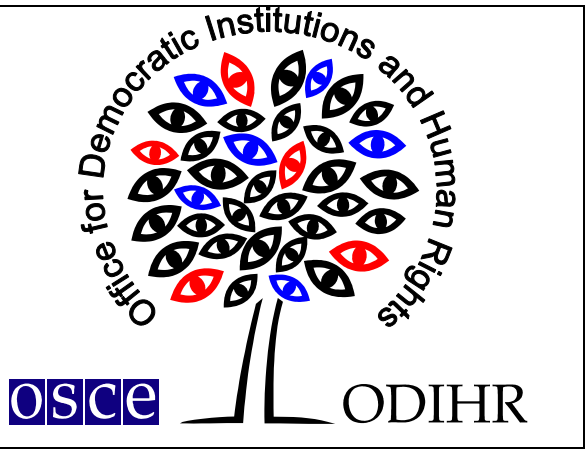
Warsaw, 20 June 2005 Opinion-Nr.: NGO – KAZ/031/2005 (DP/IU) www.legislationline.org	

Comments
on the Laws of the Republic of Kazakhstan
"On Activity of International or Foreign Non-Profit Organizations in the Territory of the Republic of Kazakhstan" and
"On Amendments to Several Legislative Acts of the Republic of Kazakhstan Concerning Non-Profit Organizations"

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1. INTRODUCTION

1. *In April 2005, two draft laws, namely, the Draft Law on Activity of International or Foreign Non-Profit Organizations in the Territory of the Republic of Kazakhstan, and the Draft Law on Amendments to Several Legislative Acts of the Republic of Kazakhstan Concerning Non-Profit Organizations (hereinafter collectively referred to as the Drafts) were presented, along with a "Explanatory Note", to the Parliament of the Republic of Kazakhstan by a group of deputies. These drafts were passed by the Mazhilis on 15 June 2005.*

2. *The comments hereafter have been prepared at the request of the OSCE Centre in Almaty on the basis of an English translation of the above mentioned draft laws as amended by the 1st reading and the "Explanatory Note," as well as the Russian translation of the Laws as adopted.*

2. SCOPE OF REVIEW

3. These comments examine the compatibility with international human rights standards, including OSCE human dimension commitments, of two above-mentioned laws. They do not purport to provide a comprehensive review.

4. The international standards relevant to this opinion are primarily those concerned with the right to freedom of association, to which the Republic of Kazakhstan has shown its commitment through signing the International Covenant on Civil and Political Rights[1], its ratification of both the Convention on the Rights of the Child[2] and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[3], its commitments as a State belonging to the Organisation for Security and Co-operation in Europe[4] and its support for the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)[5].

In addition guidance on the scope of the right to freedom of association can be derived from rulings of judicial bodies such as the European Court of Human Rights and, as is recognised in the "Explanatory Note" to the Law on Activity of International or Foreign

[1] Signed on 2 December 2003. Full text is available at http://www.ohchr.org/english/law/ccpr.htm (last visited on 25 May 2005). Freedom of association is guaranteed by Article 22.
[2] Ratified on 16 February 1994. Full is available at http://www.ohchr.org/english/law/crc.htm (last visited on 25 May 2005). Freedom of association is guaranteed by Article 15.
[3] Ratified on 11 January 2001. Full text is available at http://www.unece.org/env/pp/treatytext.htm (last visited on 25 May 2005). The Convention attaches particular importance to the role of non-governmental or non-profit organizations.
[4] See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Paras. 9.3 and 10.3.
[5] GA Res 53/144, 9 December 1998.

Non-profit Organizations, to treaties such as the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, to "soft-law" instruments such as the Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe (adopted within the framework of the Council of Europe)[6] and to the practices of other OSCE participating States. However, the provisions in the Laws also have potential implications for the exercise of other human rights, notably freedom of expression and rights to education and to privacy, and they are, therefore, also taken into account in the examination of their provisions.

5. The opinion considers the two Laws in tandem as the Law on Amendments enshrines a number of provisions consequential on the adoption of the Law on Activity of International or Foreign Non-profit Organizations – dealing with matters such as the creation of administrative offences, the application of registration requirements, the giving of information about activities and the financing of such activities – and thus clarifies the character of the obligations being imposed by that law. However, it also needs to be kept in mind that the provisions in the Laws could also have implications for the conduct of organisations that are not international or foreign. Thus the opinion looks first at the nature of the organisations that would actually be regulated by the Laws. It then considers the prerequisites for the operation of these organizations, their admissible and prohibited objectives, their reporting and other obligations, the process for establishing a branch or representative office and the arrangements for the suspension and liquidation of such a branch or representative office. It concludes by examining the provisions dealing with the property of branches and representative offices, arrangements for accountability and liability and the effect of the concluding and transitory provisions.

6. The OSCE ODIHR would like to mention that the comments provided herein are without prejudice to any further comments or recommendations that the ODIHR may wish to make on the legislation under consideration.

3. EXECUTIVE SUMMARY

7. The Laws, which seek to regulate the operation in the Republic of Kazakhstan of international and foreign non-profit organizations, approach the task with an inappropriately restrictive philosophy. The effect of their provisions is to impose restrictions that are disproportionate to any legitimate objectives that might be pursued and which will not only impede the legitimate activities of such organizations but also interfere in an unwarranted manner with the rights and freedoms of persons in the Republic of Kazakhstan. Furthermore there are many provisions for which more precise language is needed and a number whose actual object and effect is in need of clarification. There is an urgent need for the latter provisions to be recast in the light of the suggestions made hereafter.

[6] Full text in English and Russian is available at http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Civil_society/ (last visited on 10 March 2005).

8. It is recommended that the Laws be modified so as:

(a) to restrict their application to organizations established in accordance with the legislation of a foreign State by foreign States or persons within them, removing the reference to "*international non-commercial organizations of the Republic of Kazakhstan*" (para. 12);

(b) to make it clear that it is not necessary to establish a branch or representative office in order to provide a speaker at a meeting organised by some locally-established body, to mail literature to persons who have requested it and to appoint persons to provide an organization with information on matters which might be relevant to its mandate (paras. 15 and 16);

(c) to require only that an organization obtain approval to initiate activities in the Republic of Kazakhstan and that such an organization remain free to decide whether it considers it necessary to carry out its activities through the formation of a branch or representative office (para. 19);

(d) to provide for the grant of any approval to operate being made subject to receipt of appropriate evidence that the organization concerned is entitled under its charter to operate in the Republic of Kazakhstan, with the evidence for this purpose varying according to the situation in the particular country of establishment (para. 21);

(e) to clarify the scope of the "public benefit" requirement for foreign non-profit organizations to conduct activities in the Republic of Kazakhstan, whether it must be fulfilled by both the organization and its branch or representative office and whether the requirement of purposes of "public benefit" and "benefit for all members" are cumulative or alternative (paras. 23-25);

(f) to provide that the only other basis for refusing approval for an organization (or a branch or representative office) to conduct activities in the Republic of Kazakhstan is a to reasonable ground for concluding that its proposed activities would be unconstitutional or unlawful (para. 31);

(g) to require that any such refusal of approval be reasoned (para. 32);

(h) to clarify and narrow the scope of the term "financing" of the activity of political parties, trade unions and religious associations (para. 33);

(i) to delete the citizenship requirement for the head of branches and representative bodies and for members of executive boards of foundations and "international non-commercial organizations of the Republic of Kazakhstan" (para 39);

(j) to restrict the grounds for refusal of accreditation to unreliable information and reasonable grounds to conclude that unconstitutional or unlawful activities are being proposed, with all refusals being reasoned (para. 47);

(k) to specify that suspension of the activity of a foreign non-profit corporation or its branch or representative office, the prohibition on the organization operating in the country or the liquidation of its branch or

representative office must always be exceptional, be based on relevant and sufficient evidence and proportionate (para. 48);

(l) to limit the duration of suspension imposed by a prosecutor and remove the three-month minimum period of suspension imposed by a court (paras. 49 and 50);

(m) to delete suspension or termination of operations for violation of the organization's statute and to delete the unspecified grounds for the termination of operations in the absence of a compelling justification for them (paras 52-54);

(n) to reconsider the scope of the prohibition on anonymous donations (para. 55);

(o) to delete the requirement for prior approval of financing, donations and other kinds of material assistance for specific activities (para. 56);

(p) to provide a more precise indication as to scope of the obligation to report on activities and as to the means for verifying the authenticity of information so published (paras. 63 and 64);

(q) to clarify the effect of the amendments being made to the banking and tax legislation (para. 65);

(r) to ensure that proportionality governs the imposition of any fines (para. 66);

(s) to remove liability for foreign non-profit organizations insofar as they are required to establish a branch or representative office (para. 67); and

(t) to allow an existing branch or representative office that has applied for accreditation under the new legislation to continue to operate until the accreditation process has been completed (para 68).

4. ANALYSIS AND RECOMMENDATIONS

9. As the "Explanatory Note" indicates, the provisions in the Laws are shaped by an analysis of international experience which is said to show "that legislation sets up a strict control over all directions of operations of NGOs". However, such an analysis is actually at odds with both the approach of international instruments such as the Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe[7] and the general practice of States in regulating the activities of non-profit organizations[8].

4.1 Organizations being regulated

10. Article 1 of the Law on Activity of International or Foreign Non-profit Organizations indicates that it is directed at the branches and representative offices of "*international or foreign non-profit organisations*" and the latter are defined as ones "*established in accordance with the legislation of a foreign state or the provisions of international treaties, and the founders of which are international organizations, foreign states immediately (themselves) or in the person of their representative bodies, foreigners, stateless persons, foreign legal entities*". At the 1st reading the provisions of Article 1 have been amended to expand their coverage to include also "*international non-commercial organizations of the Republic of Kazakhstan*" defined as "*non-commercial organizations with foreign participation and/or non-commercial organizations, activity of which is spread out in the territory of two or more states*."[9] An exception is made for "*international and foreign organizations, the activities of which are regulated by the international treaties ratified by the Republic of Kazakhstan, as well as public institutions and religious organizations*."[10]

11. It is not entirely clear from the definition of "*international non-commercial organizations of the Republic of Kazakhstan*" what "*foreign participation*" may mean. Would a one-time receipt of funding from a foreign source change the status of an NGO to that of an "international non-commercial organization" and thus subject the organization to the provisions of the Law? This would be unreasonably onerous for the NGOs since virtually all of them have received foreign grants or may receive them in the future. As regards the Kazakhstani NGOs active beyond the boundaries of Kazakhstan, the regulation of their operations in foreign states has only marginal, if any, bearing on the interests of the Republic of Kazakhstan and is governed by the legislation of the state concerned.

It is therefore recommended that the reference to "*international non-commercial organizations of the Republic of Kazakhstan*" be deleted from the text of the Law. The application of the law should be restricted to organizations established in accordance with the legislation of a foreign State by foreign States or persons within them.

[7] Notably in Principles 45, 66, 70 and 77.
[8] See Council of Europe, A*nalysis of the Questionnaire on the Legal Framework for the Setting Up and Functioning of Non-governmental Organisations in Europe* (ONG (2005) 1).
[9] Draft Law on Activity of International or Foreign Non-Profit Organizations, Article 2(2).
[10] *Id.*, Article 1.

4.2 Prerequisites for operation in the Republic of Kazakhstan

12. Article 2 of the Law on the Activity of International or Foreign Non-profit Organizations imposes a requirement that foreign non-profit organizations seeking to operate in the Republic of Kazakhstan do so exclusively through their branches and representative offices there and then only in circumstances where their charters provide for the possibility of them extending their activities to the territory of two or more States.

13. The first aspect of this requirement is problematic in that there is a lack of clarity regarding the term "*carry out activity in the territory of the Republic of Kazakhstan*". Certainly this is a term that could cover a wide range of possibilities from providing a speaker at a meeting organised by some locally-established body in Kazakhstan, the mailing of literature to persons living there and who have requested it and the appointment of persons there to provide the organization concerned with information on matters which might be relevant to its mandate through to the holding on its own behalf of meetings and similar activities in the Republic of Kazakhstan.

14. The lack of clarity as to what is covered is inconsistent with the requirement that rights such as freedom of association and freedom of expression be subject only to restrictions that are sufficiently precise so that it is possible to foresee whether or not particular conduct is caught by them. Furthermore, insofar as it extends to conduct of the type given in the first three examples, there is also a grave risk that it will be a disproportionate restriction on the freedom of assembly, association and expression of persons in the Republic of Kazakhstan as the requirement to have a branch or representative office would in many instances make it impossible for persons to hear speakers, receive literature and associate with organizations outside the country when there is no clear pressing need for such a formality to be observed.

15. It would be appropriate, therefore, for the Law on the Activity of International or Foreign Non-profit Organizations to be modified so as to make it clear that activities of this kind are not being subjected to the prerequisite of having a branch or representative office.

16. However, the prerequisite would not cease to be problematic if its scope was expressly limited to a more substantial form of operation within the country – such as the holding of meetings and the provision of education and training – since the need to establish a distinct entity for this purpose could still impose a disproportionate burden on the organization concerned, particularly if the operation is one intended to be of a relatively short duration.

17. Although normative instruments such as the Fundamental Principles on the Status of NGOs in Europe have recognised that some form of approval might be required in order for a foreign NGO to operate within a country, there has also been recognition that the formalities should not be excessive since that instrument has specifically provided that there should not be any need for "*a new and separate entity*" to be established for this

purpose[11]. Moreover the existence of a separate entity is not an essential requirement for the regulation of a particular activity – it is significant that the "Explanatory Note" does not advance any basis for considering such a requirement to be necessary and appears to have overlooked the specific provision just cited from the Fundamental Principles when referring to the latter instrument in the context of the Law's accreditation provisions - and the interests of the Republic of Kazakhstan would be sufficiently served by a requirement that a foreign non-profit organization not commence activities of this kind before it has first obtained approval for it do so, with the activities themselves being subject to any regulatory requirements applicable to them. Indeed this is the basis on which the only international instrument dealing specifically with this issue – the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations – proceeds, appreciating that in the case of a body which already has legal personality the more appropriate concerns lie first in confirming that this is in fact the case[12] and then in judging whether there are still reasons not to allow such an entity to operate in a given country.[13] There could also be no objection to such approval being conditional on notification being given to the relevant authorities as to who is acting as the representative of the organization (or as to any change in this regard).

18. The Law should thus be amended to require only that an organization obtain approval to initiate activities in the Republic of Kazakhstan and that such an organization be free to decide whether it considers it necessary to carry out its activities through the formation of a branch or representative office.

19. The second aspect of the requirement – entailing the existence of express authorisation in the charter of the organization concerned for the extension of its activity to two or more States – is also inappropriate as it fails to respect the different ways in which organizations may derive their authority to act. Although there may be some traditions which require such authorisation in very detailed terms, there are others where this is not needed as it is well-established that the general authority to do something may carry with it a number of implied powers and these might well include the possibility of carrying out operations outside of the territory in which it is established.

20. There may be a legitimate concern on the part of the Republic of Kazakhstan to be satisfied that an organization proposing to operate within its territory has a lawful basis for so doing – not least if it wishes to ensure that recovery of liabilities incurred is not impeded by reliance on some form of *ultra vires* doctrine - but it would be sufficient for the grant of any approval to operate being made subject to receipt of appropriate evidence that the organization concerned is entitled under its charter to operate in the Republic of Kazakhstan, with the evidence for this purpose varying according to the situation in the particular country of establishment. The Law should, therefore, be amended accordingly.

[11] Principle 37.
[12] Article 3.
[13] Article 4.

4.3 Admissible and prohibited objectives

21. Article 4(1) of the Law on the Activity of International or Foreign Non-profit Organizations proposes to allow branches and representative offices of foreign non-profit organizations to be established "*for the achievement of the purposes aimed at assurance of public benefit and benefit for all members*". This does not seem in itself to be problematic but there are several points where clarification is needed.

22. Firstly there is uncertainty as to the precision of the concept of "*public benefit*" in the law of the Republic of Kazakhstan; similar terms may be found in the laws of other countries and it is possible that a particular organization may satisfy the test under its own law but not under the law of the Republic of Kazakhstan. It is essential, therefore, that the scope of this restriction be clarified so that organizations can establish whether or not they are capable of meeting this requirement of the Law.

23. Secondly there is a need to clarify whether this requirement must be met by the organization concerned or only by its branches and representative offices (the latter would be the literal reading of the stipulation that "*branches and representative offices … can be established*"); it is not unknown for bodies to establish subsidiary entities with a narrower mandate and the possibility of only branches and representative offices having to satisfy the particular requirements of the understanding of "*public benefit*" in the Republic of Kazakhstan might be advantageous for some organizations wishing to operate there without having to revise their objectives generally but this is still not a sufficient justification for requiring that an organization establish a branch or representative office prior to operating in the country.

24. Thirdly there is a need to clarify whether or not the requirement of purposes of "*public benefit*" and "*benefit for all members*" are cumulative or alternative; certainly international organizations and ones established by States will not be ones created to benefit their "*membership*" insofar as they can be said to have one.

The prohibition in Article 4(2) of branches and representative offices being established "*for the expression of the political will of citizens, various social groups, as well as in the purposes to represent their interests in representative and executive governmental bodies, local authorities and to participate in their formation*" is in need of further clarification. Although it is not unusual – nor inconsistent with freedom of association or expression - for non-nationals to be excluded from some aspects of political activity[14], such a restriction is generally directed to party politics and governmental and representative activity[15]. The restriction introduced by the Law becomes still more debatable in light of the amendments proposed at the 1st reading which expand the scope of the Law to include the essentially domestic NGOs referred to "*international non-commercial organizations of the Republic of*

[14] See Article 16 of the European Convention on Human Rights and specific provision to the contrary in the Council of Europe's Convention on the Participation of Foreigners in Public Life at Local Level.

[15] There can, therefore, be no basis for objecting to the prohibition introduced by Article 5 of the Draft Law on Amendments on foundations whose funds come from foreign States and international and foreign organizations financing the activity of political parties.

Kazakhstan" (see para 10-12 for the discussion of this issue).

25. A complete restriction on political activities in a broader, non-party sense, may not be considered justified[16] and this may be the effect of a term such as "*the expression of the political will of citizens*", which is certainly capable of covering other activities, notably the promotion of environmental protection and of human rights, in which citizens might wish either to engage the assistance of an international or foreign non-profit organisation (where a matter concerning the Republic of Kazakhstan was involved) or to work with such an organization (where a matter concerning some other country was involved). Insofar as such activity is caught by this prohibition, there would be an excessive interference with the right to freedom of association and expression of persons both in the Republic of Kazakhstan and beyond it.

26. Furthermore it is important to note that this restriction would not only breach more general commitments to secure these rights but could also have an adverse impact on both performance of the commitments regarding public participation under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and the role of non-profit organizations (including foreign ones) under the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)[17]. A more narrowly drawn definition of the prohibition in Article 4(2) would thus be appropriate. The U.N. Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights[18] should also be given close consideration in light of the fact that the Covenant is soon to be ratified by the Republic of Kazakhstan.

27. The further prohibition of purposes or actions by foreign non-profit organisations in Article 5(2) is also problematic in that the language used is insufficiently precise in a number of respects, notwithstanding that there is legitimacy in seeking to bar many of the objectives enumerated. The imprecision – which is not clarified by the "Explanatory Note" and which thus leads to the conclusion that the restriction being imposed on various rights does not satisfy the requirement of being prescribed by law – stems from the fact that the items listed in the provision employ broad language such as "*exacerbation of social and political situation*", "*disorganization of the activity of governmental authorities*" and "*disturbance of their uninterrupted functioning*" which could cover both lawful and unlawful activities. At the same time, it is welcome that reference to "*interference into internal affairs of state*" and virtually indefinable "*other undesirable consequences for the Republic of Kazakhstan,*" present in the Draft, has been removed from the Law as adopted.

[16] See *Piermont v France*, 27 April 1995.
[17] GA Res 53/144, 9 December 1998.
[18] United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985) [full text accessible at http://www1.umn.edu/humanrts/instree/siracusaprinciples.html; last visited on 20 April 2005.]

28. In accordance with the above noted Siracusa Principles, a restriction is necessary if, in addition to (a) being based on one or more of the permissible grounds (i.e. national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others), it *"(b) responds to a pressing public of social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim."* [19] Although it may be inferred from the Law that the provisions in question have been primarily designed to protect national security and public order, which are among the grounds justifying restriction, the Law nevertheless falls short of meeting the international standard, since it employs an overbroad definition of both "national security" and "public order" terms. According to the Siracusa Principles, *"[n]ational security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."* [20] Moreover, national security *"cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order"* [21] nor can it *"be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse"*[22]. There is no doubt that foreign non-profit organizations – more than anyone else – should comply with the law of a country but the purposes enumerated in Article 4(3) will be the basis on which decisions affecting the operation of an organization in the Republic of Kazakhstan can be initiated and the present broad language gives no real basis for being sure that a refusal of permission is based on legitimate grounds as opposed to a fanciful conclusion as to the unacceptability of its intended purposes or actions.

29. The need to avoid the latter is especially important given that the organization will not at this point have done anything and case law before the European Court of Human Rights bears testimony to the significant number of instances in which authorities have been too precipitous in reaching the conclusion that what certain organizations were proposing to do posed a serious threat of unconstitutional or unlawful action, notwithstanding that the particular restrictions involved were themselves entirely legitimate[23].

30. The risk of such problems could be avoided simply by replacing the present provisions by a power to refuse approval for an organization (or its branches and representative offices insofar as these were to be established) if there were reasonable grounds for concluding that its proposed activities would be unconstitutional or unlawful (which would also cover the prohibition in Article 4(3) of "*terrorist and (or) extremist organizations*" insofar as these are governed by the existing criminal law). It should be noted in this connection that the

[19] Siracusa Principles, Principle 10.
[20] *Id.*, Principle 29.
[21] *Id.*, Principle 30.
[22] *Id.*, Principle 31.
[23] See, e.g., *United Communist Party of Turkey and Others v Turkey*, 30 January 1998, *The Socialist Party and Others v Turkey*, 25 May 1998, *Sidiropoulos and Others v Greece*, 10 July 1998, *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999, *Metropolitan Church of Bessarabia and Others v Moldova*, 13 December 2001, *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, 9 April 2002, *Selim Sadak and Others v Turkey*, 11 June 2002 and *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002.

formulation "*unconstitutional or unlawful*" is already being used as the principal basis for suspending or liquidating a branch or representative office under Article 7 of the Law[24] and it would in any event be desirable to achieve consistency in the criteria being used throughout it.

31. It would, however, be essential for a refusal of approval on this ground – as well as for the one discussed in paragraphs 24-27 – to be reasoned so that there would be scope for challenging a decision that actually lacked sufficient justification. Although it may not always be possible to prevent an organization from acting unconstitutionally or illegally, it is preferable for the imposition of restrictions of an organization to be guided by the deeds of the body concerned rather than the terms used in its formal statement of objectives or mere suppositions as to what they might entail.

32. The prohibition in Article 4(4) of the financing by branches and representative offices of foreign non-profit organizations "*of the activity of political parties, trade unions and religious associations*" is not generally going to be regarded as problematic given the specific types of bodies covered. However, there is a need to clarify what is understood by the term "*financing*"; does it mean the direct provision of funds or could it also include activity such as the provision of education and training to persons belonging to such bodies? Certainly "*financing*" is taken to include "material contributions" in the context of Article 8 of the Law of Activity of International or Foreign Non-profit Organizations [25]. It is thus essential that the scope of such a prohibition be more clearly defined but it is also doubtful whether it is appropriate for forms of support to the members of such bodies, as opposed to the bodies themselves, to be precluded in the absence of some compelling justification for thereby restricting the right of those members to seek information and to associate with others.

33. On a final note, it has to be pointed out that the mention of "extremist acts" in the Law merits special consideration because of a certain level of imprecision inherent in the very notion of "extremism." "Extremism" is not defined in any international instrument and thus can not meet the requirements of legality, certainty and foreseeability in the application of the law. The definition of "extremism" would gain in precision if it were linked to a means rather than focused on so-called "extremist goals." It should depart from the emphasis inherent in such a term on the nature of opinions and beliefs. Instead, a clear connection should be made to the threat of, incitement to, or use of violence.

34. In this connection, it is also noteworthy that the provisions in question do not include the element of violence as a necessary precondition when making reference to the change of constitutional order in point 3 of para 3 (although it is included in point 4).

4.4 Reporting and other obligations

35. It is welcome that the Law on Activity of International or Foreign Non-profit Organizations as adopted no longer includes the requirement that the organizations

[24] See para. 51. There are, however, grounds for concern about some of the other bases for suspension or termination.
[25] See para. 59.

concerned provide advance notice of their events, nor the stipulation that local executive bodies should have unrestricted access to all events, which, if adopted, would –amount to an unjustified breach of rights to freedom of association and expression and to respect for privacy.

4.5 Establishing a branch or representative office of a foreign NGO or an "international non-profit organization of Kazakhstan"

36. Although it is not considered that the establishment of a branch or representative office should become a prerequisite for a foreign non-profit organization to operate in the Republic of Kazakhstan[26], there may well be instances where such an organization considers this to be the basis on which to do so and certain aspects of the accreditation provisions in the Law on Activity of International or Foreign Non-profit Organizations would continue to be of concern, although the consequential ones introduced by Article 3 of the Law on Amendments do not.

37. It is welcome that the Law as adopted no longer allows the accrediting body to request "*additional information.*" However, other relevant concerns still stand.

38. The requirement in Article 7(1) of the Law on Activity of International or Foreign Non-profit Organizations that the head of a branch or representative office be a citizen of the Republic of Kazakhstan is justified in the "Explanatory Note" by reference to Poland's law on associations but this appears to embody a misunderstanding of the latter's requirement since this is directed to the formation of an entity rather than the appointment of someone to act in an executive capacity on its behalf. Moreover a citizenship requirement for executive bodies does not appear generally to be found in the legislation governing non-profit organizations in Council of Europe countries[27]. Of course every State is entitled to require that anyone present and/or employed within its territory fulfils the requirements of immigration law but the provision, as currently formulated, would preclude anyone lawfully resident in the Republic of Kazakhstan from leading the branch or representative office of an international or foreign non-profit corporation established there and thus be inconsistent with international non-discrimination standards. It would thus be appropriate to delete this requirement – together with the similar prohibition introduced by Article 5 of the Law on Amendments with regard to "*the chiefs, members of the executive board of the foundation's administration*" and the ban on aliens as members of the "*executive governing body*" of an "*international non-commercial organization of the Republic of Kazakhstan*" found in Article 7(1) - in its entirety, as it is assumed that there is already adequate legislation governing admission to the country in order to take up employment.

39. All but the last of the grounds in Article 7(6) of the Law on Activity of International or Foreign Non-profit Organizations for refusing accreditation are in some respects problematic.

[26] See paras. 19 and 20.

[27] See Council of Europe, A*nalysis of the Questionnaire on the Legal Framework for the Setting up and Functioning of Non-governmental Organisations in Europe* (ONG (2005) 1).

40. The first – the "*threat to the national interest in the territory of the Republic of Kazakhstan*" – suffers from the same vice of imprecision seen in the list of impermissible objectives listed in Article 5(2)[28] but also suffers from the additional defect of embodying an entirely different criterion of acceptability. This will only add to the confusion of both those administering the Law and those subject to its requirements. As previously noted[29], a power to refuse approval where there were reasonable grounds for concluding that its proposed activities would be unconstitutional or unlawful would be more than adequate as a safeguard for the Republic of Kazakhstan and would also put it in a better position to specify the grounds for refusal.

41. The second – suspension or prohibition of the organization in a foreign State for acts stipulated in Article 5. Apart from the defect in the framing of the latter provision just noted, this ground is unsatisfactory because it does not take account of the unreliability of evidence or the fairness of the proceedings on which the suspension or prohibition is imposed, let alone the proportionality of such a sanction in the given circumstances of the case. This does not mean that suspension or prohibition imposed elsewhere is not something that ought not to be considered but this could be done, while allowing explanations for and criticisms of the sanction also to be submitted, in the course of reaching a conclusion as to whether there were reasonable grounds for concluding that the proposed activities of the branch or representative office to be established in the Republic of Kazakhstan would be unconstitutional or unlawful.

42. The third – prosecution for various offences of the founder and (or) heads of the organization and their branches and representative offices – not only uses yet another set of criteria for objectionable activities and purposes but also relies on conduct by someone who may no longer represent or be associated with the organisation ("the founder") or may have been appropriately sanctioned for the conduct in question. Again this does not mean that consideration of a conviction for an offence of the kind listed[30] would be unjustified – although the English translation refer only to a "*prosecution*", it is assumed that a "*conviction*" is what was actually intended as otherwise reliance on this would be even more objectionable – but that it could also be done, while allowing explanations to be submitted, in the course of reaching a conclusion as to whether there were reasonable grounds for concluding that the proposed activities of the branch or representative office to be established in the Republic of Kazakhstan would be unconstitutional or unlawful.

43. The fourth – information about proposed terrorist or extremist activity – adds nothing to a refusal based on reasonable grounds for concluding that the proposed activities of the branch or representative office to be established in the Republic of Kazakhstan would be unconstitutional or unlawful.

[28] See para. 33.
[29] See para. 36.
[30] Thus in *Refah Partisi (The Welfare Party) and Others v Turkey*, 13 February 2003 it was remarks and policy statements made by the latter which persuaded the European Court that the party was aiming at "a model of State and society organised according to religious rules" (paras 111-115). However, see also *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, 10 December 2002, in which dissolution based on remarks of party's former president was held to be a disproportionate response.

44. The fifth – unreliable information in the application – does give rise to some concern as to the basis on which the Ministry of Justice might reach such a conclusion about material emanating from another jurisdiction but this could be allayed if the reason for considering particular information to be "*unreliable*" was provided to the applicant, particularly as there is also provision in Article 6(4) for an appeal to courts against a refusal decision.

45. However, there is currently no provision in Article 6 for the giving of reasons for the refusal of accreditation but, as has already been noted[31], it is important that such a decision – whether for unreliable information or reasonable grounds to conclude that unconstitutional or unlawful activities are being proposed - should be reasoned.

46. Article 6(3) of the Law on Activity of International or Foreign Non-profit Organizations should thus be amended to restrict the grounds for refusal to unreliable information and reasonable grounds to conclude that unconstitutional or unlawful activities are being proposed. Furthermore a requirement that all refusal decisions should be reasoned ought also to be added to the Law.

4.6 Suspension and termination of activities

47. The provisions in Article 8 of the Law on Activity of International or Foreign Non-profit Organizations for the suspension of the activity of a foreign or international NGO or the complete termination of its activities on account of a breach of the constitution or of the law of the Republic of Kazakhstan is not in itself problematic[32]. However, it is evident from the case law of the European Court of Human Rights that such sanctions should be exceptional, be based on relevant and sufficient evidence and not be disproportionate[33]. It would, therefore be desirable if the Law made it clear that these considerations should always govern a decision regarding suspension or liquidation. Similarly the importance of observing proportionality ought to be included in provisions introduced by Article 1 of the Law on Amendments, whereby prohibition is specified as a penalty that can be imposed for various violations of the legislation on non-profit corporations.

48. Moreover there is a need to introduce a clear limit on the interval between any suspension imposed by a prosecutor and its confirmation by a court as the absence of any at present in Article 8(1) of the Law on Activity of International or Foreign Non-profit Organizations could lead to a suspension effectively being of longer duration than the six months' maximum period of suspension that can be imposed by a court. An appropriate interval, particularly given the importance of prompt judicial control over such a measure, should be no more than a couple of business days

49. Furthermore there would be greater scope for respecting the principle of proportionality if no minimum period of suspension was prescribed – the current figure is three months –

[31] See para. 37.

[32] Insofar as the proposal that establishing a branch or representative office not be a prerequisite for a foreign non-profit organization carrying out its activities (see para. 17), provision would need to be made for either the suspension of its ability to do this or the complete prohibition on it being able to do so.

[33] See, e.g., *United Communist Party of Turkey and Others v Turkey*, 30 January 1998 and *Refah Partisi (The Welfare Party) and Others v Turkey*, 13 February 2003. See also Principle 71 of the Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe.

so that the court would be free to impose the period that was considered appropriate in the circumstances of the case, even if this was no more than a few days.

50. It should be added that a useful step towards fulfilling the requirement of proportionality is the existence in Article 8(3) and (4) of the Law on Activity of International or Foreign Non-profit Organizations of the possibility of lifting a suspension where the problem giving rise to it has been eliminated.

51. It is not clear that there is any need for suspension or termination of operations to be imposed for violation of the organization's statute in circumstances where such a violation does not also contravene the Constitution or the law of the Republic of Kazakhstan as the only interest that is likely to be effected by such conduct is that of the parent organization and it ought to be able to decide for itself whether any action needs to be taken. It would, therefore, be appropriate for the second sub-clause of Article 8(1) and the third sub-clause of Article 8(6) of the Law to be deleted.

52. There may be sufficient justification in a given case for an organization's operations to be terminated where – as the fourth sub-clause of Article 8(6) of the Law on Activity of International or Foreign Non-profit Organizations envisages – unreliable information was supplied at the time of accreditation. However, the unreliability of the information may not be of any particular significance or be the result of a genuine error and termination of operations in such a situation would be disproportionate.

53. It is not known what are the other cases referred to in the sixth sub-clause of Article 7(6) as permitting liquidation but, insofar as they are not restricted to matters such as bankruptcy or the liquidation of the parent organization and given that termination of operations ought to be a very exceptional measure, it must be doubtful whether there is a need to have any further basis for imposing such a measure on a branch or representative office. Clarification is thus needed as to what additional cases are covered in the legislation being referred to and, in the absence of a compelling justification for liquidation on the grounds that they provide, this provision ought to be deleted from the Law.

4.7 Property of branches and representative offices

54. The prohibition by Article 9(1) of the Law on the Activity of International or Foreign Non-profit Organizations of any anonymous donations to a branch or representative office (together with the consequential provisions on penalties and confiscation introduced by Articles 1 and 5 of the Law on Amendments) is potentially problematic as this could run counter to the right to privacy under Article 17 of the International Covenant on Civil and Political Rights.[34] Although that right may be restricted where there is a sufficiently strong interest and the principle of proportionality is observed, no such interest is identified in the "Explanatory Note" and the prohibition applies whatever the size or provenance of the

[34] A possible violation of the right to freedom of thought, conscience and religion under Article 18 of the Covenant is avoided by the exception made pursuant to Article 5 of the Draft Law on Amendments for a "donation by physical persons of money to religious associations when donated in the places of public worship or religious assembly, as well as in the places esteemed by the followers of this or that religion (places of pilgrimage and others".

donation. It may well be that some restriction on anonymity would be appropriate where large sums are involved and/or the money concerned comes from abroad but there ought to be express stipulation to that effect in the Law on the Activity of International or Foreign Non-profit Organizations and it would, therefore, be appropriate for reconsideration to be given to the scope of this provision.

55. The requirement in Article 9(2) of the Law on Activity of International or Foreign Non-profit Organizations that any "*financing, including voluntary material contributions, donations, and any other kind of material assistance*" by a branch or representative office is only to be carried out "*with the approval of local executive bodies of a region (city of oblast significance)*"[35] is unduly bureaucratic and, more importantly, is also likely to impede the activities of bodies established in the Republic of Kazakhstan in pursuit of the right to freedom of association for no apparent advantage, particularly as the provisions introduced by Article 1 of the Law on Amendments entail liability to fines and prohibition for any organization accepting illegal donations.

56. Certainly there is effectively some duplication of controls already placed on branches and representative offices by the Law on Activity of International or Foreign Non-profit Organizations since they are only able to operate in the Republic of Kazakhstan with prior approval for their presence and objectives and since the admission of their funds to the country will be governed by the general laws applicable to customs and foreign exchange. Although the present control goes a little further in that it governs funding or support in a specific instance, the provision is far from clear whether or not the basis for denying approval is limited to the instances mentioned in Article 9(2) – a prohibited source or a prohibited objective – but if it is the procedure would seem to be pointless where both are concerned since they are already adequately regulated.

57. Although the scope of the requirement for approval is generally wide-ranging, the term "*any other kinds of material assistance*" is especially broad; in effect it would mean that each time someone wished to use a library or other resource on the premises of a branch or representative office there would have to be an application in advance and access to it would only be possible once approval is given, for which the deadline for a decision being ten business days. Such a requirement would an even greater stifling effect on the rights of persons resident in the Republic of Kazakhstan to freedom of association, education and expression (including the right of access to information) than the notification provision in Article 6(2), which has already been found to be problematic[36].

58. The foregoing concerns are equally applicable to the effect of Article 9(3), which extends the need for approval to the specific activities of branches and representative offices where these are financed by any of the enumerated sources, which essentially cover

[35] A provision introduced by Article 5 of the Draft Law on Amendments reiterates this requirement but then (in the English translation at least) states that such approval is not required "if a branch or representative office of an international and foreign non-profit organization receives approval of local executive of a region (city of oblast significance) for financing of non-profit organization" but this does not seem to entail any qualification at all.

[36] See paras. 36 and 37.

any source other than some form of governmental entity from the Republic of Kazakhstan.

59. The "Explanatory Note" appears to place reliance on French legislation for the imposition of these approval requirements. The actual Law referred to does not contain a requirement of approval of funding.[37] Moreover, it expressly allows to receive funds without authorization ("*sans aucune autorisation spéciale*"). It does no more than set out restrictions on acceptable purposes and sources of donations, something that would seem to be adequately covered by other legislation and other provisions in the Law.

60. Given the negative impact that the requirement of prior approval is likely to have for the legitimate exercise of freedom of association and many of other rights for persons in the Republic of Kazakhstan and the absence of any compelling justification for such a requirement, the most appropriate course would be to delete it.

61. Insofar as restrictions on donations by foreign non-profit organizations are retained, there is also a need to ensure that there is a defence of reasonable excuse for any organization accepting a donation covered by them as it would be an undue interference with the right to freedom of association to suppress an organization that has acted in good faith in receiving a donation that turns out to be improper.

4.8 Accountability

62. There is nothing problematic in principle with the requirement in Article 10 of the Law on Activity of International or Foreign Non-profit Organizations that branches and representative offices publish some form of annual report about their activities. However, this provision - (together with the consequential provision imposing penalties introduced by Article 1 of the Law on Amendments) - is insufficiently precise as to what is needed in order to satisfy this requirement, which is clearly unsatisfactory since non-compliance could give rise to liability and a more precise formulation should be adopted.

63. There is also a need for clarity as to the manner in which verification of the authenticity of the information published can be undertaken by the authorized public bodies. It may well be that this is governed by separate legislation but specific reference to the law(s) concerned should be made in the Law on Activity of International or Foreign Non-profit

[37] Loi relative au contrat d'association [modifiée par Ordonnance n°2000-916 du 19 septembre 2000 art. 5 II - JORF 22 septembre 2000 en vigueur le 1er janvier 2000], Article 6 ("*Toute association régulièrement déclarée peut, sans aucune autorisation spéciale, ester en justice, recevoir des dons manuels ainsi que des dons d'établissements d'utilité publique, acquérir à titre onéreux, posséder et administrer, en dehors des subventions de l'Etat, des régions, des départements, des communes et de leurs établissements publics:*
1° Les cotisations de ses membres ou les sommes au moyen desquelles ces cotisations ont été rédimées, ces sommes ne pouvant être supérieures à 100 F;
2° Le local destiné à l'administration de l'association et à la réunion de ses membres;
3° Les immeubles strictement nécessaires à l'accomplissement du but qu'elle se propose.
Les associations déclarées qui ont pour but exclusif l'assistance, la bienfaisance, la recherche scientifique ou médicale peuvent accepter les libéralités entre vifs ou testamentaires dans des conditions fixées par décret en Conseil d'Etat.
Lorsqu'une association donnera au produit d'une libéralité une affectation différente de celle en vue de laquelle elle aura été autorisée à l'accepter, l'acte d'autorisation pourra être rapporté par décret en Conseil d'Etat.")

Organizations.

64. There is also a lack of clarity as to what is entailed by the amendment effected by of the proposed amendments to the Tax Code and the Law On Banks and Banking Activity, both of which are concerned with the submission to the tax authorities of "*the information about the existence and numbers of bank account of individuals, balances and cash flow on these accounts*". The "Explanatory Note" indicates that this is intended to expand "*the list of data to be filed with tax services*" but in the absence of the wider context it is impossible to say whether or not its impact on foreign non-profit corporations is unjustified. However, it seems inappropriate to adopt legislation with so little clarity as to the effect of a provision and further details need to be provided. Further clarification should thus be provided. The provisions of Article 9(a) of the Law on Activity of International or Foreign Non-profit Organizations requiring branches or representations of foreign NGOs and "*international non-commercial organizations of the Republic of Kazakhstan*" use only local bank accounts for their transactions is overall legitimate but needs to be viewed in the above described context depending on whether there exists adequate protection of bank secrecy.

4.9 Liability

65. The maximum level of the fines that can be imposed – either on the non-profit organization or the chief of a branch or representative office - pursuant to the provisions introduced by Article 1 of the Law on Amendments seems to be unduly high for infractions that in at least some instances are likely to arise from inadvertence or mistake rather than intent. It would thus be highly desirable for it to be made clear that the amount imposed in a particular case must always be governed by the principle of proportionality.

66. Furthermore there is an element of inconsistency in the Law on Activity of International or Foreign Non-profit Organizations insisting on distinct branches or representative offices being constituted for foreign non-profit corporations and the Law on Amendments imposing liability on the corporations for the operation of structures that they would not necessarily have chosen. As the creation of such distinct entities would appear to give them their own legal personality – Article 6(1) of the Law on Activity of International or Foreign Non-profit Organizations gives the branch or representative office rather than the foreign non-profit organization the rights and obligations of non-profit organization of the Republic of Kazakhstan – this should also mean that liability for any wrongdoing is limited to the only entity which is allowed to have legal status in the Republic of Kazakhstan, i.e., the branch or representative office. The provisions imposing liability on the foreign non-profit corporations themselves should thus be rendered inapplicable if a branch or representative office has been established.

4.10 Concluding and transitory provisions

67. The requirement in Article 11 of the Law on Activity of International or Foreign Non-profit Organizations that existing branches and representative offices obtain accreditation is not inherently problematic but the three months allowed for this could give rise to difficulties as there is no real guarantee that the Ministry of Justice will be able to complete the process within this relatively short period. However, no hardship is likely to ensue if

this transitional provision stipulated that a branch or representative office that applied for accreditation could continue to operate until the accreditation process had been completed and the Law should be amended accordingly.

[End of text]