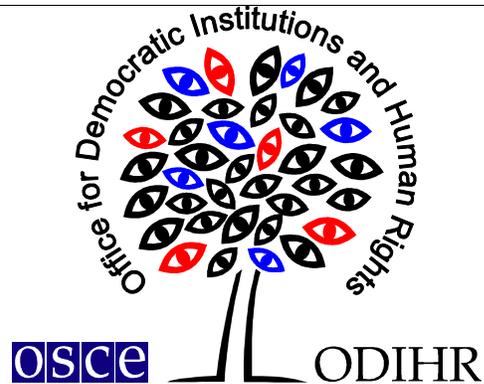


Warsaw, 28 November 2012

Opinion-Nr.: TRAFF-KAZ/216/2012
(AT)

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NOTE

ON THE REGULATORY RESOLUTION OF THE SUPREME COURT OF KAZAKHSTAN ON THE APPLICATION OF CRIMINAL LEGISLATION ON HUMAN TRAFFICKING BY COURTS

Based on an unofficial English translation of the Regulatory Resolution

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Annex 1: Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan on the Application of Legislation by Courts while Conducting Criminal Proceedings Related to Human Trafficking

I. INTRODUCTION

1. *On 25 October 2012, a Member of the Research Advisory Council at the Supreme Court of the Republic of Kazakhstan sent a letter to the Head of the OSCE Centre in Astana asking for comments and suggestions on a draft Regulatory Resolution aiming to clarify the application of criminal and criminal procedure legislation to criminal proceedings involving trafficking in human beings. Once final, the Regulatory Resolution will be circulated within courts in Kazakhstan to assist judges in applying relevant provisions of the Criminal Code and Criminal Procedure Code of Kazakhstan.*
2. *Also, on 25 October 2012, the OSCE Centre in Astana forwarded this request to the OSCE/ODIHR and asked for expertise on the contents of the Regulatory Resolution.*
3. *This Note was prepared in response to this request.*

II. SCOPE OF REVIEW

4. The scope of this Note covers only the contents of the Regulatory Resolution, and related provisions of the Criminal Code and Criminal Procedure Code of Kazakhstan. Thus limited, the Note does not constitute a full and comprehensive review of the legal and policy framework on combating trafficking in human beings in the Republic of Kazakhstan.
5. The Note raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international human rights standards and best practices, as found in the international agreements and commitments ratified and entered into by the Republic of Kazakhstan.
6. This Note is based on an unofficial translation of the Regulatory Resolution, and of the relevant provisions of the Criminal Code and Criminal Procedure Code of Kazakhstan. The Regulatory Resolution has been attached to this document as Annexes 1. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that this Note is without prejudice to any written or oral recommendations and comments related to legislation and policy governing the combat against trafficking in human beings, or to the Criminal Code and Criminal Procedure Code of Kazakhstan, that the OSCE/ODIHR may make in the future.

III. ANALYSIS AND RECOMMENDATIONS

1. International Standards on Criminalizing Trafficking in Human Beings

8. Under Article 3, par (a) of the UN Protocol (to the United Nations Convention against Transnational Organized Crime) to Prevent, Suppress and Punish Trafficking in Persons¹ (hereinafter “UN Palermo Protocol), trafficking is

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the

considered “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

9. The crime of trafficking in human beings is thus made up of three constituent elements, namely an act (recruitment, transportation, transfer, harbouring or receipt of a person), through specific means (threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving of payments to achieve the consent of a person having control over another person), to achieve a certain purpose, namely exploitation. Article 3 of the UN Palermo Protocol then cites a number of examples of what, at a minimum, constitutes exploitation.²
10. Thus, for the purposes of criminal prosecution, all three elements need to exist in order for there to be a case of human trafficking; this should be made clear in the Regulatory Resolution. For example, if there is only the act of recruiting or transporting persons, without the means or purpose described above, then this would not constitute trafficking in human beings, but rather smuggling of persons, which is dealt with by a separate Protocol to the UN Convention against Transnational Crime.³
11. According to Article 5 of the UN Palermo Protocol, the above conduct needs to be criminalized in national legislation. National criminal legislation of States having ratified or acceded to the UN Palermo Protocol should likewise reflect all three elements, and should clarify the difference between, trafficking in human beings, or, e.g., smuggling in persons or abduction. It should likewise criminalize the attempt, aiding or abetting of such crime, and the organization or direction of others to commit trafficking (Article 5 par 2 of the UN Palermo Protocol). State parties to this protocol are obliged to criminalize trafficking as a combination of constituent elements and not the elements themselves. Therefore, any conduct that combines any of the above-mentioned actions and means and is carried out for any of the listed purposes must be criminalized as trafficking.⁴ Individual elements such as abduction or the exploitation of the prostitution of others would not be seen as trafficking in

General Assembly of the United Nations. The Republic of Kazakhstan acceded to this Protocol on 31 July 2008.

² More specifically, Article 3 par 2 reads that “[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”

³ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations. The Republic of Kazakhstan acceded to this Protocol on 31 July 2008. Smuggling of migrants is described as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.

⁴ See *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, United Nations, New York, 2004, part 2(a) Definition of the term “trafficking in persons”, par 33.

human beings, although the Protocol in some cases allows for supplementary offences to be introduced and maintained by the State parties to support the purposes of the Protocol.

12. Next to the purely criminal aspect of prosecuting potential perpetrators, national legislation should also protect the privacy and identity of victims of human trafficking, and should ensure that they are informed on court and administrative proceedings, and receive assistance to enable their views and concerns to be presented at appropriate stages of criminal proceedings against offenders (Article 6 pars 1 and 2 of the UN Palermo Protocol).

2. Trafficking in Human Beings under the Criminal Code of Kazakhstan

13. In Kazakhstan, the Criminal Code regulates trafficking in human beings under Article 128, and trafficking of children under Article 133. Under both provisions, the criminal act is the sale of persons, respectively of children, or other transactions involving people, as well as exploitation and recruitment, transportation, transfer, harbouring and committing other acts with the aim of exploitation of persons, respectively of children.
14. Under Article 128 par 1, such actions are punishable by up to five years of imprisonment, with or without the confiscation of property. Par 2 contains a number of circumstances leading to aggravated punishment, namely imprisonment of five to seven years. Under Article 128 par 3, these actions lead to even longer sanctions (seven to ten years) if they are committed into or out of , or in transit through the Republic of Kazakhstan. Trafficking in human beings conducted by an organized group or resulting in the death of a victim, or other grave consequences, will lead to a punishment ranging from seven to fifteen years. All of the above aggravated circumstances also foresee punishment with or without confiscation of property.
15. In the Regulatory Resolution, it is stated that the main subject of this crime is human freedom, additional subjects are human life, dignity and health. It is true that the deprivation of freedom lies at the core of trafficking in human beings, and facilitates the act, and the exploitation of the individuals. At the same time, the core essence of human trafficking is the act of gaining control over another person in order to exploit him/her in a way that takes over this person's entire life. It is also the de-humanization of the victims, who are sold or transported against their will, often kept in deplorable conditions, merely for the benefit of others; the victims themselves are completely exploited, and thus receive no benefit in exchange for what is happening to them. These aspects make up the heinous nature of human trafficking, and that is the reason why the commission of this crime should be met with high sanctions. Also in order to prevent such acts from being repeated, it is recommended that while debating sanctions, especially under Article 128 par 1, which would technically allow mild sanctions of one or two years' imprisonment, or less, the above discussion on the special heinous nature of trafficking in human beings be kept in mind.
16. In terms of the actions that make up trafficking in human beings (e.g. sale of a person, transport, harbouring, etc), the detailed explanations of the Regulatory

Resolution are welcomed, but there appears to be some confusion as to the distinction between actions (e.g. sale, transportation, transfer, harbouring of persons) and exploitation, which is the purpose of such actions, but not an action in itself. This distinction, and the three elements making up trafficking in human beings, as described in pars 9-10 *supra*, should be clarified in the Regulatory Resolution.

17. It is welcomed that in the Regulatory Resolution, the purchase of a travel document is included as an act of trafficking. In this context, it should be noted that in general, the deprivation of a person of his/her travel document should also play a role in assessing the state of dependency that the victim is in; particularly when trafficked into a foreign country, not possessing one's own passport will usually induce victims to stay with the traffickers, even when there is an opportunity for flight, as the victim may fear reprisals due to his/her being illegally in a foreign country.

2.1 Means of Trafficking under Article 128 of the Criminal Code

18. It is noted that Article 128 par 1 does not include, in its wording, the usual means of trafficking in human beings set out in Article 3 of the UN Palermo Protocol, namely “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”. Certain of these means used for coercion are, however, included in the aggravated circumstances laid down in Article 128 par 2, namely “violence dangerous to life and health, or the threat of its use” (par 2 c), or “the use of weapons or objects used as weapons” (par 2 d). Fraud as a means to achieve trafficking is also listed as an aggravated circumstance under par 2 e), while the abuse of power or the vulnerability of a person are listed under the same provision under par 2 i) (person abusing an official position) and par 2 j) (person using material or other dependence of the victim).
19. It is difficult to imagine a trafficking scenario which would give rise to only Article 128 par 1, and not par 2, as individuals would conceivably not consent to being sold, recruited, transported, or harboured for the purposes of their exploitation without some sort of coercion, deception or abuse of dependency or vulnerable position. However, this question is part of a wider debate that should be held in the context of reforming the Criminal Code.
20. Overall, it should be borne in mind that under Article 128, depending on the means used to traffic persons, different ranges of prison sentences apply. Namely, persons trafficked based on violence that is not dangerous to life or health, or by other means such as paying persons exercising control over the victims receive the minimum punishment of up to five years of imprisonment. Trafficking persons by deception or abuse of trust (this should ideally also be interpreted to involve fraud, or perhaps this is already clear from the wording of the relevant criminal provision) is punishable by seven to ten years' imprisonment, as is trafficking by violence dangerous to life and health, with a weapon, and through abuse of power or of the vulnerability of the victim.

Aggravated abduction for the purpose of exploitation (Article 125 par 3) is punishable by ten to fifteen years' imprisonment.

21. This differentiation could be seen as problematic, as it conveys the message that trafficking achieved by buying a person from another person, or by exercising violence that is not dangerous to a person's life or health, is less deplorable than trafficking achieved through deception, dangerous violence, or by abusing a position of power or vulnerability of the victim. However, such discussion would again go beyond the scope of this review, and would be part of general discussions on reforming relevant provisions of the Criminal Code.
22. As it stands, judges will need to look very closely at the means by which victims were induced to participate in their own exploitation, as this determines which paragraph of Article 128 will apply; should it be by abduction, then Article 128 would need to apply in conjunction with Article 125 par 3 (see par 35 *infra*). This distinction should be made clear in the Regulatory Resolution of the Supreme Court. The same holds true for the interpretation of Article 133 on trafficking of minors, which is structurally identical to Article 128, but leads to higher sanctions.

2.2 Types of Exploitation under Article 128 of the Criminal Code

23. With regard to the purpose of exploitation, it is noted that in par 4 of the Regulatory Resolution, the purpose of exploitation is not explicitly mentioned when referring to the sale of persons. This point should be clarified.
24. In Articles 128 and 133, the only type of exploitation specifically mentioned is the removal of organs or tissues of a victim for transplantation or other use, which is treated as an aggravated circumstance under par 2 e) in both provisions. Under Article 3 par 2 of the UN Palermo Protocol, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs are specifically listed as (equally deplorable) examples of exploitation of human beings.
25. As it stands, Articles 128 and 133 require enhanced punishment for exploitation for the removal of organs/tissues for transplant. It follows that other examples of exploitation that are not specifically mentioned in these provisions, e.g. sexual exploitation, forced labour or services, slavery or practices similar to slavery, or servitude, are not factors that would lead to aggravated sanctions. When looking at the effect of such forms of trafficking on the victims, and to the depravity of the purpose of the actions themselves, it is questionable whether this differentiation in the Kazakhstani Criminal Code is in full compliance with the UN Palermo Protocol; while the term "exploitation" is not defined in the Protocol, it is generally associated with particularly harsh and abusive conditions of work, or "conditions of work inconsistent with human dignity"⁵. This question should be debated as part of a larger discussion on amending the Criminal Code. For the moment, the Regulatory Resolution should point out to courts that only exploitation of the removal of organs or tissues will automatically lead to aggravated sanctions.

⁵ See UNODC Model Law Against Trafficking in Persons, Vienna, 2009.

26. At the same time, all elements or examples of exploitation mentioned in the UN Palermo Protocol, including servitude, which is currently not listed at all, should be described and explained in the Regulatory Resolution. In this context, it is noted that par 13 of the Regulatory Resolution implies that labour exploitation and slavery are the same. This is not accurate – rather, they are two separate examples of exploitation. Reference should also be made to forced labour, and to the ILO Convention Concerning Forced or Compulsory Labour, which was ratified by the Republic of Kazakhstan in 2001.⁶
27. Par 11 of the Regulatory Resolution, while explaining the term exploitation, also mentions “the powers of ownership” towards a person. This term would need to be explained; should it refer to the abuse of power or position of vulnerability of the victim, then it should be clarified that this does not constitute an example of exploitation but rather a means through which trafficking is committed.

2.3 Aggravated Circumstances under Article 128 pars 3 and 4

28. Overall, both under Article 128 par 3 and under Article 133 par 3, trans-border trafficking (into, out of, and across Kazakhstan (starting in another country and ending in another country)) leads to higher sanctions. From a victim’s standpoint, trafficking into a foreign country may well be an aggravated circumstance, given that it enhances his/her dependency on the trafficker, and reduces the likelihood of being able to escape.
29. In this context, it is noted that the Criminal Code of Kazakhstan does not currently appear to contain a specific provision on the smuggling of migrants, despite the fact that the Republic of Kazakhstan acceded to the 2000 UN Protocol on the Smuggling of Migrants by Land, Sea and Air in 2008.⁷ For this reason, judges should be aware of the difference between the two, to avoid erroneous application of Article 128 par 3 and Article 133 par 3. The essential difference is that while individuals are also transported from one country to another, this transport is conducted with the full consent of or knowledge of the smuggled individual. Furthermore, while the act of procuring illegal entry into a state is remunerated, this remuneration is not linked to the exploitation of the smuggled persons. It is, of course, always possible that these people may be trafficked at a later stage by other persons once they have illegally entered a country, but this will then be treated as a separate act under criminal law.
30. In the case of cross-border transportation of persons, their full and informed consent to the transport will first need to be ascertained, as well as whether this transport was for the purpose of their exploitation, or merely to gain illegal access to the Republic of Kazakhstan. The distinction between the two phenomena is very important; while migrant smuggling itself is illegal and abuses people’s poverty and helplessness, it does not de-humanize them to the

⁶ Convention concerning Forced or Compulsory Labour or Forced Labour Convention (No.29) of the [International Labour Organization](#), signed on 28 June 1930. Kazakhstan ratified the Convention on 18 May 2001.

⁷ Op cit note 2.

extent that trafficking does. At the same time, it should be borne in mind that these differentiation criteria do not apply in the case of children, who may still be considered victims of trafficking regardless of their consent. However, with regard to adults, the difference between trafficking and illegal smuggling of migrants should be reflected in how these cases are treated before courts. If it is currently not possible to prosecute individuals for smuggling migrants under criminal or administrative legislation, then serious consideration should be given to amending such legislation.

31. Finally, Article 128 par 4 and Article 133 par 4 both contain enhanced punishments for cases where trafficking in human beings was conducted by an organized group or where it resulted in the death of the victim. It is welcome that pars 16 and 17 of the Regulatory Resolution clarifies the difference between this aggravated form of trafficking, and the commission of the act by a group of persons “by prior agreement” under Article 128 par 2 a) and Article 133 par 2 b), given the substantial difference in possible sanctions.
32. All types of trafficking under Article 128 and Article 133 also foresee, next to the ranges of prison sentences, the option of confiscation of property as an additional punishment. While this appears to be a general additional punishment found in numerous criminal provisions of the Criminal Code with high prison sentences, it takes on a special connotation in the context of trafficking of human beings. Generally, trafficking victims are kept on premises that, even if alleged perpetrators are tried and convicted before court, may not necessarily be expropriated as they may not always be owned by the accused individuals. In order to eliminate the likelihood of the same property being used for trafficking again, it should be explored whether such expropriation would be possible under the Criminal Code. Often, it may be assumed that by providing the requisite property, the owners have aided and abetted the crime of trafficking (provided, of course, that they knew or could be expected to know that their property was being used for criminal purposes). This should be debated and, if possible under the current Criminal Code, included in the Regulatory Resolution.

3. Related Criminal Provisions

33. In par 15 of the Regulatory Resolution, it is stressed that human trafficking shall be distinguished from other crimes, e.g. Articles 113, 125, 126, 132-1, 133 and 270 of the Criminal Code. The way in which these provisions shall be distinguished should be made clearer in the Regulatory Resolution.
34. Next to trafficking by removing organs or tissue for transplant (Article 128 par 2 g) and Article 133 par 2 f)), the Criminal Code, in Article 113, contains a special article on the forcible or unlawful removal of human organs and tissues. Article 113 par 2 a), par 2 e) and par 2 h) contain aggravated forms of this offence, if it was committed with respect of a person in a helpless state, with weapons, or by deception or breach of trust respectively; all of these cases lead to higher sanctions (five to seven years of prison rather than up to three years).

35. As the above aggravated forms of removing organs or tissues are similar to the means used for trafficking in human beings (abuse of vulnerability of victim, use of a weapon, and deception or breach of trust), it is important to distinguish in the Regulatory Resolution when Articles 128 and 133 apply, and when Article 113 would apply, or whether in all cases they would need to be examined together. Presumably, as the removal of organs or tissues for transplant by force, abuse of vulnerability of the victim, or deception is already in itself considered to be a form of exploitation⁸, there will in most cases be overlaps. Thus, in the cases described above, both provisions should be applied in relevant criminal proceedings before courts.
36. It is noted that abduction as a means of trafficking is not listed under Article 128, even though Article 3 of the UN Palermo Protocol lists it specifically as a means of trafficking. At the same time, abduction is regulated as a separate crime under Article 125, and under this provision's par 3, the purpose of exploitation is listed as an aggravating circumstance (leading to ten to fifteen years of imprisonment). In practice, this would mean that trafficking by abduction would thus be debated before courts under Article 125 par 3. This could be problematic as it would mean that, for data collection purposes, such crimes are not automatically listed as crimes involving trafficking in human beings; this could however be resolved by specifically including cases involving Article 125 par 3 of the Criminal Code in statistics on trafficking in human beings in the Republic of Kazakhstan. While par 31 of the Regulatory Resolution attempts to describe the difference between abduction for exploitation and trafficking, it should be noted that the factual situation described in this provision reflects the basic elements of trafficking in human beings as well. Judges should thus be alerted to this fact, and the Regulatory Resolution should specify whether, in cases where an act of trafficking involves abduction, Article 125 par 3 and Article 128 could be applied together. Generally, it needs to be made clear in the Resolution that the offence of abduction should be used to support the purposes of the UN Palermo Protocol and its Article 3, as well as Article 128 of the Criminal Code.
37. A similar situation may arise in the case of Article 126 on illegal confinement, which contains, in its par 2 h), an aggravated circumstance if the act was committed for "mercenary motives", and par 3 b) if the act was committed for the purpose of exploitation. In the Regulatory Resolution, this later term is explained as a situation where a person arrives at a location voluntarily, and is then kept there against their will. As Articles 128 and 133 also cover the act of harbouring trafficking victims, the distinction between trafficking on the one hand, and illegal confinement under Article 126 par 3 b) should be made clearer. Should this prove difficult, then courts should be advised as to which article should take precedence.
38. Under the Criminal Code, the forced prostitution of adults (Article 270) and minors (Article 132-1) by, *inter alia*, violence or threat of violence, the abuse of a position of vulnerability, or deception are punishable by fines, or imprisonment of up to five years in the case of adults, and imprisonment of

⁸ See Article 3 par 2 of the UN Palermo Protocol

five to seven years in the case of minors. While the “abuse of a position of vulnerability” should be defined in this context⁹, the distinction between forced prostitution and trafficking in human beings, which share many similar acts, means and probably also the purpose of exploitation in general, in particular in the case of minors, will need to be explored further in the Regulatory Resolution, which in its par 12 merely states that sexual exploitation of persons who are sold, transferred or exchanged shall be dealt with under Articles 128 and 133.

39. In this question, it may be helpful to take recourse to the *Travaux Préparatoires* of the UN Palermo Protocol, which define sexual exploitation as: “(i) [forced] prostitution, sexual servitude or participation in the production of pornographic materials, for which the person does not offer himself or herself with free and informed consent.”¹⁰ At the same time, while the Protocol distinguishes between exploitation for forced labour or services and sexual exploitation, this should not lead to the conclusion that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking. Coercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour or compulsory labour according to the International Labour Organization (ILO).¹¹
40. The Resolution should provide guidance as to the use of the definition of trafficking for sexual exploitation from the Protocol, which encompasses forced prostitution.

4. Protection and Rights of Victims

41. It is welcome that the Regulatory Resolution also speaks of the need to protect victims, and ensure that their safety and identity is protected during court procedures, via Articles 99-100 of the Criminal Procedure Code, which appear to also protect these persons’ families. It may be considered to extend such protection, as needed, to organizations or lawyers assisting the victim. Depending on the situation, law enforcement officials may decide that protection is needed beyond that provided during court proceedings as well. In this respect, the development of an effective and formalized National Referral Mechanism for assistance and protection of the victims of trafficking is paramount, including the mechanism to access justice and to claim remedies and compensation, as part of such a mechanism. The Resolution could refer to the establishment of a National Referral Mechanism as part of providing protection and support to the victims during and after the court procedures.
42. To ensure protection of the victim of trafficking, the Regulatory Resolution should also contain a paragraph stating that victims of trafficking should not

⁹ To help elaborate the concept of “abuse of a position of vulnerability, guidance may be sought from the United Nations Office on Drugs and Crime, Issue Paper on Abuse of a Position of Vulnerability and Other Means within the Definition of Trafficking in Persons, October 2012, available under: <http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuaside>

¹⁰ See Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1) and in particular A/55/383/Add.1, para 64

¹¹ See ILO, Eradication of Forced Labour, International Labour Conference, 2007, p. 42

be sanctioned for crimes or administrative offences that they were forced to commit while being trafficked. Such a provision should be included in the Criminal Code, to prevent prosecution and conviction for such crimes; as it is currently not included in the Criminal Code, it is recommended that courts pay special attention to crimes committed by victims of trafficking, and the fact that often, these persons had no choice but to commit these crimes.

43. It should also be borne in mind that under Article 6 of the UN Palermo Protocol, victims of trafficking should remain informed of proceedings, and should “receive assistance to enable their views and concerns to be presented at appropriate stages of criminal proceedings against offenders”. This means that, under the current system, they should receive legal aid and assistance for this purpose; should the legislation not allow this at the moment, then it should be amended accordingly. Consideration should also be given to provide victims of trafficking with residence permits to enable them to participate in the legal procedures and for the duration of any legal claims, regardless of their legal status.
44. Under Article 6 par 6 of the UN Palermo Protocol, States shall ensure that victims of trafficking are able to obtain compensation for damages suffered. Depending on the legal system, this may be part of criminal proceedings, or it may be a purely civil procedure. This question should be debated, and, if possible under the current legal system, the options for compensation should be included in the Regulatory Resolution. In this context, it should be borne in mind that currently, there is apparently no provision in the Kazakh Criminal Code obliging the perpetrator to cover material damages in relation to the victim, as part of the penalty, which makes it very difficult for the victims of crime, including victims of trafficking, to effectively claim compensation for material damages. In future efforts to reform the Criminal Code and Criminal Procedure Code, it may be advisable to review and amend accordingly existing norms relating to the compensation of victims of violent crime, including victims of trafficking.

[END OF TEXT]

REGULATORY RESOLUTION OF THE SUPREME COURT
OF THE REPUBLIC OF KAZAKHSTAN

**On the Application of Legislation by the Courts While Conducting the
Criminal Proceedings Related to Human Traffic**

(**) _____2012

Astana City

In order to ensure the appropriate and unified application of constitutional provisions, laws of the Republic of Kazakhstan, international agreements ratified by the Republic of Kazakhstan on the human rights and liberties protection by the courts while conducting the criminal proceedings related to human traffic, the plenary session of the Supreme Court of the Republic of Kazakhstan hereby

RESOLVES:

1. To draw the courts' attention to the fact that the proper application of the legislation, which stipulates the responsibility for human traffic, is the ensuring of judicial protection of human rights and liberties. The responsibility for human traffic is provided for in clause 128 of the Criminal Code of the Republic of Kazakhstan (hereinafter referred to as "CC RK" – CC RK). Criminal responsibility for the purchase and sale of a minor or other transactions, exploitation or enrollment, transportation, transfer, concealment or other actions aimed at their exploitation is stipulated in clause 133 of the CC.

The main subject of the aforesaid acts of crime is the human freedom, additional subjects are human life and health.

In line with disposition of clauses 128, 133 of the CC the infringement upon a man's freedom may consist in conducting purchase and sale or other transactions related to a man, their exploitation, enrollment, transportation, transfer, concealment or other actions aimed at their further exploitation with direct intent. The list of actions specified in disposition of part 1 clause 128 and part 1 clause 133 of the CC RK, aimed at the exploitation of a human being, is not exhaustive.

In order to qualify an action in line with part 1 clause 128 of the CC or part 1 clause 133 of the CC respectively it is sufficient to establish the fact of commission of at least one of the actions listed in this clause disposition. Commission of several actions stipulated in this clause does not form a cumulative crime.

2. Purchase and sale of a human being shall be understood as an onerous transaction, whose one party (seller) transfers a human being to the other

party (buyer) for permanent or temporary disposal for a definite consideration, paid in national or foreign currency.

Other transactions, causing criminal responsibility in line with article 128 or article 133 of the CC, shall include a gift (transfer of a human being to a person without charge), exchange (exchange of a human being for something), exchange (replacing one human being by another one), rent of a human being (transfer of a human being for a consideration for the temporary possession and use or the temporary use), retention of a human being as an enforcement of an obligation related to the transaction concluded between the parties, the use of a human being as an item for payment, transfer of a human being in order to receive any kind of non-property advantages (getting a job, promotion etc.).

3. Purchase and sale of a human being as well as other transactions involving a human being, including that committed in order to exploit, shall be deemed a finished crime starting from the moment of a human being transfer to other persons based upon the agreement between the parties. Moreover, the time of the receipt of consideration as a result of a human being sales or other transaction involving the latter, de facto exploitation of a person shall not influence the qualification of a crime as committed.

4. The subjective aspect of the purchase and sale of a human being or conclusion other transactions in respect of a human being shall be defined by the direct intent, the objective of such transactions shall not influence the qualification of a deed in line with part 1 clause 128 or part 1 clause 133 respectively of the CC.

In case of enrollment, transportation, transfer, concealment of a human being the subjective aspect of a crime shall be defined by the direct intent and objective – that is human being exploitation. De facto exploitation of a person shall not influence the qualification of a deed.

5. While establishing and estimating an objective of a deed it is necessary to proceed from the fact that a human being exploitation may consist in the use of a human being regardless of their will either free of charge or for a consideration (slave unpaid or low-paid labor, servile status, forced prostitution, rendering sexual and other services etc.). The objective of exploitation shall be deemed achieved in cases where the guilty had a real opportunity to use a human being for one's own purposes or purposes of other persons from the moment of a human being bringing to the servile status.

6. The enrolment of a person assumes the inducement of a person to consent to be engaged in a transaction for their further exploitation, as well as committing of other deeds (hiring for some works performance, involvement into some activity, including unlawful activity, involving into some organization, including organizations whose activity is prohibited in line with the legislation, etc.). Enrolment methods shall not influence the incurrance of liability and may vary (promise of compensation, fraud, persuasion, extortion,

intimidation, threatening etc.). Enrolment shall be deemed finished from the moment of fulfillment of the above actions regardless of the fact of obtaining of the enrolled human being's consent. A person who committed enrolment for the purpose of further exploitation of a human being is a crime committer. Another person's assistance in enrolment shall be subject to qualification as aiding and abetting human traffic.

7. Transportation of a person entailing responsibility in line with clause 128 of clause 133 respectively of the CC means willful acts fulfilled with the purpose of exploitation of a human being aimed at their transportation from one place into another, including within one and the same inhabited locality. Means of transport, time and type of human being transportation shall not influence the qualification of actions.

The transportation may in itself form the subjected aspect of a crime if it is fulfilled by a person who concluded an unlawful transaction. The transportation may also be carried out by another person as aiding and abetting of a person who is willing to commit or has committed any specific transaction involving a human being. Transportation may consist not only in the delivery of a transported human being accompanied by anyone, but also in purchasing a travel document to a transported person (or paying for such a travel document) to the place of destination, where the victim gets by themselves. The purchasing of travel documents or payment for travel costs of a human being to the place of exploitation shall also be subject to the qualification in line with the corresponding article 128 or article 133 of the CC.

8. Concealing a human being with their further exploitation implies concealing of a victim against their will from the law enforcement bodies, relatives, friends and family members and other persons. Concealing may consist not only in physical concealing of a victim (for instance, concealing in special premises, preventing from leaving some territory, drug-induced suppression of physical or mental activity of a victim), but also in other actions, which complicate the detection of a victim (seizure of documents, appearance modification etc.). Concealing of a victim is associated with unlawful deprivation of their freedom and is covered by the disposition of part 1 clause 128 and part 1 clause 133 of the CC and no additional qualification of the actions committed under article 126 CC RK is required.

9. Transfer of a human being can consist in its transfer at other people's disposal with the aim of exploitation. Transfer can represent an independent activity, which forms the crime elements, as well as a part of any further transaction involving a human being (for instance, their sexual exploitation). The moment of the end of transfer of a human being as an independent action shall not depend on the fact of committing and finishing of other possible actions with regard to a human being by their purchasers.

Transfer of a human being at the disposal of other person implies their receipt (acceptance) by such a person. Actions of a person who accepted a human being with the purpose of their exploitation by such a person or other persons shall be subject to qualifying in line with the respective part of article 128 of the CC, and in case of a minor human being - in line with the respective part of article 133 of the CC.

10. The previous facts of exploitation of a human being are socially dangerous acts, which result in servile status of a victim, deprive a victim of the freedom of movement, and enable transactions involving them (for instance, kidnapping or unlawful deprivation of liberty of a human being with the aim of their exploitation) shall be subject to qualifying in line with the respective articles of the CC RK, which stipulate liability for such actions. If a person, who was kidnapped or deprived of liberty, was subsequently exploited, the actions shall be qualified accumulatively – in line with item 6) part 3 clause 125 or item 6) part 3 clause 126 of the CC and the respective part of clause 128 of the CC.

11. While legal qualifying as exploitation an action committed towards a human being the courts shall follow item 2 of the amendment to article 125 of the CC RK, according to which the exploitation of a human being in the context of clause 128 of the CC shall be understood as the use of forced labor, the use of prostitution work of another person or other services rendered by such a person with the aim of appropriation of such a person's profits, as well as exercise of powers of owner towards a person, who cannot refuse the fulfillment of such works or services for the reasons beyond their control.

12. It should be considered that sexual exploitation of a human being includes not only forced prostitution by a human being but also the use of a victim for other actions of sexual nature (various actions, creation of obscene prints, videos etc.). Sexual exploitation of a sold, given or exchanged person or an enslaved person shall be covered by the disposition of articles 128, 133 of the CC, and in case of commitment of such actions towards the minor no additional qualification in line with clause 131-1 of clause 270 CC shall be required.

13. In case of finding out the circumstances of a person's being in the labor exploitation (slavery), clause 1 of the Convention on the Slavery dated September 25, 1926 shall be applied, according to which the slavery is understood as situation or status of a person, in respect of which certain or all of the powers are exercised which pertain to the right of ownership, that is a person is being treated as a thing which belongs to another person, and the reasons of their being in such a status shall be detected (for instance, the existence of an outstanding debt of a person, observance of customs related to the duty of works execution for the benefit of other people or transferring of an enslaved person to the family members, or forced marriages, transfer of a woman to another person after her husband's death etc.).

14. People towards whom at least one action listed in the first part of clauses 128 and 133 of the CC was committed shall be recognized as Human traffic victims. In case of necessity of defining the state of a person in whose respect the above actions were committed, the courts shall be entitled to engage as specialists people who command special knowledge, including the representatives of non-governmental and non-profit organizations, who render assistance to the human traffic victims consisting in gathering and presentation of evidences, in line with clause 84 of the Criminal Procedural Code. In order to ensure the victims' security the bodies conducting criminal proceeding, shall take all measures stipulated in clauses 99-100 of the Criminal Procedural Code, and in court proceeding – the measures stipulated clause 101 of the Criminal Procedural Code.

15. Human traffic shall be distinguished from other crimes, infringing personal liberties and inviolability of human dignity, stipulated in articles 113, 125, 126, 132-1, 133 and 270 of the CC RK.

In these circumstances each case shall be considered individually taking into account specific circumstances, intent direction, motives and objectives of the committed action, and the actions of the guilty shall be qualified depending on the latter as well as on the rule of regulations concurrence shall be applied, according to which a special regulation stipulating liability for the respective action is prevailing.

16. Prosecuting agencies and courts shall correctly establish the qualifying signs of crimes, stipulated in the respective parts of articles 128 and 133 of the CC.

Actions committed by a group of people by previous concert are subject to qualifying according to item a) part 2 clause 128 of the CC and item a) part 2 clause 133 of the CC. In line with part 2 clause 31 of the CC a concert is defined as a previous if it took place before the start of committing of at least one action which can be included into the objective aspect of such crime as human traffic. In this case the scope of concert may vary (specific circumstances of a crime commitment and the accessories' behavior are considered, as well as whether concert reflects the supposed actions of the group in general terms only).

People taking part in human traffic, committed by a group of people by previous concert bear the responsibility as joint participants in a crime if the intent of all the guilty covered the use of violence, threatening, fraud of a victim with the purpose of human traffic, whereas each of the members of a group has committed actions aimed at the achievement of common purpose (for instance, one joint participant chooses a victim, other ones apply violence, threatening, and the other ones transport or transfer the victim to human traffickers etc.).

In cases of purchase and sale of a human being, where one person sells and another person buys a victim with no middlemen involved, such

qualifying sign as commitment of a crime by a group of people by previous concert is absent.

Joint participants who haven't personally taken part in the actions stipulated in disposition of clauses 128, 133 of the CC, but have assisted other persons in a crime commitment, bear responsibility for the joint participation in human traffic, committed by a group of people by previous concert and in such cases their actions shall be subject to qualification with reference to the relevant part of clause 28 of the CC.

17. Human traffic, committed by an organized group, that is settled group of persons previously united for the commitment of one or several crimes, shall be qualified in line with item a) part 4 clause 128, part 4 clause 133 of the CC. An organized group should be distinguished from a group of people by previous concert in terms of settlement and organizational signs. A group settlement can be justified by unifying of two or more persons for a comparatively long period with the aim of one or several crimes commitment, and long-term joint preparation or complex execution of a criminal action. Group organized nature is defined as the group members' subordination to the instructions of one or several persons, as well as willingness to achieve the criminal objectives in an organized manner. Actions of each member of an organized group, having conducted human traffic activity, regardless of their role, shall be qualified in line with item a) part 4 clause 128 of the CC with no reference to clause 33 of the CC.

18. When qualifying human traffic by the sign of multiple commitment of criminal actions clause 11 of the CC shall be applied. In case of two episodes of criminal actions, not associated between each other by a common intent, in line with item «б» part 2 clause 133 of the CC it is necessary to establish that both criminal actions were committed towards the minors. In order to qualify two and more episodes of human trafficking in line with item «б» part 2 clause 128 of the CC a victim's age is of no importance. If the first criminal actions was committed in respect to the an adult, and the second one – in respect of a minor, the actions committed in each episode shall be qualified in line with clauses 128 and 133 of the CC accordingly without such a qualifying sign as multiple occurrence. In case were a criminal actions towards an adult was preceded by a criminal actions towards a minor, the actions of the guilty shall be qualified in line with clause 133 of the CC without such a qualifying sign as multiple occurrence, and according to clause 128 of the CC – in line with item б) part 2 clause 128 of the CC.

Multiple occurrence shall be distinguished from an ongoing crime, where several criminal actions are committed towards several victims, and an intent towards all of them arose simultaneously, that is criminal actions are covered with a single intent and purpose, that is criminal actions committed form a single crime, stipulated by clause 128 of the CC, and if at least one of the victims is a minor –in their respect clause 133 of the CC shall be applied.

19. Applying of violence, dangerous for life or health, of threat of violence applying (item в) part 2 clause 128, item в) part 2 clause 133 of the CC) shall be

understood as any kind of violence: binding, retention, personal injury of trivial, medium or grave severity etc. The threat of violence applying may consist in a threat of committing the above actions and injuring, as well as in violence which in fact caused no harm to a victim's health (for instance, short-term compression of throat, dipping of a victim's head under the water etc.), but its applying showed the guilty's readiness to pass on to the violence more dangerous to life and health of a human being.

A victim is recognized as a person towards whom personally the violence or threat of violence was applied with the objective to traffic them. Violence, applied towards other persons in order to suppress their resistance to the guilty's actions, as well as the threat of violence shall be understood as a circumstance which causes the qualification of crimes, stipulated in item в) part 2 clauses 128, 133 of the CC.

20. The use of weapon, applied as weapon (item г) part 2 articles 128, 133 of the CC), involves the use of any kind of firearms, side arms, gas spray guns, including the attempt of its use, as well as demonstration of weapon for showing the real threat of violence, dangerous for life and health of a victim. The items used as weapon may include any items, used for heating or other kind of means for pain-infliction, including everyday objects (kitchen knife, iron, hammer, stone etc.).

21. In line with item д) part 2 clause 128 of the CC should be qualified actions committed towards a woman, who is being pregnant at the moment of criminal action, which a guilty should be aware about in advance. The courts shall take into account that committing a crime in respect of a pregnant minor, is not stipulated as a qualifying sign of a crime, provided for in clause 133 of the CC. In this regard in line with item ж) part one clause 54 of the CC imputed knowledge of a minor victim's pregnancy shall be defined as a circumstance aggravating the criminal liability and punishment of a guilty.

22. HT committed towards one and more persons (item е) part 2 clause 128 of the CC, item д) part 2 clause 133 of the CC) may be committed either simultaneously or in different time, and it has no significance for the qualification if the actions were done by a common intent of the guilty or not with regards to each victim. Since clause 133 of the CC provides for responsibility for human trafficking regarding minors only, actions committed towards several minors shall be qualified in line with item д) part 2 clause 133 of the CC. If one of victims is a minor, and other victims are over the age of 18, then the action towards all of them shall be qualified in line with item е) part 2 clause 128 of the CC. Subject to the existence of intent to involve one or more persons in human trafficking, the criminal action commitment towards one victim only (whereas a crime could not be finished towards other victims for the reasons not controlled by the guilty), the committed action makes up an aggregate in the form of criminal attempt to traffic two or more persons, and a finished crime towards one person, which are qualified independently in line with the corresponding parts of clauses 128, 133 of the CC.

23. human trafficking, committed with the purpose of the victim's organs or tissues extraction for transplantation or other use (item ж) part 2 clause 128 of the

CC, item e) part 2 clause 133 of the CC), shall mean the guilty's or other persons objective of exploitation of a human body by means of further use of its organs and tissues for transplantation to other persons or other kind of. The actual use of human organs or tissues are not required for the qualification of human trafficking by this sign, the establishment of the above purpose is enough for the qualification. The fact of unlawful victim's organs or tissues extraction in the above mentioned cases is subject to independent qualification in line with the respective part of clause 113 of the CC.

24. According to item 3) part 2 clause 128, item ж) part 2 clause 133 of the CC, liability for human trafficking shall be incurred in cases, where the confidence in lawfulness or advantageousness of agreement is evolved in a victim by means of fraud (misrepresentation) or abuse of trust (trust relationship, built up between a victim and a criminal), and a victim gives their consent to involve them into certain activities (job of a waitress, housemaid, dancer, builder, farmer, marriage etc.). In fact, a person is being transferred in servile status, being unsuspecting of the fact that a criminal's actions are aimed at their trafficking, conclusion of other transactions and actions aimed at their exploitation.

25. Minors human trafficking shall be deemed completed with the purpose of a minor's involvement into crimes or other antisocial actions commitment (item и) part 2 clause 133 of the CC), if the guilty themselves or other persons would subsequently abet a minor to commit a crime or other antisocial actions, while committing actions listed in part one clause 133 of the CC. In case of proof of the fact that a person committed action provided for in clause 133 of the CC with the purpose of a minor involvement into CRIMINAL OR other antisocial actions regardless of actual achievement of this aim, the actions shall be governed by item и) part two clause 133 of the CC. If psychological or physical violence was applied to a victim (assaults, suasions, threatening and fear appeal, tampering, fraud, evoking of revenge, feeling, envy and other foul motives, assurance of impunity etc.) in order to involve them in criminal or other antisocial activity, the committed actions shall be qualified generally on the cumulative basis in line with item и) part two clause 133 and the respective parts of clauses 132, 132-1 of the CC.

When filing accusation prosecuting agencies and court shall indicate in their resolution, which actions were committed by a guilty in order to involve a minor in criminal or other antisocial activity.

26. While districting the involvement of minors into the committing of actions stipulated in clauses 132, 132-1 of the CC, and minors trafficking for their involvement into the committing of antisocial actions, responsibility for which is stipulated in item и) part two clause 133 of the CC, it should be kept in mind that in case of the latter actions, the fact of their committing using the means listed in part one clause 133 of the CC shall be established.

27. In line with item и) part 2 clause 128 and item ж) part 3 clause 133 of the CC crime committers are: persons, authorized to perform the governmental functions and similar persons, officials, and persons holding responsible public office, as well

as persons performing managerial functions in governmental and not governmental, commercial and non-profit organizations.

Human and minors traffic committed by an official shall be deemed a special crime component of exceeding official powers (clause 307 of the CC), that is why the cumulative crime is excluded.

28. Actions committed towards persons being in financial or other dependency on the guilty shall be qualified in line with item κ) part 2 clause 128 and item κ) part 2 clause 133 of the CC.

A victim's financial dependency may be determined by full or partial dependency relationship between a victim and a guilty, a victim's living in the living space of a guilty etc. Financial dependency may result in debtor and creditor or heir and testator relations. Other dependency shall be understood as any other non-financial dependency between a victim and a guilty (for instance, family relations, subordinate's dependence on a manager, a student's dependence on a teacher etc.).

29. Part 3 clause 128 and 133 of the CC stipulates the liability for human trafficking, committed with the aim of exportation (delivery) outside the territory of the Republic of Kazakhstan, importation to the territory of the Republic of Kazakhstan or transportation (transit) of persons through the territory of the Republic of Kazakhstan from one state to another, as well as exportation outside the territory of the Republic of Kazakhstan, importation to the territory of the Republic of Kazakhstan or transportation of persons through the territory of the Republic of Kazakhstan from one foreign state to another with the aim of committing such actions.

Transfer of a victim through the state border of the Republic of Kazakhstan shall be understood as both lawful and unlawful border crossing by victims. Regulation on the unlawful crossing by a victim of a state border (clause 330 CC) is covered by the regulation on human trafficking, that is why the qualification on the cumulative basis is not required.

30. Specifically qualified human trafficking (part 4 clause 128 , part 4 clause 133 of the CC) are the actions stipulated in parts 1,2,3 of the listed clauses, if: the actions are committed by an organized group; caused a victim's death by negligence or other grave consequences.

human trafficking caused a victim's death by negligence or other grave consequences implies a crime committing with the mixed guilt form. Infliction of death by negligence is a result of human trafficker's actions (for instance, putting a victim into a luggage bag, a car luggage boot where a victim asphyxiated etc.). Based on this item the responsibility takes place in case where the guilty persons commit voluntary actions while human trafficking, listed in parts 1 or 2 clause 128 of the CC and as a result of their overconfidence (carelessness) or negligence one of the following consequences occur – a victim's death or other grave circumstances.

Death by negligence in human trafficking may occur as a result of voluntary infliction of grave harm to a victim's health. In such a case the action is governed by item "B" part 4 clause 128 of the CC.

Other grave consequences may involve: grave diseases, mental disorder, large property damage etc. In case of other criminal actions committed towards a victim, which caused grave circumstances (for instance, murder, sexual offence, HIV and other sexually transmitted diseases infection, unlawful abortion etc.), the actions shall be qualified on the cumulative bases.

31. Crimes the liability for which is stipulated in clauses 128 or 133 of the CC, shall be distinguished from that committed for the purpose of exploitation of kidnapped person (clause 125 CC), unlawful confinement (clause 126 CC).

Kidnapping of a person for the purpose of their exploitation under item «б» part 3 clause 125 of the CC shall be understood as seizure and unlawful transportation of a person from their permanent or temporary place of residence to another place against a victim's will in order to use a person in forced labor, prostitution or rendering other services to other people for the purpose of misappropriation by the guilty of the incomes received, as well as exercising the powers of owner in relation to a person who cannot refuse the fulfillment of works and rendering of services for the reasons which are not under the control of such a victim.

Illegal deprivation of freedom for the purpose of exploitation in line with item б) part 3 clause 126 of the CC shall be understood as unlawful retention of a person against their will in a place where a person was or where a person arrived voluntary.

32. When determining a criminal penalty for human trafficking the courts shall strictly observe general guidelines for penalty determining, listed in clause 52 of the CC, as well as take into account the international nature, category of severity of a crime, its danger to the public, ways of committing, gravity of consequences, each of the accused degree and nature of participation in crime committing, mitigating and aggravating circumstances.

33. If in course of judicial examination of criminal proceedings on human traffic the courts reveal the circumstances that contributed to crimes committing, violations of human rights and freedoms of persons, as well as other violations of the law committed in course of the preliminary investigation or criminal proceedings by an inferior court, in line with clause 58 and 387 of the Criminal Procedural Code of the Republic of Kazakhstan, the court shall draw the attention of respective organizations and officials to the revealed facts of legislation violation in order to use the necessary measures by means of specific court orders.

34. In line with clause 4 of the Constitution of the Republic of Kazakhstan the present regulatory resolution shall be incorporated into the applicable law as well as shall be universally binding and comes into force from the date of its official publication.

Chief Justice

**of the Supreme Court
of the Republic of Kazakhstan:**

**Secretary of the plenary session
of the Supreme Court
of the Republic of Kazakhstan:**