



ARTICLE 19 and PEN International Joint Submission to the UN Universal Periodic Review of Kazakhstan

***For consideration at the 20th session of the UN working group
in October - November 2014***

15 March 2014

1. ARTICLE 19 and PEN International welcome the opportunity to contribute to the second cycle of the Universal Periodic Review (UPR) process of Kazakhstan. The submission focuses on Kazakhstan's compliance with its international human rights obligations in respect to freedom of expression.

Executive Summary

2. In 2010, states made 16 recommendations to the Government of Kazakhstan on the necessary steps to bring its national legislation and practice into line with international freedom of expression obligations. Regrettably the Government has not made any genuine efforts to implement the fifteen recommendations it accepted.
3. Instead the authorities have persecuted people who are critical of the regime and imposed further restrictions on print, electronic and Internet media.
4. On 16 December 2011 law enforcement officers used excessive and lethal force against unarmed and mostly peaceful civilians exercising their right to protest in the town of Zhanaozen, resulting in the deaths of at least 16 people. There has been no independent or effective investigation into the events, nor into allegations of the systematic use of torture and other ill-treatment of the scores of people detained following the events. In their aftermath, the Zhanaozen events were used to justify the imprisonment of prominent outspoken activists, including opposition leaders, and to close newspapers, electronic and Internet media critical of the Government.
5. This submission examines the following 3 key freedom of expression issues:
 - Legislative restrictions to freedom of expression, in particular the failure to decriminalise defamation and insult;
 - Attacks on freedom of expression, including politically motivated arrests and imprisonment;
 - Restrictions on freedom of expression online.

Legislative restrictions to freedom of expression

Criminal defamation

6. Eight recommendations from Kazakhstan's UPR included a call for the decriminalization of defamation and insult. All eight recommendations from Australia; Canada; Czech Republic; Finland; Spain; Netherlands; United Kingdom of Great Britain; and United States of America were accepted by the Government.

7. The Criminal Code of Kazakhstan currently prohibits defamation (Article 129) and insult (Article 130). In addition, there are specific provisions to protect the First President, the current President, Parliamentarians, public officials, participants in court proceedings, and members of the judiciary (Articles 317 - 320, and 342 - 343). Sanctions include fines, correctional labour, restrictions on free movement (prohibition on visiting places of public amusement, from leaving your house after 9pm, or leaving the city without police consent) and deprivation of liberty.
8. During the period under review at least two journalists, Valeriy Surganov and Sergey Bukatov were sentenced to various terms of restrictions on free movement, while Editor-in-Chief of *Adilet* newspaper, Kuanyshbek Botabekov, received a suspended custodial sentence.
9. On 19 October 2011, Kuanyshbek Botabekov received a one and a half year suspended custodial sentence under Article 129 of the Criminal Code of Kazakhstan. The court also ordered Kuanyshbek Botabekov to pay 300,000 KZT (approx. EUR€1,500) in damages and to retract the publication. The private complaint was filed by the two brothers, Kenes and Bakitbek Nakipbekov, following the publication of articles entitled "*Mr. Kenes, which team do you play for?*" and "*Dear valued Mr. President*". In his articles, the journalist expressed suspicions that the brothers, who were both public officials, were involved in corrupt practices.
10. On 7 November 2011, another journalist, Valeriy Surganov, was convicted on similar charges by the Medeu District Court in Almaty and sentenced to "restriction of freedom" for 18 months. The court also ordered Surganov to pay 100,000 KZT (approx. EUR€500) in damages to the financial police officer in the Pavlodar region, Sandzhar Aliyev, and publish a retraction of the article, entitled "*Princelings of financial police. Part II*". The journalist allegedly disseminated discrediting information about Sandzhar Aliyev "which was known to be false and accused him of grave crimes such as kidnapping, assault and rape."
11. On 21 September 2012, the city court of Petropavlovsk launched criminal defamation proceedings against Sergey Bukatov, editor of the Information Agency Kazakh-Zerno, following a private complaint filed by the company Ak Bidai-terminal. The charge stemmed from nine articles published on www.kazakh-zerno.kz between 1 November 2011 and 9 April 2012 that covered the problems grain traders encounter while exporting grain via the seaport of Aktau. Information in all these publications was considered false, misleading and damaging the business reputation of the company. On 5 December 2012, Sergei Bukatov was found guilty of insult (Article 130, Criminal Code) and sentenced to 'restricted freedom' for one year.
12. The Criminal Code is currently undergoing revision and penalties for defamation and insult are likely to be increased in the Criminal Code reforms, demonstrative of broader crackdowns on freedom of expression through Kazakhstan's legislative framework.

Civil defamation

13. Three recommendations made by the Netherlands, United States of America, and Canada during the previous UPR regarded exorbitant and disproportionate awards in civil defamation cases. All were accepted by Kazakhstan. However, civil defamation and insult provisions (Articles 143 and 951 in the Civil Code) are still frequently used to harass and silence critical journalists and media outlets.
14. Article 143 provides individuals and legal entities with remedies when "information damages their honour, dignity or business reputation." According to Article 951, moral damages are to be compensated regardless of the culpability of the defendant in cases

where the damage has been inflicted by the spread of information denigrating the honour, dignity and business standing.

15. These provisions can be used to restrict legitimate expression, since one can seek compensation for true statements damaging his/her reputation; the legislation does not distinguish between statements of fact and statements of opinion and the Civil Code does not contain definitions of “honour”, and “dignity” allowing for a broad interpretation.
16. The current Civil Code does not contain any safeguards for media and other defendants against malicious plaintiffs. Article 534 of the Civil Code provides for levying a fee for applying of only 50 per cent of the monthly assessment index in Kazakhstan (approximately EUR€7). Malicious plaintiffs take advantage of this low fee to litigate to harass media and journalists with legal claims.
17. During the period of 2010 - 2013, 332 lawsuits were filed against journalists and media outlets, seeking a total of KZT 12,697,606,204 (approx. EUR€57,716,390) in compensation for moral damage. In some cases, like that of newspaper *Uralskaya Nedelya*, the publication was required to pay KZT 5,000,000 (approx. EUR€20,833) in compensation for moral damage to a public official.
18. In the last 4 years one of the few remaining independent print outlets, *Uralskaya Nedelya*, has faced exorbitant civil defamation claims of over KZT 45 million (approx. EUR€230,770) which threaten its continued existence.
19. On 21 April 2010, *Uralskaya Nedelya* was obliged to pay KZT 20 million (approx. EUR€103,000) in moral damage to the company, Tengizneftesstry. The lawsuit for protection of honor, dignity and business reputation followed the publication of an article by Lukpan Akhmedyarov, entitled “*Behind the scenes of tender*”. In his article, the journalist reported that the company launched construction works of the future gas pipeline, as if it knew before it was officially announced that it had won the state tender. The journalist put forward a question asking why the company was so sure about its victory.

Administrative offences

20. Current proposed amendments to the Administrative Code of Offences retain provisions, including Article 342, which allows for the suspension, closure and seizure of the circulation of media outlets for minor irregularities.
21. Between August and September 2013, three newspapers, known for their criticism of the authorities, *Pravdivaya Gazeta*; *Tribuna: Ashyk Alan*; and *Pravda Kazakhstana*, were suspended for three months for mistakes in the date-line announcement. As a result of another mistake in the date-line announcement, in February 2014, the newspaper *Pravda Kazakhstana* was closed by court order under Article 342 para 5.
22. On 7 August 2013, *Pravdivaya Gazeta* was suspended for three months under Article 350 of the Code of Administrative Offence “Violation of the procedure for date-line announcement” by the specialized inter-district administrative court of Almaty. The decision was upheld by the Almaty city court on 22 August. The court proceedings were initiated after the editorial staff printed 7,000 copies instead of the announced 8,000 copies.
23. The seizure of editions and technical facilities or suspension of a mass media outlet amount to prior-censorship of the media. Seizure and suspension are very harsh sanctions, which should be applied, if ever, only in extreme cases, for example in time of

public emergency threatening the country, and must still be in accordance with lawful processes.

Attacks on freedom of expression, politically motivated arrests and imprisonment following the excessive and lethal force against unarmed civilians in Zhanaozen on 16 December 2011

24. During the excessive and lethal force against unarmed civilians in Zhanaozen and the days that followed, the territory where the events occurred was closed off, making it impossible to access the area and creating an information blackout. The events are widely seen to have been used as an excuse to tighten the authorities' grip over independent media, journalists, political parties, movements, and associations.

Criminal charges brought against civil and political activists

25. In the aftermath of the excessive and lethal force against unarmed civilians in Zhanaozen on 16 December 2011, the authorities initiated criminal proceedings against over 40 oil workers, civil and political activists, and journalists. Two provisions of the Criminal Code, Article 164 on incitement of social hatred and Article 170 on calls to overthrow the constitutional order, were used to imprison activists and political opponents of the Government.

26. Article 181 of the Draft Criminal Code proposes a revision of the current Article 164. It maintains the current text, but adds a protection of "class" and increases the sanctions for the offence. It also includes a reference to the "religious feelings of citizens". The new penalties include imprisonment of up to 20 years and deprivation of a right to hold certain positions or to engage in certain types of activity for a period up to 3 years or indefinitely.

27. Igor Vinyavskiy, chief editor of the newspaper, *Vzglyad*, was detained on 23 January 2012 in connection with the Zhanaozen events on suspicion of "calling for the violent overthrow or change of the constitutional order or the forcible violation of the unity of the Republic of Kazakhstan conducted through the media, which is punishable by a fine or imprisonment of three to seven years." The newspaper's office was searched and information materials and equipment confiscated. *Vzglyad* actively covered the seven-month strike that preceded the events. The subsequent charges brought against Vinyavskiy were based on leaflets that police had found almost two years before the Zhanaozen events occurred. Vinyavskiy was released in March under an amnesty law and left the country.

28. The provisions on incitement, and proposals in relation to introducing blasphemy provisions, do not comply with Kazakhstan's obligations under Article 19 and Article 20(2) of the International Covenant on Civil and Political Rights.

Arbitrary arrests and detention of civil society activists

29. Two civil society activists, Zhanbolat Mamai and Bolat Atabayev, were arrested and held in pre-trial detention for several weeks. Both were active supporters of oil strikers and came several times to Aktau and Zhanaozen to speak before striking oil workers.

30. Zhanbolat Mamai was detained for the first time on 16 August 2011 at Aktau airport on charges of organising an illegal gathering. Mamai was arrested, detained for 10 days and fined a sum of approximately EUR€70. Four days before his arrest he participated in an unsanctioned meeting organised by oil workers. On 23 January 2012, the apartment of Zhanbolat Mamai was searched, he and Bolat Atabayev were questioned by the National Security Committee (KNB) and gave a pledge not to leave Almaty, their city of residence. On 15 June, Atabayev and Mamai were arrested on charges of inciting social hatred (Article 164 of the Criminal Code), placed into the KBN detention facility in Almaty and

later transported to Western Kazakhstan. Atabayev reported that he had been severely beaten on that day by a law enforcement officer, Armanzhan Nurgaliyev. Less than a month later, in July, both were released after allegedly having been forced to repent and admit their guilt.

Harassment and imprisonment of opposition politicians and trade union activists

31. Prior to the unrest in Zhanaozen, on 8 August 2011, Natalia Sokolova, a trade union lawyer, received a six-year prison sentence under Article 164 of Criminal Code, as well as Article 334 of the Criminal Code for the "Violation of the order of organising and holding meetings, rallies, pickets, procession and demonstration." The sentence was based on a complaint by the president of the oil company Karazhanbasmunai, and related to her legal and union support for oil workers who took part in industrial action in May and June 2011 demanding an increase of their salaries.
32. On 6 March 2012, the Supreme Court commuted Sokolova's sentence to three years, and suspended her sentence with a probation period of two years, after she fully admitted her guilt.
33. Vladimir Kozlov, leader of the unregistered party *Alga!* was arrested in Almaty in January 2012 and charged with several crimes in connection with the December 2011 Zhanaozen events. On 8 October 2012, the Mangistau Court sentenced him to seven and a half years imprisonment on charges of inciting social hatred entailing serious consequences (Article 164, part 3 of the Criminal Code); calling for the violent overthrow of the constitutional order (Article 170, part 2); and establishing and leading an organised criminal group (Article 235, part 1).
34. The Mangistau Court failed to provide legal reasoning in their judgment; the verdict did not identify the elements of the charges, and failed to establish the link between the statements of the defendants for which they were put on trial and the events in Zhanaozen on 16 December 2011. The verdict contains no explanation to show which evidence supports the individual facts that have been considered by the court as established. The court made no references to witness testimonies or other evidence on the basis of which of the facts were regarded as established.
35. On 5 August 2013 the Supreme Court of Kazakhstan upheld this sentence. The charges and the trial were widely seen by international observers and local civil society as unfair and politically motivated.

Closure of media outlets

36. Following the conviction of Vladimir Kozlov, at the end 2012, eight newspapers, 23 internet resources under the name 'Respublika', the Internet TV channels K+ and Stan TV, and newspaper *Vzglyad* were closed down for being extremist and inciting social hatred. The orders of the Almaty district courts (Medeu, Bostandyk and Almaly) were based on the indictment and verdict in relation to Kozlov, as part of which the media outlets were considered extremist.
37. Due to the fact that neither the publications, nor their owners or representatives were a party in the court case against Kozlov, none of them had the right to appeal the verdict. After the verdict came into force, these media outlets faced charges of inciting social hatred. However as it had been already 'established' that they had incited social hatred, the Almaty district courts' orders to close them down were issued automatically following 'pro-forma' and unfair court hearings. Lawsuits were filed against the media titles rather than specifying a legal entity or person in accordance with Kazakh law.

38. During the court proceedings, the prosecution failed to name nor did it provide an independent review of the content of the material/publications that incited social hatred or promoted extremism or contained signs of extremism.

Use of solitary confinement

39. The poet and social activist Aron Atabek spent much of the period under review in solitary confinement in one of Kazakhstan's harshest prisons. In December 2012, following the online publication of *The Heart of Eurasia*, a critique of President Nursultan Nazarbayev (written in prison by Atabek and smuggled out for publication), the poet was sentenced to spend two years in solitary confinement in a high security prison in Arkalyk for breaking prison rules. Letters to and from the poet rarely arrive at their destination. To date, Atabek has had only one family visit since 2010. Atabek was originally sentenced to 18 years in jail in 2007 for his role in organizing mass protests that resulted in the death of a police officer. Atabek has maintained his innocence and rejected a government pardon in exchange for admitting his guilt.
40. Atabek's prolonged stays in solitary confinement, the harsh conditions in which he is being kept, the blocking of communications between the poet and his family, and his lack of access to writing materials, qualify as a cruel and inhuman treatment in violation of the prohibition on torture and other ill-treatment under international human rights standards and runs contrary to the recommendations made by the UN Special Rapporteur on Torture. By denying Atabek access to visits from his family and to regular correspondence with them, Kazakhstan is also violating the UN's Standard Minimum Rules for the Treatment of Prisoners.

Restrictions to Freedom of expression online

Internet legislation

41. The implementation of the law "On Changes and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Issues of Information and Communication Networks" (Internet Law), adopted in 2009, is a major concern. The law considers blogs, social media networks and chat rooms as 'mass media'. As such, they can be subject to existing restrictive laws on expression, such as criminal libel. The law also introduced broad, new restrictions on election and public protest coverage for all media, allowing authorities to suspend or shut down and censor websites without adequate oversight.
42. After the adoption of the Internet Law and subsequent changes to the Civil Procedural Code introducing "a special judicial procedure without a defendant", court proceedings necessary to block access to websites, especially foreign ones, have been significantly simplified. The reforms allow the court to hear the case in the absence of the defendant. The owner, in turn, receives no notification about the launch of court proceedings, the court decision or appellate procedure. Furthermore, the law fails to provide for a procedure for reinstating websites after their court-ordered suspension has expired.
43. Every year, the Ministry of the Interior reports that hundreds of websites are closed on charges of publishing information which is in violation of the legislation of Kazakhstan. In 2010, the Interior Ministry identified and closed 125 internet-resources. In 2011, local internet providers blocked the access to 150 websites, including LiveJournal. In 2013, the number of websites closed increased to 596. All of them, according to the Office of the Prosecutor General, propagated "extremism" and "terrorism".
44. The three-month period of suspension of the website guljan.org, ordered by the court in December 2012 remained in effect through 3 July 2013, even though the suspension should have ended in March 2013. Less than a month after it resumed, it was blocked

again. An investigation by non-official IT specialists determined that the website was blocked from within Kazakhstan.

45. Arbitrary decisions made by executive bodies also result in the closure of the websites. In the case of newspaper *Molodezhnaya Gazeta*, which actively covered the activities of trade unions, the Information and Culture Ministry's Archives Committee cancelled the registration certificate of the newspaper on 23 January 2013 without a court decision.

Other restrictions on Freedom of Expression online

46. Atheist and journalist Alexander Kharlamov was arrested in March 2013 on charges of inciting religious hatred through his blogs in which he expressed his views about world religions. The charges under Article 164 of the Criminal Code were based on psychological and linguistic expert opinions that can be summarized as follows: "the presence in the objects of negative-critical evaluation due to the diversity of readers' audience reached by the materials, their cultural, general educational level of worldview, life experience may lead to not only functional effect, but also dysfunctional effect- that will cause the emergence of native and critical attitude towards the existing religious system and the entire religion."
47. Two expert analyses by the State Institute of Forensic Expertise for East Kazakhstan and local press freedom group Adil Soz presented during the hearing found no signs that "materials are aimed at inciting social, national, clan, racial hatred or insulting the national honour and dignity, or religious feelings of citizens."
48. Following his arrest, he was subjected to two forced psychiatric examinations. In March Kharlamov was declared mentally unfit by Ust-Kamenogorsk psychiatric center. However in May he was declared sane by the Republican Scientific Psychiatric Center and put into a temporary detention facility.
49. Alexander Kharlamov's court hearing began in the city court of Ridder on 29 July. On 13 August the case was returned for further investigation. On 3 September, the court of Ridder changed the measure of restraint from arrest to pledge not to leave the city of residence. On 4 September 2013, he was freed but the criminal investigation continues and the threat of re-arrest therefore remains.

Recommendations

50. Based upon the above observations, ARTICLE 19 and PEN International call upon the Government of Kazakhstan to significantly improve the overall conditions for freedom of expression in Kazakhstan. In particular, the Government of Kazakhstan should:
 - a. **Amend or repeal all laws that violate the right to freedom of expression**
 - Decriminalise defamation and insult and remove these provisions from the draft Criminal Code;
 - Reform the Civil Code in relation to civil defamation laws, to introduce defences for truth and fair comment, guard against malicious law suits, and introduce a cap on compensation awards to ensure that damages are proportionate to the harm caused to an individual's reputation;
 - Repeal provisions within the Administrative Code that allow for the confiscation, suspension and termination of publications and media.
 - b. **Prevent attacks on the right to freedom of expression and freedom of peaceful assembly**

- Reform provisions on “incitement to hatred” to ensure compliance with Article 20(2) of the ICCPR and in accordance with the guidance given in the Rabat Plan of Action, removing the terms “social hatred” and “class hatred”, and ensuring that this provision cannot be abused to target legitimate expression;
- Repeal Criminal Code provisions on “calls to overthrow the constitutional order”;
- Amend Kazakh legislation to align it with its international obligations to establish a presumption in favour of the exercise of free expression and peaceful assembly rights;
- Ensure that the use of force is never used to disperse peaceful assemblies, and that use of force is resorted to as a last resort and in accordance with a legal framework that conforms to the principles of necessity and proportionality;
- Reform criminal provisions that are abused to undermine the right to freedom of peaceful assembly, and enact legislation to facilitate the exercise of this right;
- Release opposition party leader Vladimir Kozlov, overturn his conviction, and provide redress for his arbitrary arrest and detention;
- Overturn the court decisions against media outlets *Respublika*, *K+*, *Stan TV* and *Vzglyad* in 2012 for “incitement to hatred” and “extremism”;
- Discontinue the practice of solitary confinement, in particular as a tool for torture and ill-treatment against those who exercise their right to freedom of expression;
- Comply with the UN Basic Principles for the Treatment of Prisoners by allowing regular visits and contact between those imprisoned and their families, and facilitate this by placing prisoners in jails that are within reasonable visiting distance of their families.

c. Protect the right to freedom of expression online as well as offline

- Amend the 2009 Internet Law, removing the status of blogs, social media networks and chat rooms as ‘mass media’ and removing restrictions on election and public protest coverage online; and review all restrictions in the law from the point of view of international standards on freedom of expression;
- Amend the Civil Procedure Code to remove the ‘special judicial procedure without a defendant’, and ensure that the powers to remove or block website can only take place through judicial processes that are fair, transparent, and independent;
- Ensure effective and independent investigations into the extra-judicial closure and blocking of websites;
- Discontinue the criminal investigation against blogger Alexander Varlamov for incitement to religious hatred.