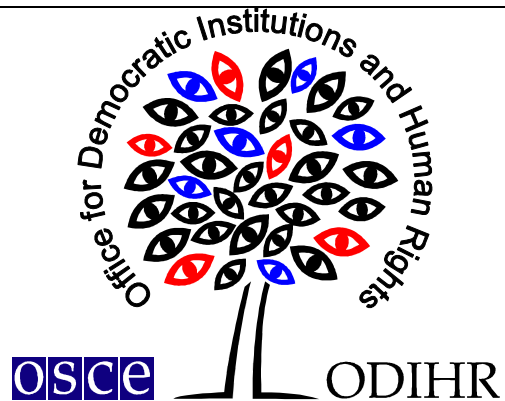


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OSCE/ODIHR COMMENTS

ON

ARTICLE 99 OF THE CRIMINAL EXECUTION CODE OF THE REPUBLIC OF KAZAKHSTAN

Based on an English translation of this provision provided by ODIHR

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1. INTRODUCTION

1. *On 24 March 2010, the Head of the OSCE Centre in Astana sent a letter to the Director of the OSCE ODIHR in which he requested an ODIHR Comment on the constitutionality of Article 99 of the Criminal Execution Code of the Republic of Kazakhstan (hereinafter “the Criminal Execution Code”) and the correspondence of this article to relevant international norms relating to forced labour.*
2. *These Comments are provided in response to the above request.*
3. *The OSCE ODIHR offers its further assistance in the form of an amicus curiae brief that it would be pleased to submit to the Constitutional Council of Kazakhstan should it wish to review the constitutionality of the provision reviewed herein.*

2. SCOPE OF REVIEW

4. The scope of the Comments covers only the above-mentioned provision of the Criminal Execution Code. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation regulating prison or other involuntary labour in Kazakhstan. The ensuing recommendations are based on international and domestic standards banning forced labour, as found in the international agreements and commitments ratified and entered into by the Republic of Kazakhstan, as well as in the Constitution of the Republic of Kazakhstan (hereinafter “the Constitution of Kazakhstan”).¹
5. The Comments are based on an unofficial translation of Article 99 of the Criminal Execution Code, which has been attached to this document as Annex 1. Errors from translation may result.
6. These Comments are without prejudice to any written or oral recommendations and comments to this or other related provisions that the OSCE ODIHR may make in the future.

3. EXECUTIVE SUMMARY

7. In order to ensure the compliance of Article 99 of the Criminal Execution Code with international and domestic human rights standards, it is recommended as follows:

¹ The Constitution of the Republic of Kazakhstan was approved by referendum on 30 August 1995 and last amended in 2007.

- A. to make the wording of Article 99 par. 1 of the Criminal Execution Code consistent with Article 24 of the Constitution of the Republic of Kazakhstan; [par. 19]
- B. to amend Article 99, par. 2, so as to ensure that all prison work conducted for state or private companies is voluntary work in line with adequate labour standards, and does not amount to forced labour; [par. 26] and
- C. to amend Article 99, par. 3 so that sentenced individuals will only be assigned to work once a medical officer has declared them physically and mentally fit to do so. [par. 28]

4. ANALYSIS AND RECOMMENDATIONS

4.1 International and Domestic Standards Relating to Forced Labour

- 8. As early as 1930, the International Labour Organization (ILO) adopted a Convention Concerning Forced or Compulsory Labour² (hereinafter “the ILO Forced Labour Convention”). Article 2, par. 1 of the Forced Labour Convention defines forced or compulsory labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. This definition for forced or compulsory labour still applies today and forms the basis of international standards in this area of human rights.
- 9. However, not all forms of involuntary or mandatory work are considered to be “forced or compulsory labour”. That is, Article 2, par. 2 of the Forced Labour Convention provides clear exceptions to certain forms of labour,³ including work performed by persons convicted by a court of law, if this work is carried out under the supervision and control of a public authority and the said person is not hired to or placed at the disposal of private individuals, companies or associations.

² Convention concerning Forced or Compulsory Labour No. C029, adopted by the General Conference of the International Labour Organization on 28 June 1930, ratified by the Republic of Kazakhstan on 18 May 2001.

³ Article 2, par. 2 (c) states that “the term **forced or compulsory labour** shall not include -

- (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic disease, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
- (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations, incumbent upon members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

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10. Subsequently, more and more States became aware of the problem of forced labour and recognized the necessity of protecting citizens from this danger. Thus, the International Covenant on Civil and Political Rights⁴ (hereinafter “the ICCPR”) includes, in its Article 8, a ban on forced or compulsory labour (Article 8, par. 3). Also under Article 8, forced or compulsory labour does not include work “**normally** required of a person who is under detention” following a lawful court order or during conditional release of such detention, as well as services of a military character or national service for conscientious objectors, services exacted in cases of emergency or calamity or work/services forming a part of normal civil obligations.
11. OSCE participating States have also committed to principles concerning economic activity provided it upholds human dignity and is free from forced labour.⁵ Likewise, all OSCE participating States have recognized the paramount importance of civil, political and other rights and freedoms and the need to fully realize these rights by all appropriate means.⁶
12. Furthermore, specific standards for prison labour are included in the UN Standard Minimum Rules for the Treatment of Prisoners.⁷ According to these Standard Minimum Rules, prison labour may not be of an afflictive nature and shall, as far as possible, maintain or increase the prisoners’ ability to earn an honest living after release.⁸ While all prisoners shall be required to work, the type of work shall depend on their physical and mental fitness as determined by a medical officer.⁹ Prisoners may also work on a voluntary basis. As far as possible, prisoners shall be able to chose the type of work they wish to perform and should also be entitled to the same safety standards and working hours as “free workmen”, while receiving equitable remuneration.¹⁰
13. The above standards have been incorporated in the Constitution of Kazakhstan, namely in Article 24, which states that “[e]veryone shall have the right to freedom of labour, and the free choice of occupation and profession.” Article 24 goes on to say that “[i]nvolutionary labour shall be permitted only [up]on a sentence of court or in the conditions of a state of emergency or martial law”¹¹. In this context, it is also relevant to note that Article 4, par. 3 of the Constitution specifies that international treaties ratified by the Republic shall have priority over its laws.

⁴ The United Nations International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966 and ratified by the Republic of Kazakhstan on 24 January 2006.

⁵ See the Preamble of the Document of the Bonn Conference of the CSCE of 11 April 1990.

⁶ See the Concluding Document of Vienna of the Third Follow Up Meeting in Vienna, 15 January 1989, Questions Relating to Security in Europe: Principles, par. 12.

⁷ UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. See also General Comment No. 21 of the Office of the High Commissioner for Human Rights replacing general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10 of the ICCPR) of 4 October 1992.

⁸ Ibid, pars. 71 (1) and (4).

⁹ Ibid, par. 71 (2).

¹⁰ Ibid, pars. 71 (6) and 74 - 76.

¹¹ See footnote 1 *supra*.

4.2. The Compatibility of Article 99 of the Criminal Execution Code with International and Domestic Human Rights Standards

14. In the Criminal Execution Code, Chapter 14 deals with labour, professional education and professional training of persons sentenced to imprisonment. Article 99 specifically deals with labour of persons sentenced to imprisonment.
15. According to paragraph 1 of Article 99, all persons sentenced to imprisonment must work in places and fulfill tasks as determined by the administration of the competent correctional unit. Paragraph 1 also specifies that “the sentenced person shall be assigned to work in enterprises of correctional units, in state companies or in companies of another type of ownership, provided that their guarding and isolation are properly ensured”.
16. Sentenced individuals are forbidden to discontinue their work activities of their own account (Article 99 par. 2). Moreover, the refusal to work or the discontinuation of work shall constitute “a malevolent violation of the order of serving one’s sentence and may trigger the application of penalties and engage material liability”.
17. Work shall be assigned to sentenced persons with due consideration for their gender, age, working capacity and, if possible, standardization (Article 99, par. 3). At the same time, the labour activities of sentenced persons may not hinder the achievement of the main goal of correctional units, namely the correction of the sentenced persons (Article 99 par. 6). A list of prohibited working activities and tasks shall be set by the Rules on the Internal Order of Correctional Units (Article 99 par. 7).

4.2.1 The Legal Basis for Permissible Prison Labour

18. First of all, it is questionable whether Article 99 par. 1 is compatible with the Constitution of Kazakhstan, which allows forced labour **only** if it is based on a court sentence.¹² This means that it is the exceptional right of a judge (not prison administration or any other authorized body) to impose forced labour.
19. Paragraph 1 of Article 99, on the other hand, states that all persons sentenced to imprisonment are obliged to work, but does not specify that the forced or compulsory labour needs to have been based on a court sentence. It is thus recommended to make Article 99 par. 1 consistent with the wording of the Constitution by specifying that only persons condemned to forced or compulsory labour by court order may be required to work, in particular in cases of hard labour.¹³

¹² See par. 13 *supra* for the exact wording of Article 24, which reflects the wording of Article 2 par. 2 (c) of the ILO Forced Labour Convention and of Article 8 par. 3 ICCPR, which specify that work conducted by detainees or prisoners will not be covered by the ban on forced/compulsory labour if the detention is a consequence of a conviction in a court of law (ILO Forced Labour Convention) or of a lawful order of a court (ICCPR)

¹³ See Article 8 par. 3 (b) of the ICCPR, which states that the ban on forced/compulsory labour does not preclude “in countries where imprisonment with hard labour may be imposed as a punishment for a

4.2.2 The Nature of Permissible Prison Labour

20. International labour standards have set additional requirements for forced or compulsory labour conducted by persons convicted and detained by a court (Article 2 par. 2 (c) of the ILO Forced Labour Convention and Article 8 par. 3 ICCPR). While Article 8 par. 3 of the ICCPR remains quite vague on this issue and only states that the work or service undertaken by detainees must be such as is “normally required of a person who is under detention in consequence of a lawful order of a court”, the ILO Forced Labour Convention contains more specific requirements. Article 2 par. 2 (c) states that such forced or compulsory work must be carried out under the supervision and control of a public authority and that the detainee in question may not be “hired or placed at the disposal of private individuals, companies or associations”. This prohibition applies regardless of whether the work is conducted outside penitentiary establishments or in workshops operated by private undertakings inside prisons.¹⁴
21. In this way, the ILO Forced Labour Convention aims to prevent a situation where private individuals, companies or associations would be able to circumvent applicable labour legislation (including standards relating to working conditions and payment) by obtaining cheap labour from prisons. Also, permitting companies to hire prison staff could dilute the aim of prison labour, usually the correction of a criminal offender, by combining it with private economic and business considerations. The focus on the corrective character of prison work is reflected in Article 99 par. 6 of the Criminal Execution Code, which states that labour activities shall not hinder the achievement of the main goal of correctional units, which is the correction of the sentenced persons. Furthermore, as stated in pars. 71 (4) and 72 (2) of the UN Standard Minimum Rules for the Treatment of Prisoners, the interests of prisoners and their vocational training (namely maintaining or increasing the ability to earn an honest living after release) must not be subordinated to the purpose of making a financial profit from an industry in the prison institution.¹⁵
22. Despite Kazakhstan’s ratification of the ILO Forced Labour Convention, the above principle is not reflected in Article 99 of the Criminal Execution Code, which, in its first paragraph, explicitly permits detainees to be assigned to not only state companies, but also to “companies of another type of ownership”, provided that guarding and isolation are ensured. Article 99 thus appears to also allow prisoners to work for private companies.¹⁶

crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court”.

¹⁴ See Report III, Part 1A: General Report and observations concerning particular countries, Report of the Committee of Experts on the Application of Conventions and Recommendations, 99th session of the International Labour Conference, 2010, p. 222 (Forced Labour, Australia).

¹⁵ See footnote 7 *supra*.

¹⁶ This issue is also the one of the focuses of the Committee of Experts on the Application of Conventions and Recommendations’ Direct Request concerning Forced Labour Convention, 1930 (No. 29), submitted to Kazakhstan in 2010, where the Committee asked Kazakhstan to clarify whether

23. While this does not appear to be compliant with the wording of Article 2 par. 2 (c) of the ILO Forced Labour Convention,¹⁷ it will, by itself, not amount to a violation of Article 2 par. 2 (c) of the ILO Forced Labour Convention, if work conducted for private companies is not compulsory. Indeed, the ILO Committee of Experts on the Application of Conventions and Recommendations noted, in its 2007 General Survey concerning the Forced Labour Convention, that “privatized prison labour may be consistent with Article 2, paragraph 1, provided that such labour is performed voluntarily and not under the menace of any penalty”.¹⁸ Any consent to work that is given under the menace of a penalty” will not be voluntary, since an offer given under threat will never be based entirely on a person’s free will.¹⁹ There must therefore be safeguards in place to ensure that the workers’ consent is given freely and voluntarily. As stressed by the above Committee, the most reliable indicators of voluntary work are the work conditions, which should, as far as possible, approximate a free labour relationship.²⁰ Wage levels, social security and occupational safety and health protection are examples of factors that would need to be taken into account in this context.²¹ Should all of these factors point to a free labour relationship, then work conducted in such a relationship would not fall within the scope of the Convention, as this would not constitute compulsory or forced labour.²²
24. However, Article 99 par. 2 specifies that sentenced persons are not permitted to discontinue their work activities and that refusal to work or discontinuation of work will constitute a “malevolent violation of the order of serving one’s sentence” that may lead to the imposition of penalties or engage material liability. The work carried out by detainees for private companies will thus always be conducted “under the menace of a penalty” and cannot be regarded as voluntary based on the above standards. The forced or compulsory work performed by detainees in Kazakhstan for state or private companies is thus not excluded from the scope of the ILO Forced Labour Convention and constitutes forced or compulsory labour as prohibited by the ILO Forced Labour Convention and other international instruments.

persons serving prison sentences may work for private companies and if so, under what terms and conditions.

¹⁷ See the Committee of Experts on the Application of Conventions and Recommendations’ Direct Request concerning Forced Labour Convention, 1930 (No. 29), submitted to Kazakhstan in 2010, which also noted that the wording of Article 99 was contrary to Article 2 par. 2 (c) of the Forced Labour Convention.

¹⁸ See Report III (Part 1B), General Survey concerning the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), 96th session of the International Labour Conference, 2007, Report of the Committee of Experts on the Application of Conventions and Recommendations, “Eradication of Forced Labour”, par. 59

¹⁹ *Ibid.*, par. 38.

²⁰ *Ibid.*, par. 116, see also the Committee of Experts on the Application of Conventions and Recommendations’ Direct Request concerning Forced Labour Convention, 1930 (No. 29), submitted to Kazakhstan in 2010.

²¹ In this context, see pars. 74-76 of the UN Standard Minimum Rules for the Treatment of Prisoners, as cited in footnote 7 *supra*, stating that safety standards and working hours of prisoners shall be the same as for free workmen. In addition, prisoners shall be entitled to equitable remuneration for their work.

²² See Report III, Part 1A: General Report and observations concerning particular countries, Report of the Committee of Experts on the Application of Conventions and Recommendations, 99th session of the International Labour Conference, 2010, p. 222 (Forced Labour, Australia).

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25. According to Article 1, par. 1 of said Convention, Kazakhstan, as an ILO Member State, is obliged to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period”. This means that all laws or regulations that provide for or allow the exaction of forced or compulsory labour must be repealed, so as to render such actions illegal under national law.²³
26. In order to ensure that this obligation is fulfilled, it is recommended that Article 99, par. 2 be amended to ensure that prison work conducted for state or private companies will be voluntary work, and not forced labour. In this context, Article 99 should also specify that prison workers are entitled to the same labour rights as free workers.

4.2.3 Requirements for Permissible Prison Labour

27. Regardless of the employers and beneficiaries of prison work, Article 99 par. 3 notes that the administration of correctional units assigns sentenced persons to work with due consideration for their gender, age, working capacity and, as far as possible, their specialization.
28. It is noted that this provision does not provide, as suggested e.g. by the UN Standard Minimum Rules for the Treatment of Prisoners, for the involvement of any medical officer to determine the prisoners’ physical and mental fitness to work. In order to ensure that objectively, prisoners are only required to work if they are physically and mentally fit to do so, it is recommended to amend Article 99 to the effect that prisoners will only be required to work if their physical and mental capacity to do so has been confirmed by a competent medical officer.

[END OF TEXT]

²³ See Report III (Part 1B), General Survey concerning the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), Report of the Committee of Experts on the Application of Conventions and Recommendations, “Eradication of Forced Labour”, 96th session of the International Labour Conference, 2007, par. 9.

Annex 1

**Criminal Execution Code
of the Republic of Kazakhstan
(excerpt)**

Chapter 14. Labour, professional education and professional training of persons sentenced to imprisonment

Article 99. Labour of persons sentenced to imprisonment

1. All persons sentenced to imprisonment must work in the places and upon the tasks determined by the administration of the correctional unit. The sentenced persons shall be assigned to work in enterprises of correctional units, in state companies or in companies of another type of ownership, provided that their guarding and isolation are properly ensured. The sentenced persons may undertake individual work activities.
2. The sentenced persons are forbidden to discontinue their work activities as a means of solving labour disputes. Refusal to work or the discontinuing of work shall constitute a malevolent violation of the order of serving one's sentence and may trigger the application of penalties and engage material liability.
3. The administration of correctional units shall assign the sentenced persons to work with due consideration for their gender, age, working capacity and if possible their specialization.
4. The sentenced men and women as well as disabled persons of the I and II degree shall be assigned to work in accordance with the labour legislation of the Republic of Kazakhstan.
5. The labour of sentenced persons, who are serving their sentence in penitentiaries, shall be organized only on the territory of the penitentiary.
6. Labour activities involving sentenced persons shall be organized with the observance of the requirements of isolation and guarding and must not hinder the achievement of the main goal of correctional units – the correction of sentenced persons.
7. The list of working activities and tasks, to which sentenced persons cannot be assigned, shall be set by the Rules on the internal order of correctional units.
8. In enterprises of correctional units it shall be allowed to use the work of freelance engineer-technical workers and qualified workers up to a quota of 15 percent of the number of sentenced persons working there.