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LEGAL ANALYSIS EXPLAINING WHY THE CANDIDACY REQUIREMENTS FOR THE JUNE PRESIDENTIAL ELECTIONS IN KAZAKHSTAN CONTRAVENE INTERNATIONAL LAW

I. INTRODUCTION

Early presidential elections are scheduled to be held in Kazakhstan on June 9, 2019, following the March resignation of long-term President Nursultan Nazarbayev. None of the past presidential elections held in Kazakhstan have been considered free or fair by international observers, most especially because of the marginalization of opposition candidates.¹ Although these elections are historic because they are the first elections in Kazakhstani history for which Nazarbayev will not stand, the legal framework for presidential elections seriously represses the possibility for there to be any genuine opposition movement. In particular, eligibility requirements imposed on presidential candidates by the Constitution and the national election law are unreasonable and contravene the right to political participation enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR), a treaty to which Kazakhstan is a state party.

II. BACKGROUND ON THE JUNE PRESIDENTIAL ELECTION IN KAZAKHSTAN

Former President Nazarbayev resigned from office on March 19, 2019, following over a month of widespread popular protests across the country. Nazarbayev was the first president of Kazakhstan after the dissolution of the Soviet Union, serving as the country's president since 1991. Following his resignation, the Speaker of the Senate, Kassym-Jomart Tokayev, assumed the role of interim president and called for early presidential elections. Nazarbayev had been elected for a five-year term in 2015, so – despite Nazarbayev's resignation – presidential elections should regularly have been scheduled for December of 2019. Nevertheless, Tokayev scheduled presidential elections in Kazakhstan for June 9, 2019, drastically shortening the pre-election timeframe.

The eligibility of presidential candidates is governed by the Kazakhstan Constitution and national election law, which were amended in 2017 and 2018 to impose additional candidacy requirements. The Constitution requires all prospective candidates to be citizens by birth, at least 40 years old, fluent in the Kazakh language, and officially resident in the country for the last 15

¹ See, e.g., *Kazakhstan*, in 2018 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, U.S. DEP'T OF STATE, Mar. 13, 2019, available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/kazakhstan/> and *Kazakhstan*, in FREEDOM IN THE WORLD 2019, FREEDOM HOUSE, Feb. 4, 2019, available at <https://freedomhouse.org/report/freedom-world/2019/kazakhstan> [hereinafter *Freedom House Kazakhstan Report*].

years.² Following the 2017 amendments to the Constitution and election law, candidates also must have a higher education and at least five years of experience in either public service or elected office.³ In addition, the 2018 amendment to the election law removed the possibility of candidates to be self-nominated, requiring presidential candidates to be nominated by public associations, such as registered political parties.⁴ Once a candidate has been registered, he or she must present signatures from at least one percent of the total number of registered voters (or 118,140 for this election), collected from nine out of the 14 *Oblasts* (regions) of Kazakhstan including the two major cities of Nur-Sultan (formerly Astana) and Almaty.⁵ In addition, they must pay a campaign deposit of 2,125,000 Kazakhstan tenge (KZT) (U.S. \$5,550), present tax declarations, and submit to a medical examination.⁶

Seven candidates are registered currently to participate in the elections, including Tokayev.⁷ Nine candidates applied to contest the elections with the Kazakhstani Central Electoral Commission (CEC). One candidate withdrew to consolidate party support around a single candidate and the Commission disqualified another for not possessing sufficient knowledge of the Kazakh language. Although more candidates are registered than in any previous election, the candidacy requirements preemptively and drastically limit the field of candidates, in contravention of the ICCPR, among other sources of international law.

III. LEGAL ANALYSIS OF THE CANDIDACY REQUIREMENTS

The right to political participation is well-established in international law, with either direct or implicit guarantees in Article 25 of the ICCPR, Article 3 of the European Convention on Human Rights, Article 23 of the American Convention on Human Rights, and Article 13 of the African Charter on Human and Peoples' Rights.⁸ Because Kazakhstan is a state party only of the ICCPR—having ratified the Covenant on January 26, 2006—this analysis will focus on violations of the rights therein enshrined.

Article 25 of the ICCPR states in pertinent part that:

² QAZAQSTAN RESPÝBLIKASYNYŇ KONSTITÝTSIIASY [CONSTITUTION], Aug. 30, 1995, art. 41, *available at* http://www.akorda.kz/en/official_documents/constitution [hereinafter *Kazakhstani Constitution*].

³ *Id.*; *Qazaqstan Respwblikasındaǵı saylaw twralı*, No. 2464, QAZAQSTAN RESPÝBLIKASYNYŇ PARLAMENTI, Sept. 28, 1995, art. 54, *available at* <https://www.election.gov.kz/eng/election-legal-framework/the-laws-of-the-rk.php> [hereinafter *Law on Elections*]; and *Republic of Kazakhstan Early Presidential Election 9 June 2019: ODIHR Needs Assessment Mission report 16-18 April 2019*, OFFICE OF DEMOCRATIC INSTS. & HUMAN RIGHTS, ORG. FOR SEC. & CO-OPERATION IN EUR., Apr. 25, 2019, at 2, *available at* <https://www.osce.org/odihr/elections/kazakhstan/418145?download=true> [hereinafter *OSCE Report*].

⁴ *Id.*, at 6.

⁵ *Law on Elections*, *supra* note 3, at art. 56.

⁶ *Id.*, at art. 59. The deposit is 2,125,000 Kazakhstan tenge (KZT), which as of May 30, 2018 equals 5,578.16 USD. Although candidates in the 2015 presidential elections were required to pay 1,060,000 KZT, roughly 5,700 USD at the time, both figures are equivalent to 50-times the minimum wage.

⁷ *Kazakh Government Kicks Off Campaign to Encourage Turnout in Presidential Election*, EURACTIV, May 10, 2019, *available at* <https://www.euractiv.com/section/central-asia/news/kazakh-government-kicks-off-campaign-to-encourage-turnout-in-presidential-election/>.

⁸ *See generally* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 Yale L.J. 539 (1992).

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions . . .

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.⁹

The Human Rights Commission (HRC), the UN treaty body responsible for monitoring state compliance with the ICCPR, further states in its General Comment No. 25 on the ICCPR:

Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence, or descent, or by reason of political affiliation.¹⁰

Candidacy requirements in Kazakhstan that require A) fluency in the Kazakh language, B) third-party nomination, C) signatures from one percent of registered voters, and D) higher education and government experience violate the right to political participation because they are unreasonable and discriminate against opposition candidates. Other requirements, though not facially discriminatory, also may be used to marginalize opposition figures – in light of the Government’s long history of suppressing any meaningful dissent.

A. The requirement that all candidates demonstrate fluency in the Kazakh language is unreasonable because it discriminates against the Russian-speaking minority and because it lacks clear criteria for assessment.

According to the HRC, language requirements are per se incompatible with Article 25. In *Ignatane v. Latvia*, the Riga Election Commission struck a prospective candidate from the list for a local election based on a determination that she did not have the required language proficiency, despite the candidate’s possession of a prior language aptitude certification.¹¹ The HRC concluded that “article 25 secures to every citizen the right and the opportunity to be elected by genuine periodic elections without any of the distinctions mentioned in article 2, including language.”¹² Here, Article 41 of the Constitution of Kazakhstan requires that all presidential candidates demonstrate fluency in the state language, which Article 7(1) defines as Kazakh.¹³ However, according to Article 7(2) of the Constitution, Russian is the language

⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at art. 25 [hereinafter ICCPR].

¹⁰ *General Comment No. 25 on Article 25: Participation in Public Affairs and the Rights to Vote*, U.N. HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/21/Rev.1/Add.7, July 12, 1996, at ¶ 15 [hereinafter *General Comment No. 25*].

¹¹ *Ignatane v. Latvia*, Communication No. 884/1999, U.N. Doc. CCPR/C/72/D/884/1999, U.N. HUMAN RIGHTS COMM., May 17, 1998, at ¶ 2.1-2.2.

¹² *Id.*, at ¶ 7.3.

¹³ KAZAKHSTANI CONSTITUTION, *supra* note 2, at art. 41 and 7(1).

officially used in state organizations and local self-government bodies along with Kazakh.¹⁴ The requirement that all presidential candidates demonstrate fluency in the state language discriminates against the significant Russian-speaking minority in Kazakhstan, in contravention of Article 2 (on non-discrimination on protected grounds) and 25 of the ICCPR.

Moreover, the HRC faulted the administration of the language test in *Ignatane* as a violation of the state's obligations under Article 25 to base any restrictions on objective and reasonable criteria clearly established by law.¹⁵ There the State Language Board subjected the petitioner to an ad hoc examination allegedly following complaints and refused to certify her proficiency based on the subjective evaluation of a single evaluator.¹⁶ Similarly here, the CEC has not established clear criteria for assessment. Before each election, the CEC establishes a Linguistic Commission, which is a nominally independent body composed of linguistic experts that is responsible for testing the language proficiency of prospective candidates. Although the criteria for evaluating the language test was previously left solely to the discretion of the Linguistic Commission, the CEC issued testing guidelines for the June election on April 19, 2019.¹⁷ According to these guidelines, each candidate must demonstrate "the ability to correctly read, write, express thoughts and speak publicly in the Kazakh language without difficulties" by writing a two-page written assignment, reading from a printed text, and giving a fifteen-minute presentation.¹⁸ Nonetheless, these guidelines still do not establish clear criteria for assessment – constituting simply the form, not the substance of the language evaluation.

Because the language test is facially discriminatory against the Russian-speaking minority and because the CEC has failed to establish clear criteria for assessment, the requirement is unreasonable and contravenes Article 25 of the ICCPR which obliges all restrictions of political participation be based on objective and reasonable criteria that are clearly established by law.

B. The requirement that only registered civil associations may nominate presidential candidates is unreasonable because – paired with the government's long-standing oppression of any genuine opposition movement – it effectively restricts the participation of opposition candidates.

Similarly, the HRC has held requirements of membership in a recognized political party per se in compatible with Article 25. In addition to the standard established in paragraph 15 of General Comment No. 25, the HRC states in paragraph 17 that "the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties."¹⁹ In *Bwalya v. Zambia*, the petitioner was denied the right to run for office

¹⁴ *Id.*, at art. 7 ("(1) The state language of the Republic of Kazakhstan shall be the Kazakh language. (2) Russian language shall be officially used on equal grounds along with the Kazakh language in state institutions and local self-administrative bodies.")

¹⁵ *Ignatane v. Latvia*, *supra* note 11, at ¶ 7.4.

¹⁶ *Id.*, at ¶ 5.8.

¹⁷ Press Release, *On the Meeting of the Central Election Commission on April 19, 2019*, CENT. ELECTION COMM'N OF THE REPUBLIC OF KAZ., Apr. 4, 2019, available at <https://www.election.gov.kz/eng/news/releases/index.php?ID=4699>.

¹⁸ *Id.*

¹⁹ *General Comment No. 25*, *supra* note 10, at ¶ 17.

based on his membership in an unrecognized opposition political party.²⁰ The HRC concluded “that restrictions on political activity outside the only recognized political party amount[ed] to an unreasonable restriction on the right to participate in the conduct of public affairs.”²¹ This issue was further addressed in *A.P. v. Russia*, where the divided Committee addressed whether the requirement that all candidates for parliamentary elections pass through the list of a registered political party contravened Article 25.²² There, the majority opinion held that because the petitioner was not required to be a member of the party to be placed on its list, the restriction was not a per se violation.²³ Further, the majority noted that the petitioner failed to demonstrate why he could not create his own political party.²⁴ For its part, the dissent found the requirement was tantamount to requiring membership in registered political parties and ran contrary to Article 25 protections against mandatory association with political parties.²⁵

Here, the requirement in Kazakhstan that only registered civil associations may nominate candidates is incompatible with Article 25 because it constitutes an unreasonable restriction on the right of political participation of independent candidates. The 2018 amendments to the national election law removed the ability of candidates to self-nominate and enforced the requirement for third-party nominations. Like in *A.P.*, where the petitioner did not need to be a member of the registered political party to be on its list, here, the election law technically does not require candidates to be members of a registered political party to be nominated by it. Further, nominations can come from any registered civil association such as a trade organization, not just a political party. Nevertheless, this distinction is meaningless considering the long-standing oppression of any genuine opposition movement. The process of registering a political party is onerous, and government officials regularly delay or deny the registration of opposition parties.²⁶ The Government of Kazakhstan also routinely disqualifies and persecutes opposition parties and their leaders under laws against “extremism” or through fabricated charges.²⁷ Moreover, the national election law permits the supreme body of the nominating association to withdraw a candidate’s nomination.²⁸ The election law does not enumerate clear criteria on which the association can decide to withdraw its support. This affords unreasonable control to the nominating association over a candidate’s campaign. With the elimination of the right to self-nominate in the 2018 amendment, this requirement – and the control it affords nominating associations – constitutes a de facto membership requirement, similar to *Bwalya*. As such, this candidacy requirement is an unreasonable restriction on the rights to political participation of prospective candidates and contravenes Article 25.

²⁰ *Bwalya v. Zambia*, Communication No. 314/1988, U.N. Doc. CCPR/C/48/D/314/1988, U.N. HUMAN RIGHTS COMM., adopted July 14, 1993, at ¶ 6.6.

²¹ *Id.*

²² *A.P. v. Russia*, Communication No. 1857/2008, U.N. Doc. CCPR/C/107/D/1857/2008, U.N. HUMAN RIGHTS COMM., adopted May 10, 2013.

²³ *Id.*, at ¶ 10.6.

²⁴ *Id.*

²⁵ *Id.*, at app. ¶ 6.

²⁶ *Freedom House Kazakhstan Report*, supra note 1 at B1.

²⁷ *Id.*

²⁸ *Law on Elections* supra note 3, at art. 60.

C. *The requirement that all candidates gather signatures from one percent of registered voters is unreasonable because the geographical size and harsh terrain of Kazakhstan make collection difficult during the shortened pre-election timeframe and because the verification process lacks transparency.*

The HRC establishes in paragraph 17 of General Comment No. 25 that “[i]f a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy.”²⁹ Although the HRC has not taken up this issue in an adversarial process, the European Court of Human Rights (hereinafter ECtHR) has heard several cases regarding whether signature requirements violated similar protections of the right to political participation enshrined in Article 3 of the European Convention on Human Rights. There, the ECtHR has held that signature requirements are not per se incompatible with the right to political participation, but that “such measures must pursue a legitimate aim . . . [and] must comply with the rule of law and protect the integrity of the elections.”³⁰

Here, the requirement that all candidates present signatures from one percent of the total number of registered voters, equally representing two thirds of the regions and cities of Kazakhstan, is unreasonable and effectively acts as a barrier to the candidacy of independents. Kazakhstan is the ninth largest country in the world, with a total area of over one million square miles or roughly the size of Western Europe. It is one of the most sparsely populated countries in the world, with a population density of approximately 18 people per square mile. Further, the country has an exceedingly complex and harsh terrain. These factors make collection of the requisite signatures difficult under normal circumstances, particularly for candidates that lack the institutional support of the large political parties. However, during these elections, the CEC allocated only a month for nomination of candidates, verification of their compliance with the requirements of the Constitution and electoral law, collection of signatures, submission of the signature pages to the CEC, subsequent verification of signatures by the CEC, and final registration of candidates.³¹ Thus, the very limited amount of time to collect signatures raises significant doubts that candidates could gather the required number of signatures without the support of the government and its administrative resources.

Moreover, the process by which the CEC verifies the authenticity of signatures lacks transparency and leaves supporters of opposition candidates susceptible to harassment. Although the CEC has issued some guidance on the process, a determination of invalidity is unappealable. As such, any guidance is effectively unenforceable. At the same time, it is impossible for the public to verify the authenticity of the signatures in support of the candidates backed by the authorities. Without a transparent and enforced process for signature verification, the signature verification process continues to be susceptible to political manipulation. Finally, because the verification process requires that candidates collect the personal information of all signatories,

²⁹ *General Comment No. 25, supra* note 10, at ¶ 17.

³⁰ *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to Free Elections*, EUR. COURT OF HUMAN RIGHTS, Apr. 30, 2019, at ¶¶ 63-65, available at https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf.

³¹ Press Release, *On April 10, 2019, the Central Election Commission of the Republic of Kazakhstan Approved the Calendar Plan of Main Activities for the Preparation and Conduct of the Early Election of the President of the Republic of Kazakhstan, Scheduled for June 9, 2019*, CENT. ELECTION COMM'N OF THE REPUBLIC OF KAZ., Apr. 10, 2019, available at <https://www.election.gov.kz/eng/news/releases/index.php?ID=4695>.

supporters of opposition candidates are vulnerable to intimidation, harassment, or worse for their political beliefs.

Because the geography of Kazakhstan makes collection of the required signatures exceedingly difficult in the shortened pre-election timeline and the verification process lacks transparency, the signature requirement is unreasonable and constitutes a barrier to the free exercise of the right to political participation of candidates in contravention of Article 25.

D. The requirement that presidential candidates possess a higher education and at least five years of experience in either public service or elected office is unreasonable because – in the context of the political history of Kazakhstan – it unduly restricts the rights to political participation of opposition candidates.

Education requirements are unreasonable, discriminatory, and per se incompatible with Article 25, according to the HRC.³² The HRC has been less clear on minimum experience requirements. Paragraph 16 of General Comment No. 25 states that “[i]f there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions . . . measures to avoid any conflicts of interest should not unduly limit the rights protects by paragraph (b) (of Article 25).”³³ In *Debreczeny v. The Netherlands*, the HRC upheld the preclusion of a national police sergeant from seeking election to a Dutch municipal council.³⁴ The Committee found that the conflict of interest created by the police sergeant’s subordination to the municipal mayor, who himself was accountable to the council for which the petitioner sought election, was sufficient to render the restriction reasonable. However, the HRC has issued no guidance on whether the requirement of particular experience is discriminatory. As a result, such restrictions are judged by the standard that they must be reasonable and not unduly restrictive of the right to political participation.

Here, the requirement that presidential candidates possess at least five years of experience in either public service or elected office is unreasonable because it further marginalizes opposition candidates. As previously established, the Government of Kazakhstan under the direction of former President Nazarbayev has routinely discredited and criminalized any opposition movement, which effectively excluded opposition figures from public service and seeking elected office. Consequently, the minimum experience requirement deprives all opposition candidates of the opportunity to seek election for president. Moreover, the majority of the country’s citizens lack the requisite experience, owing to the limited number of qualifying positions. Thus, this candidacy requirement effectively restricts the right to be elected president to the political elite of Kazakhstan, much like the education requirement does – which the HRC has deemed per se incompatible with Article 25.

As such, the requirement that presidential candidates in Kazakhstan possess a minimum of five years of experience in either public service or elected office – like the higher education

³² *General Comment No. 25*, supra note 10, at ¶ 15.

³³ *Id.*, at ¶ 16.

³⁴ *Debreczeny v. The Netherlands*, Communication No. 500/1992, U.N. Doc. CCPR/C/53/D/500/1992, U.N. HUMAN RIGHTS COMM., adopted Apr. 4, 1995, at ¶ 9.3.

requirement – unreasonable restricts the right to seek election for president to mainstream political figures and the political elite, which contravenes Article 25 of the ICCPR.

E. Other candidacy requirements, although not facially discriminatory, could contravene Article 25 if unduly restrictive of the right to political participation as applied to opposition candidates.

Finally, although the other candidacy requirements are not facially discriminatory, they could be used to marginalize opposition candidates. The requirement that all presidential candidates have resided in the country for fifteen years prior to the election, for instance, precludes the candidacy of numerous opposition politicians who have sought asylum abroad to escape political oppression in Kazakhstan.³⁵ Similarly, the requirement that presidential candidates submit to a medical examination could be arbitrarily applied to disqualify opposition candidates.³⁶ As such, if these eligibility requirements – as applied to opposition candidates – unreasonably restrict the right to political participation, they also could contravene Article 25.

³⁵ *Freedom House Kazakhstan Report, supra* note 1.

³⁶ *Id.*