

**THE NORMATIVE BASIS FOR PROSECUTING  
INTERNATIONAL CRIMES UNDER THE LEGISLATION  
OF THE REPUBLIC OF KAZAKHSTAN**

## A. Introduction<sup>1</sup>

**General information.** The Republic of Kazakhstan is a State in the central part of Eurasia. Territory – 2'717'000 square kilometers. Capital – Astana city. Population – 15.7 million (1999); 50.6% – Kazakhs, 32.2% – Russians, 4.5% – Ukrainians, 1.9% – Germans. The State language is Kazakh; at the same time, it is provided under the current Constitution (Article 7(2)) that Russian should officially be used in State organisations and the local governance bodies, on the condition of equality with Kazakh. Main religions are the Sunnite Islam and the Orthodox Christianity.

The Kazakh Khanate came into being in late XV century and was divided in three *zhuzes* (tribes): Junior, Middle and Senior. By 1860, all three *zhuzes* were annexed by the Russian Empire. The Soviet power was established in November 1917 – February 1918. On 26 April 1920, the Kyrgyz Autonomous Soviet Socialist Republic had been established (and had become part of the Russian Soviet Socialist Federal Republic) and was renamed the Kazakh Autonomous Soviet Socialist Republic on 19 April 1925. As a result of the national and territorial division (1924 – 1925), most of the historical Kazakh territories have been united, and Kazakhstan became a Soviet Republic within the Soviet Union on 5 December 1936. On 25 October 1990, the Supreme Soviet of the Kazakh SSR adopted the Declaration "On the State Sovereignty", which, for the first time, set out the integrity and inviolability of the territory, declared Kazakhstan's international legal personality, introduced citizenship as well as the equal status of all property forms. In turn, on 16 December 1991, the Republic's Parliament adopted the Constitutional Law "On the National Independence of the Republic of Kazakhstan", which approved the new name of the State – the Republic of Kazakhstan.

In the Kazakh SSR, Constitutions were adopted in 1937 and 1978, following the examples of the USSR and Russian SSFR Constitutions. The first post-Soviet Constitution was adopted on 28 January 1993. Having been a compromise between the old and new political constructions, an attempt to implement a Western democracy model on a post-Soviet soil, this Constitution contained inherent contradictions. It was subsequently replaced by the current Constitution of Kazakhstan, which was adopted by a referendum on 30 August 1995 (and amended on 7 October 1998).

Under the 1995 Constitution, the Republic of Kazakhstan declares itself as a democratic, secular, law-governed and social State whose supreme values are the human person, her life, rights and freedoms (Article 1). Kazakhstan is a unitary State with the presidential form of government (Article 2(1)).

In accordance with Article 4(1) of the Constitution, the applicable law in the Republic of Kazakhstan comprises provisions of the Constitution, of laws adopted in accordance therewith, of other normative legal acts, international treaty-based and other obligations of the Republic, as well as of normative regulations passed by the Constitutional Council and the Supreme Court of the Republic.<sup>2</sup>

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<sup>1</sup> For more detailed information on the form of State and the legal system of the Republic of Kazakhstan, see: А.Я. Сухарев (отв. ред.), *Правовые системы стран мира: Энциклопедический справочник*, 3-е изд., перераб. и доп. (Москва, Издательство "Норма", 2003 г.)

<sup>2</sup> The hierarchy of sources of Kazakhstan's law is set out in the Law "On Normative Legal Acts" of 24 March 1998. The provisions of the Constitution possess the supreme legal authority, followed by: laws modifying or amending the Constitution; constitutional laws; general laws and law-making decrees by the President; normative decrees by the President; normative regulations by the Parliament of the Republic of Kazakhstan; normative regulations by the Government; normative orders by ministries, regulations by State

S. Sayapin LL.M., 2007

International treaties ratified by the Republic prevail over its laws and apply directly, except when it is evident from a treaty that an implementing law is required (Article 5(3) of the Constitution). International treaties, which the Constitutional Council would recognise as incompatible with the Constitution, may not be ratified and brought into force.

**Criminal legislation.** Kazakhstan's criminal legislation, as those of other member States of the CIS, consists exclusively of a Criminal Code (CC).<sup>3</sup> There are no other sources of criminal law except the Criminal Code.

The current Criminal Code of the Republic of Kazakhstan was adopted on 16 July 1997 (as amended)<sup>4</sup> and replaced the 1961 Criminal Code of the Kazakh SSR. It was largely based upon the Model Criminal Code for the CIS member States. For this reason, its concept and content are quite close to those of the Russian Federation's Criminal Code (adopted in 1996). Both Codes' structures are generally similar, although the Kazakh Criminal Code is somewhat more voluminous (Kazakhstan's Criminal Code contains 393 articles, while the initial version of the Russian Federation's Criminal Code contained 360 articles). As all post-Soviet criminal codes do, it gives priority to the protection of the human person, and not the State.

The 1997 Criminal Code lists the following types of principal punishments (Article 39): a) fine; b) deprivation of the right to occupy a certain post or to engage in a certain activity; c) involvement in social (communal) work; d) correctional labour; e) restriction of promotion in military ranks; f) restriction of liberty; g) arrest; i) confinement to a disciplinary military unit; j) deprivation of liberty; k) death penalty. Additional types of punishments include the confiscation of property, as well as deprivation of a special, military or honorary title, class rank, diplomatic rank, qualification rank and State awards. Life sentence may be imposed as an alternative to the death penalty for the commission of particularly grave crimes attempting against life.

Death penalty (by shooting) may be imposed, as the capital punishment, only for the gravest crimes attempting against life, as well as ones committed in time or circumstances of war, for treason, crimes against the peace and security of mankind and for particularly grave crimes against the order of military service. Death penalty may not be imposed on women as well as persons who have not attained the age of 18 years by the time of committing the crime, and men who would have attained the age of 65 years by the pronouncement of the sentence (Article 49 of the Criminal Code).

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committees, orders and regulations by other central bodies; normative decisions by *maslikhats* (local representative bodies) и and *akims* (head of local executive authorities).

It may seem that this hierarchy does not comprise the normative regulations by Kazakhstan's Constitutional Council, Supreme Court and Central Electoral Commission. However, regulations by the Constitutional Council are based exclusively upon the Constitution of Kazakhstan, and no normative act may therefore contradict the Constitutional Council's regulations.

<sup>3</sup> Article 1 of the Criminal Code ("Criminal legislation of the Republic of Kazakhstan"):

"1. The criminal legislation of the Republic of Kazakhstan consists exclusive of the present Criminal Code of the Republic of Kazakhstan. Other laws, which provide for a criminal liability, are to apply only following their integration in the present Code.

2. The present Code is based upon the Constitution of the Republic of Kazakhstan and generally recognised principles and provisions of international law".

<sup>4</sup> Law № 167-I

S. Sayapin LL.M., 2007

***Criminal procedure legislation.*** The criminal procedure in Kazakhstan is regulated by the 1997 Criminal Procedure Code (CPC),<sup>5</sup> which replaced the 1959 Kazakh SSR Criminal Procedure Code. At its development, the Model Criminal Procedure Code for the CIS member States was taken into account. Despite the 1995 Constitution and the CPC itself having incorporated a number of new democratic principles and provisions relative to the criminal justice, the new criminal procedure legislation does, to a large extent, maintain traditions of the Soviet criminal procedure. The declared aim of striking a general balance between the procedural rights of prosecution and defence has not so far been attained.

In accordance with the Constitution (Article 16), arrest and detention are only allowed in cases provided for by law and only following a sanction issued by a court or a prosecutor, subject to the arrested person's right of judicial appeal. One may be detained without a prosecutor's sanction for no more than 72 hours. In 1995, having only recently been introduced, articles on defendants' and their lawyers' right to have their arrest appealed against in a court, were deleted from the Criminal Procedure Code. The 1997 CPC (Article 110) set out again that suspects, defendants, their lawyers, lawful representatives were empowered to appeal against an arrest sanctioned by the prosecutor, as well as against the prolongation of an arrest in a town (district) court.

The new CPC provides for the possibility of participation of a defence lawyer not only from the moment of apprehension, arrest or indictment, as the Constitution so requires (Article 16(3)), but also from the moment one is recognized as a suspect.

In order to ensure the principle of competitiveness and to exclude the overlapping of judicial and accusatorial functions, the 1997 CPC provides for a mandatory participation of prosecutors in at the principal hearing stage of all cases, except privately instituted ones.

On 7 October 1998, Article 75 of the Constitution was amended to allow for judicial proceedings with the participation of Jurors. Under the 1997 CPC (Article 58), the hearing of criminal cases, which may be punishable by the death penalty, should be carried out by first instance courts with the participation of 3 judges. Other cases are to be heard by the first instance and appeals judges unilaterally. Appeals on criminal cases and supervisory hearings are to be carried out by chambers composed of at least 3 judges; where newly discovered circumstances have been established, cases are to be considered by the same numbers of judges as the initial cases.

When considering appeals claims and protests, courts should verify whether a case's factual circumstances had been established and the criminal law had been applied correctly, as well as whether the criminal procedure provisions had been complied with during the consideration and resolution of the case. When considering appeals claims and protests, courts should verify the legality and validity of sentences on the basis of materials contained in the cases and of additional materials.

The Criminal Executive Code of Kazakhstan was adopted on 13 December 1997.

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<sup>5</sup> Law № 206-I

***Elements of international crimes in the current criminal legislation.*** Chapter 4 of the Criminal Code ("Crimes against the peace and security of mankind") includes 9 articles:

- "Planning, preparation, unleashing or conducting a war of aggression" (Article 156);
- "Propaganda and public calls for unleashing a war of aggression" (Article 157);
- "Production or proliferation of weapons of mass destruction" (Article 158);
- "Application of prohibited means and methods of warfare" (Article 159);
- "Genocide" (Article 160);
- "Ecocide" (Article 161);
- "Mercenarism" (Article 162);
- "Launching an attack against internationally protected persons or organisations" (Article 163);
- "Incitement of social, national, tribal, racial or religious enmity" (Article 164).<sup>6</sup>

The elements of all abovementioned crimes have already been incorporated in the initial text of the Criminal Code, which was adopted on 16 July 1997, that is, before the adoption of the Rome Statute of the International Criminal Court on 17 July 1998, and the formulations (dispositions and sanctions) of the respective articles have not been revised subsequently. Kazakhstan does not participate in the Rome Statute and has not signed it. Moreover, on 22 September 2003, Kazakhstan and the United States of America concluded a bilateral agreement on their mutual duty not to deliver each other's nationals to the International Criminal Court ("Article 98 Agreement").<sup>7</sup>

Thus, for the purpose of the present Report, it makes sense to comment upon the elements of international crimes, which are contained in the Criminal Code of the Republic of Kazakhstan, first of all, from the point of view of the national criminal legislation and policy, and with due regard to the content of according international legal sources. It should be noted that already *after* the adoption of the Criminal Code, Kazakhstan acceded to a number of relevant international treaties (including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and a number of international human rights and humanitarian law treaties). By virtue of the principle of complying in good faith with States' obligations under international law (*pacta sunt servanda*), these treaties, following their entry into force for Kazakhstan, must have corrected the content of respective blanket provisions of the criminal legislation to a certain extent.

Unless another source is indicated specifically, references to articles of a normative legal act within this Report mean, as a rule, references to the respective articles of the Criminal Code of the Republic of Kazakhstan.

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<sup>6</sup> See commentary on Articles 158, 161 – 164 below, in section V ("Reflection of elements of other international crimes in the national legislation")

<sup>7</sup> *Agreement regarding the surrender of persons to the International Criminal Court*, signed in New York on 22 September 2003, entered into force on 10 October 2004. See also the US State Department's Press statement 2003/956, of 23 September 2003: <http://www.state.gov/r/pa/prs/ps/2003/24331.htm>

## **B. International crimes and their reflection in the national criminal legislation**

### **I. Genocide**

#### **1. Elements of the crime and legal sources**

The elements of the crime of genocide are formulated in Article 160 of the Criminal Code of the Republic of Kazakhstan:

Genocide, that is, deliberate acts aimed at the full or partial destruction of a national, ethnic, racial or religious group, by means of killing members of this group, inflicting grave harm to their health, forcible prevention of births, forced transfer of children, forcible resettlement or the creation of other conditions of life aimed at the physical destruction of members of this group [...]

To a large extent, the above formulation corresponds to the definition contained in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.<sup>8</sup> In particular, it does reflect such essential elements of the definition of the crime of genocide as:

- the membership of the crime's victims in a certain national, ethnic, racial or religious group;
- the existence of a direct intent to destroy that group fully or in part.

At the same time, the Kazakh legislators have themselves defined the *objective element* of the crime of genocide (or, possibly, borrowed it from Article 357 of the 1996 Criminal Code of the Russian Federation), this is why its various facets are different, to various extents, from the conventional one:

- apparently, in order to clarify the application of the definition *rationae personae* (national, ethnic, racial or religious groups) and to exclude its broad interpretation, the indicative pronoun ("such [group]") was replaced by another indicative pronoun ("this [group]");
- the relatively detailed formulation "[c]ausing serious bodily or mental harm [to members of the group]" was replaced by a more general, at the first glance, category of "inflicting grave harm to [their] health";<sup>9</sup>

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<sup>8</sup> Kazakhstan acceded to the Convention on 26 August 1998.

Article 2 of the Convention reads as follows:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group".

<sup>9</sup> It seems, however, that the content of the disposition "inflicting grave harm to [their] health" should be interpreted in light of the content of Article 103 of the Criminal Code ("Deliberate infliction of grave harm to health"):

"Deliberate infliction of grave harm to health, which is dangerous to a person's life and entailed the loss of sight, speech, hearing or of an organ or the loss of an organ's functions, or one expressed in an irreversible disfiguration of [a person's] face, as well as the infliction of another harm to health, which is dangerous to life or caused the malfunctioning of health related to a substantial stable loss of general working capability by at least one third, or to the full loss of professional working capability, [a result which could have been]

S. Sayapin LL.M., 2007

- it is unclear whether all *deliberate* "measures intended to prevent births [within the group]" are to be considered "*forcible* prevention of births" as expressed in the descriptive disposition of Article 160, or whether the Kazakh legislators meant only the most cruel measures;
- speaking of the "forced transfer of children", the legislators did not specify, unlike the 1948 Convention, that the transfer of children "of the group to another group" is meant, at the end of the day, to disallow those children to associate themselves to the group they actually come from;
- in the latter alternative disposition, "forcible resettlement" is an essential addition to the conventional formulation. It seems that here, possibly, the objective elements of the crime of genocide, on the one hand, and of "ethnic cleansing" or of "deportation or forcible movement of the population", on the other hand, are mixed up. Besides, Article 160 does not specify, unlike the Convention, that the crime consists in the deliberate creation of conditions aimed at a *full or partial* physical destruction thereof. Consequently, it may seem that, for the purpose of the Kazakh criminal law, only measures aimed at the full destruction of a respective group would be considered as genocidal.

With the above considerations in mind, it seems that, when applying Article 160 (there were no examples of such practice so far), courts would need to take into account the factual circumstances of a case and apply the national criminal law, with due regard to the relevant international legal experience.

In accordance with В соответствии со Articles 14(1) and 15 of the Criminal Code, criminal liability for the crime of genocide may be attributed to a sane natural person who has attained the age of sixteen years by the time of the commission of the crime.

## 2. Foreseen legal consequences

The Republic of Kazakhstan's places the crime of genocide in the category of particularly grave crimes<sup>10</sup> and punishes it by the deprivation of liberty for a term between ten and twenty years, or by the death penalty, or by life sentence.

Kazakhstan's criminal law provides for the following legal consequences with regard to the qualification of particularly grave crimes, the establishment of the measure of liability and the assignment of punishment for their commission, the order of enforcing punishments and clearing off the conviction:

- (1) the ensuing of criminal liability for preparation to a crime (Article 24(2));<sup>11</sup>
- (2) the ensuing of criminal liability for an attempted crime (Article 24(4));<sup>12</sup>
- (3) a qualified degree of liability for the commission of a crime by a criminal association (organisation) (Article 31(4));<sup>13</sup>

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known to the perpetrator beforehand, or which entailed the interruption of pregnancy, psychological malfunction, addiction to drugs or toxic substances [...]"

<sup>10</sup> Under Article 10(5) of the Criminal Code, "[p]articularly grave crimes are deliberate acts for the commission of which this Code establishes a punishment in the form of deprivation of liberty for more than twelve years or the death penalty".

<sup>11</sup> Article 24(2): "Criminal liability shall only ensue for preparation to a grave or particularly grave crime".

<sup>12</sup> Article 24(4): "Criminal liability shall ensue for an attempted crime of medium gravity, a grave or a particularly grave crime".

<sup>13</sup> Article 31(4): "A crime shall be considered to have been committed by a criminal association (criminal organisation), if it has been committed by an organised group (organisa-

(4) the non-applicability of the restriction of liberty as a type of punishment to a person who has a conviction for a particularly grave crime (Article 45(3));<sup>14</sup>

(5) the possibility of assigning as a punishment the deprivation of liberty for up to twenty years or for life (Article 48(3));<sup>15</sup>

(6) the possibility of depriving a person of an honorary, military, special or another title, class rank, diplomatic rank, qualification rank (Article 50(1));<sup>16</sup>

(7) where mitigating circumstances exist, the impossibility of assigning a punishment exceeding three-fourths of a maximum term or size of the most severe type of punishment, which is provided for in a respective Article of the Criminal Code's Specific Part (Article 53(4));<sup>17</sup>

(8) where punishment is assigned for an aggregate of crimes, the absorption of a less severe punishment by a more severe one by way of a full or partial addition of punishments (Article 58(3));<sup>18</sup>

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tion), which was established for the commission of grave or particularly grave crimes, or by an association of organized groups established for the same purpose".

<sup>14</sup> Article 45(3): "The restriction of liberty shall not apply to persons who have a conviction for the commission of a grave or a particularly grave crime, to members of the military personnel as well as to persons who do not have a permanent residence".

<sup>15</sup> Article 48(3): "The deprivation of liberty for the commission of crimes provided for in the present Code shall be assigned for a term between six months and fifteen years, and [for the commission] of particularly grave crimes indicated in the first part of Article 49 of the present Code – [for a term of] up to twenty years or for life".

Cf. Article 48(4): "The deprivation of liberty for life shall only be established as an alternative to the death penalty for the commission of particularly grave crimes attempting at life, and may be assigned in cases when the court considers possible not to apply the death penalty. The deprivation of liberty for life shall not be assigned to women as well as persons who have committed a crime before attaining the age of eighteen years, and to men who would have attained the age of sixty-five years by the pronouncement of the sentence".

Cf. Article 49(1): "The death penalty by shooting may only be assigned as the capital punishment for particularly grave crimes attempting at human life, as well as for crimes committed in time or circumstance of war, for treason, *crimes against the peace and security or mankind* and for particularly grave crimes against the order of military service" (emphasis added).

<sup>16</sup> Article 50(1): "When sentencing a person for the commission of a grave or a particularly grave crime, the court may take into account the personality of a defendant and deprive him or her of an honorary, military, special or another title, of a class rank, diplomatic rank, qualification class".

<sup>17</sup> Article 53(4): "Where mitigating circumstances provided for in paragraphs d) and k) of the first part of the present Article exist, and where there are no aggravating circumstances, the term or size of a punishment [...] may not exceed [...] for the commission of a particularly grave crime – three-fourths of a maximum terms or size of the most severe type of punishment which is provided for in a respective Article of this Code's Specific Part".

Cf. Article 53(1): "The following shall be regarded as circumstances mitigating the liability and punishment:

[...]

d) providing the victim with medical and other aid immediately after the commission of a crime, voluntarily compensating for the material damage and moral harm inflicted as a result of the crime, other actions aimed at making good for the harm which has been inflicted by the crime;

[...]

k) full-hearted repentance, reporting guilty of a crime, contributing actively to the investigation of the crime, to the identification of other accomplices in the crime and the search of property acquired as a result of the crime".

<sup>18</sup> Article 58(3): "If an aggregate of crimes includes grave or particularly grave crimes, the final punishment shall be assigned by way of absorption of a less severe punishment by a more severe one by way of a partial or full addition of punishments. The final punishment in the form of deprivation of liberty may thereby not exceed twenty years".

S. Sayapin LL.M., 2007

(9) in individual cases, where punishment is assigned for an aggregate of crimes, the assignment of a punishment by way of a partial or full addition of punishments, whereby the term of the final punishment in the form of deprivation of liberty should not exceed twenty-five years (Article 58(4));<sup>19</sup>

(9) non-applicability of statutory limitation to persons who have committed crimes against the peace and security of mankind (Article 69(6));<sup>20</sup>

(10) the possibility of applying a conditional pre-term release after at least two-thirds of the assigned punishment have elapsed (Articles 70(3)(c)<sup>21</sup> и 84(d));<sup>22</sup>

(11) theoretically, where extraordinary circumstances exist, the possibility of postponing the serving of a sentence by a maximum of three months (Article 74(2));<sup>23</sup>

(12) the impossibility of releasing from criminal liability or punishment on the basis of an act of amnesty (Article 76(2));<sup>24</sup>

(13) clearing off a conviction after eight years following the serving of a sentence have elapsed (Article 77(3)(f)<sup>25</sup>, or, where a crime was committed by a person who has not attained the age of eighteen years, – after three years after the serving of a sentence have elapsed (Article 86(c)).<sup>26</sup>

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<sup>19</sup> Article 58(4): "If an aggregate of crimes includes at least one particularly grave crime, for the commission of which the present Code provides for a punishment in the form of deprivation of liberty for a term not exceeding twenty years or the death penalty, or a life sentence, the final punishment shall be assigned by way of a partial or full addition of punishments. The final punishment in the form of deprivation of liberty may thereby not exceed twenty-five years".

<sup>20</sup> Article 69(6): "No statutory limitations shall apply to persons who have committed crimes against the peace and security of mankind".

<sup>21</sup> Article 70(3)(c): "The conditional pre-term release may only be applied after a convicted person has actually served [...] at least two-thirds of a punishment assigned for a particularly grave crime".

<sup>22</sup> Article 84(d): "The conditional pre-term release from serving a sentence may be applied to persons who had been convicted to the deprivation of liberty [...] before they attained the age of majority, after they have actually served [...] at least two-thirds of a punishment assigned by the court for a particularly grave crime related to an attempt against human life".

<sup>23</sup> Article 74 ("Release from punishment and postponing the serving of a punishment due to extraordinary circumstances"):

"1. A person who has been convicted of a crime of lesser or medium gravity may be released from punishment by the court, if his serving the sentence may entail particularly grave consequences for the convicted person or his family, due to a fire or a natural disaster, a grave illness or death of an only family member who is capable of working, or due to other extraordinary circumstances.

2. A person who has been sentenced to the deprivation of liberty for a grave or particularly grave crime may have his serving the sentence postponed by the court, where circumstances listed in the first part of the present Article exist, for a term not exceeding three months".

<sup>24</sup> Article 76(2): "An act of amnesty shall not apply to persons who have committed grave or particularly grave crimes [...]"

<sup>25</sup> Article 77(3)(e): "The conviction shall have cleared off [...] with regard to persons who have been convicted for particularly grave crimes, after eight years following the serving of a sentence have elapsed".

<sup>26</sup> Article 86(c): "With regard to persons who have committed crimes before attaining the age of eighteen years, the terms of clearing off a conviction, provided for in Article 77 of the present Code, shall be shortened and equal to, respectively:

[...]

c) three years following the serving of deprivation of liberty for [the commission of] a grave or a particularly grave crime".

## II. Crimes against humanity

### 1. Elements of the crime and legal sources

Kazakhstan's criminal legislation does not know the notion of "crimes against humanity", as these are understood in contemporary international criminal law and, in particular, in Article 7(1) of the Rome Statute of the International Criminal Court. It follows from the definition that the distinctive, conceptual features of crimes against humanity are: (1) their aiming against any civilian populations; (2) a large scale or (3) systematic character of the attack in the framework of which they are committed; (4) knowledge of the attack. Essentially, a crime against humanity is a totality of deliberate crimes united in a single attack by a common intent and the "context of organized violence",<sup>27</sup> which allows for attacking, on a large scale or systematically, the fundamental rights of a defined group of rather numerous victims. It follows from the logic of the Republic of Kazakhstan's criminal legislation that a compound deliberate act, which would be qualified as a crime against humanity under international law, would, most probably, be considered from the point of view of the Kazakh criminal law either as a multiplicity of crimes (Article 11(1)),<sup>28</sup> or as a lasting crime (Article 11(4)),<sup>29</sup> or as an aggregate of crimes (Article 12).<sup>30</sup>

From the point of view of compatibility between Kazakhstan's current criminal law and the Rome Statute's provisions on crimes against humanity, one may single out three groups of *corpus delicti*: (1) crimes, which are provided for in the Criminal Code and adequately correspond to the international legal standards; (2) crimes, which are provided for in the Criminal Code and partially correspond to the international legal standards; (3) international crimes, which are not provided for in the Criminal Code.

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<sup>27</sup> G. Werle, *Principles of International Criminal Law* (The Hague, TMC Asser Press, 2005), p. 94

<sup>28</sup> Article 11(1): "The multiplicity of crimes is the commission of two or more acts, which are provided for by the same Article or part of an Article of this Code's Specific Part".

<sup>29</sup> Article 11(4): "A lasting crime, that is, a crime consisting of a number of identical criminal acts, which are encompassed by a common intent and purpose and make up, as a whole, a single crime, shall not be considered a multiplicity of crimes".

<sup>30</sup> Article 12 ("The aggregate of crimes"):

"1. An aggregate of crimes is the commission of two or more acts, which are provided for by different Articles or parts of an Article of this Code's Specific Part, for neither of which the perpetrator has been convicted or released from the criminal liability on grounds provided for by the law. Where there is an aggregate of crimes, the perpetrator shall bear the criminal liability for each committed crime on the basis of a respective Article or part of an Article of the present Code, unless the elements of the committed acts are not encompassed by a provision of one Article of part of an Article of the present Code, which provides for a more severe punishment.

2. An aggregate of crimes also is an act (an omission), which contains elements of crimes provided for by two or more Articles of the present Code. Where such an aggregate exists, the perpetrator shall bear the criminal liability for each of the crimes on the basis of the respective Articles of the present Code, unless the elements of one act are encompassed by a provision of an Article of the present Code, which provides for a more severe punishment for another act".

(1) Kazakhstan's Criminal Code directly provides for the following acts referred to in Article 7(1) of the Rome Statute:

- *murder* (Article 96);
- *enslavement* (Article 128 – "Trading in people", Article 133 – "Trading in minors");
- *imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law* (Article 126 – "Unlawful deprivation of liberty");
- *torture* (Article 347-1);
- *rape* (Article 120);
- *sexual slavery* (Article 125 – "Kidnapping a person", Article 126 – "Unlawful deprivation of liberty", Article 128 – "Trading in people", Article 133 – "Trading in minors", when these latter crimes are committed for the purpose of exploiting a victim – see comment 2 to Article 125<sup>31</sup>);
- *enforced prostitution* (Article 270 – "Involvement in prostitution"<sup>32</sup>, Article 271 – "Organising or running brothels for engagement in prostitution and pimping").

(2) There exists a partial compatibility between the elements of the following crimes and the international legal standards:

- *extermination* (Article 160 – "Genocide"),<sup>33</sup>
- *deportation or forcible transfer of population* (Article 159 – "Application of prohibited means and methods of warfare");<sup>34</sup>
- *forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity* (Article 117 – "Unlawful abortion", Article 121 – "Forcible acts of a sexual nature"),<sup>35</sup>
- *enforced disappearance of persons* (Article 125 – "Kidnapping a person", Article 126 – "Unlawful deprivation of liberty");<sup>36</sup>

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<sup>31</sup> Comment 2 to Article 125: "In this Article and Articles 126, 128, 133 of the present Code, exploitation of a person means the use of forced labour, another person's engagement in prostitution or [in] another service for the purpose of having revenues appropriated by the perpetrator, as well as his exercising the proprietor powers over a person who cannot refuse the performance of a work or a service for reasons, which are beyond [that person's] authority".

<sup>32</sup> Article 270 criminalises involvement in prostitution "by way of applying violence or a threat of its application, using a dependent condition, blackmail, destruction or damaging property or by way of fraud".

<sup>33</sup> Article 160 criminalises the creation of conditions of life, which are aimed at the physical destruction of members of an identifiable national, ethnic, racial or religious group but, strictly speaking, it does not encompass the creation of such conditions with respect to "mixed" population groups, which are not united by a common national, ethnic, racial or religious link.

<sup>34</sup> Article 159 criminalises the "deportation of the civilian population" but, by attributing this act to the prohibited methods of warfare, it does not encompass deportation, if it is carried out outside the circumstances of an armed conflict.

<sup>35</sup> "Enforced prostitution" is not criminalised as such. In particular, it is not mentioned in the Criminal Code as a separate crime or as a circumstance aggravating the criminal liability for rape. However, probably, "forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" may in practice be qualified under Article 121 as "other actions of a sexual nature [carried out] with violence or a threat of its application against the (male or female) victim or against other persons, or by way of using a helpless condition of the (male or female) victim".

<sup>36</sup> Articles 125 and 126 do embrace the objective element of the crime of enforced disappearance (arrest, detention or kidnapping a person by a State or a political organisation or

S. Sayapin LL.M., 2007

- *other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health* (Article 103 – "Deliberate infliction of grave harm to health", Article 104 – "Deliberate infliction of medium-gravity harm to health", Article 107 – "Torment").<sup>37</sup>
  
- In its turn, the international crime of "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3 [of Article 7 of the Rome Statute of the International Criminal Court], or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" (Article 7(1)(h) of the Rome Statute) should be commented upon separately. Closest to this crime is the disposition of Article 164 of the Criminal Code ("Incitement of social, national, tribal, racial or religious enmity").<sup>38</sup> Strictly speaking, judging from its disposition, this Article criminalises "deliberate acts aimed at the *incitement* of social, national, tribal, racial, religious enmity or division", i.e. active participation in *organising* violent acts against identifiable social groups. Thus, Article 164 presupposes a special subject of the crime – an initiator or organizer of enmity or division, a propagator of one group's being exclusive or superior to another.<sup>39</sup> In their turn, if those incitements are successful and do provoke violence against an identifiable group, the perpetrators should bear liability under other respective Articles of the Criminal Code,<sup>40</sup> whilst the commission of those crimes on the ground of social, national, racial or religious hatred or enmity should be regarded as a circumstance aggravating the criminal liability (also, see *infra*).

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with their permission, support or consent), but the elements of these crimes do not necessarily suppose that the purpose (a constituent part of those crimes' mental element) of detaining victims forcibly is precisely that of "removing them from the protection of the law for a prolonged period of time".

<sup>37</sup> It seems that the elements of crimes provided for in Articles 103, 104 и 107 do generally correspond to the standards of Article 7(1) of the Rome Statute, but their titles differ for objective reasons.

<sup>38</sup> Article 164: "1. Deliberate acts aimed at the incitement of social, national, tribal, racial, religious enmity or division, at insulting the national honour and dignity or religious feelings of citizens, likewise propagating for exclusivity, superiority or inferiority of citizens on the ground of their attitude towards religion, class-based, national, tribal or racial affiliation, if these acts are committed publicly or with the use of mass media [...];

2. The same acts, committed by a group of persons or on multiple occasions, or related with violence or a threat of its application, likewise [committed] by a person acting in his or her official capacity or by a leader of a public association [...];

3. Acts provided for in the first and second parts of this Article, which have entailed grave consequences [...]"

<sup>39</sup> See also Article 337(2) ("Establishing or participating in activities of unlawful social and other associations"): "Establishing of a social association, which propagates for or implements in practice a racial, national, tribal, social, class-based or religious intolerance or exclusivity [...], likewise leading such an association [...]"

<sup>40</sup> In particular, Articles 96 ("Murder"), 103 ("Deliberate infliction of grave harm to health"), 104 ("Deliberate infliction of medium-gravity harm to health", 107 ("Torment"), 141 ("Violating citizens' equal rights"), 187 ("Deliberate destruction or infliction of damage to someone else's property"), 275 ("Mocking dead bodies or their burial places") directly mention this circumstance among those which aggravate the criminal liability.

S. Sayapin LL.M., 2007

(3) The crime of apartheid is not provided for in Kazakhstan's Criminal Code. This crime is defined in the Rome Statute as "inhumane acts of a character similar to those referred to in paragraph 1 [of Article 7 of the Rome Statute of the International Criminal Court], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime" (Article 7(2)(h)). In their turn, the Kazakh legislators, in formulating criminal law provisions, which aim at the protection of people's and citizens' constitutional rights and freedoms from criminal attempts, has chosen the path of establishing criminal liability for "a direct or indirect limitation of human (citizens') rights and freedoms on the grounds of origin, social, official or property-related situation, gender, *race* (emphasis added), nationality, language, attitude towards religion, opinions, residence, affiliation with social associations or on other grounds" (Article 141 – "Violating citizens' equal rights"). On the one hand, the range of rights and freedoms, which are protected by this Article, is significantly wider than the definitional (exclusively racial) context of the crime of apartheid. It seems that Article 141 is therefore capable of exercising the protective and preventive functions with respect to the crime of apartheid. However, since Article 141 does not refer directly to a regime of racial domination and suppression, as well as to the aim of preserving such a regime as the crime's mental element, one may conclude that the crime of apartheid is not directly provided for in Kazakhstan's criminal law.

## 2. Foreseen legal consequences

It may be concluded from the above that Kazakhstan's criminal legislation, whilst not providing for the notion of crimes against humanity as such, does nevertheless contain sufficient material legal tools for preventing and prosecuting most of common crimes, which may constitute the objective elements of crimes against humanity. The crime of apartheid is the only substantial exception.

From the point of view of Kazakhstan's criminal law, common crimes, which were included in this section of the Report, fall within the categories of medium-gravity,<sup>41</sup> grave<sup>42</sup> and particularly grave<sup>43</sup> crimes. The qualification of an act under a particular part of an Article of the Criminal Code should depend on the existence or absence of circumstances, which aggravate the criminal liability and punishment (Article 54),<sup>44</sup> as well as on whether there exists a form of multiplicity of crimes.<sup>45</sup>

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<sup>41</sup> Article 10(3): "Medium-gravity crimes are deliberate acts for the commission of which the maximum punishment provided for in this Code does not exceed five years of deprivation of liberty, as well as negligent acts for the commission of which the foreseen punishment exceeds five years of deprivation of liberty".

<sup>42</sup> Article 10(4): "Grave crimes are deliberate acts for the commission of which the maximum punishment provided for in this Code does not exceed twelve years of deprivation of liberty".

<sup>43</sup> See *supra*, note 10

<sup>44</sup> Article 54 ("Circumstances which aggravate the criminal liability and punishment"):  
"1. The following shall be regarded as circumstances aggravating the criminal liability and punishment:

a) multiplicity of crimes [...];

b) the crime's causing grave consequences;

c) the commission of a crime by a group, by a previously arranged group or by a criminal association (criminal organisation);

[...]

f) the commission of a crime on the ground of national, racial and religious hatred or enmity [...] as well as with the purpose of concealing another crime or of facilitating its commission;

S. Sayapin LL.M., 2007

At the same time, the absence of the notion of crimes against humanity may create certain difficulties for enforcing the law, of both material and procedural nature, such as: existence of statutory limitations with regard to common crimes, principles of jurisdiction, and the like (see *infra*, Section C – "Principles of implementing provisions of national criminal law").

### III. War crimes

#### 1. Elements of the crime and legal sources

The elements of war crimes, which are criminalised in Kazakhstan, are reflected in Article 159 of the Criminal Code ("Application of prohibited means and methods of warfare").<sup>46</sup> This Article's disposition was borrowed almost *verbatim* from Arti-

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g) the commission of a crime against a woman whom the perpetrator knew certainly to have been in the condition of pregnancy, as well as against a minor, another defenceless or helpless person or against a person who was finding himself or herself dependent on the perpetrator;

[...]

i) the commission of a crime with excessive cruelty, sadism, mocking as well as torment on the part of the victim;

j) the commission of a crime with the use of a weapon, munitions, explosive substances, explosive devices or imitations thereof, specially produced technical means, easily inflammable and incendiary liquids, poisonous and radioactive substances, medicinal and other chemical or pharmaceutical substances, as well as by way of using physical or psychological compulsion or by a generally dangerous means;

k) the commission of a crime in the circumstances of a state of emergency, natural or another social disaster as well as [in the circumstances of] mass disorders;

[...]

m) the commission of a crime by a person who thereby has violated an oath of allegiance or a professional oath;

n) the commission of a crime by way of using trust that was given to the perpetrator due to his or her official capacity [...];

p) the commission of a crime by way of using the uniform or documents of a representative of a public authority".

<sup>45</sup> See above, notes 28 – 30

<sup>46</sup> The Republic of Kazakhstan participates in the following principal treaties of international humanitarian law (the dates of ratification, accession and, where appropriate, succession are indicated in brackets):

– Geneva Conventions for the protection of victims of war (GC I – IV) of 12 August 1949 and their Additional Protocols (AP I and II, respectively) of 8 June 1977 (5 May 1992, succession);

– Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (HC 1954) and a Protocol thereto of 14 May 1954 (14 March 1997);

– Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (CBW 1972) of 10 April 1972 (17 April 2007);

– Convention on the prohibition of military or any hostile use of environmental modification techniques (ENMOD 1976) of 10 December 1976 (25 апреля 2005 г.);

– Convention on the Rights of the Child of 20 November 1989 (12 August 1994);

– Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (CCW 1993) of 13 January 1993 (23 March 2000);

– Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP 2000) of 25 May 2000 (10 April 2003).

S. Sayapin LL.M., 2007

cle 356 of the Russian Federation's Criminal Code (1996), with all advantages and disadvantages of the original source. The disposition of the first part of Article 159 is descriptive, that of the second part is blanket:

1. Cruel treatment of prisoners-of-war or the civilian population, deportation of the civilian population, plundering national property in an occupied territory, application in an armed conflict of means and methods, which are prohibited by an international treaty of the Republic of Kazakhstan [...]
2. Employing a weapon of mass destruction prohibited by an international treaty of the Republic of Kazakhstan [...]

It should be noted at once that Article 159 of the Criminal Code *does not draw a distinction between international armed conflicts and armed conflicts not of an international character*. Consequently, there is a criminal liability for the commission of war crimes in both types of armed conflicts, certainly, with due regard to the volume of international law, which applies in these respective situations. Under the first part of Article 159, four alternative acts are criminalised, two of which ("deportation of the civilian population"<sup>47</sup> and "plundering a national property in an occupied territory"<sup>48</sup>) are formulated narrowly and do not contain blanket references to the respective international treaties. At the same time, two further crimes ("cruel treatment of prisoners-of-war or the civilian population" and "application in an armed conflict of means and methods, which are prohibited by an international treaty of the Republic of Kazakhstan") allow for, and in the second case, even require to be correlated with the provisions of the 1949 Geneva Conventions, 1977 Additional Protocols and of other respective international treaties of the Republic of Kazakhstan, which are concerned with war crimes.

It follows from part 1 of Article 159 that only acts, which are directly prohibited by international treaties of the Republic of Kazakhstan, may be regarded as violations of the laws and customs of war. For this reason, certain war crimes under customary international law – for example, those derived from the 1899 and 1907 Hague Conventions – may probably be excluded from the range of criminal offences. It is stated in the Judgment of the Nuremberg Military Tribunal that provisions of these Conventions constitute customary international law,<sup>49</sup> but Kazakhstan did not formally ratify them, therefore the degree of reception of customary international humanitarian law's provisions on war crimes is not quite clear.

On the other hand, the legislators' decision to criminalise all "prohibited" acts (and not only those which are characterised as "grave breaches" or "war crimes" in the treaties). One may therefore conclude that, in Kazakhstan, at least the following acts referred to in Article 8 of the Rome Statute are criminalised:

(1) In international armed conflicts:

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Source: Advisory Service on International Humanitarian Law database, International Committee of the Red Cross (ICRC) ([www.icrc.org/eng/](http://www.icrc.org/eng/))

<sup>47</sup> This crime encompasses the first part of the crime provided for in Article 8(2)(a)(vii) of the Rome Statute.

<sup>48</sup> This crime encompasses the crimes provided for in Articles 8(2)(b)(xvi) and, possibly, 8(2)(b)(xiii) of the Rome Statute.

<sup>49</sup> IMT, Judgment of 1 October 1946, in *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, pp. 449 et seq.

S. Sayapin LL.M., 2007

(a) In the framework of the crime of "Cruel treatment of prisoners-of-war or the civilian population":

(i) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:<sup>50</sup>

- willful killing;
  - torture or inhuman treatment, including biological experiments;
  - willfully causing great suffering, or serious injury to body or health;
  - extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  - willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  - unlawful deportation or transfer or unlawful confinement;
- taking of hostages.

(ii) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion (AP I, Article 85(3)(e));
- subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons (GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147);
- compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war (GC III, Article 130; GC IV, Article 147);
- committing outrages upon personal dignity, in particular humiliating and degrading treatment (AP I, Article 75(2)(b));
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f) [of the Rome Statute of the International Criminal Court], enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;<sup>51</sup>
- conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (OP 2000, Articles 1, 2, 4(1, 2), 6(1); AP I, Article 77(2, 3)).

(b) In the framework of the crime of "Application in an armed conflict of means and methods, which are prohibited by an international treaty of the Republic of Kazakhstan":

- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (AP I, Article 85(3)(a));

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<sup>50</sup> See GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147

<sup>51</sup> See *supra*, pp. ctp. 12 – 13

S. Sayapin LL.M., 2007

- intentionally directing attacks against civilian objects, that is, objects which are not military objectives (AP I, Article 85(3)(a));
  - intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance (AP I, Article 71(2)) [...] as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict (see, in particular, AP I, Article 71(4));
  - intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects (AP I, Article 85(3)(b)) or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (ENMOD 1976 r., Article IV; AP I, Article 55(1));<sup>52</sup>
  - attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives (AP I, Article 85(3)(d));
  - making improper use of a flag of truce (AP I, Article 37(1)(a), Article 38(1)), of the flag or of the military insignia and uniform of the enemy (AP I, Article 39(2)) or of the United Nations (AP I, Article 37(1)(d), Article 38(2)), as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury (AP I, Article 85(3)(f));
  - the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (AP I, Article 85(4)(a));
  - intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (HC 1954, Article 4; AP I, Article 53(a), Article 85(4)(d));
  - killing or wounding treacherously individuals belonging to the hostile nation or army (AP I, Article 37(1));
- declaring that no quarter will be given (AP I, Article 40);
- utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations (AP I, Article 51(7));
  - intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law (GC I, статьи 19, 20; GC II, статьи 22 – 25; AP I, Article 12(1));
  - intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival (AP I, Article 54(1, 2)), including willfully impeding relief supplies (AP I, Article 70) as provided for under the Geneva Conventions.

It should be reminded that all war crimes listed above fall under part 1 of Article 159 of the Criminal Code. The sanction provided for in part 1 of Article 159 is the deprivation of liberty for a term not exceeding twelve years.

The only war crime listed in Article 8(2)(a, b) of the Rome Statute and not covered by part 1 of Article 159 of Kazakhstan's Criminal Code, as far as the prohibited means and methods of warfare are concerned, is "Employing bullets which expand

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<sup>52</sup> See also the commentary on Article 161 ("Ecocide"), pp. 28 – 29 of this Report.

S. Sayapin LL.M., 2007

or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions" (Article 8(2)(b)(xix) of the Rome Statute). This crime's international legal source is the 1899 Hague Declaration on the renunciation of bullets, which expand or flatten easily in the human body (Declaration III). However, as was indicated above, Kazakhstan does not formally participate in this Declaration. Since Kazakhstan's criminal legislation consists exclusively of the Criminal Code (Article 1(1)), and a respective Article of the Criminal Code's Specific Part (Article 159) contains a blanket provision referring exclusively to "international treaties of the Republic of Kazakhstan" (and not, for example, to "generally recognized principles and provisions of international law", wherein customary provisions of international humanitarian law could probably be included), the said crime "falls out" of the sphere of the Republic of Kazakhstan's penal policy.

(c) In their turn, acts related to "[e]mploying a weapon of mass destruction prohibited by an international treaty of the Republic of Kazakhstan" should be qualified under part 2 of Article 159. It seems that part 2 encompasses the elements of two war crimes provided for in the Rome Statute:

employing poison or poisoned weapons (CCW 1993, Article I(1)(b); CBO 1972 r., Article I),<sup>53</sup>

- employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices (CCW 1993, Article I(1)(b)).<sup>54</sup>

Part 2 of Article 159 provides for a more severe punishment – the deprivation of liberty for a term between ten and twenty years, or the death penalty or a life sentence.

As far as the war crime provided for in Article 8(2)(b)(xx) of the Rome Statute<sup>55</sup> is concerned, this provision is irrelevant for the purpose of this Report, since it points to the *future* possibility of and conditions for including further war crimes related to the use of prohibited weapons in the Rome Statute. It was included in Article 8, since a number of Delegations that participated in the 1998 Diplomatic Conference, considered the list of weapons prohibited under the Statute to be incomplete, and insisted upon the legal possibility of amending it in the future, with due regard to the development of the military technologies and international law.<sup>56</sup>

## (2) In armed conflicts not of an international character:

Since the volume of international law which applies in armed conflicts not of an international character is quite limited, the range of acts which are criminalized as war crimes is accordingly narrower. More particularly, the law of non-international armed conflicts does not know the combatant status, the notion of military occupa-

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<sup>53</sup> Article 8(2)(b)(xvii) of the Rome Statute

<sup>54</sup> Article 8(2)(b)(xviii) of the Rome Statute

<sup>55</sup> Article 8(2)(b)(xx) establishes the criminal liability for "Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123".

<sup>56</sup> O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), pp. 242 – 244

S. Sayapin LL.M., 2007

tion and a detailed regulation of the means and methods of warfare. The law of non-international armed conflicts is almost exclusively "humanitarian", that is, it aims to protect persons who do not or no longer take a direct part in hostilities and the civilian objects, – and the objects of war crimes are, in non-international armed conflicts, accordingly limited to the most fundamental values related to the protection of the human person.

Thus, in non-international armed conflicts, Article 159 of the Criminal Code of the Republic of Kazakhstan embraces the following war crimes listed in the Rome Statute (Article 8(2)(c, e)):

(a) In the framework of the crime of "Cruel treatment of [...] the civilian population":<sup>57</sup>

(i) Serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture (Article 3(1)(a));
- committing outrages upon personal dignity, in particular humiliating and degrading treatment (Article 3(1)(c));

taking of hostages (Article 3(1)(b));

- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable (Article 3(1)(d)).

(ii) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f) [of the Rome Statute of the International Criminal Court], enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions (Article 3(1)(a, c));
- conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities (AP II, Article 4(3)(c));
- subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons (AP II, Article 5(2)(e)).

(b) In the framework of the crime of "Application in an armed conflict of the means and methods, which are prohibited by an international treaty of the Republic of Kazakhstan":

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<sup>57</sup> As was stated above, there is no prisoner-of-war status in non-international armed conflicts, and this disposition therefore only covers crimes against the civilian population.

S. Sayapin LL.M., 2007

- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (AP II, Article 13);
- intentionally directing attacks against buildings, material, medical units and transport (AP II, Article 11(1)), and personnel (AP II, Article 9(1)) using the distinctive emblems of the Geneva Conventions in conformity with international law (AP II, Article 12);
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict (AP II, Article 13);
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (HC 1954, Article 19; AP II, Article 16);
- ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand (AP II, Article 17);

declaring that no quarter will be given (AP II, Article 4(1)).

(c) It should be noted that part 2 of Article 159 ("Employing a weapon of mass destruction which is prohibited by an international treaty of the Republic of Kazakhstan") also covers non-international armed conflicts. However, in this case, its international legal foundation is not found in Article 3 common to the 1949 Geneva Conventions or in Additional Protocol II, since these sources do not regulate the means and methods of warfare. The grounds for criminalization are found, respectively, in Article I(1)(b) of the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction and Article I of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, in which the Republic of Kazakhstan participates independently of its participation in the Conventions and Protocols<sup>58</sup> and which fill the said normative gap. Part 2 of Article 159 provides for a more severe punishment – the deprivation of liberty for a term between ten and twenty years, or the death penalty or a life sentence.

Due to the absence of a detailed regulation of the means and methods of warfare in non-international armed conflicts, Article 159 of the Criminal Code of the Republic of Kazakhstan does not encompass the elements of three war crimes, which are provided for in Article 8(2)(e) of the Rome Statute:

- pillaging a town or place, even when taken by assault;
- killing or wounding treacherously a combatant adversary;
- destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

It seems that the Republic of Kazakhstan's criminal legislation may be amended, as far as the criminalisation of the above acts is concerned, as a result of an according legislative initiative.<sup>59</sup>

## 2. Foreseen legal consequences

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<sup>58</sup> See *supra*, note 46

<sup>59</sup> See *infra*, Section G («Conclusions and recommendations»), point 8

Crimes, which fall under part 1 of Article 159 of the Criminal Code of the Republic of Kazakhstan, fall within the category of grave crimes, since they are punishable by the deprivation of liberty for a term not exceeding twelve years.<sup>60</sup> Crimes, which fall under part 2 of Article 159, are considered to be particularly grave and are punishable by the deprivation of liberty for a term between ten and twenty years, or the death penalty or a life sentence.<sup>61</sup>

#### IV. The crime of aggression

##### 1. Elements of the crime and legal sources

The Criminal Code of the Republic of Kazakhstan establishes criminal liability for planning, preparation, unleashing or conducting a war of aggression (Article 156),<sup>62</sup> as well as for propaganda and public calls for unleashing a war of aggression (Article 157).<sup>63</sup>

These provisions' constitutional foundation is Article 20(3) of the Constitution of the Republic of Kazakhstan:<sup>64</sup>

The propaganda or agitation for a violent change of the constitutional order, infringement of the Republic's integrity, undermining the security of the State, war, social, racial, national, religious, class-based or tribal superiority, as well as for a cult of cruelty and violence, shall not be allowed.

Up to this time, there is no definition of aggression in the international treaty law. Therefore, the scholarly doctrine, as a rule, interprets the content of this term in light of Articles 1 – 5 of the Annex to the 1974 Resolution on the Definition of Aggression,<sup>65</sup> although, in some scholars' opinion, this Resolution was not capable of exercising any "visible impact" upon the subsequent action of the Security Council.<sup>66</sup> The Criminal Code of the Republic of Kazakhstan has borrowed the disposition of Articles 156 and 157 from the Criminal Code of the Russian Federation, which, probably, bears evidence of there being similar scholarly and practical approaches in those countries. These crimes' *immediate object* is the peaceful co-existence of States. At the same time, each of them also has additional objects.

The *objective element* of the crime provided for in Article 156 of the Criminal Code of the Republic of Kazakhstan consists in the planning, preparation, unleashing and conducting a war of aggression. Planning is, essentially, an element in the preparation for war. Besides, preparation for war includes building up volumes of offensive weapons and munitions, relocation and concentration of troops for attack, mobilisation of economic capacities for the war, establishing economic reserves,

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<sup>60</sup> See *supra*, note 42

<sup>61</sup> See *supra*, notes 10 – 26

<sup>62</sup> Article 156: "1. Planning, preparation or развязывание of a war of aggression shall be punishable by [...]"

2. Ведение of a war of aggression shall be punishable by [...]"

<sup>63</sup> Article 157: "1. Propaganda and public calls for развязыванию of a war of aggression shall be punishable by [...]"

2. The same acts, committed by way of using the mass media or [committed] by a public official occupying a responsible position within the State shall be punishable by [...]"

<sup>64</sup> И. И. Рогов, С. М. Рахметов, Н. Н. Турецкий, *Уголовный кодекс Республики Казахстан с постановочными материалами* (Алматы, 2005), стр. 301 – 302

<sup>65</sup> UN GA Res. 3314 (XXIX), *GAOR* 29th Sess., Supp. No. 31 (1974)

<sup>66</sup> M. C. Bassiouni, B. B. Ferencz, "The Crime against Peace", in M. C. Bassiouni (ed.) *International Criminal Law* (2<sup>nd</sup> edition, 1999), vol. I, at 313, 334

S. Sayapin LL.M., 2007

carrying out propaganda campaigns, etc. Unleashing a war means starting hostilities, be these a large-scale attack or a local operation, which grows into an armed conflict. The conduct of a war is its continuation until the end of hostilities.<sup>67</sup>

The *subject of planning, preparation and развязывания* of a war of aggression can be a person who occupies a superior post within the State or Government of the Republic of Kazakhstan. Other persons who would not occupy superior posts within the State (for example, specialists of the General Staff who would plan a war of aggression) may be held criminally liable under Article 156 as accomplices. As concerns the *subject of ведения* a war of aggression (part 2 of Article 156), the criminal legislation does not contain any restrictive elements in that regard. Consequently, other persons than only superior State officials should be held liable for ведение a war of aggression – for example, commanders of military formations who would personally direct military operations.<sup>68</sup>

The *mental element* is a direct intent. The motives and purposes of planning, preparation, unleashing and conducting a war of aggression are predominantly political but may also include factors of a personal nature (e.g., greed, vain glory, hatred, revenge).<sup>69</sup>

In its turn, the *objective element* of the crime provided for in Article 157 of the Criminal Code consists in issuing calls for развязыванию a war of aggression, that is, oral and written statements aimed at starting a war against another State. These oral or written statements must be public, i.e. spoken or published in the presence of more than one person, or calculated to reach many persons (statements for the press, radio, television, and the like). If public calls for развязыванию a war of aggression are made in the mass media, criminal liability should be determined under part 2 of Article 157.

The *subject of the crime* may be a person who has attained the age of 16 years. If the crime is committed by a person who occupies a responsible State office, there is a qualified liability under part 2 of Article 157.

The *mental element* consists in a direct intent. The purposes and motives of the crime may differ. They would not influence the qualification of the crime but should be taken into account at the assignment of punishment.<sup>70</sup>

## 2. Foreseen legal consequences

Crimes under part 1 of Article 156 of the Criminal Code of the Republic of Kazakhstan fall in the category of grave ones, since the punishment for their commission would consist in the deprivation of liberty for a term between seven and twelve years.<sup>71</sup> Should a crime fall under part 2 of Article 156, it would be recognised as particularly grave and be punishable by a deprivation of liberty for a term between ten and twenty years, or by the death penalty, or by a life sentence.<sup>72</sup>

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<sup>67</sup> See: *Уголовное право России. Особенная часть*, под ред. В. Н. Кудрявцева, В. В. Лунеева, А. В. Наумова (Москва, 2005), стр. 535

<sup>68</sup> *Ibid.*, стр. 535 – 536

<sup>69</sup> Л. Н. Смирнов, Е. Б. Зайцев, *Суд в Токио* (Москва, 1978), стр. 71 – 72

<sup>70</sup> See *supra*, note 67, стр. 536

<sup>71</sup> See *supra*, note 42

<sup>72</sup> See *supra*, notes 10 – 26

S. Sayapin LL.M., 2007

Depending on factual circumstances, crimes, which are qualified under part 1 of Article 157, may be ones of lesser<sup>73</sup> or medium gravity,<sup>74</sup> since they are punishable by a fine equivalent to three thousand of monthly calculation indicators, or to the convicted person's salaries or other revenues for a period between three to nine months, or by the deprivation of liberty for a term not exceeding three years. Where a deprivation of liberty for a term not exceeding two years or another equivalent punishment were assigned, the crime would fall within the first category; where a deprivation of liberty for a term between two and three years or another equivalent punishment were assigned, the crime would fall within the second one.

Crimes, which are qualified under part 2 of Article 157, are punishable by a fine of up to five thousand monthly calculation indicators, or to the convicted person's salaries or other revenues for a period between six months and one year, or by the deprivation of liberty for a term between two and five years with the deprivation of the right to occupy certain posts or to engage in certain activities for a term not exceeding three years. Accordingly, such acts also are crimes of medium gravity and should entail legal consequences, which the criminal legislation has established with regard to this category of crimes.<sup>75</sup>

## **V. Reflection of elements of other international crimes in the national legislation**

### **V.1. "Production or proliferation of weapons of mass destruction" (Article 158)**

#### **V.1.1. Elements of the crime and legal sources**

In addition to *employing* a weapon of mass destruction, which is prohibited by an international treaty of the Republic of Kazakhstan (part 2 of Article 159), the Criminal Code also establishes criminal liability under Article 158 for "[p]roduction, procurement or disposal of chemical, biological as well as other weapons of mass destruction, which are prohibited by an international treaty of the Republic of Kazakhstan". It is worthwhile noting that this act had been criminalised long before it acceded to the respective international treaties.<sup>76</sup> At present, Article 158 encompasses the production, procurement or disposal of exclusively chemical and biological weapons, since Kazakhstan does not participate in international treaties, which prohibit other types of weapons.<sup>77</sup>

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<sup>73</sup> Article 10(2): "Crimes of lesser gravity are deliberate acts, for the commission of which the maximum punishment provided for in this Code does not exceed two years of deprivation of liberty, as well as negligent acts for the commission of which the maximum punishment provided for in this Code does not exceed five years of deprivation of liberty".

<sup>74</sup> See *supra*, note 41

<sup>75</sup> *Ibid.*

<sup>76</sup> See *supra*, note 46

<sup>77</sup> *Ibid.* However, I. I. Rogov, S. M. Rakhmetov, N. N. Turetskiy mention, in the materials on Article 158, the Convention on the prohibition of nuclear weapons, which was adopted on 7 December 1988 at the Forty-fourth session of the UN General Assembly, and the UN General Assembly Resolution 3479 (XXX) of 11 December 1979 "On the prohibition of development and production of new types of weapons of mass destruction and of new systems of such weapons". See *supra*, note 66, *срп.* 302. Probably, this authoritative doctrinal point of view bears evidence of the existence of a tendency in favour of criminalising the nuclear weapons, as well as other weapons of mass destruction, which are not directly prohibited by Kazakhstan's international treaties (for example, radiological, infra-sound, radiotechnical and other types of weapons). See also note 67, *срп.* 540.

S. Sayapin LL.M., 2007

It might seem that, unlike Article 355 of the Russian Federation's Criminal Code ("Development, production, stockpiling, procurement and disposal of weapons of mass destruction"), Article 158 of the Criminal Code of the Republic of Kazakhstan, does not, strictly speaking, encompass the *development* and *stockpiling* of weapons of mass destruction. However, a reasonable interpretation of the disposition of Article 158 brings one to a contrary conclusion. The criminal law's prohibition of the production of weapons of mass destruction comprises both the industrial and handicraft production – for instance, one carried out as a result of theft of dangerous substances. Military plants, which were technically able to produce such weapons, possess the respective technologies but have no right to use them, whilst the potential handicraft producers, who do not possess the technologies, would be compelled to develop them, which would constitute a *preparation* for the commission of a premeditated crime (Article 24(2)), which would entail criminal liability.<sup>78</sup> On the other hand, the stockpiling of weapons of mass destruction is also covered by Article 158, since both their production (which precedes the potential stockpiling) and the subsequent disposal of them are criminal.

Thus, it may be concluded that the crime's *objective element* includes the development, production (industrial or handicraft), stockpiling, procurement or disposal of, at least, the chemical and biological weapons, as well as – in the future – of other types of weapons, which might find themselves prohibited by an international treaty of the Republic of Kazakhstan.

Since the *subject* of the crime is not specifically named in the Article, the subject may be any person who has attained the age of 16 years. In reality, such subjects may include statesmen, specialists in charge of industrial production, engineers and scientists who master technologies of producing weapons of mass destruction, as well as military or civilian persons – officials of organizations, which procure or dispose of such weapons.

The *mental element* consists in a direct intent. The motives and purposes of the conduct do not have any significance for the qualification of the crime.

### **V.1.2. Foreseen legal consequences**

Article 158 provides for a punishment in the form of deprivation of liberty for a term between five and ten years.<sup>79</sup>

## **V.2. "Ecocide" (Article 161)**

### **V.2.1. Elements of the crime and legal sources**

The crime of ecocide equally was integrated in Kazakhstan's Criminal Code long before the ratification of the Convention on the prohibition of military or any hostile use of environmental modification techniques of 10 December 1976.<sup>80</sup> Article 161 of the Criminal Code formulates it the following way:

Mass destruction of the flora or fauna, contaminating the atmosphere, the land or water resources, as well as committing other acts which have caused or are capable of causing an ecological disaster [...]

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<sup>78</sup> See *supra*, note 11

<sup>79</sup> See *supra*, note 42

<sup>80</sup> See *supra*, note 46

S. Sayapin LL.M., 2007

The *immediate object* of the crime of ecocide is the ecological balance, the viability of the flora and fauna, the cleanliness of the atmosphere, of water resources and the human biosphere as a whole. This crime's *additional objects* are citizens' lives and health, economic and other interests of persons and organizations in the threatened territory. Ecocide also violates the human right to a healthy environment.

In accordance with the disposition of Article 161, the *objective element* of ecocide consists in the mass destruction of the flora or fauna, contaminating the atmosphere, the land or water resources, as well as committing other acts which have caused or are capable of causing an ecological disaster. Thus, the crime is considered complete once the said acts are accomplished, whilst the arrival of an ecological disaster may serve as a qualifying circumstance for the purpose of assigning a punishment.

The *subject of the crime* may be a person who has attained the age of 16 years. In fact, a crime as serious as ecocide can hardly be committed by one person. In practice, its subjects may be quite high-ranking military or civilian officials in charge of issuing orders to use means or methods, which could be detrimental to nature. The persons who enforce such orders should also be held criminally liable.

The *mental element* of the crime consists in a direct intent. The motives and purposes of the conduct do not have any significance for the qualification of the crime.

### **V.2.2. Foreseen legal consequences**

Article 161 provides for a punishment in the form of deprivation of liberty for a term between ten and fifteen years.<sup>81</sup>

## **V.3. "Mercenarism" (Article 162)**

### **V.3.1. Elements of the crime and legal sources**

Article 162 contains the elements of two crimes: (1) recruiting, training, financing or otherwise providing a mercenary materially, as well as using him in an armed conflict or in hostilities (parts 1 and 2), and (2) the participation of a mercenary in an armed conflict or in hostilities (parts 3 and 4):

1. Recruiting, training, financing or otherwise providing a mercenary materially, as well as using him in an armed conflict or in hostilities [...]
2. The same acts committed by a person using his or her official capacity or with respect to a minor [...]
3. The participation of a mercenary in an armed conflict or in hostilities [...]
4. The act provided for in the third part of the present Article, which has entailed human deaths or other grave consequences [...]

The disposition of the first crime criminalises all stages of engaging in mercenarism – from recruiting a mercenary (in time of peace or war) through to actually using him in an armed conflict. It is not fully clear from the disposition where the legal difference is, in the Kazakh legislators' opinion, between «an armed conflict» and «hostilities». If one interprets this crime from the point of view of international humanitarian law, one may suppose that the legislators have practically equalled these notions, since hostilities are a part of an armed conflict. Since the disposition does not draw a distinction between international and non-international

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<sup>81</sup> See *supra*, notes 10 – 14, 16 – 26

armed conflicts, Article 162 should be considered to apply in both types of armed conflicts.

The *subject* of this crime can be any person who has attained the age of 16 years. In practice, these could be agents of the armed forces or special services who recruit, train, finance or use mercenaries. If these persons occupy posts within the State apparatus or commit the crime with respect to minors, they should be held liable under part 2 of Article 162.

The second crime's *objective element* consists in the participation of a mercenary in an armed conflict or in hostilities. Both crimes' *mental element* is a direct intent. It follows from the commentary on Article 162 that a mercenary should be prompted by a desire of material gain.<sup>82</sup> As concerns the persons who recruit, train and finance mercenaries, the purposes and motives of their conduct should not influence the qualification of their acts.<sup>83</sup>

### V.3.2. Foreseen legal consequences

Depending on factual circumstances, crimes which are qualified under part 1 of Article 162, may fall within the categories of medium-gravity<sup>84</sup> or grave<sup>85</sup> crimes, since they are punishable by the deprivation of liberty for a term between four and eight years. In its turn, the participation of a mercenary in an armed conflict, qualified under part 3 of Article 162, is punishable by the deprivation of liberty for a term between three and seven years. If the deprivation of liberty for a term below five years is assigned, the crime will fall within the first category, if the term of the deprivation of liberty exceeds five years, the crime will fall within the second category.

The crimes provided for in parts 2 and 4 of Article 162 are particularly grave and are punishable, respectively, by the deprivation of liberty for a term between seven and fifteen years with the confiscation of property or without such, and by the deprivation of liberty for a term between ten and twenty years with the confiscation of property, or by the death penalty with the confiscation of property, or by a life sentence with the confiscation of property.<sup>86</sup>

## V.4. "Launching an attack against internationally protected persons or organisations" (Article 163)

### V.4.1. Elements of the crime and legal sources

The immediate object of the crime provided for in Article 163 is the international cooperation of States, and additional (optional) ones are the lives and health of the victims, their property-bound and other interests. Part 1 of Article 163 singles out specifically the purpose of this crime, which distinguishes it from adjacent common crimes:

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<sup>82</sup> Article 162, commentary: «A mercenary is a person who acts for the purpose of obtaining a material gain or another personal profit, and is not a national of a party to an armed conflict, is not permanently resident in its territory and has not been sent by another State for the performance of official duties».

<sup>83</sup> See *supra*, note 67, ctp. 539

<sup>84</sup> See *supra*, note 41

<sup>85</sup> See *supra*, note 42

<sup>86</sup> See *supra*, notes 10 – 26

S. Sayapin LL.M., 2007

1. Launching an attack against a representative of a foreign State or an internationally protected official of an international organisation, or against his family members who are resident with him, as well as against offices or residences or transportation means of internationally protected persons, as well as kidnapping or forcibly depriving such persons of liberty, if these acts have been committed for the purpose of provoking a war or complicating international relations [...]
2. The same acts, committed on multiple occasions, or with the use of weapons, or by a previous arrangement among a group of persons, or related to causing grave harm to health, or entailing by negligence the death of a person [...]

The crime's *objective element* consists in launching an attack against an internationally protected person, or against such persons' offices and residences or transportation means. The range of internationally protected persons and organizations is determined, first and foremost, in the 1973 Convention on the prevention and punishment of crimes against internationally protected persons. It mentions, in particular, the Heads of States and Governments, Ministers for Foreign Affairs, as well as representatives and other officials of foreign States (personnel of the diplomatic, consular and foreign trade services, except members of the technical staff) or of international intergovernmental organizations and their family members.

Launching an attack means any violence against a person (e.g. detaining, beating, depriving someone of the freedom of movement). In cases of murder (Article 92(2)(b)), deliberate infliction of grave harm to health (Article 103(2)(b)) or deliberate infliction of medium-gravity harm to health (Article 104(2)(b)) of a person or his family members, because of that person's performance of official activities or of a professional or social duty, an additional qualification is required. In its turn, launching an attack against premises or transportation means presupposes, for example, entering them, blocking entrances and exits or creating obstacles to the movement of a means of transportation.

The *subject of the crime* is a person who has attained the age of 16 years. The *mental element* is a direct intent.

#### **V.4.2. Foreseen legal consequences**

Crimes, which are qualified under part 1 of Article 163, are punishable by the deprivation of liberty for a term between three and eight years with the confiscation of property or without such.<sup>87</sup> Under part 2, the punishment in the form of deprivation of liberty for a term between ten and fifteen years with the confiscation of property or without such is assigned.<sup>88</sup>

#### **V.5. "Incitement of social, national, tribal, racial or religious enmity" (Article 164)**

##### **V.5.1. Elements of the crime and legal sources**

The *immediate object* of the crime provided for in Article 164 of the Criminal Code of the Republic of Kazakhstan are the constitutional principles of ideological and political pluralism (Article 5(1, 3, 4) of the Constitution), non-discrimination (Article 14(2) of the Constitution), cultural variability (Article 19 of the Constitution), freedom of conscience (Article 22(1) of the Constitution), inter-ethnic accord (Article 39(2) of the Constitution). The *objective element* of the crime has been formulated as follows:

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<sup>87</sup> See *supra*, notes 41, 42

<sup>88</sup> See *supra*, note 10 – 14, 16 – 26

1. Deliberate acts aimed at the incitement of social, national, tribal, racial, religious enmity or division, at insulting the national honour and dignity or religious feelings of citizens, likewise propagating for exclusivity, superiority or inferiority of citizens on the ground of their attitude towards religion, class-based, national, tribal or racial affiliation, if these acts are committed publicly or with the use of mass media [...];
2. The same acts, committed by a group of persons or on multiple occasions, or related with violence or a threat of its application, likewise [committed] by a person acting in his or her official capacity or by a leader of a public association [...];
3. The acts provided for in the first and second parts of the present Article, which have entailed grave consequences [...]

The extreme danger of the crime provided for in Article 164 consists in the formation of feelings of alienation, discontent, anger, revenge, hatred and enmity between people of different ethnicities, races, languages, origins, religions, social groups, which may lead to inter-ethnic, inter-religious, inter-racial and other confrontations.<sup>89</sup> With due regard to those circumstances, Article 164 contains elements of both a formal (parts 1 and 2) and a material (part 3) crime. It should be noted that murder (Article 96(2)(k)), deliberate infliction of grave harm to health (Article 103(2)(h)), deliberate infliction of medium-gravity harm to health (Article 104(2)(f)) or torment (Article 107(2)(f)) on the ground of social, national, racial, religious hatred or enmity require an additional qualification.

Acts provided for in Article 164 must be committed publicly or with the use of mass media, i.e. the respective extremist views<sup>90</sup> must be expressed orally or in presence of a public at meetings, sessions, manifestations or broadcast on the television or radio, or communicated in writing through publications in newspapers, journals, leaflets, etc.

The *subject of the crime* can be any person who has attained the age of 16 years.

The *mental element* of the crime presupposes a direct intent with the purpose of attaining the criminal result, i.e. the incitement of social, national, tribal, racial, religious enmity or division, insulting citizens' national honour and dignity or religious feelings, or propagating for exclusivity, superiority or inferiority of citizens on the ground of their attitude towards religion, class-based, national, tribal or racial affiliation.

### V.5.2. Foreseen legal consequences

The crime provided for in part 1 of Article 164 is punishable by a fine in the amount of up to one thousand monthly calculation indicators or equivalent to the convicted person's salaries or other revenues for a period of up to ten months, or by arrest for a term not exceeding six months, or by correctional labour for a term not exceeding two years, or by the deprivation of liberty for a term not exceeding five years.

Under part 2, a punishment in the form of a fine between five hundred and three thousand monthly calculation indicators or one equivalent to the convicted person's salaries or other revenues for a period between five months and one year, or the restriction of liberty for a term not exceeding four years, or the deprivation of lib-

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<sup>89</sup> See *supra*, note 67, ctp. 402

<sup>90</sup> In accordance with commentary 2 on Article 41 of the Criminal Code of the Republic of Kazakhstan, the crime provided for in Article 164 is regarded as one containing elements of extremism.

S. Sayapin LL.M., 2007

erty for a term between two and six years with the deprivation of the right to occupying certain posts or to engaging in certain activities for a term not exceeding three years, or without such, is to be assigned.

Under part 3 of Article 164, a punishment in the form of the deprivation of liberty for a term between three and ten years with the deprivation of the right to occupying certain posts or to engaging in certain activities for a term not exceeding three years, or without such, is to be assigned.

## **C. Principles of enforcing provisions of the national criminal law**

### **I. Jurisdictional principles rooted in criminal law**

#### **1. General overview of jurisdictional principles rooted in criminal law**

The principal and most voluminous is the *territorial principle*, which is reflected in Article 6 of the Criminal Code of the Republic of Kazakhstan.<sup>91</sup> With due regard to provisions of international law, the national territory of the Republic of Kazakhstan includes its land, maritime and aerial space within its State borders. In accordance with Article 6(2) of the Criminal Code, it also applies to crimes committed on the continental shelf and within the exclusive economic zone of the Republic of Kazakhstan.

The order of enforcing criminal liability for crimes committed aboard ships and aeroplanes, as well as for crimes committed within the territory of the Republic of Kazakhstan by diplomatic representatives of foreign States and by other persons who enjoy immunities also takes account of respective international treaties' provisions.

The application of criminal law to persons who have committed crimes outside the Republic of Kazakhstan is regulated by Article 7 of the Criminal Code.<sup>92</sup> Part 1 of

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<sup>91</sup> Article 6 («Application of criminal law to persons who have committed crimes on the territory of the Republic of Kazakhstan»):

«1. A person who has committed a crime on the territory of the Republic of Kazakhstan shall be held liable in accordance with this Code.

2. A crime shall be considered committed on the territory of the Republic of Kazakhstan, if it commenced or continued, or was completed on the territory of the Republic of Kazakhstan. This Code shall also apply to crimes committed on the continental shelf and within the exclusive economic zone of the Republic of Kazakhstan.

3. A person who has committed a crime aboard a ship, which is registered at a port in the Republic of Kazakhstan and which is an open aerial or maritime space outside the Republic of Kazakhstan, shall be held liable in accordance with this Code, unless an international treaty of the Republic of Kazakhstan provides to the contrary. A person who has committed a crime aboard a military ship or a military aeroplane of the Republic of Kazakhstan shall also be held liable in accordance with this Code, irrespective of its location.

4. The issue of criminal liability of diplomatic representatives of foreign States and of other persons who enjoy immunities, and who have committed a crime on the territory of the Republic of Kazakhstan, shall be dealt with in accordance with provisions of international law».

<sup>92</sup> Article 7 («Application of criminal law to persons who have committed crimes outside the Republic of Kazakhstan»):

«1. Citizens of the Republic of Kazakhstan who have committed crimes outside the Republic of Kazakhstan shall be held criminally liable in accordance with this Code, if the acts they have committed are also regarded as crimes in the State in whose territory they have been committed, and if these persons have not been convicted in another State. At the sentencing of the said persons, the [assigned] punishment may not exceed the upper limit of

S. Sayapin LL.M., 2007

Article 7 formulates the jurisdictional *principle of nationality* of a person who has committed a crime outside his or her State of nationality. Unlike some other post-Soviet criminal laws, Kazakhstan's Criminal Code provides directly that no higher sentence may be imposed upon nationals of the Republic of Kazakhstan and stateless persons who have committed a crime outside its borders, than one which is provided by a sanction contained in the law of the State where the crime was committed.

Part 3 of Article 7 formulates the principle of *patronage (or special regime)* with regard to members of the Republic of Kazakhstan's military personnel stationed abroad. As a rule, international treaties on the status of armed forces stationed outside the State of their origin contain provisions, which exempt members of these armed forces from the criminal jurisdiction of the receiving State. Accordingly, under this general rule, members of the Republic of Kazakhstan's armed forces who are stationed abroad should be held liable for crimes they commit under the legislation of their own country.

In its turn, part 4 of Article 7 formulates two jurisdictional principles: the *principle of protecting interests of the State* and the *principle of conditioned universal jurisdiction*. The first consists in the rule that foreign nationals who commit a crime outside the Republic of Kazakhstan should be held liable under Kazakhstan's criminal legislation, if the crime is directed against its interests. The wording of the principle of conditioned universal jurisdiction refers one to according international treaties of the Republic of Kazakhstan (a typical example of treaties containing the *aut dedere aut judicare* provision are the 1949 Geneva Conventions on the Protection of Victims of War), and emphasises particularly that foreign nationals who are held criminally liable on the territory of the Republic of Kazakhstan on the ground of according international treaties should not have been previously convicted for these very crimes in another State (*ne bis in idem*).

## **2. Overview of jurisdictional principles, which apply to international crimes**

The jurisdictional principles reflected in Articles 6 and 7 of the Criminal Code of the Republic of Kazakhstan apply on equal terms to all crimes, including crimes against the peace and security of mankind.

## **3. Attribution of jurisdictional principles to material criminal law or to the criminal procedure law**

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a sanction, which is provided for by the legislation of the State in whose territory the crime has been committed. Stateless persons shall be held liable on the same grounds.

2. Conviction and other criminal law consequences of the commission by a person of a crime on the territory of another State shall have no criminal law significance for taking a decision about that person's criminal liability for a crime [he or she has] committed on the territory of the Republic of Kazakhstan, unless an international treaty of the Republic of Kazakhstan provides to the contrary, or unless a crime committed on the territory of another State concerns interests of the Republic of Kazakhstan.

3. Members of the Republic of Kazakhstan's military units, which are stationed abroad, shall be held criminally liable for crimes committed on the territory of a foreign State in accordance with this Code, unless an international treaty of the Republic of Kazakhstan provides to the contrary.

4. Foreign nationals who have committed crimes outside the Republic of Kazakhstan, shall be held criminally liable in accordance with this Code, if [their] crimes are directed against interests of the Republic of Kazakhstan, and in cases provided for in an international treaty of the Republic of Kazakhstan, if they have not been convicted in another State and are held criminally liable on the territory of the Republic of Kazakhstan».

S. Sayapin LL.M., 2007

The jurisdictional principles are contained in the material criminal law (Articles 6 and 7 of the Criminal Code of the Republic of Kazakhstan). In its turn, the Criminal Procedure Code of the Republic of Kazakhstan contains principles of application of the criminal procedure legislation *rationae loci* (Article 3),<sup>93</sup> *rationae temporis* (Article 5),<sup>94</sup> with respect to foreign nationals and stateless persons,<sup>95</sup> as well as with respect to the applicability of a foreign State's criminal procedure legislation on the territory of the Republic of Kazakhstan (Article 4).<sup>96</sup>

## II. Mandatory or permissive prosecution

In accordance with Article 32(4) of the Criminal Procedure Code of the Republic of Kazakhstan, cases related to accusations of crimes against the peace and security of mankind are ones of public prosecution. Thus, the penal prosecution of these cases is mandatory, irrespective of whether there is a complaint filed by a victim or of other circumstances.<sup>97</sup>

### D. General conditions of punishability or of releasing from punishment

The notion and types of punishment are regulated by Section III of the Criminal Code of the Republic of Kazakhstan (Articles 38 – 51). The general conditions of

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<sup>93</sup> Criminal Procedure Code of the Republic of Kazakhstan, Article 3 («Application of the criminal procedure legislation *rationae loci*»):

«1. The criminal procedure shall be carried out on the territory of the Republic of Kazakhstan in accordance with this Code, irrespective of where a crime has been committed.

2. If an international treaty, which has been ratified by the Republic of Kazakhstan, provides for other rules of this Code's application *rationae loci*, the provisions of the international treaty shall apply».

<sup>94</sup> Criminal Procedure Code of the Republic of Kazakhstan, Article 5 («Application of the criminal procedure legislation *rationae temporis*»):

«1. The criminal procedure shall be carried out in accordance with the criminal procedure legislation, which has entered into force by the moment of implementing a procedural action, taking a procedural decision.

2. A criminal procedure law, which imposes new obligations, cancels or diminishes rights, which belongs to the participants in a [criminal] procedure, or which restricts their enjoyment by additional conditions, shall not be retroactive.

3. The admissibility of evidence shall be determined in accordance with the law which shall apply at the moment of their receipt».

<sup>95</sup> Criminal Procedure Code of the Republic of Kazakhstan, Article 6 («Application of the criminal procedure legislation with respect to foreign nationals and stateless persons»):

«1. The criminal procedure with regard to foreign nationals and stateless persons shall be carried out in accordance with this Code.

2. The particulars of criminal procedure with respect to, or participation of, persons who possess diplomatic or other privileges and immunities, which shall have been established by international treaties of the Republic of Kazakhstan, shall be determined in accordance with Chapter 53 of this Code».

<sup>96</sup> Criminal Procedure Code of the Republic of Kazakhstan, Article 4 («Application on of a foreign State's criminal procedural legislation on the territory of the Republic of Kazakhstan»): «The application of a foreign State's criminal procedure legislation on the territory of the Republic of Kazakhstan by investigative bodies and the judiciary of [that] foreign State, or, upon their request, by an organ implementing the criminal procedure may be allowed, if this is provided for by an international treaty, which has been ratified by the Republic of Kazakhstan».

<sup>97</sup> Criminal Procedure Code of the Republic of Kazakhstan, Article 32(4) («Cases of private, private-public and public prosecution and indictment»): «Cases related to crimes, except ones indicated in the second and third parts of this Article, shall be considered cases of public prosecution. The criminal prosecution of these cases shall be carried out irrespective of whether there is a complaint filed by a victim».

assigning a punishment are outlined in Section IV (Articles 52 – 64). The conditions of releasing from punishment are reflected in Section V of the Criminal Code (Articles 65 – 77). In Section VI (Articles 78 – 87), the particulars of minors' criminal liability are set out.

## **I. General conditions of punishability or of releasing from punishment**

### **1. Intentional form of guilt**

In accordance with Article 20 of the Criminal Code, a crime is considered to have been committed intentionally, if it has been committed with a direct or an indirect intent.

A crime is considered to have been committed with a *direct* intent, if its perpetrator was conscious about the social danger posed by his or her action (omission), foresaw the possibility or inevitability of those socially dangerous consequences and wished their arrival (part 2 of Article 20). It should be noted here that all crimes against the peace and security of mankind, which are punishable under Kazakhstan's criminal legislation, presuppose a direct intent.

Under part 3 of Article 20, a crime is considered to have been committed with an *indirect* intent, if its perpetrator was conscious about the social danger posed by his action (omission), foresaw the possibility of those socially dangerous consequences, did not wish but consciously allowed for the arrival of those consequences or treated them indifferently.

### **2. Negligent form of guilt**

Under Article 21 of the Criminal Code of Kazakhstan, a crime is considered to have been committed negligently, if that crime has been committed out of conceit or carelessness. Thereby, a negligent act is only then considered a crime when this is specifically provided for by a respective Article of the Criminal Code's Specific Part (Article 19(4)).

A crime is considered to have been committed out of *conceit*, if its perpetrator foresaw the possibility of socially dangerous consequences of his action (omission) but, without sufficient grounds and in a light-minded way, expected those consequences to be prevented (part 2 of Article 21).

A crime is considered to have been committed out of *carelessness*, if its perpetrator did not foresee the possibility of socially dangerous consequences of his action (omission), although he should and could have foreseen these consequences, if he had had more attention and farsight (part 3 of Article 21).<sup>98</sup>

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<sup>98</sup> Kazakhstan's criminal law also establishes liability for crimes committed with two forms of guilt (Article 22): «If, as a result of the commission of an intentional crime, grave consequences are caused, which entail a more serious punishment in accordance with the law and which were not embraced by the perpetrator's intent, the criminal liability for such consequences shall only ensue, if the perpetrator foresaw their possibility but, without sufficient grounds in a self-assured way, expected those consequences to be prevented, or if the perpetrator did not foresee but should and could have foreseen the possibility of those consequences. Overall, such a crime is considered to have been committed intentionally».

### 3. Regulation of mistakes of fact and mistakes of law

Kazakhstan's Criminal Code does not contain provisions analogous to those of Article 32 of the Rome Statute of the International Criminal Court.<sup>99</sup> However, since with regard to both mistakes of fact and mistakes of law the key criterion is the existence of a required mental element of a particular crime, one should bear in mind the provisions of Article 19(2) of the Criminal Code regarding the prohibition of objective imputation («sham crime», mistaken prohibition, mistaken assessment of an action (omission)),<sup>100</sup> as well as the provisions of Article 23 («Innocent infliction of harm»)<sup>101</sup>.

### 4. Punishability of attempted crime and possibility of timely refusal of attempt

Kazakhstan's Criminal Code sets out in Article 24 («Preparation to a crime and attempted crime») conditions for criminal liability for deliberate crimes whose commission has not been completed in the circumstances, which did not depend on the perpetrator. These conditions relate directly to the subject of this Report, since all acts considered herein fall within the category of deliberate crimes.

In accordance with Article 25 of the Criminal Code, a completed crime is an act, which contains all elements of a crime provided for in the Criminal Code. Under Article 24, criminal liability for the preparation to a crime and for an attempted crime would ensue under the same Article of the Criminal Code as would for a completed crime, whereby a reference to a respective part of Article 24 should be made.

The preparation to a crime includes the deliberate search, production or adaptation of means of tools for the commission of the crime, selection of accomplices, making an arrangement to commit the crime or otherwise deliberately creating conditions for the commission of the crime, if the crime has not thereby completed in the circumstances, which did not depend on the perpetrator (Article 24(1)).

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<sup>99</sup> Rome Statute of the International Criminal Court, Article 32 («Mistake of fact or mistake of law»):

«1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33».

<sup>100</sup> Article 19(2) («Guilt»): «Objective imputation, that is, criminal liability for an innocent infliction of harm shall not be allowed».

<sup>101</sup> Article 23 («Innocent infliction of harm»):

«1. An act is considered to have been committed innocently, if the action (omission) and the socially dangerous consequences which ensued had not been covered by the perpetrator's intent, and this Code does not provide for criminal liability for a negligent commission of such an act and a [negligent] infliction of [its] socially dangerous consequences.

2. An act is considered to have been committed innocently, if its perpetrator was not and, in the circumstances of the case, could not have been conscious about the social danger of his action (omission), or did not foresee the possibility of [those] socially dangerous consequences and, in the circumstances of the case, should not and could not have foreseen them. An act is also considered to have been committed innocently, if its perpetrator foresaw the arrival of socially dangerous consequences when committing it, had sufficient reasons to expect to have them prevented, or could not have prevented these consequences due to an incompatibility between his or her psycho-physical qualities and the exigencies of extreme conditions or of neuro-psychological overloads».

Criminal liability ensues only for preparation to a grave or a particularly grave crime (Article 24(2)).

The attempted crime is defined in Article 24(3) of the Criminal Code: «An attempted crime is an action (omission), committed with a direct intent, directly aimed at the commission of a crime, if the crime has not thereby been completed, in the circumstances which did not depend on the perpetrator».

Criminal liability ensues only for attempt to commit a grave or a particularly grave crime.

In its turn, Article 26 of the Criminal Code provides that a person should be held criminally liable, if he or she has voluntarily and irreversibly refused to bring the crime to an end, and if the action, which the person has in fact committed, does not contain the elements of another crime.<sup>102</sup>

## 5. Types of accomplices and liability of accomplices

Article 28 of the Criminal Code classifies accomplices in a crime as perpetrators, organisers, instigators and accessories:

1. In addition to the perpetrator, accomplices in a crime shall be [its] organiser, instigator and accessory.
2. A perpetrator is a person who has directly committed a crime or immediately participated in its commission together with other persons (co-perpetrators), as well as a person who has committed a crime by way of using other persons who are not criminally liable, due to [their] age, insanity or other circumstances provided for in this Code, as well as by using persons who [may] have committed the crime negligently.
3. An organiser is a person who has organised the commission of a crime or managed its commission, as well as a person who has established an organised criminal group or a criminal association (criminal organisation) or managed them.
4. An instigator is a person, who [acting] by [way of] persuasion, bribe, threat or otherwise, induces another person to commit a crime.
5. An accessory is a person who contributes to the commission of a crime [by way of providing] advice, directions, supplying information, tools or means of the commission of the crime, as well as a person who has promised in advance to conceal the criminal, tools or other means of the commission of the crime, traces of the crimes or items acquired as a result of the crime, as well as a person who has promised in advance to procure or dispose of such items.

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<sup>102</sup> Article 26 («Voluntary refusal to commit a crime»):

«1. The voluntary refusal to commit a crime shall be the discontinuation by a person of preparatory actions or the discontinuation of an action (omission) directly aimed at bringing the crime to an end. A person shall not be held criminally liable for a crime, if he or she has voluntarily and irreversibly refused to bring that crime to an end.

2. A person who has voluntarily refused to bring a crime to an end shall only be held criminally liable, if the action he has in fact committed contains the elements of another crime.

3. The organiser of a crime and the instigator of a crime shall not be held criminally liable, if these people have prevented the perpetrator's bringing the crime to an end, by having reported [it] to State organs or by other measures taken. The accessory to a crime shall not be held criminally liable, if he or she refuses to provide the perpetrator with support that was promised [him] beforehand, or [if he] eliminates the results of assistance [he has] already provided.

4. If the actions [taken by] the organiser or the instigator set out in the third part of this Article have not prevented the commission of a crime by the perpetrator, the measures [they have] taken may be taken into account by the court as mitigating circumstances at the assignment of punishment».

In accordance with Article 29 of the Criminal Code, the criminal liability of perpetrators should be determined by the *character and degree of participation* each of them would have contributed to the commission of a crime:

- co-perpetrators should be held liable under the same Article of the Criminal Code for a crime they would have jointly committed, without any reference to Article 28;
- the liability of an organiser, instigator and accessory should ensue under the Article, which provides for a punishment for the commission of a given crime, with a reference to Article 28 of the Criminal Code, except cases where they also are co-perpetrators of the crime;
- should a crime not be completed, in the circumstances, which would not depend on the perpetrator, other accomplices in the crime should be held liable for complicity in the preparation to the crime or in attempting to commit the crime. The preparation to a crime also entails the liability of a person who would not be able to induce other persons to commit the crime in the circumstances which would not depend on him;
- a person who is not specifically indicated in a respective Article of the Criminal Code's Specific Part as the subject of a crime and who has participated in the commission of the crime, which is provided for in that Article, should be held criminally responsible for this crime as its organiser, instigator or accessory.

## 6. Punishability of omission

Whereby all crimes considered in this Report fall within the category of *criminal actions*, that is, of socially dangerous and unlawful conduct, which consists in engaging in a proactive behavior forbidden by law, it should be noted that Kazakhstan's criminal legislation establishes criminal liability for *criminal omissions* too, that is, for socially dangerous and unlawful conduct, which consists in a person's failure to do what he or she must and could have done, on certain grounds.<sup>103</sup> Part 1 of Article 9 of the Criminal Code («Notion of a crime») reads: «A crime is a guiltily committed socially dangerous conduct (action or omission), which is prohibited by this Code under the threat of a punishment».

It is obvious that part 2 of the same Article of the Criminal Code, which provides that an action or an omission, which formally contains elements of act provided for in the Criminal Code's Specific Part but does not pose any social danger, due to its little significance, that is, does not cause and harm to any person, society or State, should not be considered a crime, does not fit within the context of the present report.

## 7. Special liability of superiors

The criminal liability for issuing an unlawful order or instruction is provided for by part 1 of Article 37:

A person who has issued an unlawful order or instruction shall be held criminally liable for inflicting [the] harm.

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<sup>103</sup> See: *Уголовное право России. Общая часть*, под ред. В. Н. Кудрявцева, В. В. Лунеева, А. В. Наумова (Москва, 2005), стр. 124, 128

It should be noted that this norm concerns both the military and civilian superiors who issues orders and instructions, which are mandatory for their subordinates, since no contrary conclusion may be drawn from the text of the Criminal Code.

## 8. Significance of conduct upon orders

The conduct of a subordinate who acts upon orders from his superior is also regulated by Article 37 of the Criminal Code:

1. The infliction of harm to interests, which are protected by this Code, by a person who acts in pursuance of an order or an instruction, which is mandatory for him, shall not be a crime. A person who has issued an unlawful order or instruction shall be held criminally liable for inflicting such harm.
2. A person who has committed a deliberate crime in pursuance of a manifestly unlawful order or instruction shall be held criminally liable on general grounds. Non-compliance with a manifestly unlawful order or instruction shall exclude criminal liability.<sup>104</sup>

There follow several essential conclusions from Article 37:

- overall, subordinates are legally compelled to comply with lawful orders and instructions issued by their superiors. With respect to the military personnel, disobedience or another non-compliance with a lawful order or instruction issued by a superior entails criminal liability under Article 367 of the Criminal Code;<sup>105</sup>

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<sup>104</sup> Cf. Article 33 of the Rome Statute of the International Criminal Court («Superior orders and prescription of law»):

«1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful».

<sup>105</sup> Article 367 («Disobedience or another non-compliance with an order»):

«1. Disobedience, that is, an open refusal to comply with a superior's order, as well as another deliberate non-compliance by a subordinate with a superior's order, which has been issued in due course, that has caused a substantial harm to the interests of service, -

shall be punishable by restriction of promotion in military ranks for a term not exceeding two years, or by arrest for a term not exceeding six months, or by confinement to a disciplinary military unit for a term not exceeding two years.

2. The same act, committed by a group, by a previously arranged or by an organized group, as well as one which has entailed grave consequences, -

shall be punishable by the deprivation of liberty for a term not exceeding five years.

3. The acts provided for in the first of second parts of this Article, committed during or in the context of a war, -

shall be punishable by the deprivation of liberty for a term between five and twenty years, and where aggravating circumstances exist – by the death penalty or a life sentence.

4. Non-compliance with an order due to a negligent or ill-conscious attitude towards the service, which has entailed grave consequences, -

shall be punishable by restriction of promotion in military ranks for a term not exceeding one year, or by arrest for a term between three and six months, or by confinement to a disciplinary military unit for a term not exceeding one year.

5. The act provided for in the fourth part of this Article, committed during or in the context of a war, -

shall be punishable by the deprivation of liberty for a term between three and ten years».

S. Sayapin LL.M., 2007

- the infliction of harm at the discharge of a lawful order or instruction is not a crime and does not entail criminal liability either for the subordinate or the superior;
- if a superior issues a manifestly unlawful order or instruction to his subordinate, the subordinate must refuse to comply with such an order or instruction and must not be held criminally liable for non-compliance. I. I. Rogov, S. M. Rakhmetov, N. N. Turetskiy quote in their materials on Article 37, as an example of a manifestly unlawful order, Article 2(3) of the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment: «An order from a superior officer or a public authority may not be invoked as a justification of torture».<sup>106</sup> Since this prohibition emanates from the legal fact of Kazakhstan's participation in this Convention, a substantiated supposition may be put forward that orders to commit genocide or war crimes also are manifestly unlawful in light of Kazakhstan's criminal law – by virtue of its participation in the respective international treaties. In turn, it seems that an order to commit crimes against humanity should also be manifestly unlawful – in the context of customary international law and Kazakhstan's criminal legislation (see *supra*, pp. 14 – 15 of the present Report).

## 9. Significance of conduct in the state of necessary defence

In accordance with Article 32 of the Criminal Code, it is not a crime to inflict harm on an attacker in the state of necessary defence, that is, in the context of defending one's person, residence, property, land and other rights of the person who defends himself or herself or of other people, of interests of society and State which are protected by law from a socially dangerous attempt, by way of inflicting harm on the attacker, if there was no excess of necessary defence.

It is specifically pointed out in part 2 of Article 32 that all persons, irrespective of their professional or other special training and official capacity, have an equal right to necessary defence. This right belongs to a person irrespective of the possibility to avoid a socially dangerous attempt or to address other persons or State bodies for help.

Criminal liability is entailed, if harm is deliberately inflicted as a result of an excess of limits of necessary defence. Part 3 of Article 32 defines an excess of limits of necessary defence as a manifest inconsistency between the defence actually applied and the character and degree of a criminal attempt's social danger, in consequence of which the attacker suffers an obviously excessive harm, which is not compatible with the circumstances.

However, the second paragraph of part 3 of Article 32 contains a reservation that it is no excess of limits of necessary defence to inflict harm on a person who attempts on another person's life, or when repelling other kinds of attacks related to the use or attempted use of weapons.

## 10. Significance of existence of a state of emergency

The General Part of Kazakhstan's criminal legislation contains a provision, which is specifically devoted to the commission of a crime by way of using the circumstances of a state of emergency, a natural or another social disaster, as well as well

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<sup>106</sup> See *supra*, note 64, стр. 53

S. Sayapin LL.M., 2007

as in the circumstances of mass disorders – point k) of part 1 of Article 54 («Circumstances which aggravate the criminal liability and punishment»).

As G. Werle points out, the context of «organised violence» – of a condition that is synonymous to the circumstances of a state of emergency, of a natural or another social disaster, as well as of mass disorders – does inevitably constitute either the objective or the mental element of all international crimes.<sup>107</sup> Since this circumstance is not listed specifically among the elements of crimes against the peace and security of mankind,<sup>108</sup> it may be concluded that it should be taken into account by the court as a circumstance, which aggravates the criminal liability and punishment for the commission of any of these crimes (including the crime provided for by Article 163 ("Launching an attack against internationally protected persons or organisations"), since it is committed «with the purpose of provoking a war or complicating international relations»).

### **11. Age of criminal liability**

As a general rule, criminal liability may ensue with respect to persons who have attained the age of sixteen years by the time of the commission of a crime (Article 15(1) of the Criminal Code). However, for the commission of a number of crimes,<sup>109</sup> including some crimes, which are considered in the present Report, criminal liability ensues at the age of fourteen years.

### **12. Rules of assigning punishments and special purposes of punishment for international crimes**

Section IV of the Criminal Code (Articles 52 – 64) contains rules of assigning punishments. The punishment's declared characteristics are *fairness* and *sufficiency* for the correction of persons who have committed crimes, and for the prevention of new crimes.

A stricter type of punishment, out of those foreseen for a specific crime, is only assigned, if a less severe type thereof should not be capable of ensuring the attainment of the punishment's purposes (Article 52(2)). A stricter punishment than one

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<sup>107</sup> See *supra*, note 27

<sup>108</sup> Article 54(2): «If a circumstance, which is indicated in the first part of this Article, is provided for by a respective Article of this Code's Specific Part as an element of a crime, it may not be taken into account repeatedly as a circumstance, which aggravates the liability and punishment».

<sup>109</sup> Article 15(2): «Persons who have attained the age of fourteen years by the time of the commission of a crime shall be held criminally liable for murder (Article 96), deliberate infliction of grave harm to health (Article 103), deliberate infliction of medium-gravity harm to health with aggravating circumstances (Article 104, second part), rape (Article 120), violent actions of a sexual nature (Article 121), kidnapping a person (Article 125), theft (Article 175), robbery (Article 178), burglary (Article 179), extortion (Article 181), unlawfully taking possession of a car or of another means of transportation with aggravating circumstances, without the purpose of stealing it (Article 185, second, third, fourth parts), deliberately destroying or causing damage to property with aggravating circumstances (Article 187, second, third parts), terrorism (Article 233), taking a hostage (Article 234), making a knowingly false report of an act of terrorism (Article 242), taking possession or extorting weapons, munition, explosive substances and explosive devices (Article 255), hooliganism with aggravating circumstances (Article 257, second, third parts), vandalism (Article 258), taking possession or extorting narcotic substances or психотропных веществ (Article 260), mocking bodies of dead persons and their burial places with aggravating circumstances (Article 275, second part), deliberately setting means of transportation or communication out of order (Article 299)».

S. Sayapin LL.M., 2007

provided for by the respective Articles of the Criminal Code's Specific Part for the commission of a given crime may be assigned for a multiplicity of crimes or result from a multiplicity of sentences, in accordance with Articles 58 and 60. Grounds for assigning a lighter punishment than one provided by the respective Articles of the Criminal Code's Specific Part for the commission of a given crime are set out in Article 55.

At the assignment of a punishment, the character and degree of a given crime's social danger, the perpetrator's personality, including his behaviour before and after the commission of the crime, circumstances which mitigate or aggravate the criminal liability and punishment, as well as the influence of the assigned punishment upon the convicted person's correction and the living conditions of his family or his dependants (Article 52(3)).

### **13. Criminal liability of juridical persons**

In accordance with Article 14(1) of the Criminal Code, only natural persons may be held criminally liable.<sup>110</sup> The Republic of Kazakhstan's criminal legislation does not provide for the criminal liability of juridical persons.

### **14. Significance of international and constitutional immunities**

In accordance with the Constitution of the Republic of Kazakhstan, members of the Parliament,<sup>111</sup> Chairman and members of the Constitutional Council,<sup>112</sup> judges,<sup>113</sup> the General Prosecutor<sup>114</sup> enjoy functional immunities during their terms of office. The particulars of the criminal procedure with respect to persons who enjoy privileges and immunities from criminal prosecution on general grounds are regulated by Chapter 53 of the Criminal Procedure Code of the Republic of Kazakhstan. In particular, this Chapter contains special rules of criminal procedure with respect to:

- members of the Parliament of the Republic of Kazakhstan;
- the Chairman or members of the Constitutional Council of the Republic of Kazakhstan;
- judges;

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<sup>110</sup> Article 41(1): «The criminal liability may only ensue with respect to a sane natural person who has attained the age stipulated in this Code».

<sup>111</sup> Article 52(4) of the Constitution: «A member of the Parliament may not, during his or her term of office, be arrested, summoned, subjected to judicially impossible administrative penalties, held criminally liable without the consent of a respective Chamber, except where he or she has been apprehended on a crime scene or has committed a grave crime».

<sup>112</sup> Article 71(5) of the Constitution: «The Chairman and members of the Constitutional Council may not, during their terms of office, be arrested, summoned, subjected to judicially impossible administrative penalties, held criminally liable without the consent of the Parliament, except where they have been apprehended on a crime scene or have committed grave crimes».

<sup>113</sup> Article 79(2) of the Constitution: «A judge may not be arrested, summoned, subjected to judicially impossible administrative penalties, held criminally liable without the consent of the President of the Republic of Kazakhstan, founded upon a recommendation from the Supreme Judicial Council of the Republic, or, in the case provided for by subparagraph 3 of Article 55 of the Constitution – without the consent of the Senate, except where he or she has been apprehended on a crime scene or has committed a grave crime».

<sup>114</sup> Article 83(3) of the Constitution: «The General Prosecutor of the Republic may not, during his or her term of office, be arrested, summoned, subjected to judicially impossible administrative penalties, held criminally liable without the consent of the Senate, except where he or she has been apprehended on a crime scene or has committed a grave crime. The General Prosecutor's term of office shall be five years».

- the General Prosecutor of the Republic of Kazakhstan;
- persons who enjoy diplomatic immunity from criminal prosecution.

The text of Chapter 53 of the Criminal Procedure Code of the Republic of Kazakhstan is included in Annex I to the present Report.

Under the Constitution, the President and former Presidents of the Republic of Kazakhstan enjoy functional and personal immunities<sup>115</sup> and may not, consequently, be held criminally liable either during their terms of office or after they would have elapsed.

### **15. Provisions on statutory limitations with regard to international crimes**

Under Article 69(6) of the Criminal Code,<sup>116</sup> no statutory limitations should apply to persons who have committed crimes against the peace and security of mankind. However, since the criminal legislation does not contain the notion of crimes against humanity, one should bear in mind the statutory limitations, which apply to common crimes under part 1 of Article 169.

### **16. Significance of amnesties and pardons for the prosecution of international crimes**

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<sup>115</sup> Article 46 of the Constitution: «1. The President of the Republic of Kazakhstan, his honour and dignity shall be inviolable.

2. The President of the Republic of Kazakhstan and his family shall be provided for, served and guarded at the expense of the State.

3. The provisions of this Article shall apply to ex-Presidents of the Republic of Kazakhstan.

4. The status and powers of the First President of the Republic of Kazakhstan shall be regulated by the Constitution and a constitutional law».

<sup>116</sup> Article 69 («Releasing from criminal liability due to the statutory limitations»):

«1. A person shall be released from criminal liability, if the following terms have elapsed since the day of the commission of a crime:

- a) two years – after the commission of a crime of lesser gravity;
- b) five years – after the commission of a crime of medium gravity;
- c) fifteen years – after the commission of a grave crime;
- d) twenty years – after the commission of a particularly grave crime.

2. The statutory limitations shall be calculated from the day of the commission of a crime and until the moment of the sentence's entry into legal force.

3. The course of the statutory limitations shall be suspended, if a person who has committed a crime evades investigation or judicial prosecution. In this case, the course of the statutory limitations shall recommence from the moment the person is apprehended or reports guilty. A person may not thereby be held criminally liable, if twenty-five years have elapsed since the commission of a crime, and the statutory limitation was not interrupted.

4. The course of the statutory limitations shall be suspended, if a person who has committed a grave or a particularly grave crime commits another deliberate crime before the terms set out in the first part of this Article have elapsed. In such cases, the calculation of the statutory limitations shall recommence from the day of the commission of the new crime. In other cases, if a person commits a new crime before the statutory limitations have elapsed, the statutory limitations shall elapse independently with respect to each crime.

5. The issue of applying the statutory limitations to a person who has committed a crime, for the commission of which the death penalty may be imposed in accordance with this Code, shall be decided upon by the court. If the court does not consider it possible to release the person from criminal liability due to the statutory limitations, the death penalty may not be imposed. In this case, the court should impose the deprivation of liberty for a term not exceeding twenty-five years or a life sentence.

6. No statutory limitations shall apply to persons who have committed crimes against the peace and security of mankind».

Acts of amnesty, which are issued by the Parliament of the Republic of Kazakhstan, have significance for the prosecution of international crimes, inasmuch they should not apply to persons who have committed grave or particularly grave crimes (second paragraph of part 2 of Article 76).<sup>117</sup> However, an individually definite person in whose regard a sentence has entered into legal force may be pardoned by the President of the Republic of Kazakhstan (parts 3 and 4 of Article 76).

### **17. Significance of non-retroactivity of criminal law with respect to international crimes**

The application of the criminal law *rationae temporis* is regulated by Articles 4 and 5 of the Criminal Code of the Republic of Kazakhstan. As a general rule, the criminality and punishability of an act (common as well as international crime) should be determined by the law, which applied at the time of the commission of that act. The time of the commission of a crime is the time of carrying out a socially dangerous action (omission), irrespective of when its consequences arrive (Article 4).

It is emphasised in part 1 of Article 5 («Retroactivity of criminal law») that a law which cancels the criminality of an act, mitigates the liability or punishment or otherwise improves the situation of a person who has committed a crime, is retroactive, i.e. it applies to persons who have committed a respective act before such law's entry into force, including persons who are serving their sentences or have done so but still have a conviction.

If a new law softens the punishability of an act for which a person serves the sentence, the assigned punishment must be diminished within the limits of the sanction provided for by the newly adopted criminal law (part 2 of Article 5).

A law, which establishes the criminality or punishability of an act, severs the liability or punishment or otherwise worsens the situation of the person who has committed this act, must not be retroactive (part 3 of Article 5).

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<sup>117</sup> Article 76 («Releasing from criminal liability and punishment on the ground of an act of amnesty or pardon»):

«1. Acts of amnesty are to be issued by the Parliament of the Republic of Kazakhstan with respect to an individually indefinite range of persons.

2. Persons who have committed crimes may be released from criminal liability on the ground of an act of amnesty. Persons who have been convicted for crimes may be released from punishment, or the punishment that was assigned to them may be diminished or replaced by a lighter type of punishment, or such persons may be released from an additional type of punishment. An act of amnesty may release persons who are serving [their] sentences or ones who have been released from further serving them from [their] convictions.

An act of amnesty shall not apply to persons who have committed grave or particularly grave crimes, as well as to [persons] whose punishment has been assigned for a dangerous or particularly dangerous repeated commission of crimes.

3. An act of pardon may be issued by the President of the Republic of Kazakhstan with respect to an individually definite person [whose] accusatory sentence has entered into legal force.

4. [On the ground of] a pardon, a person who has been convicted for a crime may be released from serving further punishment, or the punishment that was assigned to him may be diminished or replaced by a lighter type of punishment. An act of pardon may release a person who has served [his or her] sentence from [his or her] conviction».

## **18. Significance of the «ne bis in idem» principle with respect to international crimes**

The «ne bis in idem» principle is set out in Article 3 of the Criminal Code of the Republic of Kazakhstan: «No one shall be held criminally liable twice for the same crime». This provision applies equally to common as well as international crimes.

## **II. Other conditions of punishability and releasing from punishment, which are specifically relevant to international crimes**

Kazakhstan's criminal legislation does not contain any provisions on punishability and releasing from punishment, which could be specifically relevant to international crimes.

### **E. Procedural deviations from «normal procedure» at the investigation and judicial prosecution of international crimes**

The Criminal Procedure Code of the Republic of Kazakhstan regulates, on equal grounds, the procedural aspects of investigation and judicial prosecution of common and international crimes. The criminal procedural legislation does not provide for any deviations, with respect to the latter, from the «normal procedure».

### **F. Existing practice of prosecution**

With due regard to a relatively high political and legal stability in the country and the absence of armed conflicts and of other situations of large-scale violence from the newest history of the Republic of Kazakhstan, there accordingly is no judicial practice of prosecution of crimes against the peace and security of mankind.

### **G. Conclusions and recommendations**

On the basis of the aforesaid, the following conclusions can be drawn and the following recommendations can be made:

- 1) When formulating the elements of most international crimes, the drafters of the Criminal Code of the Republic of Kazakhstan have largely followed the content of the Model Criminal Code for the CIS countries and the 1996 Criminal Code of the Russian Federation, in consequence of which Kazakhstan's criminal law has «inherited» some of their advantages as well as individual deficiencies;
- 2) The elements of international crimes have already been integrated in the initial version of the Criminal Code, which was adopted on 16 July 1997, i.e. before the adoption of the Rome Statute of the International Criminal Court on 17 July 1998, and the formulations (dispositions and sanctions) of the respective Articles have not subsequently been revised. A probable reason for that is the absence of an according judicial practice;
- 3) The elements of the crime of genocide are generally formulated in the spirit of the 1948 Convention; however, there are a number of discrepancies in the formulation of its objective elements. It seems that, if faced with cases of genocide, courts would need to take into account the factual circumstances of a case and apply the national criminal law, with due regard to the relevant international legal experience;
- 4) The absence of the notion of crimes against humanity from the criminal law should not prevent the criminal prosecution of acts listed in Article 7

S. Sayapin LL.M., 2007

of the Rome Statute as common crimes (except the crime of apartheid). However, the existence of statutory limitations with respect to common crimes, which have been committed on the territory of the Republic of Kazakhstan or abroad, may create legal and practical difficulties for law enforcement agencies;

- 5) The range of international humanitarian law treaties, in which the Republic of Kazakhstan participates, allows for embracing a majority of war crimes listed in Article 8 of the Rome Statute of the International Criminal Court. However, since Article 159 of the Criminal Code (1) refers to international treaties of the Republic of Kazakhstan and (2) does not comprise customary international law, the law enforcement agencies may be faced with difficulties when having to qualify war crimes;
- 6) As of December 2007, Kazakhstan does not participate in the Rome Statute and has not even signed it. Moreover, on 22 September 2003, Kazakhstan and the United States of America concluded a bilateral Agreement with respect to their mutual obligation not to deliver each other's nationals to the International Criminal Court ("Article 98 Agreement"). Taking into account the State's social and economic priorities and the existence of constitutional immunities of key State officials in all branches of power, the ratification of the Rome Statute in a foreseeable future would not seem probable;
- 7) At the same time, with due regard to Article 4(3) of the Constitution of the Republic of Kazakhstan,<sup>118</sup> quite a wide use of multilateral international treaties, which have entered into force for the Republic of Kazakhstan, in the law enforcement practice is possible, both in theory and practice, – first and foremost, of treaties in the fields of protection of human rights and fundamental freedoms, international humanitarian law and international criminal law;
- 8) In conclusion, it seems that, provided there is a required political will and as a result of an according legislative initiative, the Criminal Code of the Republic of Kazakhstan may be brought in conformity with contemporary tendencies of (material) international criminal law, irrespective of Kazakhstan's non-participation in the Rome Statute of the International Criminal Court, by way of amending it (1) as concerns the establishment of criminal liability for crimes against humanity and (2) war crimes, which are not currently covered, as well as, probably, (3) as concerns a correction of the elements of the crime of genocide.

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<sup>118</sup> Article 4(3) Конституции: «Международные договоры, ратифицированные Республикой, имеют приоритет перед ее законами и применяются непосредственно, кроме случаев, когда из международного договора следует, что для его применения требуется издание закона».

## **Annex I**

### **Chapter 53 of the Criminal Procedure Code of the Republic of Kazakhstan: «The particulars of the criminal procedure with respect to persons who enjoy privileges and immunities from criminal prosecution»**

#### **Article 496. Carrying out a preliminary investigation with respect to a member of the Parliament of the Republic of Kazakhstan**

1. A criminal case may only be instituted against a member of the Parliament of the Republic by the chief of a State body of the Republic of Kazakhstan, which carries out inquiries and preliminary investigations. The General Prosecutor of the Republic of Kazakhstan shall be notified of the institution of the criminal case immediately. Once urgent investigatory motions have been accomplished, a case shall be transmitted, through the intermediary of the General Prosecutor of the Republic of Kazakhstan, to an investigator, no later than within forty-eight hours. The carrying out of a preliminary investigation with respect to cases against members of the Parliament of the Republic of Kazakhstan shall be mandatory.
2. A member of the Parliament may not, during his or her term of office, be arrested, summoned, subjected to judicially imposable administrative penalties, held criminally liable without the consent of a respective Chamber, except where he or she has been apprehended on a crime scene or has committed a grave crime.
3. In order to obtain consent to holding a member of the Parliament criminally liable, [to his or her] arrest, summons the General Prosecutor of the Republic of Kazakhstan shall make a proposal [to this effect] to the Senate or the Majilis of the Parliament of the Republic of Kazakhstan. The proposal shall be made before a member of the Parliament is indicted, [or] an arrest warrant is issued, or before it is decided whether it is necessary to forcibly bring the member of the Parliament before a preliminary investigation authority.
4. If a respective Chamber of the Parliament of the Republic of Kazakhstan consents to holding a member of the Parliament liable, the further investigation shall be carried out in accordance with this Code, with due regard to the particulars set out in the present Article.
5. If a respective Chamber of the Parliament of the Republic of Kazakhstan consents to an arrest, summons, the order of applying these measures of prevention, procedural enforcement to a member of the Parliament shall be decided upon in accordance with this Code.
6. If a respective Chamber of the Parliament of the Republic of Kazakhstan does not consent to holding a member of the Parliament of the Republic of Kazakhstan criminally liable, the criminal case shall be closed on this ground.
7. If a respective Chamber of the Parliament of the Republic of Kazakhstan consents to an arrest, summons, other measures of prevention, procedural enforcement may be applied with respect to a member of the Parliament in accordance with this Code.
8. The legality at carrying out a criminal investigation with respect to a member of the Parliament of the Republic of Kazakhstan shall be supervised by the General Prosecutor of the Republic of Kazakhstan. Warrants to perform investigatory actions with respect to a member of the Parliament of the Republic of Kazakhstan, which, in accordance with this Code, must be sanctioned by a prosecutor, shall be issued by the General Prosecutor of the Republic of Kazakhstan. The prolongation of the term of an arrest with respect to a member of the Parliament of the Republic of Kazakhstan, as provided for by Article 153 of this Code, shall be made by the General Prosecutor of the Republic of Kazakhstan.

S. Sayapin LL.M., 2007

9. A case whose investigation has been completed shall be sent, together with an indictment, by an investigator to the General Prosecutor of the Republic of Kazakhstan, for transmission to the court.

**Article 497. Carrying out a preliminary investigation with respect to the Chairman or members of the Constitutional Council of the Republic of Kazakhstan**

1. A criminal case may only be instituted against the Chairman or members of the Constitutional Council of the Republic of Kazakhstan by the chief of a State body of the Republic of Kazakhstan, which carries out inquiries and preliminary investigations. The General Prosecutor of the Republic of Kazakhstan shall be notified of the institution of the criminal case immediately. Once urgent investigatory motions have been accomplished, a case shall be transmitted, through the intermediary of the General Prosecutor of the Republic of Kazakhstan, to an investigator, no later than within forty-eight hours. The carrying out of a preliminary investigation with respect to cases against the Chairman or members of the Constitutional Council of the Republic of Kazakhstan shall be mandatory.

2. The Chairman and members of the Constitutional Council of the Republic of Kazakhstan may not, during their terms of office, be arrested, summoned, subjected to judicially imposable administrative penalties, held criminally liable without the consent of the Parliament of the Republic of Kazakhstan, except where he or she has been apprehended on a crime scene or has committed a grave crime.

3. In order to obtain a consent to holding the Chairman or a member of the Constitutional Council of the Republic of Kazakhstan criminally liable, [to his or her] arrest, summons the General Prosecutor of the Republic of Kazakhstan shall make a proposal [to this effect] to the Parliament of the Republic of Kazakhstan. The proposal shall be made before the Chairman or a member of the Constitutional Council of the Republic of Kazakhstan is indicted, [or] an arrest warrant is issued, or before it is decided whether it is necessary to forcibly bring him or her before a preliminary investigation authority.

4. Once the General Prosecutor of the Republic of Kazakhstan has received a decision of the Parliament of the Republic of Kazakhstan, the further proceedings shall be carried out in accordance with the fourth, fifth, sixth, seventh, eighth, ninth of Article 496 of this Code.

**Article 498. Carrying out a preliminary investigation with respect to a judge**

1. A criminal case may only be instituted against a judge by the General Prosecutor of the Republic of Kazakhstan who should authorise a body, which carries out inquiries and preliminary investigations, to carry out an investigation. The carrying out of a preliminary investigation with respect to cases against judges shall be mandatory.

2. A judge may not, during their terms of office, be arrested, summoned, subjected to judicially imposable administrative penalties, held criminally liable without the consent of the President of the Republic of Kazakhstan, founded upon a recommendation from the Supreme Judicial Council of the Republic, or, in the case provided for by subparagraph 3 of Article 55 of the Constitution – without the consent of the Senate, except where he or she has been apprehended on a crime scene or has committed a grave crime.

3. In order to obtain a consent to holding a judge criminally liable, [to his or her] arrest, summons the General Prosecutor of the Republic of Kazakhstan shall make a proposal [to this effect] to the President of the Republic of Kazakhstan or, in the case provided for by subparagraph 3 of Article 55 of the Constitution – without the consent of the Senate of the Parliament of the Republic of Kazakhstan. The pro-

S. Sayapin LL.M., 2007

posal shall be made before the judge is indicted, [or] an arrest warrant is issued, or before it is decided whether it is necessary to forcibly bring the judge before a preliminary investigation authority.

4. Once the General Prosecutor of the Republic of Kazakhstan has received a decision of the President of the Republic of Kazakhstan, the further proceedings shall be carried out in accordance with the fourth, fifth, sixth, seventh, eighth, ninth of Article 496 of this Code.

**Article 499. Carrying out a preliminary investigation with respect to the General Prosecutor of the Republic of Kazakhstan**

1. A criminal case may only be instituted against the General Prosecutor of the Republic of Kazakhstan by his or her First Deputy. Following a proposal from the First Deputy of the General Prosecutor, the President of the Republic of Kazakhstan shall suspend the General Prosecutor of the Republic of Kazakhstan from duty, from the moment a criminal case has been instituted against him or her until an investigation has been completed. The General Prosecutor of the Republic of Kazakhstan may not, during his or her term of office, be arrested, summoned, subjected to judicially imposable administrative penalties, held criminally liable without the consent of the Senate of the Parliament of the Republic of Kazakhstan, except where he or she has been apprehended on a crime scene or has committed a grave crime.

2. In order to obtain a consent to holding the General Prosecutor of the Republic of Kazakhstan criminally liable, [to his or her] arrest, summons the First Deputy of the General Prosecutor shall make a proposal [to this effect] to the Senate of the Parliament of the Republic of Kazakhstan. The proposal shall be made before the General Prosecutor of the Republic of Kazakhstan is indicted, [or] an arrest warrant is issued, or before it is decided whether it is necessary to forcibly bring him or her before a preliminary investigation authority.

3. Once the First Deputy of the General Prosecutor of the Republic of Kazakhstan has received a decision of the Senate of the Parliament of the Republic of Kazakhstan, the further proceedings shall be carried out in accordance with the fourth, fifth, sixth, seventh, eighth, ninth of Article 496 of this Code.

4. The legality at carrying out a criminal investigation with respect to the General Prosecutor of the Republic of Kazakhstan shall be supervised by his or her First Deputy. Warrants to perform investigatory actions with respect to the General Prosecutor of the Republic of Kazakhstan shall be issued by his or her First Deputy. The prolongation of the term of an arrest with respect to the General Prosecutor of the Republic of Kazakhstan, as provided for by this Code, shall be made by the First Deputy of the General Prosecutor of the Republic of Kazakhstan.

5. A case whose investigation has been completed shall be sent, in accordance with this Code, together with an indictment, by an investigator to the First Deputy of the General Prosecutor of the Republic of Kazakhstan, for transmission to the court.

**Article 500. Judicial hearing of a criminal case against a member of the Parliament of the Republic of Kazakhstan, the Chairman or a member of the Constitutional Council, a judge, the General Prosecutor of the Republic of Kazakhstan**

1. The hearing of a case shall be carried out in accordance with general rules pertaining to judicial hearings, with due regard to the provisions set out in this Article.

2. A court has the right to subject a defendant member of the Parliament of the Republic of Kazakhstan, the Chairman or a member of the Constitutional Council, a judge, the General Prosecutor of the Republic of Kazakhstan to an arrest, as a preventive measure, as well as to summons, as a measure of procedural enforce-

S. Sayapin LL.M., 2007

ment, having requested a consent therefore under, respective, the third part of Article 496, the third part of Article 497, the third part of Article 498, the second part of Article 499 of this Code, if the State bodies referred to in paragraph 4 of Article 52, paragraph 5 of Article 71, paragraph 2 of Article 79, paragraph 3 of Article 83 of the Constitution of the Republic of Kazakhstan did not grant their consent to an arrest, summons during the preliminary investigation, or if such a consent has not been requested.

#### **Article 501. Persons who enjoy diplomatic immunity from criminal prosecution**

1. In accordance with the legislation of the Republic of Kazakhstan and international treaties, which have been ratified by the Republic of Kazakhstan, the following persons shall enjoy immunity from the criminal prosecution in the Republic of Kazakhstan:

1) heads of foreign States' diplomatic representations, members of these representations' diplomatic personnel and their family members, if they reside together with them and are not nationals of the Republic of Kazakhstan;

2) on the basis of reciprocity, members of diplomatic representations' service personnel and their family members who reside together with them, if these members of personnel and their family members are not nationals of the Republic of Kazakhstan or are not permanent residents of Kazakhstan, heads of consulates and other consular officials – with respect to acts they have committed at the discharge of their professional duties, unless an international treaty of the Republic of Kazakhstan provides to the contrary;

3) on the basis of reciprocity, members of diplomatic representations' administrative and technical personnel and their family members who reside together with them, if these members of personnel and their family members are not nationals of the Republic of Kazakhstan or are not permanent residents of Kazakhstan;

4) diplomatic couriers;

5) heads and representatives of foreign States, members of parliamentary and governmental and, on the basis of reciprocity. – members of foreign States' delegations who shall have arrived in Kazakhstan to participate in international negotiations, international conferences and sessions or with other official tasks, or who shall travel, for the same purposes, through the territory of the Republic of Kazakhstan and the said persons' family members who shall accompany them, if these family members are not nationals of the Republic of Kazakhstan;

6) heads, members and the personnel of States [represented] in international organisations, officials of these organisations who shall find themselves on the territory of the Republic of Kazakhstan, on the basis of international treaties or generally recognised international customs;

7) heads of diplomatic representations, members of the diplomatic personnel of foreign States' representations in third States, who shall travel through the territory of the territory of the Republic of Kazakhstan and their family members who shall accompany the said persons or travel separately, in order to join them or to return to their country;

8) other persons, in accordance with an international treaty of the Republic of Kazakhstan.

2. Persons who are listed in paragraphs 1, 4 – 7 of the first part of the present Article, as well as other persons, in accordance with an international treaty of the Republic of Kazakhstan may only be subject to criminal prosecution, if a [respective] foreign State declares an explicit waiver of immunity from criminal prosecution. The issue of such waiver shall be resolved by diplomatic means on the basis of a proposal from the General Prosecutor of the Republic of Kazakhstan, through the

S. Sayapin LL.M., 2007

intermediary of the Ministry of Foreign Affairs of the Republic of Kazakhstan. If a respective foreign States does not waive the said persons' immunity from criminal prosecution, no criminal case may be instituted against them, and an instituted one shall be subject to closure.

3. The provisions of the second part of the present Article shall not apply to persons referred to in paragraphs 2 and 3 of the first part of the present Article, save in cases where a crime committed by these persons is related to their discharge of professional duties and is not directed against the interests of the Republic of Kazakhstan, unless an international treaty of the Republic of Kazakhstan provides to the contrary.

#### **Article 502. Detention and arrest of persons who enjoy diplomatic immunity**

1. Persons who are listed in paragraphs 1, 4 – 7 of the first part of Article 501 of this Code, as well as other persons, in accordance with an international treaty of the Republic of Kazakhstan, shall enjoy personal inviolability. They may not be detained or arrested, save in cases where this is necessary to enforce a sentence, which has been pronounced in their respect and has entered into legal force.

2. Persons who are listed in paragraphs 2 and 3 of the first part of Article 501 of this Code may only be detained or arrested, where they are prosecuted for the commission of a grave or a particularly grave crime or in order to enforce a sentence, which has entered into legal force, unless an international treaty of the Republic of Kazakhstan provides to the contrary.

#### **Article 503. Diplomatic immunity from testifying**

1. Persons who are listed in paragraphs 1, 3 – 6 of the first part of Article 501 of this Code, as well as other persons, in accordance with an international treaty of the Republic of Kazakhstan, are entitled not to testify as witnesses, victims, and where they consent to so testifying, [they] are not obliged to appear in an organ, which carries out the criminal procedure. An invitation to interrogation, [which may be] handed in to the said persons, must not contain threats of enforcement measures for their non-appearance in the organ, which carries out the criminal procedure.

2. Where these persons have testified as victims, witnesses during the preliminary investigation but have not appeared in the judicial hearing, the court may pronounce their testimony.

3. Persons who are listed in paragraph 2 of the first part of Article 501 of this Code may not refuse to provide testimony as witnesses and victims, save with regard to issues, which are related to their discharge of professional duties. Where consular officials refuse to testify, no measures of procedural enforcement may be applied in their respect.

4. Persons who enjoy diplomatic immunity are not obliged to provide an organ, which carries out the criminal procedure, the correspondence or other documents, which are related to their discharge of professional duties.

#### **Article 504. Diplomatic immunity of premises and documents**

1. The residences of heads of diplomatic representations, premises of diplomatic representations, residences of members of the diplomatic personnel and of their family members, the property they possess, and the transportation means shall be inviolable. Access to these premises, as well as search, seizure, arrest of property may only be carried out with the consent of the head of a diplomatic representation or of a person who replaces him or her.

2. On the basis of reciprocity, the immunity which is provided for by the first part of the present Article, shall extend to residences, which are occupied to members of the service personnel of a diplomatic representation and their family members

S. Sayapin LL.M., 2007

who reside together with them, if these members of personnel and their family members are not nationals of the Republic of Kazakhstan.

3. The premises of a consulate and the residence of the head of a consulate shall, on the basis of reciprocity, enjoy inviolability. Access to these premises, search, seizure, and arrest may only take place in response to a request from, or with the consent of, heads of consulates or of the diplomatic representation of a respective foreign State.

4. The archives, official correspondence and other documents of diplomatic representations and consulates shall be inviolable. They may not be subjected to search and seizure without the consent of the head of a diplomatic representation, a consulate. The diplomatic correspondence shall not be subjected to unpacking or detention.

5. The consent of heads of diplomatic representations and consulates for granting access to premises, which are listed in the first, second and third parts of the present Article, for carrying out search, seizure [there], as well as for inspection and seizure of documents, which are referred to in the fourth part of the present Article, shall be requested by a prosecutor through the intermediary of the Ministry of Foreign Affairs of the Republic of Kazakhstan.

6. The search, seizure, inspection shall, in the said cases, be carried out in the presence of a prosecutor and a representative of the Ministry of Foreign Affairs of the Republic of Kazakhstan.