



COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

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against Women**

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**INTERNATIONAL COMMISSION OF JURISTS' (ICJ) SUBMISSION TO
COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST
WOMEN IN ADVANCE OF THE EXAMINATION OF KAZAKHSTAN'S
COMBINED THIRD AND FOURTH PERIODIC REPORTS UNDER
ARTICLE 18 OF THE CONVENTION ON THE ELIMINATION OF ALL
FORMS OF DISCRIMINATION AGAINST WOMEN**

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**ICJ submission to the Committee on the Elimination of Discrimination
against Women in advance of the examination of Kazakhstan’s combined
third and fourth periodic reports under Article 18 of the Convention on
the Elimination of All Forms of Discrimination against Women**

1. During its 57th session, 10th February – 28th February 2014, the Committee on the Elimination of Discrimination against Women (the Committee) will examine Kazakhstan’s implementation of the provision of the Convention on the Elimination of All Forms of Discrimination against Women (the Convention), including in light of the State Party’s combined third and fourth periodic reports under Article 18 of the Convention. In this context, the ICJ welcomes the opportunity to submit the following observations to the Committee.

EXECUTIVE SUMMARY

2. This submission focuses on legal obstacles women in Kazakhstan face when seeking legal protection, accountability and redress for gender based violence and other forms of discrimination. The submission is drawn from, and summarizes findings of, the 2013 ICJ Report on *Women’s Access to Justice in Kazakhstan: Identifying the Obstacles and Need for Change*. A fuller analysis of the concerns highlighted in the submission can be found in the Report.¹
3. As the Committee has repeatedly underscored, effective laws and procedures are imperative building blocks in efforts to advance the protection of women’s human rights and to enable appropriate legal accountability and redress for abuses, as required by the Convention.² Although such laws and procedures are not the only measures necessary for compliance with Convention obligations, they represent an essential foundation, without which progress will stall.
4. Over the past ten years Kazakhstan has taken a range of commendable steps to reform existing laws and enact new legislation concerning both gender discrimination and gender-based violence. However, certain aspects of the relevant legal frameworks continue to reflect problematic flaws and gaps that undermine women’s access to justice, in law and practice.
5. The following sections outline some of these persistent problems in Kazakhstan’s legal framework, beginning with gender-based violence and subsequently turning to gender-discrimination. The submission also includes a number of broadly framed recommendations urging the authorities in Kazakhstan to address these concerns and give effect to the State Party’ obligations under the Convention.
6. Although a range of Convention provisions are relevant in this regard, the submission is particularly concerned with the State’s implementation of its obligations under Article 2 of the Convention, when read together with Articles 1, 5 and 15(1).

**Articles 1, 2(b),(c),(e)-(g) and 5 of the Convention: Improving
Legislative and Justice Sector Responses to Sexual Violence in
Kazakhstan**

7. Under international law sexual violence constitutes discrimination against women,³ and contravenes women’s equal enjoyment of rights such as freedom

¹ Women’s Access to Justice in Kazakhstan: Identifying the Obstacles and Need for Change, 2013: <http://www.icj.org/kazakh-government-must-step-up-efforts-to-advance-womens-access-to-justice/>.

² These obligations are outlined in detail in the ICJ Report: Women’s Access to Justice in Kazakhstan: Identifying the Obstacles and Need for Change, 2013.

³ CEDAW, *General Recommendation 19*, Violence Against Women, U.N. Doc. CEDAW/C/1992/L.1/Add.15, (hereinafter CEDAW General Recommendation 19), Paras. 1, 6, 7 and in general; CEDAW, *General Recommendation 28*, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW General Recommendation 28), Paras. 19, 34; CESCR, *General Comment No. 16*, The Equal Right of Men and

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from torture and other ill-treatment,⁴ personal integrity⁵ and the highest attainable standard of health.⁶ The Convention and general international law require States to exercise effective due diligence to prevent, investigate, prosecute, punish and ensure access to remedies in instances of sexual violence perpetrated by public and private actors.⁷ Among other things, compliance with this obligation requires the adoption and implementation of legislative frameworks dealing with various forms of sexual violence, and providing adequate protection to all women, respecting their integrity and dignity. Such frameworks must provide for penal sanctions, civil remedies, and remedial and protective provisions. Where officials fail to conduct prompt, independent and effective investigations into incidents of sexual violence, with a view to pursuing the accountability of perpetrators, including, chiefly, through their criminal prosecutions, such omission to act will give rise to a breach of the State's international obligations.⁸ In addition, a gender-sensitive judicial process must be ensured in cases of sexual violence.⁹

8. A number of provisions of Kazakhstan's Criminal Code and Criminal Procedure Code, read together with a binding 2007 Supreme Court Decree,¹⁰ combine to establish Kazakhstan's criminal justice framework for dealing with sexual assault, including rape.¹¹ Although in recent years this framework has seen some important additions and reform initiatives, a number of problematic legal provisions and protection gaps remain. Those interviewed by the ICJ explained that women in Kazakhstan rarely seek justice and legal accountability in respect of sexual violence. They stressed that, among other factors, a range of inappropriate legal concepts and legal protection gaps play a significant role in these decisions not to seek legal redress for sexual violence crimes.

(a) Problematic Definitions of Rape and Sexual Assault

9. As the Committee has repeatedly stressed, pursuant to the Convention, States must address, prevent and redress sexual violence against women, including, in particular, through effective criminal justice responses. These require that criminal laws, procedures and practice appropriately and adequately define and prohibit all forms of sexual violence and provide for dissuasive sanctions and punishment commensurate with the gravity of the offence and fulfilling a deterrent function.¹² A key component of this is ensuring that legal definitions

Women to the Enjoyment of all Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4, 11 August 2005, Para. 20 (hereinafter CESCR General Comment No.16), Para. 27; Article 3, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104; See for a general discussion the Report of the Secretary General: In Depth Study on all Forms of Violence Against Women, 6 July 2006, U.N. Doc. A/61/122/add.1.

⁴ CEDAW General Recommendation 19, Para. 7(b); Committee Against Torture, *General Comment No.2, Implementation of Article 2 by States Parties*, CAT/C/GC/2, 24 January 2008 (hereinafter *CAT General Comment No. 2.*), Paras. 18, 22; Committee Against Torture, *General comment No. 3, Implementation of article 14 by States parties*, CAT/C/GC/3, 13 December 2012 (hereinafter *CAT General Comment No. 3.*), Paras. 32, 34; Human Rights Committee, *General Comment No. 28, Article 3 (The equality of rights between men and women)*, HRI/GEN/1/Rev.9 (Vol. I), 29 March 2000, (hereinafter *HRC General Comment No. 28.*), Para. 7; Article 3, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104;

⁵ CEDAW General Recommendation 19, Para 7(d); Article 3, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104;

⁶ CEDAW General Recommendation 19, Para. 7(g); CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, E/C.12/2000/4, 11 August 2000, Paras. 48 & 51 (hereinafter *CESCR General Comment No. 14.*), Paras. 21, 51;

⁷ CEDAW, *General Recommendation 19, Violence Against Women*, U.N. Doc. CEDAW/C/1992/L.1/Add.15, (hereinafter *CEDAW General Recommendation 19.*), Para. 9; Article 4(c), *UN Declaration on the Elimination of Violence Against Women*, 20 December 1993, General Assembly, Resolution A/RES/48/104; *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, *Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29.

⁸ Articles 2(3) & 7 ICCPR; Article 2 CEDAW; Articles 12,13 & 16 CAT. See also: CEDAW, *General Recommendation 19*, Para. 9; *A.T. v. Hungary*, CEDAW Communication No. 2/2003, Views of 26 January 2005, UN Doc. A/60/38 (Annex III); *Fatma Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005.

⁹ *V.K. v. Bulgaria*, CEDAW Communication No. 20/2008, Views of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008, Paras. 9.9 and 9.11-9.16; *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008.

¹⁰ "On some issues of definition of crimes of rape and other violent acts of a sexual nature," Supreme Court Decree, 2007. (Hereinafter *Supreme Court Decree*)

¹¹ These are supplemented, in relation to domestic violence of a sexual nature, by the 2009 Law on Prevention of Domestic Violence and related provisions in the Administrative Code that provide for specific procedures which may be applied in situations of domestic violence. See preceding discussion below.

¹² CEDAW General Recommendation 19, Para.24; Human Rights Committee, *General Comment No. 28, Article 3 (The equality of rights between men and women)*, HRI/GEN/1/Rev.9 (Vol. I), 29 March 2000, (hereinafter *HRC General Comment No. 28.*), Para.11; And see in general: *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc. CEDAW/C/39/D/5/2005; *Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005; *A.T. v. Hungary*, CEDAW Communication No. 2/2003, Views of 26 January 2005, UN Doc. A/60/38 (Annex III); *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; *Jallow v. Bulgaria*, CEDAW Communication No. 32/2011, Views

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of rape, sexual assault and of consent to sexual intimacy do not embody wrongful stereotypes.¹³

10. Contrary to these obligations, a range of problematic concepts and terminology continue to be reflected in Kazakhstan's criminal laws concerning rape and sexual assault. These include: the fact that the crime of rape is defined only as vaginal intercourse by a man against a woman; that additional crimes of sexual assault include a range of inappropriate concepts and terminology; and that both the crimes of rape and sexual assault are defined with reference to the use or threat of violence or force.
11. **The crime of rape is limited to penetrative vaginal intercourse perpetrated by a man against a woman:** Article 120 of Kazakhstan's Criminal Code criminalises rape and defines the crime as: "sexual intercourse accompanied by violence, or a threat of violence to a victim, or to other persons, or with the use of the helpless state of a victim".¹⁴ The Supreme Court Decree provides further detail, explaining that rape is an act of sexual intercourse "in its natural form" perpetrated against a woman against her will or without her consent, using violence or the threat of violence "or taking advantage of her helpless condition".¹⁵
12. It follows that the definition of rape does not encompass penetration through anal or oral sex or through the use of objects. Nor does it acknowledge that men may be victims of rape or that women may perpetrate rape.
13. **Inappropriate categorizations and terminology:** In addition to the crime of rape, the Criminal Code includes a separate offence of "violent actions of a sexual character". Article 121 details this as: "sodomy, lesbianism, or other acts of a sexual character accompanied by violence or a threat of violence with regard to a given victim (male or female)".¹⁶ The Supreme Court Decree explains that this offence involves sexual violence in an "unnatural form" against either men or women.¹⁷ Essentially this provision appears to be intended to capture various forms of non-consensual sexual activity that fall outside the current definition of rape and that may be perpetrated by both men and women, and against both men and women. A similar range of penalties apply as for rape¹⁸ and, as a result, although the offence of rape is limited to penetrative vaginal intercourse between men and women, other forms of non-consensual sexual conduct between adults, including where perpetrated against men, are criminalised to same extent.
14. However the inappropriate use of terminology to define the conduct encompassed in Article 121 is problematic. In particular the use of the term 'lesbianism', which describes a particular sexual orientation as opposed to types of sexual conduct, and the distinction drawn in the Supreme Court Decree between "natural" and "unnatural" forms of sexual activity, are confusing, unnecessary and pejorative.
15. **Violence or threat of violence is a necessary element of the crimes:** Both the crime of rape and the crime of "violent actions of a sexual character" are defined with reference to a requirement that they be accompanied by

of 23 July 2012, UN Doc. CEDAW/C/52/D/32/2011; *V.K. v. Bulgaria*, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008; *V.V.P. v. Bulgaria*, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011.

¹³ See *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; Article 5 CEDAW.

¹⁴ Article 120(1), Criminal Code of the Republic of Kazakhstan. This provides for a basic sentence of three to five years' imprisonment. Respectively Articles 120(2) and 120(3) specify a series of instances in which this will be increased. For example, they outline that the penalty will increase to five to ten years' imprisonment in situations of gang rape, or rape involving particular brutality "or transmission of a venereal" disease (Article 120(2)). It increases again to between eight and fifteen years' imprisonment where rape is perpetrated against a child under fourteen or results in death or severe damage to health or contraction of HIV/AIDS (Article 120(3)).

¹⁵ Paragraph 1, Supreme Court Decree

¹⁶ Article 121(1), Criminal Code of the Republic of Kazakhstan

¹⁷ Paragraph 2, Supreme Court Decree

¹⁸ Article 121(2)&(3), Criminal Code of the Republic of Kazakhstan

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violence or a threat thereof. The Supreme Court Decree explains that "violence" is an act meant to overcome the resistance of the victim, and gives examples such as striking, suffocating, holding down the victims arms, or ripping off clothes.¹⁹ Thus, physical force or threat thereof are elements of each crime that must be present in order for each crime to have occurred. As a result, it appears that Articles 120 and 121 do not apply to situations in which non-consensual sexual contact has not been accompanied by violence or a threat thereof. Although Article 123 outlines a lesser offence of "coercion into sexual intercourse, sodomy, lesbianism, or other actions", which does not include the element of physical violence, a conviction for this crime would attract a sentence of not more than two years' imprisonment which will often not be commensurate with the gravity of the conduct involved. Meanwhile the offence under Article 123 is classified by the Criminal Procedure Code as a crime of private accusation.²⁰ As outlined below, this classification gives rise to a range of particularly problematic implications.

16. The result is that acts of rape or sexual assault that do not involve an element of violence or threat thereof are not treated as serious crimes that the State is obliged to investigate, prosecute and punish.
17. Each of the three problems outlined above undermines the effectiveness of Kazakhstan's criminal legal framework and results in a failure of compliance with international obligations concerning the criminal prohibition and prosecution of sexual violence. They omit several forms of rape and sexual assault from appropriate criminalization and punishment and embody a series of wrongful gender stereotypes which in turn may lead to erroneous legal outcomes and failures of legal accountability.
18. The fact that, under domestic criminal law, the crime of rape can only be perpetrated by a man against a woman through penetrative, vaginal intercourse conveys the impression that this form of assault by a man against a woman is necessarily different in consequence or nature to other forms of sexual violence (such as anal or oral sexual assault, or sexual assault of men). It is also symbolic of an approach to sexual assault that is focused on the specific form the assault takes as opposed to the underlying violation of sexual autonomy that all incidents of sexual assault involve.
19. Meanwhile the inclusion of violence or threat thereof as an essential element of the crimes of rape and other violent acts of a sexual nature excludes other forms of rape and sexual assault from effective criminal prohibition and dissuasive and proportional sentences. This requirement is based on problematic and inaccurate assumptions concerning the proper and natural reaction of victims to unwanted sexual contact. These include beliefs that if sex is truly non-consensual victims will physically defend themselves and perpetrators will need to use or threaten violence. They obscure the reality that fear and shock influence victims' behaviour in many different ways and that coercion may involve many forms of non-violent threats, intimidation and duress. Victims in many instances therefore may not physically resist sexual assault and perpetrators may not always need to rely on violence or threats thereof.²¹

(b) Problematic Framework for Prosecution and Investigation of Rape and Sexual Assault

¹⁹ Paragraph 3 of the Supreme Court Decree. Meanwhile Paragraph 4 defines "a threat of violence" as intimidating the victim with the objective of preventing resistance or verbal threats expressing the intention to carry out physical violence.

²⁰ Article 123, Criminal Code of the Republic of Kazakhstan; Articles 32-33 and 37, Criminal Procedure Code of the Republic of Kazakhstan; Article 67, Criminal Code of the Republic of Kazakhstan.

²¹ Vertido v. The Philippines, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, see in general.

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20. These omissions and conceptual problems reflected in Kazakhstan's substantive criminal law dealing with sexual assault crimes are compounded by related provisions in the Criminal Code and Criminal Procedure Code that categorize and classify the relevant crimes in a problematic manner.
21. As noted above the Convention, and general international law, requires that in cases of rape and sexual assault, State officials conduct a prompt and effective official investigation into all allegations, of their own volition and with a view to ensuring the vigilant and speedy identification and prosecution of alleged perpetrators.²²
22. However, in Kazakhstan the way in which certain crimes are categorised and classified by the Criminal Code and Criminal Procedure Code undermines and prevents compliance with this obligation.
23. **No prosecution without victim's complaint:** Articles 32 to 34 of the Criminal Procedure Code outline that prosecution procedures will vary depending on whether a crime is classified as a 'private', 'private-public' or 'public' matter. In the case of private and private-public crimes, State prosecutions may only commence following an official complaint by the victim. Currently the Criminal Procedure Code designates that the crimes of "rape" and "violent actions of a sexual nature", as currently defined in domestic law, are to be treated as private-public matters, unless the aggravating circumstances specified in Articles 120(2)-(3) and Articles 121(2)-(3) are present.
24. This means that where incidents of "rape" and "sexual violence", as currently defined in domestic law, did not occur in a gang rape context, or did not involve elements such as threats of death, "severe impacts to the victim's health" or "infection with a disease",²³ the onus is on the victim to make an official complaint and pursue accountability. Only then can the State investigate and initiate prosecutions. This differs from the procedure applicable to public crimes, which include aggravated forms of rape and sexual violence. In the case of public crimes, "prosecution shall be carried out irrespective of the submission of a complaint by the victim".²⁴
25. **No obligatory State investigation:** Moreover, where a crime is classified as a matter of private accusation, the State is not obliged to initiate an official preliminary investigation, even if a complaint is filed.²⁵ As outlined in Para.15, this classification includes the crime of sexual coercion defined in Article 123. This approach contrasts with other crimes where the onus is on State officials to immediately conduct a preliminary investigation into all incidents brought to its attention.
26. **Reconciliation:** In addition, the classification of certain forms of rape and sexual violence as private or private-public matters also means that in such situations a State prosecution must cease where, having made an official complaint, the victim later 'reconciles' with the perpetrator.²⁶ This possibility is

²² CEDAW General Recommendation 19, Para.24; HRC, General Comment 28, Para.11; And see in general: *Goekce v. Austria*, CEDAW Communication No. 5/2005, Views of 21 July 2004, UN Doc.CEDAW/C/39/D/5/2005; *Yildirim v. Austria*, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005; *A.T. v. Hungary*, CEDAW Communication No. 2/2003, View of 26 January 2005, UN Doc. A/60/38 (Annex III); *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; *Jallow v. Bulgaria*, CEDAW Communication No. 32/2011, Views of 23 July 2012, UN Doc. CEDAW/C/52/D/32/2011; *V.K. v. Bulgaria*, CEDAW Communication No. 20/2008, View of 25 July 2011, UN Doc. CEDAW/C/49/D/20/2008; *V.V.P v. Bulgaria*, CEDAW Communication No. 31/2011, Views of 12 October 2012, UN Doc. CEDAW/C/53/D/31/2011; Committee Against Torture, *General Comment No.2, Implementation of Article 2 by States Parties*, CAT/C/GC/2, 24 January 2008 (hereinafter *CAT General Comment No. 2.*), Para.18; See also more generally HRC, *Case of Delgado Paez v. Colombia*, Communication No. 195/1985, 12 July 1990, Para.5.5; *Case of Dias v. Angola*, Communication No. 711/1996, 20 March 2000, Para.8.3; *Case of Marcellana & Gumanoy v. Philippines*, Communication No. 1560/2007, 17 November 2008, Para.7.6.a

²³ See Articles 120(2)-(3) and 121(2)-(3) Criminal Procedure Code of the Republic of Kazakhstan for a full list.

²⁴ Article 32(4), Criminal Procedure Code of the Republic of Kazakhstan

²⁵ Articles 33 & 191(1), Criminal Procedure Code of the Republic of Kazakhstan. See also Article 37, dealing with situations in which criminal prosecution may not proceed, and which creates a further exception for crimes of private accusation.

²⁶ Articles 32-34, Criminal Procedure Code of the Republic of Kazakhstan; See also Articles 67 & 10(3) of the Criminal Code of the Republic of Kazakhstan.

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provided for in Article 67 of the Criminal Code, which outlines that, in certain contexts, a perpetrator will be relieved of criminal liability if they have 'reconciled' with the victim and 'made good for the harm caused to the victim'.²⁷

27. These categorizations and their implications undermine the State's compliance with its obligations to ensure authorities exercise due diligence to investigate, prosecute and punish sexual assault crimes of their own volition. They undermine the ability of women in Kazakhstan who are victims of rape and other forms of sexual assault to seek justice and accountability. Because in many instances prosecutions cannot commence unless proactively initiated by the victim, family and social pressure on the victim, as well as threats, fear and stigma have a significant influence on whether accountability is pursued. As those interviewed by the ICJ explained often women do not file complaints in instances of sexual assault and may be particularly reticent to do so in situations where the perpetrator is someone known to them and where the incident does not result in serious physical injuries.
28. Moreover, even in situations where women do file complaints, similar factors may subsequently intervene, leading them to 'reconcile' with the perpetrator and accept compensation, thereby precluding continuation of the prosecution. Indeed, the system outlined above places victims of sexual assault at considerable risk of re-victimization as perpetrators may often seek to "convince" the victim to accept compensation or not to make a complaint in the first place. To this end they may use various methods of intimidation.
29. Meanwhile, the situation may be particularly acute in relation to incidents of sexual assault that do not involve physical force or threats thereof. In such circumstances officials bear no obligation to conduct an investigation into the matter and if women wish to pursue justice they must pursue prosecution of their own volition.

(c) Sexual Harassment

30. As the Committee has repeatedly underlined States parties to the Convention must enact laws to prohibit and criminalise sexual harassment in a wide range of circumstances. Sexual harassment should be recognised as a form of discrimination by explicit provision in gender-equality and non-discrimination legislation. A comprehensive definition of sexual harassment should be enacted and should encompass unwelcome sexually determined behaviour, both by both those in authority and between peers, when it occurs in a broad range of circumstances including education, employment and the provision of goods and services. A series of applicable penalties should be outlined in the law.²⁸
31. However, there is currently no legal prohibition of sexual harassment in place in Kazakhstan. Where sexual harassment encompasses acts of sexual assault, these may be dealt with by invoking Articles 120, 121, 123 discussed above. Beyond this, however, sexual harassment is not prohibited. As a result women and girls often do not have a clear legal foundation on which to seek remedies and pursue the accountability of the perpetrator when they face unwanted sexual behavior that may not be categorized as or involve sexual assault. For example, this may include behaviour such as touching, requests for sexual

²⁷ Ibid.

²⁸ CEDAW, General Recommendation 19, Para. 9, 18 & 24; Article 4(c), UN Declaration on the Elimination of Violence Against Women, 20 December 1993, General Assembly, Resolution A/RES/48/104; Fatma Yildirim v. Austria, CEDAW Communication No. 6/2005, Views of 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Paras. 12.1.2. and 12.1.5. See also, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, U.N. Doc. E/CN.4/2006/61, 20 January 2006, Para. 29.

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favours, verbal or non-verbal conduct of a sexual nature, or display of sexual materials.

32. The absence of enforceable legal consequences causes situations of sexual harassment to escalate and repeat themselves. Those interviewed by the ICJ spoke of a generally permissive approach to many forms of sexual harassment in Kazakhstan's workplaces, universities and schools. They expressed the view that, as a result, for many women sexual harassment is simply a fact of life, without legal consequences, that must be endured.

Recommendations

33. In order to improve its criminal justice response to sexual violence and take steps towards compliance with its obligations under the Convention the ICJ has recommended that the Government of Kazakhstan initiate a process towards the revision and amendment of the provisions of the Criminal Code and Criminal Procedure Code dealing with rape and sexual assault.²⁹ Such a law reform process should involve close consultation with civil society organizations and independent experts. It should be informed by and draw on international expertise and comparative good practice in other states.
34. Among other things, the ICJ has recommended that such a law reform process should ensure that the definitions of rape and sexual assault:
- (i) Appropriately encompass sexual violence against both women and men;
 - (ii) Do not differentiate between vaginal penetration and other forms of sexual assault such as oral and anal penetration;
 - (iii) Encompass penetration by objects as well as sexual organs;
 - (iv) Do not encompass requirements that sexual assault crimes are accompanied by violence or threats thereof or by proof of resistance;
 - (v) Do not embody inappropriate terminology such as lesbianism or categorizations of different sexual conduct as unnatural or natural.
35. In addition the law reform process should revise the categorization and classification of crimes of rape and sexual assault such that:
- (i) All crimes of rape and sexual assault are classified as crimes of public accusation, no matter what the applicable punishment;
 - (ii) Reconciliation is not a defense to or ground for dismissing or failing to investigate or bring a prosecution in respect of the crimes of rape or sexual assault.
36. In order to comply with its international obligations under the Convention to prevent, address and redress sexual harassment the ICJ has also called on the Government of Kazakhstan to initiate the development of legislative proposals that comprehensively prohibit sexual harassment and provide for the application of dissuasive and proportionate sanctions and punishment. Such a law reform process should involve close consultation with civil society organizations and independent experts. It should be informed by and draw on international expertise and comparative good practice in other states

²⁹ See ICJ Report Women's Access to Justice in Kazakhstan: Identifying the Obstacles and Need for Change, 2013: <http://www.icj.org/kazakh-government-must-step-up-efforts-to-advance-womens-access-to-justice/>, pg. 43 – 48.

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Articles 1, 2(a)-(e) of the Convention: Improving Kazakhstan's Legal Framework for Gender Equality and Non-Discrimination and Ensuring Effective Accountability and Redress

37. As the Committee has outlined on many occasions, compliance with the Convention requires States parties to ensure their laws incorporate and give overriding and enforceable status to the principles of equality between women and men and of non-discrimination in the enjoyment of human rights.³⁰ Legislation guaranteeing equality and prohibiting discrimination in all fields of women's lives and throughout their lifespan should be adopted. However, the mere existence of such laws is insufficient for compliance with the Convention. Compliance with international obligations not only requires that laws dealing with gender equality and discrimination against women be put in place: it also requires that states ensure that they are 'effective' or 'fit for purpose'. To this end, the Committee and other international human rights treaty monitoring bodies have repeatedly identified a series of basic requirements that national legal frameworks on gender equality and non-discrimination should encompass in order to comply with international human rights law and standards, including the Convention.³¹
38. Although Kazakhstan's laws include a range of constitutional, civil and criminal provisions intended to ensure gender equality and prohibit discrimination against women, including the 2009 "Law on the State Guarantees of Equal Rights and Equal Opportunities of Women and Men", they do not meet the basic requirements of international law mentioned above. A number of critical omissions and inadequacies continue to undermine the ability of Kazakhstan's legal framework to provide women with the effective protection from discrimination required by the Convention.

Kazakhstan's General Legal Framework on Discrimination

39. Kazakhstan's Constitution proclaims that "everyone shall be equal before the law and court" and specifies that "no one shall be subjected to discrimination on grounds of origin, social and property status, sex, race and nationality, language, religion, creed, place of residence or any other circumstances".³² The Criminal Code provides that: "violating the equality of citizens" is a criminal offence that can be punished by a fine, detention upon arrest or imprisonment for up to one year,³³ and specifies separately that refusal to hire a woman, or dismissing her on grounds of pregnancy or because she has children under three years of age, is subject to a fine or correctional labour.³⁴
40. Although these are important provisions they do not appear to offer women a viable or clear cause of action that they can pursue when they face sex discrimination and those the ICJ interviewed in Kazakhstan explained that neither provision has been invoked before courts or other justice mechanisms in the country in situations of sex discrimination. There are a number of reasons for this. For example, the criminal law classifies both the criminal code offence as crimes of 'public accusation' and thereby vests responsibility for their investigation and prosecution with the State, providing that such investigations and prosecutions can and should be carried out irrespective of whether or not the victim makes a complaint. This is important. Yet the law

³⁰ Article 2, CEDAW; Articles 2,3 & 26 ICCPR; Article 3 ICESCR; CEDAW, General Recommendation 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW General Recommendation 28), Para. 31.

³¹ CEDAW, *General Recommendation 28*, Paras. 17, 31-34; HRC, *General Recommendation 28*, Para. 31. See also CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, U.N. Doc. E/C.12/GC/20, 2 July 2009, (hereinafter CESCR *General Comment No. 20*), Para. 40; CESCR, *General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2005/4, 11 August 2005, Paras. 19 & 21.

³² Article 14(2), Constitution of the Republic of Kazakhstan

³³ Article 141, Criminal Code of Kazakhstan. The limitation of the guarantee to citizens is problematic and may exclude migrants and other non-citizens from the protection offered.

³⁴ Article 148, Criminal Code of Kazakhstan.

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does not provide women with a corresponding cause of action they can pursue if the authorities fail to act and it is notable that those interviewed by the ICJ explained that no criminal prosecutions in respect of crimes of discrimination against women on grounds of sex appear to have been initiated by the authorities. Similarly there is a prevailing lack of clarity as to what legal procedures a victim of discrimination might use to invoke the relevant constitutional guarantees. For example, while the Constitution specifies that everyone shall have the right to "judicial defense" of her or his rights and freedoms, it is unclear what legal procedures should be followed. The Constitution does not specify a constitutional cause of action.³⁵

The Law on the State Guarantees of Equal Rights and Equal Opportunities of Women and Men

41. In many respects the elaboration, for the first time, in 2009 of dedicated gender equality and non-discrimination legislation, provided Kazakhstan with an opportunity to address and overcome these gaps and ambiguities. The Law on the State Guarantees of Equal Rights and Equal Opportunities of Women and Men sets out the State's policy goals concerning equal rights and opportunities and outlines the responsibilities of various actors in securing equal rights and opportunities. Yet, a number of particular concerns persist regarding deficits in the Law's content and scope.

(a) Inadequate Prohibition of Discrimination

42. In order to meet the requirements of the Convention and general international law, a States parties law must include a comprehensive prohibition of discrimination against women in all aspects of women's lives and throughout their lifespan. This means that it must prohibit both direct and indirect, *de jure* and *de facto* discrimination in all sectors of society, by both public and private actors.³⁶ Such prohibitions must be applicable and enforceable in respect of the conduct of public authorities, the judiciary, organizations, enterprises and private individuals.³⁷
43. Currently the Law on Equal Opportunities does not contain a prohibition of discrimination along these lines. It merely includes a provision specifying that *laws* constituting sex discrimination may be challenged before a court, in accordance with civil procedural law.³⁸ However, beyond this the Law does not include a more general provision prohibiting other forms of discrimination. As a result, a narrow reading of the Law on its face does not appear to prohibit discrimination in practice (*de facto*). Meanwhile, it includes a number of provisions addressing equality in specific spheres such as public service employment,³⁹ employment more generally,⁴⁰ marriage and family relations and upbringing of children,⁴¹ and health, education and culture.⁴² Yet, apart from the provisions dealing with employment, none of the above-mentioned provisions includes generally applicable obligations to ensure equality or prohibitions of discrimination in the relevant spheres. Instead, they focus on broad policy goals that will be pursued by the State.⁴³ Although these may be

³⁵ See Articles 13(2), 14(1),(2) Constitution of the Republic of Kazakhstan. See also Article 78, Constitution of the Republic of Kazakhstan.

³⁶ CEDAW General Recommendation 28, Paras. 13, 17, 31, 32. CESCR General Comment 16, Paras.19 & 41. See also HRC, General Comment 28 Paras.4 & 31

³⁷ Ibid.

³⁸ Article 4 (1), Law Equal Opportunities.

³⁹ Article 9, Law on Equal Opportunities.

⁴⁰ Article 10, Law on Equal Opportunities.

⁴¹ Article 11, Law on Equal Opportunities.

⁴² Article 12, Law on Equal Opportunities.

⁴³ For example Article 11 on Marriage and Family Relations and Upbringing of Children specifies that, "Gender equality of rights and obligations of men and women in marriage and family relations and upbringing of children shall be secured by: 1) improving the image of the family, reinforcing family relations, and propagating the values of marriage and family; 2) equal sharing of responsibilities for upbringing of children between men and women; 3) implementation of a social policy aimed at maintaining and improving the quality of family life. In turn Article 12 on Health Protection, Education and Culture provides that, " The State shall guarantee: 1) further development of legislation of the Republic of Kazakhstan and adoption of measures aimed at the maintenance of reproductive health of men and women, reducing mortality and narrowing the gap between male and female life expectancies; 2) securing equal conditions of

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important commitments, they cannot act as a substitute for prohibitions of *de jure* and *de facto* discrimination and inequality that women in Kazakhstan can invoke as a basis for legal complaints of sex discrimination.

(b) Lack of Complaint Procedures and Redress Mechanisms, Sanctions and Penalties

44. In order to comply with Convention obligations, States parties must ensure that laws prohibiting discrimination and promoting gender equality provide women who are subjected to discrimination with appropriate remedies. This means that laws must clearly outline an effective remedial procedure and must clearly define the forms of redress available.⁴⁴ Moreover prohibitions of discrimination against women must be accompanied by explicitly delineated sanctions in case of their breach. The efficacy of gender equality laws will be undermined where they do not outline the applicable sanctions that will apply in case of breach. The lack of explicit sanctions provisions restricts the deterrent effect of such laws and fails to provide an incentive for change. States must also ensure that the applicable penalties are disuasive, proportional and appropriate. A range of flexible pecuniary and non-pecuniary measures must be provided for.⁴⁵
45. However, just as Kazakhstan's Law on Equal Opportunities does not include a general prohibition of discrimination based on sex, neither does it include provisions detailing penalties or sanctions to be imposed against those who engage in discriminatory conduct. Nor does it outline what remedial mechanisms individuals might use to enforce its provisions. Instead, in addition to holding that discriminatory legislation may be challenged in court according to civil procedure,⁴⁶ it sets out briefly that any violation of its provisions "shall be punishable under the laws of the Republic of Kazakhstan", without specifying what laws would be applicable.⁴⁷ In addition, the provision dealing with employment outlines that "those who consider themselves victims of discrimination in employment relations shall have the right to complain to bodies and organizations responsible for securing equal rights".⁴⁸ Those interviewed by the ICJ stressed that the ambiguous nature of the relevant provisions leaves women, their lawyers, civil society representatives and even public authorities themselves without clarity as to if, and how, the legislation may be enforced effectively in practice as a basis for legal action seeking to redress inequality and discrimination.

(c) Failure to Clearly Designate Oversight Responsibilities and Monitoring Mechanisms

46. Compliance with the Convention also requires States to ensure guarantees of equality and non-discrimination are accompanied by a delineation of the allocation of clear responsibilities and monitoring mechanisms.⁴⁹ This is because such legal guarantees and commitments will have little impact where they fail to delineate which State actors are responsible for ensuring the

access of men and women to all kinds of professional retraining and advanced training; 3) preventing preferential treatment when granting admission to studies, except as specified by the laws of the Republic of Kazakhstan; 4) preventing advertisement containing textual, visual and auditory information which is contrary to the well-established standards of humanity and moral standards due to its use of offensive sex-related language, comparisons and images; 5) gender education in accordance with the current State policy aimed at ensuring equal rights and equal opportunities between men and women."

⁴⁴ Article 2(c) CEDAW; Article 2(3) ICCPR; CEDAW General Recommendation 28, Paras. 17, 32, 34, 36. CESCR General Comment 16, Paras. 21 & 48; CESCR General Comment 20, Para.40; HRC General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, Paras.15-20. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by GA resolution 60/147 of 16 December 2005.

⁴⁵ Article 2(b) CEDAW; CEDAW General Recommendation 28, Paras. 17 & 37(b); CEDAW General Recommendation 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004), Para.7.

⁴⁶ Article 4 (1), Law on Equal Opportunities.

⁴⁷ Article 15, Law on Equal Opportunities.

⁴⁸ Article 10(4), Law on Equal Opportunities

⁴⁹ CESCR General Comment 16, Paras. 21&41. CEDAW General Recommendation 28, Paras. 24 & 39. CESCR General Comment 20, Para.41. See Gender Equality Laws, Global Good Practice, UNIFEM, 2009.

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implementation of these commitments. Legal provisions outlining policy commitments and pledging action need to clearly designate in each case which public body is responsible for ensuring their implementation. Similarly, laws must establish a process by which their implementation can be monitored and evaluated on an ongoing basis and again must explicitly assign oversight responsibility to a specific public body.

47. However significant concerns persist regarding the extent to which Kazakhstan's Law on Equal Opportunities fails to clarify which State agencies are responsible for its various policy commitments or for monitoring and supervising its implementation and compliance with its provisions. The Law's substantive policy pledges do not designate the responsible State agency. Meanwhile, although Article 13 specifies that monitoring and supervision of compliance shall be conducted through inquiries by State agencies in charge of securing equal rights and opportunities, it does not specify to which State agencies it refers.⁵⁰ As a result, there appears to be a prevailing lack of clarity as to who bears what responsibility under the Law.

Recommendations

48. In order to ensure that its laws and procedures respond appropriately to sex discrimination, including by offering women an effective and accessible route to remedy and redress, and comply with its obligations under the Convention the ICJ has recommended that the Government of Kazakhstan initiate a process of legislative reform which would supplement the guarantees enshrined in the *The Law on the State Guarantees of Equal Rights and Equal Opportunities of Women and Men* with comprehensive prohibitions of sex discrimination, elaboration of clear penalties and remedial procedures and establishment of monitoring mechanisms.⁵¹
49. To this end, the ICJ has recommended that legislative provisions should be elaborated which:
- (i) Include a comprehensive prohibition of both *de jure* and *de facto* discrimination which complies with international requirements and is accompanied by an accessible procedure through which women can make complaints of discrimination and obtain effective redress.
 - (ii) Provide for the establishment of effective monitoring mechanisms and explicit designation of responsibilities applicable to the policy commitments enshrined in the *Law on the State Guarantees of Equal Rights and Equal Opportunities of Women and Men*.
50. Such a law reform process should involve close consultation with civil society organizations and independent experts. It should be informed by and draw on international expertise and comparative good practice in other states.

⁵⁰ The text of the Article provides: "State monitoring and supervision over compliance with the laws of the Republic of Kazakhstan on the State guarantees of equal rights and equal opportunities for men and women shall take the form of inquiries conducted by the State agencies in charge of securing equal rights and equal opportunities for men and women in accordance with the procedure established by the laws of the Republic of Kazakhstan."

⁵¹ Women's Access to Justice in Kazakhstan: Identifying the Obstacles and Need for Change, 2013: <http://www.icj.org/kazakh-government-must-step-up-efforts-to-advance-womens-access-to-justice/>, pg. 27 – 34.