where the death penalty is not used. So we should reserve imprisonment for the most serious crimes and for other crimes we should use a less heavy penalty.

A representative from the General Prosecutor in our session this morning expressed this very well. Using prison less and using other penalties more is an important step in humanising the criminal code. That is very true.

It is certainly a human rights measure to use alternatives to pre-trial detention whenever we can. Prison conditions in pre-trial detention are often the worst. A pre-trial detainee has not been convicted and should only be detained when there is a really good reason such as the prevention of further crime or preventing interfering with witnesses.

Now how can we develop alternatives to a prison sentence so that they really act as alternatives rather than adding to the people under penal control? Well there is a good European example from Finland.

In Finland they decided to introduce unpaid work for the benefit of the community as an alternative to prison, and they decided it should be used as an alternative to a prison sentence of 8 months. In Finland that is quite a long sentence. To achieve this they made the law so that first of all the judge had to decide what was the right prison sentence for the crime. Then the judge had to convert any sentence of 8 months or less into community work if the convicted person agrees, can do the work and is not a long time recidivist. This has been quite successful in reducing prison sentences there.

How are these alternatives to be provided? Is it by a probation service or as in Scotland by criminal justice community service? And how is it to be organised?

There are many models in Europe. The model that will be most successful in human rights terms is the model that provides the best social reintegration. Here it is interesting to look at work that is being undertaken in Russia where an alternatives service is now being developed and the Russian Ministry of Justice has decided to place this service with the local administration in the regions – because that is where the resources are for the reintegration of prisoners and where the social problems can be solved – the housing, the health services, the access to education and work.

In Scotland too that is the system. The criminal justice community service is based in local government.

All over the world you see the same people in prison. Overwhelmingly the people in prison in Europe, as in Kazakhstan, are the same people – mostly poor, mostly in bad health, mostly mentally ill; the women have mostly had a life of violence and sexual abuse; the young people are the orphans, the street children and the products of the reformatories that do not reform.

For all these people alternatives to prison are needed and help from the society is needed. It is in that sense – for reasons of social justice - that we really need alternatives to prison. It is also good social policy and it makes societies safer.

*Speaker 3: **Ms. Galina Sudakova**, Director of the Baltic Training Centre, Professor of the Kazakh Academy of Labour and Social Relations, Associate Professor of the St. Petersburg State Institute of Psychology and Social Work, St. Petersburg, Russia*

Role of Social and Probation Services in General Social Crime Prevention

The notion of *crime prevention* is analyzed and studied by various sciences, such as law, sociology, pedagogy, psychology, and community service theory. Methods, technologies, and legal procedures forming a set of measures referred to as *crime prevention* are but different components of its applied, or practical, space. The general public in Russia and Kazakhstan, as well as government officials and professional practitioners, still hold firm stereotypical views on the very notion of *crime prevention*. The basis of this stereotype is rooted in the Soviet history of our countries. This factor, for the most part, determines the ongoing debates about the reforms on expanding crime prevention activities which are conducted both in Russia and Kazakhstan. It is worth mentioning that today it is the *police approach* that prevails in all crime prevention measures taken in our countries.

The prevention role of social services remains factually disregarded, as well as the study of their possibilities and expansion of their authority and areas of application. In Kazakhstan and Russia the issue of introducing a probation service is considered at the discussion level only, and in most cases, its status is viewed within the *police* structures. The issue of introducing a prohibition on the use of reconciliation procedures during preliminary investigation and its discussion by Kazakhstan's expert community cannot be called promising regarding the constructive development of restorative justice in the country. We are particularly concerned about the regulatory approach to the status of CTIARJs[36]. According to the draft law "On Amending Several Legislative Acts of the Republic of Kazakhstan on Strengthening the Grounds and Procedures for Detention of Citizens" these institutions remain under the jurisdiction of the Interior Ministry.

An increasing use of coercive treatment and its strengthening in the legislation are not good in terms of the psychological and social efficiency of this procedure. Expanding repressive measures in the area of preventing deviance and delinquency among adolescents (introducing

[36] Centers for Temporary Isolation, Adaptation and Rehabilitations of Juveniles (*Translator's note*)

a curfew for children and juveniles, compulsory drug testing, increasing drinking age to 21 years old, etc) do not seem to be efficient preventive measures either.

In our opinion, the measures of comprehensive social prevention implemented by social services of any ownership and working based on certain common state regulations and national standards may prove to be most effective. In the early 2009, Kazakhstan adopted a Law "On Social Services" that legally defines such notions as social service, community service, and social worker. Legally, the law leaves, quite logically, room for establishing a social services network of, importantly, any ownership, providing professional social services to a target group which has been traditionally supervised by probation services in European countries. Today, the *third sector* in Kazakhstan has accumulated a wealth of interesting experience working with this target group, which should be thoroughly studied, analyzed and developed by experts. No doubt, the issues of inter-agency coordination and legal authority of social services having access to such a difficult target group become more important. At this stage, a significant role can be played by developing social partnership of all institutions working on *crime prevention*.

In the context of my speech, I would like to voice the opinion of experts working in a joint Russian and Swiss project meant to introduce a social services system into the penal system. The diversity of opinions on social integration of offenders reflects the complexity of such a task as rehabilitating those who broke the law in society, and particularly if we think of many countries where social readiness to wait for and accept re-socializing offenders is becoming more and more dubious. Social integration of convicts gives rise to developing different opinions and sorting out diverse positions. Furthermore, the issue of integrating offenders raises many clashes of interests, which causes manipulation of statistics and theories.

Foreign researchers and practitioners pose the following question: What should the theory of integrating offenders be? Some researchers insist on keeping within the scope of such sciences as criminology, law, sociology, political science and psychology. For instance, the rehabilitation forecast is determined by criminal science experts, public tolerance resource – by sociologists and anthropologists, and the rights of convicts to assistance – by lawyers. Others provide evidence showing that preserving purely scientific approaches to rehabilitation directly affected the development of such an idea as bifurcation, which had a deleterious effect on carrying out rehabilitation activities.

Experts propose various ways of interdisciplinary combinations that would include different sciences and theories and be viewed as an alternative to the existing *many-voiced* approach to social integration. However, are such combinations always acceptable? An answer to this question can be considered within the model "volunteer-professional." The dilemma "punish or rehabilitate" exists within some approaches and is solved within other approaches. What is more important for rehabilitation, controlling or supporting convicts? Is it possible to find a balance between monitoring offenders and facilitating their integration? Not only do these questions determine two major rehabilitation strategies, *pro-penal* and *restorative*, each of which has its own negative aspects, but they also offer solutions on transcending the conflict between rehabilitation and punishment and neutralizing the two polarities. In order to rehabilitate convicts, it is important to know who implements these activities, a professional or a volunteer.

The professionalization of rehabilitation or, on the contrary, the use of society and microcommunity's resources to help convicts and to improve their environment become basic

ways of resolving these issues. A clinical model of integration is presented in the official position in regard to the execution of punishment in Italy: a convict should wish to change and participate in rehabilitation, and then he or she may be granted a number of rights. A social model is presented in the official definition of integration in Germany: "in the constitutional context, rehabilitation does not mean belief that every prisoner after undergoing rehabilitation will become improved or reformed, but the idea of re-socialization reflects a basic principle of the social state – the right of every citizen to basic freedoms and the means of ensuring thereof." In a number of countries, it is admitted that the use of alternative measures of punishment and early release depend on the social status of a convict – a convict with no family and no clear-cut means of availing himself or herself of his or her social rights is often denied early release. A convict who does not agree to take part in rehabilitation can also be denied the right to alternative forms of punishment or early release.
Orientation of supranational institutions towards alternative forms of punishment and towards minimization of application of deprivation of liberty (formalized in the 1990 Tokyo Rules) enables to connect difficulties in receiving early release by those who does not have sufficient possibilities for realization his or her social rights with discrimination. In particular, cases of denying early release on the basis of absence of guarantees of social rights realization are in contravention of articles 1.5, 1.4 (concerning application of early release at as early stages of imprisonment as possible) of the Tokyo rules. Thus, focusing exclusively on civil rights does not provide integration of convicts. But then again ensuring social rights of convicts does not guarantee their integration. So the concept of the "need of a convict" is transformed and built into the needs of a family and environment, because social rights relate to household rather than an individual.

Problems that became factors in the commitment of crimes relate to lifestyle of the community in which an offender lives. Social guarantees and human rights can constitute a uniform standard of securing rights. It is possible to talk that both human rights projects and social projects in the area of closed institutions are characterized by paternalism, though of a different kind. Human rights defenders think that they have monopoly on interpretation of what a human right is and social workers think that only they perfectly know the technology of aid and that it is impossible to transmit such a technology. That is why social projects tend to turn into something constantly acting – this is welcomed by the colony and often by socially oriented NPOs themselves (NGOs – in Kazakhstan). Social projects need to provide the balance between *universalization* of suggested methods and preservation of space for individualization and modification of suggested methods of aid. So projects for improving monitoring of the methods application and first of all of the methods that imply change of organizational design of closed institutions become actual lines of project activity for socially oriented organizations (introduction of case-work, case-management, family-centered services and visiting service; interdepartmental teams).

The general task for human rights projects and social projects is the development of an agreement on concerted actions in the area of *deinstitualization*. Cooperation between social and human rights movements can be aimed at a gradual introduction of rights of the third generation. An idea of the development of cooperation between human rights and social organizations can be realized in joint research; "exchange" of employees by organizations which could try other position and role "in action"; joint workshops and discussion groups aimed at the evaluation of projects within each of the groups of organizations.

Cooperation between social organizations of human rights and social orientation seems to be actual because of two reasons: first, *deinstitualization* became quite a real reform and a

concerted effort of all participants in the process is important; second, both in Russia and Kazakhstan there are quite a lot of organizations which have not taken a decision on their orientation and have not sold a dilemma – "social rights or civil freedoms". So dealing with such organizations can be considered as a separate line the of project activity. In other words, how we can make these organizations take a decision on their orientation. Amalgamation of social and human rights projects on the basis of understanding differences of positions and readiness to find areas of cooperation makes the issue of finding a niche in the community relevant for these hybrid and "lost" organizations. Contradiction between rehabilitation and punishment exists in some systems of social services and of criminal justice and this contradiction is solved in other systems. If justice in regards to the underage is built into the general logic of the criminal justice and the system of social assistance, the contradiction can be solved. Otherwise, it is impossible to expect the resolution of the contradiction between rehabilitation and punishment. The wide distribution of information concerning the beating of a police psychologist by juveniles in the Pavlodar CTIARJ can be regarded as a pursuit by journalists of "hot" cases connected with hostility and violence. But also it can be considered as a tendentious information campaign aimed at the support of "punitive" measures in the RK legislation in question.

It should be noted that at the present the Russian juvenile justice is separated both from the criminal justice and social assistance – its embedding in both systems should be understood in the context of all defects in the criminal justice and social sphere because, basically, there is no place which the juvenile justice can be built into. I think that this thesis is also to some degree actual for the Kazakhstan juvenile justice.
The strategic line for the development of the domestic practice of assistance for the underage should be considered not so much as the introduction of new institutions but as activation and transformation of already functioning services and institutions.

There is no doubt in the importance of social projects aimed at the applied research of the following questions: approaches to the description and understanding of problems of convicts (for example, when the problem definition becomes a risk of separation of convicts from society); management of rehabilitation (for example, where there is variety of programs and strategies; or in a situation of crisis of services that perform probation functions); economic validity of rehabilitation programs (criteria of evaluation of the economic validity of rehabilitation programs; problem of variation of criteria depending on the organization, including application of methods of cost-benefits analysis for calculation of short-term and long-term effects of projects); social marketing of rehabilitation programs and criminal justice for the underage (how to optimize the society's attitude towards the rehabilitation of convicts); introduction of results of modern studies in the work of specialists. Legal issues relating to the creation of an alternative punishment system and juvenile justice, as well as the future of CTIARJs, are centered on a single social problem of *crime prevention*, safety of the citizens of the country and increasing quality of life for all categories of the public.

ANNEX V: AGENDA

SUNDAY, 28 JUNE 2009

All day Arrival of participants

18.30 Welcome cocktail hosted by the European Commission

MONDAY, 29 JUNE 2009
DAY 1

09.00 - 09.30 Registration of participants

PLENARY SESSION: THE OPENING
ALMATY ROOM

09.30 - 09.40 Welcoming speech by **H.E. Ambassador Bedřich Kopecký**, Embassy of the Czech Republic in the Republic of Kazakhstan, on behalf of the EU Presidency

09.40 - 09.50 Welcoming speech by **H.E. Ambassador Norbert Jousten**, Head of the Delegation of the European Commission to the Republic of Kazakhstan

09.50 - 10.20 COFFEE-BREAK

10.20 - 12.30 **PLENARY SESSION: LEGISLATIVE REGULATION OF THE ADMINISTRATIVE RESPONSIBILITY**
ALMATY ROOM

Issues that could be discussed:
- Key directions of reforming legislation on administrative responsibility in the Republic of Kazakhstan
- Fair trial guarantees and administrative arrest
- Judicial oversight of legality and reasons for any type of arrest and detention
- Administrative detention as a type of administrative punishment
- Relationship between administrative responsibility and administrative justice institutions

Speaker 1: Professor Alan Page, Dean of the School of Law, Dundee Law School, UK
Speaker 2: Professor Leonid Golovko, Faculty of Law, Moscow State University, Russia
Speaker 3: Mr. Olexandr Banchuk, Director of Criminal and Administrative Justice Projects, Centre of Political and Legal Reforms, Ukraine

Speaker 4: Ms. Zhemis Turmagambetova, Executive Director, Public Foundation "Charter for Human Rights", Kazakhstan

12.30 - 14.00 LUNCH

14.00 - 17.30 DISCUSSION IN TWO PARALLEL WORKSHOPS

MONDAY, 29 JUNE 2009
DAY 1

WORKSHOP I: JUDICIAL SYSTEM
ALMATY ROOM

SESSION 1: INDEPENDENCE OF THE JUDICIARY AND STATUS OF JUDGES

Issues that could be discussed:
Legal framework and practical challenges in ensuring independence of judges
Separation of powers and check and balances
Selection and appointment of Judges – procedures and safeguards to ensure selection of the most qualified candidates for the judicial profession
Judicial tenure, promotion, and remuneration as means to ensure independence
Case assignment procedures – practices that foster greater independence and public confidence in justice administration
Impartiality of judges and procedure of recusal or challenge of a judge
Complaint mechanisms for judicial misconduct, review, and investigation of complaints
The role of the judicial self-government in ensuring integrity

14.00 - 14.30 Introductory remarks by:
Speaker 1: Professor Tania Groppi, Research Centre for European and Comparative Public Law, Department of Economic Law, University of Siena, Italy
Speaker 2: Mr. Lucian Mihai, Member of the Venice Commission of the Council of Europe, Romania
Speaker 3: Mr. Daniyar Kanafin, Defense Attorney, Member of the Presidium of the Almaty City Collegium of Advocates, Kazakhstan

14.30 – 15.20 Discussion

15.20 – 15.40 Formulation of recommendations

15.40 - 16.00 COFFEE-BREAK

SESSION 2: EFFICIENCY OF COURTS

Issues that could be discussed:
Trial within reasonable time
Accelerated court proceedings and plea bargaining: pros and cons
Judicial oversight of surveillance and investigative measures
Compliance with fair trial guarantees relating to the right to an interpreter, free legal aid during trial, public pronouncement of a judgment, etc
Trials in absentia
The use of anonymous witnesses and their testimonies during trial

Recent changes in the organization of the judicial system of the Republic of Kazakhstan
Role of the court in investigating allegations of ill-treatment of participants of the criminal proceedings during pre-trial stages
Exclusion during trial proceedings of evidence obtained through torture or the use of other illegal methods
Direct application of international treaties by Courts
Practice of taking into account jurisprudence of relevant UN treaty bodies when deciding on cases
Public access to court hearings, court information and documents
Material conditions of courts conducive to proper administration of justice

16.00 – 16.20 Introductory remarks by:
Speaker 1: Mr. Ignazio Patrone, Deputy General Prosecutor of the Italian Supreme Court, Italy
Speaker 2: **Mr. Jiri Kopal,** Chair, League or Human Rights, Czech Republic and Deputy Secretary General, International Federation for Human Rights (FIDH), France
Speaker 3: Mr. Alexander Rozentsvaig, Defense Attorney, Member of the Presidium of the Almaty City Collegium of Advocates, Kazakhstan

16.20 – 17.10 Discussion

17.10 – 17.30 Formulation of recommendations

17.30 – 17.40 Wrap up of the first day

19.00 - 22.00 DINNER hosted by the European Commission

TUESDAY, 30 JUNE 2009
DAY 2

WORKSHOP I: JUDICIAL SYSTEM
ALMATY ROOM

SESSION 3: JURY TRIALS: PRACTICAL IMPLEMENTATION AND FOLLOW UP

Issues that could be discussed:
Results of monitoring of jury trials in the Republic of Kazakhstan
Forming of lists of potential jurors: law and practice
Selection of jurors: practical challenges
Specificities of the criminal proceedings during jury trials
Other issues pertaining to improvement of jury trials in the Republic of Kazakhstan

09.00 – 09.20 Introductory remarks by:
Speaker 1: Mr. Fernando Piernavieja Niembro, President of the Council's of Bars and Law Societies of Europe (CCBE), Access to Justice Committee, Human Rights and Criminal Law Committee' member, teacher of Criminal Procedure at the Master on Advocacy of Malaga's University and Bar Association, Spain

Speaker 2: Ms. Tatyana Zinovich, Independent Expert, Project Coordinator of the OSCE/ODIHR Project on Jury Trials Monitoring in the Republic of Kazakhstan (2007-2008), Kazakhstan

09.20-10.40 Discussion

10.40 – 11.00 Formulation of recommendations

11.00 - 11.20 COFFEE-BREAK

SESSION 4: IMPLEMENTATION OF COURT DECISIONS

Issues that could be discussed:
Legal procedure for implementation of court decisions
Timeliness and effectiveness of implementation
Sufficient funding of activities of judicial court implementers
Legal redress in case of delays in implementation of court decisions
Implementation of court decisions through a private scheme

11.20 – 11.40 Introductory remarks by:
Speaker 1: Mr. Anton Burkov, Cambridge University
Speaker 2: Mr. Salimzhan Mussin, Defense Attorney, Member of the Presidium of the Almaty City Collegium of Advocates, Kazakhstan

11.40 – 12.20 Discussion

12.20 - 12.30 Formulation of recommendations

12.30 - 14.00 LUNCH

PLENARY SESSION: ALMATY ROOM
DEVELOPING AND APPLYING IN PRACTICE ALTERNATIVES TO IMPRISONMENT: THE EUROPEAN EXPERIENCE AND OUTSTANDING PRIORITIES FOR THE REPUBLIC OF KAZAKHSTAN

Issues that could be discussed:
Alternative punishments: legal regulation, scope and practical application
Societal benefits and comparative advantages of alternatives to imprisonment: European practice
Judicial practice of imposition of alternative punishments in Kazakhstan
Implementation of alternative punishments: a need to establish a probation service
Alternatives to criminal prosecution in the Republic of Kazakhstan. Establishment of the mediation service

14.00 – 14.20 Introductory remarks by:
Speaker 1: Baroness Doctor Vivien Stern, Senior Research Fellow, International Centre for Prison Studies, King's College, University of London, UK
Speaker 2: Ms. Vera Tkachenko, Director, Legal Policy Research Centre, Kazakhstan
"Kazakhstan practice of application of punishments that do not involve deprivation of liberty"

Speaker 3: Professor Galina Sudakova, Director of the Baltic Training Center, Professor at St. Petersburg's State Institute of Social Work, Professor of Kazakh Academy of Labour and Social Relations, Russia

14.20 – 15.10 Discussion

15.10 – 15.30 Formulation of recommendations

15.30 – 15.50 COFFEE-BREAK

15.50 – 17.00 Reports from working sessions and adoption of recommendations

17.00 - 17.30 Wrap up, closing remarks

MONDAY, 29 JUNE 2009
DAY 1

WORKSHOP II: CONDITIONS OF DETENTION
ABLAI KHAN ROOM

SESSION 1: LEGAL FRAMEWORK FOR PROTECTION AND PROMOTION OF PRISONERS' RIGHTS: INTERNATIONAL COOPERATION AND BRINGING NATIONAL LAWS AND PRACTICE IN LINE WITH INTERNATIONAL STANDARDS

Issues that could be discussed:
International standards on the legal status of prisoners
National law and practice
Ongoing reforms and future challenges
Assistance of international organizations

14.00 – 14.30 Introductory remarks by:
Speaker 1: Baroness Doctor Vivien Stern, Senior Research Fellow, International Centre for Prison Studies, King's College, University of London, UK
Speaker 2: Ms. Zhemis Turmagambetova*,* Executive Director, Public Foundation "Charter for Human Rights", Kazakhstan

14.30 – 15.20 Discussion

15.20 – 15.40 Formulation of recommendations

15.40 - 16.00 COFFEE-BREAK

SESSION 2: ESTABLISHING OF A NATIONAL PREVENTIVE MECHANISM (NPM) UNDER THE UN OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE (UN OPCAT) AND CIVIL SOCIETY'S ACCESS TO ALL PLACES OF DETENTION

Issues that could be discussed:
Importance of civil society monitoring of places of detention

Monitoring of police cells and psychiatric hospitals: institutionalization of such practice
Legal regulation of public monitoring
Creation of the NPM: role of the Ombudsman
Importance of civil society's input into the work of the NPM

16.00 – 16.30 Introductory remarks by:
Speaker 1: Mr. Zbigniew Lasocik, International Commission of Jurists, Polish Section, Member of the UN SPT under OPCAT, Poland
Speaker 2: Ms. Anara Ibrayeva, Director of Astana Branch, Kazakhstan International Bureau for Human Rights and Rule of Law, PhD, Kazakhstan
Speaker 3: Ms. Svetlana Kovlyagina, Chair of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions of Pavlodar Region, Chair of Public Foundation "Human Rights Monitoring Commission", Kazakhstan

16.30 – 17.10 Discussion

17.10 – 17.30 Formulation of recommendations

17.30 – 17.40 Wrap up of the first day

19.00 - 22.00 DINNER hosted by the European Commission

TUESDAY, 30 JUNE 2009
DAY 2

WORKSHOP II: CONDITIONS OF DETENTION
ABYLAI KHAN ROOM

SESSION 3: FROM DEATH PENALTY TO FIXED SENTENCES: IMPROVEMENT OF THE DETENTION'S CONDITIONS FOR LONG-TERM SENTENCED DETAINEES

Issues that could be discussed:
Conditions of detention of long-term sentenced detainees
Legal safeguards for decrease of sentences
Procedure for early conditional release
Prospects for ratification of the UN Second Option Protocol to the ICCPR, aiming at the abolition of the death penalty

09.00 – 09.20 Introductory remarks by:
Speaker 1: Dr. Carmen Thiele, Faculty of Law, Europa-Universitaet Viadrina Frankfurt (Oder), Germany
Speaker 2: Dr. Georgi Bankov, Coordinator "Closed institutions programme", Bulgarian Helsinki Committee, Bulgaria "Monitoring and evaluating of detention conditions"
Speaker 3: Ms. Anastasiya Knaus, Deputy Director of Kostanai Branch Office, «Kazakhstan International Bureau of Human Rights and Rule of Law», Chair of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions of Kostanai Region, Kazakhstan

09.20-10.40 Discussion

10.40 – 11.00 Formulation of recommendations

11.00 - 11.20 COFFEE-BREAK

SESSION 4: HUMANIZATION OF DETENTION CONDITIONS AND EFFECTIVENESS OF COMPLAINT MECHANISMS AGAINST DETENTION CONDITIONS AND ILL-TREATMENT

Issues that could be discussed:
Applicable international standards on human conditions of detention
Recent and ongoing legal reforms on humanization of detention conditions
Detention conditions and complaint avenues for detainees
Impartiality and independence of complaint review bodies
Redress in case of complaints of ill-treatment in detention
Status of the body authorized to investigate torture complaints

11.20 – 11.50 Introductory remarks by:
Speaker 1: Mr. Nikhil Roy, Programme Development Director, Penal Reform International (PRI), UK
Speaker 2: Mr. Kuat Rakhimberdin, Dean of the Law Faculty, East-Kazakhstan State University, Kazakhstan
Speaker 3: Ms. Monika Platek, Professor of Law, Law Faculty, Warsaw University
Speaker 4: Ms. Tatiana Chernobil, Associate Legal Officer, Open Society Justice Initiative, Kazakhstan

11.50 – 12.20 Discussion

12.20 - 12.30 Formulation of recommendations

12.30 - 14.00 LUNCH

PLENARY SESSION: ALMATY ROOM
DEVELOPING AND APPLYING IN PRACTICE ALTERNATIVES TO IMPRISONMENT: THE EUROPEAN EXPERIENCE AND OUTSTANDING PRIORITIES FOR THE REPUBLIC OF KAZAKHSTAN

Issues that could be discussed:
Alternative punishments: legal regulation, scope and practical application
Societal benefits and comparative advantages of alternatives to imprisonment: European practice
Judicial practice of imposition of alternative punishments in Kazakhstan
Implementation of alternative punishments: a need to establish a probation service
Alternatives to criminal prosecution in the Republic of Kazakhstan. Establishment of the mediation service

14.00 – 14.20 Introductory remarks by:
Speaker 1: Baroness Doctor Vivien Stern, Senior Research Fellow, International Centre for Prison Studies, King's College, University of London, UK

Speaker 2: Ms. Vera Tkachenko, Director, Legal Policy Research Centre, Kazakhstan
"Kazakhstan practice of application of punishments that do not involve deprivation of liberty"
Speaker 3: Professor Galina Sudakova, Director of the Baltic Training Center, Professor at St. Petersburg's State Institute of Social Work, Professor of Kazakh Academy of Labour and Social Relations, Russia

14.20 – 15.10 Discussion

15.10 – 15.30 Formulation of recommendations

15.30 – 15.50 COFFEE-BREAK

15.50 – 17.00 Reports from working sessions and adoption of recommendations

17.00 - 17.30 Wrap up, closing remarks

ANNEX VI: CONCEPT NOTE AND MODALITIES

BACKGROUND

In 2007, the European Union adopted a 'Strategy for a New Partnership' with Central Asia, aimed at developing further co-operation with the Central Asian region. One of the main objectives of this initiative is the promotion of human rights, rule of law, good governance and democratization in Central Asia through enhanced exchanges in civil society.
To this end, the European Commission is organising a series of annual Seminars on a variety of human rights issues, bringing together officials, non-governmental organizations and other civil society representatives. These Seminars will provide an opportunity to discuss international standards and best practices on human rights, and invite civil society to give their perspective on the current situation and challenges in the countries of the region, with a view to developing recommendations for governments.
In 2008, the European Union and Kazakhstan agreed to establish an annual human rights dialogue. On 15 October 2008, the first session of the dialogue took place in Astana. Both sides confirmed the importance of having an open, constructive and result-oriented human rights dialogue. A number of specific problems with regard to the human rights situation were discussed including the reforms of the judicial system, freedom of association and assembly, the freedom of expression and the media, freedom of thought and religion, and the rights of women and children. Furthermore, both sides agreed to hold a dedicated human rights Seminar between civil society representatives from Kazakhstan and the EU.

AIM OF THE SEMINAR

The aim of the civil society Seminar is to contribute to the human rights dialogue through open discussions which will help to enrich the official dialogue. The civil society Seminar will provide an opportunity for discussion between European and Kazakhstani civil society representatives, academics and government officials on human rights topics and on how to enhance the application of human rights.

The civil society Seminar on human rights is intended to:
allow academics and members of civil society through non-confrontational discussion to feed the agenda of the official dialogue with their views;
enhance the official human rights dialogue by creating a space for the European and Kazakhstani academic and NGO communities to have open and professional discussions at expert level in order to formulate recommendations for future reforms based on best practices and applicable international standards;
expose academics and civil society representatives to expert analysis on the areas where the use of international human rights standards and EU practices could be further promoted in Kazakhstan.

In relation to each specific issue identified in the agenda, discussions should draw on three strands:
Examination of international standards
Examination of current national law and practice
Examples of best practice / alternatives to current practice

STRUCTURE OF THE SEMINAR

The Seminar will consist of opening and closing plenary sessions, as well as two plenary sessions: one devoted to the issue of law on administrative responsibility and another one focusing on alternatives to imprisonment.

Between these two joint plenary sessions all participants will be divided in two workshops: on judicial system and conditions of detention.

Participants are encouraged to register in one of the workshops already in advance of the Seminar by conveying their wishes to the Seminar's moderators. They are requested to contribute to all sessions of the assigned workshop.

MODALITIES OF THE DISCUSSION

Opening speeches

Each session of the Seminar will be opened by one of the two moderators, followed by short introductory speeches of the European and Kazakhstani experts identified on the agenda. European speakers are invited to briefly introduce the European standards (main sources of inspiration, refer to organizations/institutions/NGOs that can be used as experts, etc.) and Kazakhstani speakers are suggested to give a short overview of the situation in the country in a given area.

Each introductory speech should not exceed 10 minutes and should highlight best practices and recommendations for reform. Written versions of the speeches will be made available to the participants on USB sticks, both in Russian and English languages.

Interventions of participants

Following the introductory speeches, the floor will be open for discussion among the participants who are encouraged to share their theoretical knowledge and practical experience that will help to formulate proposals for future action in the areas outlined in the agenda. A moderator will give the floor to the participants when seeing a raised hand.

The intention is to develop a free-flowing discussion, therefore the participants are asked to refrain from lengthy remarks and reading out prepared statements. They are, at the same time, encouraged to intervene during the Seminar as many times as they wish, however, limiting their statements to the specific issues at hand thereby contributing to a genuine discussion.

Interventions should provide ideas that may assist the Government of the Republic of Kazakhstan in bringing law and practice in line with applicable international standards and give direction of the cooperation between the European Union and the Republic of Kazakhstan on the intergovernmental (in particular, the European Union-Kazakhstan human rights dialogue) and the civil society level.

State officials and other observers are expected to give priority to interventions of civil society representatives. However, when appropriate and so requested, the moderators will give the floor to the observers.

Adoption of recommendations

Participants are kindly requested during their interventions to suggest conclusions and concrete recommendations. At the end of each session there will be time allocated for the participants to agree on the submitted recommendations.
Adopted wording of the recommendations will be presented during the closing plenary session by the moderators. Participants will then have a last opportunity to make comments and propose corrections. Final recommendations will be submitted to the EU and Kazakhstani officials in view of the official dialogue on human rights which will take place in the second half of 2009. They will also be included in a final report to be produced after the Seminar.

The role of the moderators is to ensure that the core issues have been discussed and that recommendations have been made. Two assigned note-takers will keep a record of the discussions.

Advance submission of written recommendations

Participants can submit concise written recommendations before the Seminar by sending them to one of the moderators. Written recommendations will be taken into account when preparing moderators' reports to the plenary session at the end of the Seminar.

Display table for information materials

All participants may bring with them background materials that they wish to distribute to the participants of the Seminar. A display table will be made available in the lobby in front of the Seminar rooms.

ORGANISATION

The event is organised by the European Commission.

PARTICIPANTS

Between 60 and 65 participants are expected, including representatives of the Kazakhstani authorities, experts on human rights, representatives of the legal profession, academics, representatives of non-governmental organisations and other civil society actors from Kazakhstan and the European countries, representatives of international organisations and the EU institutions.

REGISTRATION

The registration for all participants will begin in the morning of 29 June 2009.

LANGUAGES

The Seminar will be held in the Russian, Kazakh and English languages. Simultaneous interpretation will be provided for all sessions.

MEALS

A Welcome Networking Cocktail will be organized for all participants on Sunday, 28 June at 18.30 in the Hotel "InterContinental Almaty".
On behalf of the EU, one dinner will be offered for all the guests at the end of the first day of the Seminar on Monday, 29 June.
Two lunches will be organized for all participants as well as coffee breaks during the Seminar days.

WELCOME DESK

A Welcome Desk will be available during both days of the seminar at the entrance to the seminar venue from 09:00 to 17:30 to register the participants, disseminate the information packs with all relevant materials and respond to the participants' queries.

WORKING HOURS OF THE SEMINAR

The seminar will take place in the Almaty and Abylai Khan meeting rooms.
The working hours are as follows:

Monday, 29 June: Registration of Participants 09:00 - 09:30
Seminar 09:30 - 17:40
Tuesday, 30 June: Seminar 09:00 - 17:30

ANNEX VII: LIST OF ATTENDANCE

CIVIL SOCIETY REPRESENTATIVES FROM THE REPUBLIC OF KAZAKHTAN			
NOT REGISTERED FOR ANY SPECIFIC WORKSHOP			
1.	Serik AIDOSSOV	Director, Sociological Resource Centre	serik1@rambler.ru
2.	Zauresh BATTALOVA	President of Public Foundation «Fund of Development of Parliamentarizm in Kazakhstan»	z.battalova@mail.ru
3.	Tatiana CHERNOBIL	Associate Legal Officer, Open Society Justice Initiative	tchernobil@justiceinitiative.org
4.	Ivaneta DOBICHINA	Director of the Freedom House in Kazakhstan	ivadobichina@gmail.com
5.	Galina DYRDINA	Deputy Chief Editor of newspaper Public Opinion	galichka001@yandex.ru
6.	Anara DZHUMALIYEVA	Project Coordinator, Penal Reform International Representative Office in Central Asia	adzhumaliyeva@penalreform.org
7.	E. GABADUALINA	Editor, IWPR (Institute for War and Peace reporting)	
8.	Alexei PAK	Project Co-ordinator, Legal Policy Research Centre	apak@lprc.kz
9.	Vladimir VOEVOD	Journalist, newspaper «Almaty-Info»	almatainfo@mail.ru
10.	Nazgul YERGALIEVA	Independent Consultant	
11.	Raushan YESSERGEPOVA	Deputy Chief Editor, newspaper “Almaty-Info”	

WORKSHOP I: THE JUDICIAL SYSTEM			
1.	Gulnar BAIGAZINA	Defense Lawyer, Member of the Presidium of the Almaty City Collegium of Advocates	ukadvokat@mail.ru
2.	Zhanar BALGABAYEVA	Lawyer, Republican Public Foundation «Shanyrak»	erzakovna@mail.ru
3.	Yekaterina BOKHAN	Programme Manager, Republican Public Foundation "Community of Young Professionals"	Scorpion_bk@mail.ru
4.	Ninel FOKINA	Chair, Almaty Helsinki Committee	ninel.ahc@gmail.com
5.	Daniyar KANAFIN	Defense Attorney, Member of the Presidium of the Almaty City Collegium of Advocates, PhD	daniyar_kanafin@mail.ru
6.	Viktoriya KIM	Representative of the Human Rights Watch in Kazakhstan	kimv@hrw.org
7.	Asylbek KOZHAKHMETOV	Chair, Republican Public Organization "Shanyrak"	
8.	Elena MAMADNAZAROVA	Regional Representative, Norwegian Helsinki Committee	elena@nhc.no
9.	Salimzhan MUSSIN	Defense Attorney, Member of the Presidium of the Almaty City Collegium of Advocates	advokat_mussinsa@inbox.ru
10.	Serghei PEN	Karaganda Law Institute, PhD, police colonel	pen@02.kz
11.	Nurul RAKHIMBEK	Chair of the Board, Republican Public Foundation "Community of Young Professionals"	rnurul@hotmail.com
12.	Alexander ROZENTSVAIG	Defense Attorney, Member of the Presidium of the Almaty City Collegium of Advocates	abanat@mail.ru
13.	Gulnara SULEIMENOVA	General Director of the Law Firm «Vindex», PhD, Professor	narimans2@yandex.ru
14.	Bakhytzhan TOREGOZHINA	Head of Public Foundation «Ar.Rukh.Khak»	bakhytzhan@inbox.ru
15.	Y.VOITOVA	Acting Head, Republican	yliya_voitova@mail.ru

		Public Foundation "Community of Young Professionals"	
16.	Sergey UTKIN	Independent Lawyer	utkinkz@gmail.com
17.	Svetlana VITKOVSKAYA	Defense Attorney, Chair of the specialized juvenile justice legal clinic of the Almaty City Collegium of Advocates, President of the Public Association «Women-lawyers of Kazakhstan»	vitkovskaya@mail.ru
18.	Tatyana ZINOVICH	Independent Expert, Project Coordinator of the OSCE/ODIHR Project on Jury Trials Monitoring in the Republic of Kazakhstan (2007-2008)	tzinovich@mail.ru

WORKSHOP 2: CONDITIONS OF DETENTION			
1.	Youriy GUSSAKOV	Director of Karaganda Branch Office, «Kazakhstan International Bureau for Human Rights and Rule of Law»	ygussakov@gmail.com
2.	Anara IBRAYEVA	Director of Astana Branch Office, «Kazakhstan International Bureau for Human Rights and Rule of Law», PhD	aibrayeva@mail.ru
3.	Raikhan HOBDABERGENOVA	Member of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions of Shymkent City	
4.	Tatyana KISSILEVA	Acting Director of South-Kazakhstan Branch Office, «Kazakhstan International Bureau for Human Rights and Rule of Law»	ukokmb@mail.ru
5.	Anastasiya KNAUS	Deputy Director of Kostanai Branch Office, «Kazakhstan International Bureau for Human Rights and Rule of Law», Chair of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions of Kostanai Region	Anastasi007@mail.ru
6.	Svetlana KOVLYAGINA	Chair of Public Foundation «Human Rights Monitoring Commission», Chair of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions of Pavlodar Region,	kovlyagina@land.ru
7.	Kuat RAKHIMBERDIN	Dean of the Law Faculty, East-Kazakhstan State University, PhD	matai71@mail.ru
8.	Leila RAMAZANOVA	Lawyer on criminal cases, «Kazakhstan International Bureau for Human Rights and Rule of Law»	leyla@bureau.kz

9.	Rozlana TAUKINA	President of Human Rights Foundation «Journalists are in Danger», Chief Editor of newspaper «Public Opinion»	rozlana@mail.ru
10.	Vera TKACHENKO	Director of Legal Policy Research Centre	vtkachenko@lprc.kz
11.	Bakhyt TUMENOVA	President of Public Foundation "Aman-saulyk"	tumenova@bk.ru
12.	Zhemis TURMAGAMBETOVA	Executive Director, Public Foundation «Charter for Human Rights»	zhemis@chr.kz
13.	Gaidar UTESHEV	«Legal Reform» Programme Co-ordinator, Soros-Kazakhstan Foundation	guteshev@soros.kz
14.	Ardak ZHANABILOVA	Chair of the Public Oversight Commission on Monitoring Human Rights in Penitentiary Institutions in Almaty and Almaty region, President of Public Foundation «Sayugy»	ardak_ardak@mail.ru
15.	Marina ZHUCHKOVA	Lawyer of the Public Foundation «Luch Nadezhdy», Member of the Public Oversight Commission for Penitentiary Institutions in Akmolinskiy region	Lrubezhanskaya@yandex.ru
EUROPEAN CIVIL SOCIETY REPRESENTATIVES			
WORKSHOP I: THE JUDICIAL SYSTEM			
1.	Olexandr BANCHUK	Director of Criminal and Administrative Justice Projects, Centre of Political and Legal Reforms, Ukraine	banchuk@gmail.com
2.	Anton BURKOV	Cambridge Univertsiy, PhD	ab636@cam.ac.uk
3.	Massimo FRIGO	Associate Legal Officer, International Commission of Jurists, Switzerland	massimo.frigo@icj.org

4.	Leonid GOLOVKO	Professor of Department of Criminal Procedure, Justice and Prosecutorial Oversight, Law Faculty, PhD, Moscow State University, Russia	lvgolovko@yahoo.com
5.	Tania GROPPI	Professor, Research Centre for European and Comparative Public Law, Department of Economic Law, University of Siena, Italy	groppi@unisi.it
6.	Jiri KOPAL	Chair, League or Human Rights, Czech Republic and Deputy Secretary General, International Federation for Human Rights (FIDH), France	jkopal@llp.cz
7.	Lucian MIHAI	Member of the Venice Commission, former President of the Constitutional Court of Romania, Professor at the Faculty of Law of Bucharest, Romania	lucian.mihai@drept.unibuc.ro
8.	Alan PAGE	Dean of the School of Law, Dundee Law School, UK, Professor	a.c.page@dundee.ac.uk
9.	Ignazio PATRONE	Judge, Deputy General Prosecutor of the Italian Supreme Court	ignazio.patrone@giustizia.it
10.	Fernando PIERNAVIEJA NIEMBRO	President of the Council's of Bars and Law Societies of Europe (CCBE) Access to Justice Committee, Human Rights and Criminal	estudiojuridico@andaluciaglobal.com

		Law Committee member, teacher of Criminal Procedure at the Master on Advocacy of Malaga's University and Bar Association, Spain	
11.	Galina SUDAKOVA	Director of the Baltic Training center, professor at St. Petersburg's State Institute of Social Work, Professor of Kazakh Academy of Labour and Social Relations	treningcom@mail.ru

WORKSHOP II: CONDITIONS OF DETENTION			
1.	Georgi BANKOV	Bulgarian Helsinki Committee, Coordinator "Closed institutions programme"	bankov@gmail.com
2.	Maria EJCHART	Polish Helsinki Foundation for Human Rights	M.Ejchart@prawaczlowieka.pl
3.	Dadimos HAILE	Head, International Justice and Human Rights, Avocats Sans Frontières (ASF), Belgium	DHaile@asf.be
4.	Stefan KIRSCH	Dr. jur., lecturer at Philipps university in Marburg, Rechtsanwalt and Fachanwalt für Strafrecht / Frankfurt am Main, Germany	stefan.kirsch@hammpartner.de
5.	Zbigniew ASOCIK	International Commission of Jurists, Polish Section, Member of the UN SPT under OPCAT, Poland	zlasocik@uw.edu.pl
6.	Monika PLATEK	Professor of Law, Law Faculty, Warsaw University, Poland	platek@warman.com.pl
7.	Nikhil ROY	Programme Development Director, Penal Reform International	nroy@penalreform.org
8.	Vivien STERN	Baroness Doctor, Senior Research Fellow, International Centre for Prison Studies, King's College, University of London, United Kingdom	
9.	Carmen THIELE	Faculty of Law,	Thiele@euv-frankfurt-o.de

		Europa-Universitaet Viadrina Frankfurt (Oder)	
10.	Maisy WEICHERDING	Researcher on Central Asia, Amnesty International, UK	mweicher@amnesty.org
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1.	Miron ADRIAN	Romanian Embassy in the Republic of Kazakhstan	amb@romania.kz
2.	Michael EMERSON	Senior Research Fellow, Centre for European Policy Studies (CEPS)	michael.emerson@ceps.eu
3.	Michal GOLABEK	DG Relex, European Commission	Michal.GOLABEK@ec.europa.eu
4.	Norbert JOUSTEN	Head of the Delegation of the European Commission to the Republic of Kazakhstan	Norbert.Jousten@ec.europa.eu
5.	Bedřich KOPECKÝ	H.E. Ambassador, Embassy of the Czech Republic in the Republic of Kazakhstan, EU Presidency	astana@embassy.mzv.cz
6.	Maurits ter KUILE	Deputy Head of Mission, Embassy of the Netherlands in Astana	maurits-ter.kuile@minbuza.nl
7.	Alessandro LIAMINE	Attaché, Regional Political Affairs Adviser, Delegation of the European Commission to the Republic of Kazakhstan	Alessandro.Liamine@ec.europa.eu
8.	Sandrine LOECKX	EuropeAid, European Commission	Sandrine.LOECKX@ec.europa.eu
9.	Caroline MARTIN	Legal Officer at the	caroline.martin@coe.int

		Venice Commission, Council of Europe, Strasbourg/France	
10.	Pavel OLEYNIC	First Secretary of the Embassy of Poland in Kazakhstan	ambpol@poland.kz
11.	Bernard PAQUETEAU	Conseiller of the Embassy of France in Kazakhstan	Bernard.PAQUETEAU@diplomatie.gouv.fr
12.	Michael PAULY	First Secretary of the Embassy of Belgium in Kazakhstan	embassy.astana@diplobel.fed.be
13.	Hubert PETIT	EU Delegation	
14.	Svetlin SERGEENKOV	Political Officer, Delegation of the European Commission to the Republic of Kazakhstan	Svetlin.SERGEENKOV@ec.europa.e
REPRESENTATIVES OF THE STATE AUTHORITIES OF THE REPUBLIC OF KAZAKHSTAN			
1.	Abduahit ABDUALIYEV	Senior Prosecutor, Department of supervision over legality of implementation of punishment and rehabilitation, Office of the Prosecutor General of the Republic of Kazakhstan	
2.	Mugulsum AMIROVA	Head of Expert Unit, Ombudsman Office of the Republic of Kazakhstan	ombudsman_kz@mail.ru
3.	Didar ATANTAYEV	Head of Department on administration of criminal-executive inspections, Committee of criminal-executive system of the Ministry of Justice of the Republic of	

		Kazakhstan	
4.	Tlektes BARPIBAYEV	Chair of court of Almaty city	
5.	Nikolay BELORUKOV	Member of the Constitutional Council	belorukov@constcouncil.kz
6.	Kainzhamal BUKHBANOVA	Chief of Collegium of judges for criminal cases of court of Almaty city	
7.	Gulnara KHUANOVA	Deputy Head of International Collaborations Department, Office of the Prosecutor General of the Republic of Kazakhstan	
8.	Tokzhan KIREEVA	Chair of the Specialized Administrative Court of Ust-Kamenogorsk City	uka_adminsud@ukg.kz
9.	T. UNAIBAYEV	Deputy Head, OSCE Department of the Ministry of Foreign Affairs of the Republic of Kazakhstan	
10.	Abdrashid ZHUKENOV	Chief of Collegium of judges for criminal cases, Supreme Court of the Republic of Kazakhstan	
INTERNATIONAL ORGANIZATIONS			
1.	Parvina ABDUVAKHOBOVA	Project Assistant to the OSCE/ODIHR Rule of Law Co-ordinator for Central Asia	Parvina.Abduvakhobova@osce.org
2.	Damelya AITKHOZHINA	National Protection Officer, UNHCR, Almaty/Kazakhstan	AITKHOZH@unhcr.org
3.	Eugenia BENIGNI	Human Dimension Officer, OSCE	eugenia.benigni@osce.org

		Centre in Astana	
4.	Aigerim DUIMAGAMBETOVA	Junior Coordinator, EU-Central Asia Monitoring (EUCAM) project	aigerim.duimagambetova@ceps.eu
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1.	Aislu AKHMEDIYAROVA	Logistics Assistant	aislu.akhmediyarova@gmail.com
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4.	Michel IVOR	Event Co-ordinator	michelivor@gmail.com
5.	Murat KUZHEKEEV	Interpreter	kmurat_55@mail.ru
6.	Saniya LER	Note-taker	saniya.ospanova@gmail.com
7.	Timur NURPEISSOV	Interpreter	nurpeisovt@hotmail.com
8.	Larisa KHMADIYEVA	Interpreter	
9.	Véronique PLANÈS-BOISSAC	Note-taker	vero.planes@orange.fr
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11.	Natalya SEITMURATOVA	Seminar Moderator	natalya_seitmuratova@yahoo.com

ANNEX VIII: LIST OF DOCUMENTS DISTRIBUTED TO PARTICIPANTS ELECTRONICALLY AND IN HARD COPY

SEMINAR DOCUMENTS/ДОКУМЕНТЫ СЕМИНАРА

Agenda Программа	Eng, Ru, Kaz
List of Attendance Список участников	Eng, Ru, Kaz
Concept Note Концепция и процедурные правила	Eng, Ru, Kaz

INTRODUCTORY REMARKS/ВВОДНЫЕ ВЫСТУПЛЕНИЯ

Administrative Responsibility, Administrative Detention, Administrative Arrest: Conceptual Deformation of Notions in Kazakhstan's Legal System by Leonid Golovko «Концептуальная деформация категорий «административная ответственность», «административное задержание» и «административный арест» в правовой системе Республики Казахстан», Леонид Головко	Eng, Ru
Proceedings in Cases on Administrative Offences and Guarantees of Human Rights and Fundamental Freedoms, Olexander Banchuk «Производство в делах об административных правонарушениях и гарантии прав человека и основоположных свобод», Олександр Банчук	Eng, Ru
Independence of Judiciary and Status of Judges by Professor Tania Groppi «Независимость судебной системы и статус судей», Professor Tania Groppi	Eng, Ru
Results of monitoring of jury trials in the Republic of Kazakhstan by Tatyana Zinovich «Результаты мониторинга судебных разбирательств с участием присяжных заседателей в Республике Казахстан», Татьяна Зинович	Eng, Ru
Presentation on Being an NPM (OPCAT requirements) by Professor Zbigniew Lasocik Национальный Превентивный Механизм (Требования Факультативного протокола к Конвенции ООН против пыток), Professor Zbigniew Lasocik	Eng, Ru
«Система Комитета уголовно-исполнительной системы», Светлана Ковлягина «System of Penitentiary Committee of the Republic of Kazakhstan» by Svetlana Kovlyagina	Eng, Ru
Introductory remarks by Ignazio Patrone Вводное выступление, Ignazio Patrone	Eng, Ru
Introductory remarks by Fernando Piernavieja Niembro Вводное выступление, Fernando Piernavieja Niembro	Eng, Ru
Introductory remarks by PD Dr. Carmen Thiele Вводное выступление PD Dr. Carmen Thiele	Eng, Ru
Introductory remarks by Anara Ibrayeva Вводное выступление Анары Ибраевой	Eng, Ru
Introductory remarks by Salimzhan Mussin Вводное выступление Салимжана Мусина	Eng, Ru
Introductory remarks by Anastassiya Knaus Вводное выступление Анастасии Кнаус	Eng, Ru
Effectiveness of Presenting Complaints against Cruel Treatment in Places of Confinement by Tatiana Chernobil	Eng, Ru

«Эффективность механизма подачи жалоб на жестокие виды обращения в местах содержания под стражей или лишения свободы», Татьяна Чернобиль	
Domestic Courts and International HR Standards by Jiří Kopal «Национальные суды и международные стандарты прав человека», Джири Копаль	Eng, Ru
International Human Rights and Domestic Courts: Certain Aspects by Jiří Kopal «Некоторые аспекты работы международных судов по защите прав человека и национальных судов», Джири Копаль	Eng, Ru
Role of Social and Probation Services in General Social Crime Prevention by Galina Sudakova «Роль социальной службы и службы пробации в общесоциальной профилактике преступности», Галина Судакова	Eng, Ru
Penal System of Kazakhstan – Indicators of Unsolved Issues by Kuat Rakhimberdin «Уголовно-исполнительная система Казахстана – индикаторы нерешенных проблем», Куат Рахимбердин	Eng, Ru
Condition and Remedies for Humanization Prison and Pre-trial Conditions by Monika Platek Условия и средства для гуманизации условий содержания в пенитенциарных учреждениях и досудебных местах содержания под стражей, проф. Моника Платек	Eng, Ru

ANALYTICAL AND BACKGROUND DOCUMENTS ON JUDICIAL AND LEGAL REFORMS IN KAZAKHSTAN/АНАЛИТИЧЕСКИЕ И ДОПОЛНИТЕЛЬНЫЕ МАТЕРИАЛЫ О СУДЕБНОЙ И ПРАВОВОЙ РЕФОРМАХ В РЕСПУБЛИКЕ КАЗАХСТАН

Замечания к проекту Закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам закрепления оснований и порядка содержания граждан», ОФ «Хартия за права человека»	Ru
Предварительные комментарии по проекту Закона Республики Казахстан «О профилактике преступлений», ОФ «Хартия за права человека»	Ru
Административное и уголовно-процессуальное задержание в Республике Казахстан, ОФ «Хартия за права человека» Қазақстан Республикасындағы әкімшілік және қылмыстық іс жүргізуге сәйкес ұстау	Ru, Kaz
Обзор правового регулирования задержания и обеспечения прав задержанных в законодательстве Республики Казахстан с точки зрения международных стандартов, ОФ «Хартия за права человека»	Ru
Перспективы реформирования административного права и административной юстиции в Республике Казахстан, Центр исследования правовой политики	Ru
Перспективы развития административно-деликтного права (права административной ответственности) в Республике Казахстан, Центр исследования правовой политики	Ru
Аналитическая записка о перспективах совершенствования казахстанского общего и специального законодательства о профилактике правонарушений, Центр исследования правовой политики	Ru
Экспертное заключение на проект Закона Республики Казахстан «О профилактике правонарушений», Центр исследования правовой политики	Ru
Актуальные направления реформы уголовного судопроизводства в Республике Казахстан, Центр исследования правовой политики	Eng, Ru

Current Trends in Penal Reform in the Republic of Kazakhstan, Legal Policy Research Centre	
Ежегодник Центра исследования правовой политики 2008	Ru
Ежегодник Центра исследования правовой политики. Январь – Июнь 2009	Ru
The OSCE Chairmanship and Kazakhstan. Reform Commitments Remained Unfulfilled, Legal Policy Research Centre	Eng
Состояние демократии и верховенства права в свете предстоящего Председательства Республики Казахстан в ОБСЕ. Декабрь 2008	Ru
Recommendations of the International Conference «Prevention of Torture in the Republic of Kazakhstan: from Discussions to Practical Implementation» Рекомендации международной конференции «Предотвращение пыток в Республике Казахстан: от дискуссий к практической реализации»	Eng, Ru
Материалы международной конференции «Предотвращение пыток в Республике Казахстан: от дискуссий к практической реализации»	Ru
«Концепция и программа создания Национального превентивного механизма в Республике Казахстан», доклад на международной конференции «Предотвращение пыток в Республике Казахстан: от дискуссий к практической реализации» Евгения Жовтиса	Ru
Основные идеи по поводу соблюдения прав граждан при проведении оперативно-розыскной деятельности	Ru
Рекомендации круглого стола «Санкционирование прокуратурой содержания задержанных в приемниках-распределителях: проблемы и перспективы»	Ru
Memorandum on Legal Safeguards Against Application of Torture and Other Cruel, Inhuman or Degrading Treatment by the Law Enforcement Agencies in Kazakhstan by Nikolai Kovalev	Eng
«Существующие механизмы мониторинга мест лишения свободы в Казахстане и их соответствие стандартам ФПКПП», Центр исследования правовой политики	Ru
Инвентаризация мест содержания под стражей в Республике Казахстан в рамках Факультативного протокола к Конвенции против пыток. Обзорный документ. Центр исследования правовой политики	Ru
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INTERNATIONAL STANDARDS/МЕЖДУНАРОДНЫЕ СТАНДАРТЫ

International Covenant on Civil and Political Rights Международный пакт о гражданских и политических правах	Eng, Ru
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Конвенция против пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания	Eng, Ru
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Факультативный протокол к Конвенции против пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания	Eng, Ru

Standard Minimum Rules for the Treatment of Prisoners Минимальные стандартные правила обращения с заключенными	Eng, Ru
Basic Principles for the Treatment of Prisoners Основные принципы обращения с заключенными	Eng, Ru
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Свод принципов защиты всех лиц, подвергаемых задержанию или заключению в какой бы то ни было форме	Eng, Ru
United Nations Rules for the Protection of Juveniles Deprived of their Liberty Правила ООН, касающиеся защиты несовершеннолетних, лишенных свободы	Eng, Ru
Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Принципы медицинской этики, относящиеся к роли работников здравоохранения, в особенности врачей, в защите заключенных и задержанных лиц от пыток и других жестоких бесчеловечных, или унижающих достоинство видов обращения	Eng, Ru
Safeguards guaranteeing protection of the rights of those facing the death penalty Меры, гарантирующие защиту прав тех, кто приговорен к смертной казни	Eng, Ru
United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Минимальные стандартные правила ООН в отношении мер, не связанных с тюремным заключением (Токийские правила)	Eng, Ru
United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) Минимальные стандартные правила ООН, касающиеся отправления правосудия в отношении несовершеннолетних (Пекинские правила)	Eng, Ru
Basic Principles on the Independence of the Judiciary Основные принципы независимости судебных органов	Eng, Ru
Basic Principles on the Role of Lawyers Основные принципы, касающиеся роли юристов	Eng, Ru
Guidelines on the Role of Prosecutors Руководящие принципы, касающиеся роли лиц, осуществляющих судебное преследование	Eng, Ru
Istanbul Protocol on investigations torture allegations Стамбульский протокол. Руководство по эффективному расследованию и документированию пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания	Eng, Ru
Paris principles Принципы, касающиеся статуса национальных учреждений, занимающихся поощрением и защитой прав человека	Eng, Ru
The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights Сиракузские принципы толкования ограничений и отступлений от положений Международного пакта о гражданских и политических правах	Eng, Ru
Report of the Special Rapporteur on the Independence of judges and lawyers, Leandro Despouy, Mission to Kazakhstan, E/CN.4/2005/60.Add.2, 11 January 2005 Доклад Специального докладчика по вопросу о независимости судей и адвокатов г-на Леонардо Деспуи, Миссия в Казахстан,	Eng, Ru

E/CN.4/2005/60.Add.2, 11 января 2005	
Concluding Observations of the UN Committee Against Torture on Kazakhstan, A/56/44, paras. 121-129, May 17, 2001 Выводы и рекомендации Комитета ООН против пыток, Казахстан, A/56/44, paras. 121-129, 17 мая 2001 г.	Eng, Ru
Concluding Observations of the UN Committee Against Torture on Kazakhstan, CAT/C/KAZ/CO/2, 12 December 2008 Заключительные замечания Комитета против пыток, CAT/C/KAZ/CO/2 12 декабря 2008	Eng, Ru
UN Press Release. Expert on Torture Concludes Visit to Kazakhstan. 13 May 2009 Пресс-релиз ООН. Специальный докладчик ООН завершает поездку по Казахстану, 13 мая 2009 г.	Eng, Ru
Подборка замечаний общего порядка и общих рекомендаций, принятых договорными органами ООН по правам человека	Ru
Замечание общего порядка № 32. Статья 14: Равенство перед судами и трибуналами и право каждого на справедливое судебное разбирательство	Ru

EUROPEAN UNION DOCUMENTS/ДОКУМЕНТЫ ЕВРОПЕЙСКОГО СОЮЗА

Guidelines on Human Rights Defenders Обеспечение защиты – Руководство ЕС по проблеме защитников прав человека	Eng, Ru
Guidelines on torture and other cruel, inhuman or degrading treatment Руководство по политике ЕС в отношении третьих стран по поводу пыток и иного грубого, негуманного или унижающего человеческое достоинство обращения или наказания	Eng, Ru

COUNCIL OF EUROPE DOCUMENTS/ДОКУМЕНТЫ СОВЕТА ЕВРОПЫ

Recommendation REC(2003)23 of the CoE' Committee of Ministers on Management by Prison Administrations on Life-Sentence and Other Long-Term PrisonersРекомендация Rec(2003)23 Комитета министров Совета Европы государствам-членам и тюремным администрациям по управлению заключенными, приговоренными к пожизненному заключению, и другими заключенными с длительными сроками тюремного заключения	Eng, Ru
Recommendation Rec(2006)2 of the CoE' Committee of Ministers to member states on the European Prison Rules Европейские пенитенциарные правила, Рекомендация REC(2006)2 Комитета министров Совета Европы государствам-членам	Eng, Ru
Recommendation Rec(2003)22 of the CoE' Committee of Ministers to member states on Conditional Release (Parole) Рекомендация Rec(2003)22 Комитета министров Совета Европы государствам-членам об условно-досрочном освобождении	Eng, Ru
Recommendation Rec(2000)19 of the CoE' Committee of Ministers to member states on the Role of Public Prosecution in the Criminal Justice System	Eng

OSCE DOCUMENTS/ДОКУМЕНТЫ ОБСЕ

Отчет БДИПЧ ОБСЕ, Результаты мониторинга судебных разбирательств в Республике Казахстан, 2005-2006	Ru, Eng

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Отчет по результатам Мониторинга судопроизводства с участием присяжных заседателей в Республике Казахстан в 2007 г.	Ru
OSCE Commitments Relating to The Right to a Fair Trial Обязательства ОБСЕ, связанные с правом на справедливое судебное разбирательство	Eng, Ru

STATE PROGRAMMES AND DRAFT LAWS/ГОСУДАРСТВЕННЫЕ ПРОГРАММЫ И ПРОЕКТЫ ЗАКОНОВ

Resolution of the Government of the Republic of Kazakhstan on On Adoption of the Action Plan for Implementation of the State Programme "Path to Europe 2009-2011", 4 October 2008, No 916 Постановление Правительства Республики Казахстан от 4 октября 2008 года № 916 «Об утверждении Плана мероприятий по реализации Государственной программы «Путь в Европу» на 2009-2011 годы»	Eng, Ru
State Programme “The Pass to Europe” 2009 - 2011 Указ Президента Республики Казахстан от 29 августа 2008 года N 653 «О Государственной программе «Путь в Европу» на 2009-2011 годы»	Eng, Ru
Кодекс Республики Казахстан об административных правонарушениях (новая редакция) от 19 июня 2009 г.	Ru
Административный процессуальный кодекс Республики Казахстан (проект от 19 июня 2009 г.)	Ru
Закон Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам административного процессуального законодательства»	Ru
Сравнительная таблица к проекту Закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам административного процессуального законодательства»	Ru
Проект Закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам закрепления оснований и порядка содержания граждан»	Ru

RESOURCE MATERIALS/ДОПОЛНИТЕЛЬНЫЕ МАТЕРИАЛЫ

Amnesty International Fair Trial Manual Руководство Международной амнистии по справедливому судопроизводству	Eng, Ru
Гражданское общество и Национальные Превентивные Механизмы по Факультативному Протоколу Конвенции против Пыток, Ассоциация против пыток	Ru
Руководство «Учреждение и назначение национальных превентивных механизмов», Ассоциация против пыток	Ru
Руководство Interrights для юристов. Право на справедливый суд в рамках Европейской конвенции о защите прав человека (статья 6)	Ru
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«Проблемы материального и социального обеспечений судей», Гульнар Сулейменова	Ru
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Human Rights Concerns in Central Asia, May 2009, Briefing prepared by Amnesty International for the EU Troika	Eng
Human Right Watch Kazakhstan Country Summary 2009 Страновой обзор Хьюман Райтс Вотч, Казахстан 2009	Eng, Ru
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Positive obligations to ensure the human rights of prisoners (Safety, healthcare, conjugal visits and the possibility of founding a family under the ICCPR, the ECHR, the ACHR and the AfChHPR) by Piet Hein van Kempen	Eng
Avocats sans Frontieres. Annual report 2007	Eng
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PRI ROUND TABLE MATERIALS ON NPM IN KAZAKHSTAN/МАТЕРИАЛЫ КРУГЛОГО СТОЛА PRI О НПМ В КАЗАХСТАНЕ

Национальный превентивный механизм Республики Казахстан - оценка существующих механизмов в свете обязательств, предусмотренных Факультативным Протоколом к Конвенции ООН против пыток, Др. Элина Штейнерте	Ru
Improving Conditions of Detention. The Role of Prevention and Monitoring/Complaints Mechanisms by Nikhil Roy	Eng
Общественный контроль психиатрических больниц: законодательство и практика, Райхан Хобдабергенова	Ru
О результатах мониторинга в приемниках-распределителях и специальных приемниках, Инара Ибраева	Ru
Общественный контроль пенитенциарных учреждений в Казахстане (2004-2009): основные результаты и сложности, Ардак Жанабилова	Ru
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Опыт Кыргызстана в продвижении Национально Превентивного Механизма, Правозащитный Центр «Граждане против коррупции»	Ru