



Submission by Human Rights Watch to the Committee on Economic, Social and Cultural Rights on Kazakhstan

65th session, 2019

This submission is for consideration during the Committee on Economic, Social and Cultural Rights' review Kazakhstan. It focuses on the crackdown on the independent trade union movement and attacks on workers' rights; discrimination based on sexual orientation and gender identity; the protection of students, teachers, and schools in situations of armed conflict; and inclusive education in Kazakhstan.

The right of everyone to form and join trade unions (Article 8)

The government of Kazakhstan fails to guarantee workers' rights or to fully protect their interests in the workplace. Workers must overcome significant obstacles established in law and in practice to organize in Kazakhstan. Legislative changes in recent years have restricted the rights of workers to freely form unions and bargain collectively and have introduced criminal sanctions for leading or participating in strikes deemed illegal under Kazakh law. Outspoken trade union leaders and worker activists have faced harassment and legal prosecution for their labor activism.

Legal Framework

Kazakhstan's Trade Union Law, adopted in June 2014, imposes significant restrictions on workers' right to freedom of association and to organize. The law introduced a burdensome two-step registration process that has been used to strip key independent trade unions in Kazakhstan of their legal status. It also obliges trade unions to affiliate with higher-tier unions, a provision that seriously undermines workers' right to freely determine their unions' structures.¹

To register as a trade union, the Trade Union Law requires a group of at least ten workers to hold a congress, adopt a charter, and form a trade union body, which must then register with the Ministry of Justice. Within six months of registration, the union must prove its membership

¹ "We Are Not the Enemy: Violations of Workers' Rights in Kazakhstan," November 23, 2016, <https://www.hrw.org/report/2016/11/23/we-are-not-enemy/violations-workers-rights-kazakhstan>.

base and its affiliation to a higher-tier union, such as an industrial trade union or a trade union confederation, or it remains in legal limbo and the Ministry of Justice can strip it of its legal status.²

Kazakh law bans outright certain categories of workers from forming unions, such as judges, firefighters and prison staff. Kazakh law also prohibits trade unions in Kazakhstan from receiving any financial support from their international trade union affiliates. Kazakhstan's constitution and legislation on public associations also prohibit foreign unions from operating in the country.³

Although the government pledged to introduce amendments to the Trade Union law at the International Labor Conference in June 2017, and reiterated this commitment in a high-level tripartite meeting in Astana in May 2018, at which the Kazakh government adopted a road map to address a number of the International Labour Organization's concerns regarding freedom of association, as of this writing, proposed amendments have not been submitted to parliament for consideration.

Forced closure of trade unions

In a serious blow to the independent trade union movement in Kazakhstan, a court on January 4, 2017 held that the Confederation of Independent Trade Unions of Kazakhstan (KNPRK), the country's largest independent trade union confederation, failed to comply with the Trade Union Law's registration requirements and must shut down. The court did not allow the union to fairly present its case or defend itself. For example, it refused to postpone the hearing to allow the union sufficient time to prepare, and denied all of the union's motions, including requests to question witnesses.

The government also closed three affiliated unions – for domestic workers, health care employees, and metalworkers. In August 2017, the Supreme Court refused to consider the Trade Union of Social and Domestic Workers' appeal against its forced closure.

On April 11, 2018, the Mangistau regional economic court ruled to close the local-level independent Oil Construction Company trade union of oil workers, following a complaint filed by the Mangistau Regional Administration Office, which claimed the union had not complied with registration requirements by affiliating with an industrial-tier trade union.

In 2018, the Ministry of Justice three times refused to register the Confederation of Independent Trade Unions of Kazakhstan under a new name.

Retaliation Against Trade Union Activists

² Ibid.

³ Ibid.

In a November 2016 report, Human Rights Watch documented how Kazakh authorities acted in apparent retaliation against trade union leaders, labor activists, and workers, including by threatening them with criminal charges or placing activists under government surveillance.⁴ Since the publication of the report, authorities have criminally prosecuted and courts have jailed trade union leaders for their labor activism.

The closure of KNPRK prompted hundreds of workers to stage a peaceful protest in January 2017. On January 19, an Aktau court found the protest illegal and the next day, police arrested Amin Eleusinov and Nurbek Kushakbaev, trade union leaders who participated in the protest.

Eleusinov was prosecuted on politically motivated charges of “embezzlement” and was sentenced to two years in prison in May 2017. Kushakbaev was prosecuted separately on the wholly unjustified charge of “calling on workers to continue an illegal strike” and on April 7, 2017, a separate Astana court sentenced him to two-and-a-half years in prison. Eleusinov and Kushakbaev were granted parole in May 2018 but are prohibited from resuming any trade union activism for five and two years, respectively.⁵

Larisa Kharkova, leader of the now-banned Confederation of Independent Trade Unions, was prosecuted on politically motivated criminal charges of large-scale embezzlement and fraud, following an investigation and trial marred by procedural violations. On July 25, 2017, a court convicted Larisa Kharkova of “abuse of office” and sentenced her to 400 hours of community service. It also placed restrictions on her freedom of movement for four years and banned her from holding a leadership position in any nongovernmental organization, such as a trade union, for five years.⁶ In January 2018, Kharkova successfully contested the compulsory community service component of her sentence.

In September 2018, Kazakh authorities in Shymkent opened a spurious criminal case against Erlan Baltabay, head of the local trade union Decent Work for petrochemical industry workers. The investigation stems from a complaint filed by a trade union member, who accused Baltabay of stealing approximately US\$28,000 in trade union membership dues. Baltabay denies the charges and told Human Rights Watch that the funds remain in his possession, and he can account for the funds before his union’s members. The authorities have repeatedly summoned Baltabay for questioning, searched his home and office, and seized trade union documents and its stamp, which has effectively paralyzed his union from carrying out any formal activities. The investigation is ongoing.

⁴ Ibid.

⁵ Trade Union Leaders Freed in Kazakhstan, June 6, 2018, <https://www.hrw.org/news/2018/06/06/trade-union-leaders-freed-kazakhstan>.

⁶ Kazakhstan: Trade Union Leader Convicted, June 26, 2017, <https://www.hrw.org/news/2017/07/26/kazakhstan-trade-union-leader-convicted>.

In November 2018, unidentified assailants attacked Dmitry Senyavskii, leader of the Karaganda region industrial-tier fuel and energy trade union. His injuries prevented him from meeting with a visiting international trade union delegation in the capital, Astana, three days later. Following the attack, Kazakh authorities initiated an investigation under the offense of “hooliganism.”⁷ As of this writing, the investigation is ongoing.

Restrictions on the Right to Strike

The right to strike is guaranteed in Kazakhstan’s constitution and Labor Code, but all “railway transport and civil aviation workers, medical workers, and service providers (including workers in public transport, water supply, electricity, heat, and communications)” are prohibited from going on strike, as are workers at “hazardous production facilities,” and “in other cases envisaged by the laws of the Republic of Kazakhstan.”

In 2014, Kazakhstan introduced to the Criminal Code a new offense of “actions provoking continued participation in a strike declared illegal by the court,” which carries a maximum prison sentence of three years. While the right to strike is not absolute in international law, the International Labour Organization has determined that criminal sanctions for those who participate in peaceful strikes is an excessive punishment.

Human Rights Watch recommends to the Committee that it call upon the government of Kazakhstan to:

- Respect the rights of workers to associate, organize, and form unions, and to peaceful assembly with others in accordance with international human and labor rights law.
- Foster an environment that protects, not punishes, labor rights activists for defending workers’ rights in Kazakhstan.
- Comply fully with the conclusions adopted in 2015, 2016, and 2017 by the ILO Committee on the Application of Standards;
- Have the court-ordered closure of the Confederation of Independent Trade Unions of Kazakhstan set aside and allow the KNPRK to operate without interference;
- End the harassment of independent trade union activists, including by lifting restrictions on trade union activism of Larisa Kharkova, Amin Eleusinov, and Nurbek Kushakbaev;
- Revise the 2014 Trade Union Law to allow trade unions to register and function in line with international protections and standards;
- Revise the 2015 Labor Code by lifting broad restrictions and prohibitions on the right to strike and clearly define provisions for collective bargaining;

⁷ Kazakhstan: Attack on Trade Union Leader, November 12, 2018, <https://www.hrw.org/news/2018/11/12/kazakhstan-attack-trade-union-leader>.

- Repeal Criminal Code article 402 criminalizing “calling on workers to participate in a strike that has been found illegal by a court,” as incompatible with freedom of association, the right to organize, and the right to strike.

Discrimination based on Sexual Orientation and Gender Identity (Articles 2, 6, 7, and 12)

Harassment, discrimination, and the threat of violence affect the everyday lives of Lesbian Gay Bisexual and Transgender (LGBT) people in Kazakhstan. LGBT people are faced with hostility behind the closed doors of private homes, and in public places, such as in parks and outside nightclubs. State institutions fail to provide consistent care and protection. In the rare cases when victims report abuses or seek social services, official responses are inadequate. In many cases, the abuses suffered by LGBT people are shrouded in shame due to widespread antipathy toward sexual and gender diversity.

Discrimination in Work

Transgender people in Kazakhstan face intense social prejudice and discrimination, including discrimination in employment. In July 2015, Human Rights Watch reported that for some transgender people, the difficulty in obtaining legal recognition of their gender identity can prevent them from getting jobs.⁸ Producing official documents is a requirement for obtaining work in Kazakhstan, and transgender individuals face added scrutiny and possible accusations of fraud if they do not conform to the gender set forth on their official documents.⁹

Standard of Physical and Mental Health for LGBT People

Access to physical and mental health services can be an issue for LGBT people in Kazakhstan. Due to abusive experiences in medical settings and widespread antipathy toward sexual and gender diversity, LGBT individuals in Kazakhstan often conceal their identities from health care providers.

A 2009 Soros Foundation survey found that 66 percent of LGBT people conceal their identity from health care providers,¹⁰ while a 2012 survey of 400 men who have sex with men (MSM) in Almaty, conducted by researchers at Johns Hopkins University, recorded that barely 3 percent of respondents had told their health care providers of their same-sex intimate relations.¹¹ A 2009 evaluation of the Global Fund’s HIV project in Kazakhstan noted that “MSM remain one

⁸ “That’s When I Realized I Was Nobody: A Climate of Fear for LGBT People in Kazakhstan,” July 23, 2015, <https://www.hrw.org/report/2015/07/23/thats-when-i-realized-i-was-nobody/climate-fear-lgbt-people-kazakhstan>.

⁹ Ibid.

¹⁰ Soros Foundation-Kazakhstan, “Unacknowledged and Unprotected: Lesbian, Gay, Bisexual, and Transgender People in Kazakhstan,” 2009, https://www.soros.kz/wp-content/uploads/2010/05/2013_09_04_04_43_19_269.pdf (accessed January 11, 2019)

¹¹ Mark Berry, et al., “Risk Factors for HIV and Unprotected Anal Intercourse among Men Who Have Sex with Men (MSM) in Almaty, Kazakhstan,” PLoS ONE, August 24, 2012, <https://doi.org/10.1371/journal.pone.0043071> (accessed January 11, 2019).

of the hardest to reach groups with the minimal level of coverage by preventive activities.”¹² The report attributed the inadequate prevention interventions to “Negative and sometimes hostile attitude of the society, including medical personnel and the law enforcement agencies towards MSM, as well as self stigmatization of this group.”¹³

Among the most fundamental barriers to realizing the human rights of transgender people, including protecting them from violence and discrimination, are obstacles to having their gender identity legally recognized. When transgender people carry documents that list a sex or gender that does not match their identity and appearance, officials subject them to humiliating and sometimes abusive scrutiny. In a 2015 survey of 41 transgender people in Kazakhstan by a local NGO, when asked what needed to happen to help them become more fully integrated in society, nearly two-thirds of respondents answered that they needed to change their legal gender on documents, while only two respondents had actually been able to do so.

In 2009, a new health code introduced the “the right to sex change,” specifying sex reassignment surgery as a possibility.¹⁴ The government then considered the specific meaning and implementation of this right and drafted guidelines.¹⁵ The guidelines, passed in 2011, specifically added increasingly coercive and humiliating procedures to the previous requirements in order for the commission to confirm a diagnosis.¹⁶ The new procedure reads: “Gender reassignment medical measures are realized upon the results of the Commission’s decision, and include two stages: Hormonal therapy; Surgical correction.”¹⁷

Human Rights Watch recommends to the Committee that it call upon the government of Kazakhstan to:

- Publicly acknowledge the scope and gravity of the problem of violence and discrimination against lesbian, gay, bisexual, and transgender (LGBT) people in

¹² Anna Deryabina and Larisa Bashmakova, “Report on the results of the GFATM second round HIV project in the Republic of Kazakhstan,” June 2009, <http://www.rcaids.kz/files/00000094.pdf> (accessed January 11, 2019). HIV programs include MSM on paper, and there is a MSM representative on the Country Coordinating Mechanism, the monitoring body for all Global Fund grants in country. However in a 2015 report, the Eurasian Coalition on Male Health noted “the need to work with [MSM] is not recognized.” Eurasian Coalition on Male Health, “The Global Fund New Funding Model and Country Dialogue: Involvement of MSM and Transgender People in Eastern Europe and Central Asia,” 2015, <http://www.globalfundadvocatesnetwork.org/wp-content/uploads/2015/03/ECOM.Country-Dialogue-Report.pdf> (accessed January 11, 2019).

¹³ Ibid.

¹⁴ Code on People’s Health and System of Healthcare of the Republic of Kazakhstan, 2009, art. 88.

¹⁵ LGBT Organization Labrys (Kyrgyzstan) in cooperation with NGO Amulet (Kazakhstan), ILGA-Europe, and Sexual Rights Initiative, “Recommendations on Sexual Rights in Kazakhstan 7th session of Universal Periodic Review,” <http://sexualrightsinitiative.com/wp-content/uploads/Kazakhstan-UPR-7.pdf> (accessed July 16, 2015).

¹⁶ Decree of the Government of the Republic of Kazakhstan No. 1484, December 7, 2011; Code of the Republic of Kazakhstan, art. 88, clause 3.

¹⁷ Ibid.

Kazakhstan, and work with human rights organizations and LGBT activists to improve protections.

- Amend Kazakhstan’s gender recognition procedure to allow transgender people to change their legal gender on all documents through a process of self-declaration that is free of medical procedures or coercion.
- Commit the Ministry of Health to engage effectively with men who have sex with men (MSM) and transgender populations on HIV education, prevention, counseling, testing, and treatment activities, including by making strong public statements against discrimination.
- Put in place a quick, transparent and accessible procedure of legal gender recognition, without any requirements of medical interventions, to facilitate the enjoyment of the Covenant rights by transgender persons.

Education in times of Armed Conflict (Article 13)

Kazakhstan has been supportive of children’s education during times of armed conflict and has promoted the protection of students, teachers, and schools.

In July 2015, Kazakhstan became the 48th country to endorse the Safe Schools Declaration¹⁸ and thereby committed to using the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*¹⁹ as a practical tool to guide their conduct during relevant security operations.

During its time as a member of the UN Security Council, in the October 31, 2017 open debate on children and armed conflict, the Kazakh permanent representative to the UN called on the Security Council member states “to universally ratify and implement the relevant international treaties and to enact related national legislation, as well as to endorse international tools designed to promote the protection of children in armed conflict ... We have not only endorsed the Paris Principles and Commitments, as well as the Safe Schools Declaration, we are also working actively to implement them effectively.”²⁰

In 2018, Kazakhstan co-authored Security Council resolution 2427 on children in armed conflict, which “expresses deep concern at the military use of schools in contravention of

¹⁸ Safe Schools Declaration, May 28, 2015,

https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe_schools_declaration.pdf (accessed January 11, 2019).

¹⁹ Global Coalition to Protect Education from Attack (GCPEA), *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*, March 18, 2014,

http://protectingeducation.org/sites/default/files/documents/guidelines_en.pdf (accessed January 11, 2019).

²⁰ Ibid.

applicable international law, recognizing that such use may render schools legitimate targets of attack, thus endangering children's and teachers' safety as well as children's education."²¹

Human Rights Watch recommends that the Committee:

- Acknowledge Kazakhstan for its endorsement of the Safe Schools Declaration and the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*;
- Encourage Kazakhstan to advocate for neighboring states to endorse the Safe Schools Declaration and implement its commitments to protecting students, teachers, and schools during armed conflict;
- Encourage Kazakhstan to continue to develop and share examples of its implementation of the Declaration's commitments with this Committee and with other countries that have endorsed the Safe Schools Declaration—especially during the 2019 Third International Safe Schools Conference to be held in Spain in May—as examples of good practice in protecting students, teachers, and schools during armed conflict.

Inclusive Education for Children with Disabilities (Articles 10, 13)

Despite the Kazakh government's stated commitments to ensuring inclusive education in mainstream schools for children with disabilities by 2019, progress towards full and genuine inclusive education is slow. Some children with disabilities attend mainstream schools, but the vast majority of children with disabilities are enrolled in special schools for children with disabilities, which can be located far from their families and communities; educated at home, isolated from their peers with limited class hours; or segregated in special classrooms in mainstream schools. Children with disabilities living in psychiatric-neurological institutions receive very little or no education.

Kazakhstan's Law on Education guarantees the right of all children to attend free primary and early secondary school in their neighborhoods and establishes free compulsory education through upper secondary school.²²

Psychological-Medical-Pedagogical Consultations (PMPK) currently are a key barrier to children with disabilities studying in mainstream schools. PMPK commissions, organized under local departments of education or the Ministry of Education, are typically made up of doctors, a speech therapist, psychologist, and other specialists. They assess children with disabilities and issue a conclusion with a recommendation as to whether a child should study in a

²¹ "Kazakhstan Co-Authors New UNSC Resolution on Children in Armed Conflict," The Ministry of Foreign Affairs, Republic of Kazakhstan, July 9, 2018, <http://www.mfa.kz/en/content-view/kazahstan-vystupil-soavtorom-novoi-rezolucii-soveta-bezopasnosti-oon-po-detam-v-vooruzennykh-konfliktah-2> (accessed January 22, 2019).

²² Law on Education, Art 26, point 2.

mainstream school, in a special school for children with disabilities, or at home, as well as the types of rehabilitation and support services to which the child is entitled.

Human Rights Watch interviews with children, parents, and school staff in multiple cities in Kazakhstan in 2017 and 2018 found that in practice, the PMPK conclusion is frequently treated as a definitive determination of whether a child can enroll in a mainstream school.

Under Kazakh law, the exact authority of the PMPK in determining a child's access to education is unclear. On the one hand, rules regulating PMPKs suggest that the PMPK conclusion on the child's eligibility is not definitive: the conclusion will include a "*recommendation* on the education conditions" (emphasis added) for a child."²³ However, the same rules also state that "the basis for sending children with particular learning needs to special organizations [special schools] and educational organizations [mainstream schools] is the PMPK conclusion."²⁴ In addition, the Law on Social and Medical-Pedagogical Support for Children with Disabilities stipulates that the way children with disabilities access mainstream pre-primary education and mainstream schools is with a PMPK conclusion.²⁵

Where children with disabilities do study in mainstream schools, inclusive education appears to include only children in lower grades; classes are held in buildings that do not meet Universal Design standards; and schools do not always provide reasonable accommodations for children. Barriers at mainstream schools include inaccessible buildings, classrooms, and toilets; a lack of trained and qualified staff to teach children with disabilities; or a lack of aides to support children with disabilities.

Human Rights Watch found that some special schools also struggle to provide a quality education because of a lack of physical accessibility, accessible materials, or teacher training.

Children with disabilities who are educated at home do not receive a quality education – teachers conduct no more than eight to ten hours of classes per week – and children are isolated and separated from their peers, classmates, and society more broadly. Kazakh law allows children to receive home schooling as a form of education; it is not envisioned exclusively as a temporary measure.

Human Rights Watch recommends to the Committee that it call upon the government of Kazakhstan to:

- Guarantee access to and participation in education for all children with disabilities on an equal basis with others, in line with the government's international obligations.

²³ Order No. 66 of the Minister of Education and Science of the Republic of Kazakhstan, February 14, 2017, Appendix 7, pt. 26.

²⁴ Order No. 66 of the Minister of Education and Science of the Republic of Kazakhstan, February 14, 2017, Appendix 7, pt. 12.

²⁵ Law on Social and Medical-Pedagogical Support for Children with Disabilities, art 15-5.

- Amend legislation to define inclusive education by a) including a provision that mainstream schools will provide reasonable accommodations and quality education to children with disabilities on an equal basis with others, including individualized support measures; and b) making clear that inclusive education is a right for every individual.
- Transform the Psychological-Medical-Pedagogical Consultations (PMPK) by introducing provisions in law that make explicit that children are not required to have a PMPK conclusion to attend mainstream schools. Ensure, and enforce through legal provisions, that PMPK assessments are solely for the purpose of determining the individual reasonable accommodations and support which a child will receive to ensure inclusive quality education. The assessment should involve individuals who are knowledgeable about a child's abilities (parents, other relatives familiar with the child, teachers, other school staff) and the types of accommodations that may meet the child's needs, without making an explicit recommendation about what school a child may attend.
- In line with the CRPD Committee General Comment no. 4, promote instruction and a teaching culture that moves away from a one-size-fits-all approach to learning towards one that can adapt to different learning abilities and styles and meets the diverse needs of all learners.
- Ensure that home education is exceptional and used only for short periods, and then only when absolutely necessary for health reasons, rather than a practice to further segregate children with disabilities.
- Ensure maximum inclusion of children in mainstream classrooms and avoid segregation of children with disabilities in special schools, home education, or in separate classrooms within mainstream schools.
- Ensure that children with disabilities and their parents have access to adequate comprehensive information, regarding education and the right to inclusive education, especially at key transition stages (e.g. preschool to primary; primary to lower secondary; upper secondary to higher education).