

Second Monitoring Report Documents Further Violations of Fair Trial in Kozlov Case

Trial of Vladimir Kozlov

Aktau, Kazakhstan

September 11, 2012

Report #2

Freedom House is monitoring the trial of Kazakhstani opposition leader Vladimir Kozlov, who is being tried alongside activists Serik Sapargali and Akzhanat Aminov on charges of attempting to overthrow the government of Kazakhstan through agitation and organization of striking oil workers in the western city of Zhanaozen. The report on the first week of the trial can be found [here](#).

This report covers the period from August 27-September 7, 2012. On August 21 the court unexpectedly announced a break in the proceedings from August 22-26. The official reason for the break was given as needing to await the return of defense lawyer A. Plugov, who is defending Mr. Kozlov and had to leave Aktau to attend due to the death of his mother. One day earlier the court had denied the request of Mr. Plugov to delay the proceedings.

Based on violations of due process and judicial impartiality in the first monitoring period, Freedom House expressed concern that the proceedings violate Mr. Kozlov's right to a fair trial. This period has added to Freedom House's concerns. Violations observed in this period include but are not limited to:

- The search of Mr. Kozlov's cell by unidentified parties, the planting of humiliating materials about his family in his cell, and the failure of the court to adequately respond to these events.
- The secretaries' and bailiffs' regular receipt during the proceedings of notes by SMS and other means that they pass to the judge, and which the judge refuses to describe to the court.
- The denial of multiple requests of the defense without explanation, in violation of the Criminal-Procedural Code of the Republic of Kazakhstan.
- The refusal of the court to make available for questioning key individuals whose names are mentioned frequently in the course of the proceedings.
- The presentation of the testimony of witnesses for the prosecution who are not made available for questioning by the defense.
- The appearance of witnesses whose testimony is identical word-for-word, raising the possibility of falsification of testimony.

In addition to documenting violations, this report analyzes the legal basis of the charges against Mr. Kozlov. This analysis concerns two primary factors: the role of Muktar Ablyazov, and Article 164 under which the defendants are being prosecuted.

Muktar Ablyazov

The accusation presents Muktar Ablyazov as the organizer of an organized criminal group, which included Mr. Kozlov. Specifically, the indictment states:

“The preliminary investigation has established: That citizens of the Republic of Kazakhstan Muktar Kabulovich Ablyazov, Muratbek Kamalbaevich Ketebaev, and Vladimir Ivanovich Kozlov, the leaders of

an organized criminal group created by Ablyazov for the purposes of demolishing and destroying the socio-political bases of the constitutional order of the Republic of Kazakhstan (henceforth – the extremist criminal group of Ablyazov), which included as a structural sub-unit the criminal group of A.M. Aminov (henceforth – the criminal group of Aminov), committed crimes leading to grievous consequences against the peace and security of humanity, the bases of the constitutional order and security of the state, public security, and public order in the following circumstances... ”

For the purposes of an objective and full investigation it would be necessary to include Mr. Ablyazov as an accused party or to question him as a witness, seeing as how it is impossible to establish the guilt and intention of Mr. Kozlov without finding also the guilt and intention of Mr. Ablyazov in committing criminal acts. Moreover, in the course of the prosecution the primary actions have been ascribed to Mr. Ablyazov himself. It appears that the court is examining a criminal case in which the primary organizer of the crimes (if the prosecution considers him thus) is not even a witness, which calls into doubt the objectivity and completeness of the investigation.

Legal Basis of the Accusation

The primary basis of the accusation is Article 164 of the Criminal Code of the Republic of Kazakhstan, “incitement of social enmity or discord.” This article, however, lacks legal definition of the key term “social.”

Mr. Kozlov, Mr. Sapargali, and Mr. Aminov are accused of committing “planned actions to incite *social enmity and discord* among a group of people, with the use of means of mass information, leading to grave consequences in the form of mass disorders in the city of Zhanaozen December 16 2011, that is a crime against the peace and security of humanity, as stipulated by Art. 164 part 3 of the Criminal Code of the Republic of Kazakhstan.”

In accordance with Article 20 of the Constitution of the Republic of Kazakhstan, propagandizing and advocacy of social, racial national, religious, class, or tribal superiority is forbidden; Article 5 of the Constitution bans the formation and activity of public associations with goals or actions intended to incite social, racial, national, religious, class, or tribal discord.

The objective aspect of the crime stipulated in part 1 of Article 164 of the Criminal Code is characterized by actions intending to:

- a) Incite social, national, tribal, racial, or religious enmity or discord;
- b) Insult the national honor or dignity, or religious feelings of citizens;
- c) Propagandize exclusion, superiority, or inferiority of citizens according to their religion, class, national, tribal, or racial membership.

The subjective aspect is characterized by direct intention.

The objective aspect of the crime stipulated under Article 164 of the Criminal Code is more or less understandable in terms of national, racial, or religious discord or enmity. Social and tribal enmity or discord, on the other hand, are unclear not only to common citizens, but to specialists as well. There has

been no decree of the Supreme Court or other official document that would provide a legal explanation of Article 164.

At present, the basis for all criminal cases that have been raised on Article 164 has not been the incitement of national, racial, or religious enmity or discord, but of incitement of *social* discord. This demands explanation of the understanding of social enmity or discord not only in the official sense, but in the legal sense as well.

In B.A. Mukhamedzhanov and T.S. Donakov's academic commentary on Article 164, they write, "under the rubric of incitement of social, national, tribal, racial, or religious enmity or discord is understood *an effort to create conflicts between citizens of different nationalities, tribes, races, or confessions*, which may be conducted by aggressive methods, physical force, or threats, by destruction or damage to property etc. (under enmity), or isolation, alienation, limitation of rights, benefits, or privileges (under discord)."

From a literal interpretation of "*an effort to create conflicts between citizens of different nationalities, tribes, races, or confessions*," actions intending to incite national, tribal, racial, or religious enmity or discord may be clearly understood, while *social* enmity or discord remains unexplored.

The commentaries on the Criminal Code of S.M. Rakhmetov and T.A. Bapanov also do not explore the essence of "incitement of social enmity or discord."

As can be seen, Article 164 does not contain a clear definition of what is understood as "social enmity or discord" or what actions incite it. In Mr. Kozlov's case, the use of this article by the prosecution in relation to the accused is based on the principle "by analogy of law." In criminal law, analogy is understood as the use of criminal law for cases that are not directly provided for, but coincide in some or other ways.

According to Article 9 of the Criminal Code, "the use of criminal law by analogy is forbidden." In addition, in accordance with Article 77, point 3, subpoint 8 of the Constitution, "any doubts in the guilt of an individual are interpreted in favor of the accused."

During the period of August 27-September 7, 2012, the following violations were observed:

Improper actions towards the accused in detention

- In the course of the proceedings Mr. Kozlov has told the court that his room is being searched by people who present no identification and plant printed materials containing libel and insults about him and his wife while he is absent. Specifically during this period materials alleged to be correspondence between Mr. Kozlov's lawyer and his wife appeared on the Internet. In the correspondence the wife of Kozlov supposedly acknowledges that she has cheated on Mr. Kozlov with his lawyer. Mr. Kozlov raised this issue for the first time August 20th. At that time the judge promised to take measures to resolve the issue. Mr. Kozlov repeated his statement on September 7. The judge did not respond to the second request.

- Also in this period the wife of Kozlov communicated that she is having difficulty bringing him food and clothes in detention. The administration of the detention facility has not allowed food and clothing to be provided to Mr. Kozlov.

Judicial impartiality and independence

- Throughout the course of the trial the judge has been constantly receiving notes from the bailiffs and secretaries of the court. The secretary of the court keeps a cellphone in front of her, and after receiving an SMS often approaches the judge and communicates with him. On September 4th the bailiff gave the judge a note. Defense lawyer Sarsenbina made a request concerning the bailiffs constant handing of notes to the judge, asking that the judge acquaint the lawyers with these notes, as according to Article 22 of the Criminal-Procedural Code, “Any interference in the activity of the court’s administration of justice is unallowable and carries punishment by law.” The judge answered that the communication was the list of witnesses and did not explain further.
- On September 5th defense lawyer Sarsenbina requested that the court give permission to Mr. Kozlov to meet with the human rights ombudsman of Germany, Marcus Lening, in the presence of bailiffs and procurators. The judge denied the request without explanation.

Due Process

- On September 5th, defense lawyer Sarsenbina requested to question via Skype the chairman of the editorial board of the newspaper *Golos Respubliki* Irina Petrushov, the editor of the newspaper *Vzglyad* Igor Vinyavskiy, the Vice-President of the Polish fund “Open Dialog” Ludmila Kozlovsky, and the political figure Muktar Ablyazov, who in the course of the proceedings had been frequently mentioned and whose activities were frequently referenced. The judge said that he would decide this question after the questioning of all witnesses. The next day, September 6th, after completion of the questioning of all witnesses, he asked the opinion of the parties on this request and then denied the request without explanation. According to Article 24 of the Criminal-Procedural Code, the procurator and the investigators are required to take all measures stipulated by the law to ensure a comprehensive, full, and objective investigation of the facts that are necessary and sufficient for the correct adjudication of the case. The explanation of the case must include any facts either incriminating or exculpating the accused, as well as those mitigating or aggravating his or her responsibility and punishment.
- On September 7th, defense lawyer Sarsenbina noted that the statements of the witnesses for the prosecution Karashaeva and Chalaeva concerning Mr. Kozlov were identical down to the word across two pages of testimony. Given that testimony is taken from direct speech, it would be impossible for witnesses to give identical testimony in such a large quantity. Ms. Sarsenbina requested that the investigator who had questioned both witnesses be called to the courtroom in connection with possible falsification of testimony. The judge denied the request without explanation.
- Throughout the process the judge has not provided explanations for denial of requests of the defense. According to Article 102 point 6 of the Criminal-Procedural Code, “In confirming a

request, or denying a request in full or in part, the party supervising a criminal process will provide a justified decree to the party making the request.”

Right to defense

- On September 6th, the questioning of witnesses was completed. The procurator requested to read aloud the testimony of witnesses for the prosecution who were not present. The judge confirmed this request. Specifically, the testimonies of the following witnesses for the prosecution were read aloud: O. Tulkibaev, Chalaev, O. Tursynbaev, Zh. Mamai, Zh. Saktaganova, Zh. Baibusinova, and B. Kalzhanov. The reason for why they did not appear in court was stated as being that they were receiving medical care and could not travel to the court. The witness for the prosecution Mr. Mamai at that moment was in Almaty, where he gave [a press conference](#) on the creation of a new publication, the newspaper “Ashyk Alan”. Thus without providing an opportunity for the defense to question these witnesses, their testimony will be used as evidence in the case.
- On September 6th, the expert M.A. Grachev was questioned in court. The lawyers for Mr. Kozlov were not informed beforehand that he would testify. Defense lawyer Sarsenbina requested to reschedule the questioning of the expert until after lunch so that the defense could prepare, and to take a copy of the case record that included the expert testimony of Mr. Grachev. The judge denied this request and moved immediately to questioning the expert.