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Aarhus Convention Secretariat
United Nations Commission for Europe
Environment and Human Settlement Division
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Communication to the Aarhus Convention Compliance Committee

I. Information on correspondents submitting the Communication:

Communicants:

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- Sergei Georgievich KURATOV – Green Salvation Environmental Association;
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- Alma Zhanatovna OMARBKOVA – lawyer for Green Salvation Environmental Association;
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II. State concerned

Republic of Kazakhstan

III. Facts of the Communication

The **Green Salvation Environmental Association** ('Green Salvation') is a non-governmental organization whose aims, under its Memorandum and Articles, are to assist environmental protection activities. In 2015-2016, seeking to prevent the **illegal destruction of 'Red Book plants' (the Central Asian Wild Apple and the Wild Apricot)** in the area of **construction of a road to the Kok Zhailau mountain ski resort**, Green Salvation applied to the courts of Kazakhstan at all levels.

Green Salvation made these applications under article 6, paragraph 2, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') and Article 14(1)(1-1) of the Environmental Code of the Republic of Kazakhstan ('the Environmental Code'). Green Salvation asked the courts:

1. to recognize as unlawful and to set aside the document '**Materials for an inventory of the area's vegetation and a survey of the forest pathology**' commissioned by the City of Almaty Highways Authority from Kronverk LLC;
2. to recognize as unlawful and to set aside the **Environmental Impact Assessment** for the Kok Zhailau Mountain Ski Resort Road Construction Project, commissioned by the City of Almaty Highways Authority;
3. to recognize as unlawful and to set aside the **conclusion of the State Environmental Review** issued by the City of Almaty Department of Natural Resources and Environmental Management with regard to the above-mentioned EIA.

The area on which it is planned to build a road to the Kok Zhailau mountain ski resort is situated within Ile Alatau National Park and contains habitats of rare plant species – the wild apricot and the

Central Asian wild apple. These trees are listed in the Red Book of Kazakhstan and appear on the Red List of the International Union for the Conservation of Nature ('the IUCN'), as follows:

Wild Apple – **Malus sieversii** – Category: **Vulnerable**. IUCN Red List of Threatened Species: <http://dx.doi.org/10.2305/IUCN.UK.2007RLTS.T32363A9693009.en>.

Wild Apricot – **Armeniaca vulgaris** – Category: **Endangered**. IUCN Red List of Threatened Species: <http://dx.doi.org/10.2305/IUCN.UK.2007.RLTS.T63405A12666025.en>.

In fact, the presence of 'Red Book plants' was one of the main reasons for the inclusion of this area within the Ile Alatau State National Nature Park ('Ile Alatau National Park'), which is designated by the government as a public institution. Activities in Ile Alatau National Park are regulated by the Law of the Republic of Kazakhstan on specially protected natural areas ('the Specially Protected Natural Areas Act').

Kazakhstan is a Party to the **Convention on Biological Diversity** ('the CBD'). This Convention was adopted by the Republic of Kazakhstan under Resolution No. 918 of the Cabinet of Ministers of 19 August 1994.

The objectives of the CBD are 'the **conservation of biological diversity**, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources' (Article 1).

Article 8 of the CBD provides that 'Each Contracting Party shall, as far as possible and as appropriate:

a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

...

d) **Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;**

...

(f) **Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species**, inter alia, through the development and implementation of plans or other management strategies'.

Case 1.

In June 2016, Green Salvation filed an **application** to the Specialized Inter-District Economic Court for the City of Almaty ('Almaty Economic Court'), requesting that the document '**Materials for an inventory of the area's vegetation and a survey of the forest pathology**' ('the Materials') be recognized as unlawful and set aside.

According to the Materials, which were produced by the company Kronverk, 226 wild apricot trees and 536 wild apple trees will be subject to destruction and/or sanitary felling. This is in breach not only of Article 8 of the CBD, but also of the provisions of Article 12 of the Forest Code, Article 32-1(5) of the Specially Protected Natural Areas Act and Article 339 of the Criminal Code.

On 6 June 2016, Almaty Economic Court dismissed Green Salvation's application. In his determination, the judge held that, **under Article 151(1)(1) of the Civil Procedure Code, the case was not subject to consideration and settlement in civil proceedings because 'the materials at issue do not give rise to legal consequences for the applicant'**. That is, the court proceeded on the basis that the NGO was not affected by the process in question. The court did not recognize Green Salvation as 'the public concerned' and refused it 'access to a review procedure before a court of law'.

Green Salvation submits that this determination by Almaty Economic Court was unlawful, since it failed to comply with the provisions of article 2, paragraph 5, and article 9, paragraph 2, of the Aarhus Convention. These articles stipulate that non-governmental organizations may be 'the public concerned', both factually and legally.

On 17 June 2016, Green Salvation filed a private complaint before the court of second instance, Almaty City Court ('the appeal court') under the appeals procedure. On 20 July 2016, the court denied the private appeal.

On 12 October 2016, Green Salvation submitted an appeal on a point of law to the Civil Division of the Supreme Court. On 14 November 2016, a judge, after preliminary examination of Green Salvation's petition, refused to forward it to the Judicial Review Panel of the Supreme Court. Both the

appeal court and the Supreme Court repeated the findings of the court of first instance, dismissing the case because **‘the materials at issue do not give rise to legal consequences for the applicant’**.

Thus Green Salvation was denied access to a review procedure before the highest court of law.

Outcome. The courts of Kazakhstan at all levels **failed to comply with the provisions of article 2, paragraph 5, and article 9, paragraphs 2, 3 and 4**, of the Aarhus Convention.

Case 2.

In July 2015, Green Salvation filed an application to Almaty Economic Court, requesting that the **Environmental Impact Assessment** (‘the EIA’) for the Kok Zhailau Mountain Ski Complex Road Construction Project be recognized as unlawful and set aside. The EIA was commissioned by the City of Almaty Highways Authority, which is a division of the Akimat (Mayor’s Office) of the City of Almaty and a municipal public authority.

On 11 March 2016, Almaty Economic Court reviewed the case and dismissed the application.

The judge referred to another court case, in which judgment had gone against Green Salvation. This concerned an application for the **conclusion of the State Environmental Review** (‘the SER Report’) on EIA materials for the Kok Zhailau Mountain Ski Resort Road Construction Project to be recognized as unlawful and set aside (see Case 3 below).

The judge also referred to the Rules for Maintenance and Protection of Vegetation in the City of Almaty – which in fact do not apply to specially protected natural areas of national significance (Paragraph 55 of the Rules). The judge then went beyond the scope of the claims made in the application, in breach of Article 225(2) of the Civil Procedure Code. The court failed to provide adequate and effective remedies, including injunctive relief, thus violating the principles of impartiality and fairness.

On 7 April 2016, Green Salvation lodged an appeal before Almaty City Court under the procedure provided for by Article 401 of the Civil Procedure Code.

On 29 June 2016, the appeal court upheld the Almaty Economic Court ruling of 11 March 2016 and dismissed Green Salvation’s appeal.

The appeal court dismissed the case because ‘the applicant has not demonstrated how the defendant was in breach of environmental legislation’. At the same time, the judgment referred to the fact that the competent environmental protection authority had not alleged any failure on the part of the defendant to comply with environmental requirements when carrying out the EIA. In addition, the judges referred to another court case, in which judgment had gone against Green Salvation. This concerned an application for **the SER Report** on EIA materials for the Kok Zhailau Mountain Ski Resort Road Construction Project to be recognized as unlawful and set aside (see Case 3 below). That also constitutes a breach of the Civil Procedure Code (Article 16(1)). Again, the court violated the principles of impartiality and fairness.

In its judgment, the appeal court stated: **‘The court finds that the legislation of the Republic of Kazakhstan does not permit felling of the Central Asian Wild Apple and the Wild Apricot, both of which are listed in the Red Book of Kazakhstan and appear on the Red List of the International Union for the Conservation of Nature, and that this is confirmed by the evidence submitted by the applicant to the court’ (Quotation 1)**. This finding by the appeal court **complies fully with the legislation in force**.

But the appeal court judges went on to say: **‘However, any further decision on the matters at issue – as regards the destruction and/or sanitary felling of wild apple and/or wild apricot trees, which appear in the Red Book of Kazakhstan and on the Red List of the International Union for the Conservation of Nature – does not come within the competence of either the drafter of the EIA or the body that commissioned it’ (Quotation 2)**.

Green Salvation considers this finding by the appeal court to be unfounded, since the disputed EIA (in Chapter 8 – ‘Flora and fauna impact assessment’) states that **‘3,283 deciduous trees (including 465 wild apples)**, 12 conifers and 15,855 shrubs lie directly in the path of road construction and are unsuitable for transplanting ... **71 wild apple trees will be subject to sanitary felling’**.

The disputed EIA does not mention that plants which appear in the Red Book of Kazakhstan and on the statutory List of Rare and Endangered Species of Plants and Animals of the Republic of Kazakhstan have been growing for a long time on the entire length of the proposed road construction site. Nor does the EIA mention that the IUCN includes the Central Asian Wild Apple and the Wild Apricot on its **Red List of Threatened Species. Without making any reference to the legislation, the EIA concludes that it is acceptable to proceed with the destruction and sanitary felling of ‘Red Book plants’.**

The appeal court did not provide reasoned grounds and made no reference to the laws and international conventions by which it was guided in making its judgment. This is a gross breach of Article 426(8) of the Civil Procedure Code.

The judgment does not mention that, in the course of construction, it is proposed to destroy not only ‘Red Book plants’ but also their habitats. The judges did not apply the provisions of the CBD, despite the fact that, under Article 4(3) of the Constitution, that Convention has primacy over the laws of the Republic of Kazakhstan. The court also failed to apply the provisions of Article 12 of the Forest Code, Article 32-1(5) of the Specially Protected Natural Areas Act and Article 339 of the Criminal Code.

On 26 October 2016, Green Salvation appealed to the Judicial Review Panel of the Civil Division of the Supreme Court on a point of law, requesting review of the above-mentioned judicial acts. Green Salvation submitted that the contested judicial acts failed to comply with the requirements of:

- Articles 6, 16, 224 and 225 of the Civil Procedure Code;
- Paragraph 5 of Decision No. 5 of the Supreme Court of 11 July 2003 on judicial decisions, which has regulatory force;
- Paragraph 19 of regulatory Decision No. 8 of the Supreme Court of 25 November 2016 on some issues of application by the courts of the environmental legislation of the Republic of Kazakhstan in civil cases, which stated that ‘the provisions of article 9 of the Aarhus Convention are applicable to disputes about access for members of the public... in respect of: ... impairment of the public’s right to participate in decision-making ... (within the framework of EIA and State Environmental Review procedures); challenging decisions, acts and omissions by public authorities and non-governmental bodies...’.

The judge, after preliminary examination of Green Salvation’s petition, refused to forward it to the Judicial Review Panel of the Supreme Court. First, the judge referred to judicial acts adopted in regard to another application by Green Salvation (see Case 3 below). Secondly, the judge did not take into account the finding of the appeal court that **‘the legislation of the Republic of Kazakhstan does not permit’** clearance (felling) of ‘Red Book plants’. **Thirdly, the judge did not take into account the requirements of the CBD or of national legislation.**

Thus Green Salvation was denied access to a review procedure before the highest court of law.

Outcome. The courts of Kazakhstan at all levels **failed to comply with the provisions of article 9, paragraphs 2, 3 and 4,** of the Aarhus Convention. The courts did not take into account the provisions of the CBD, which have primacy over the laws of the Republic of Kazakhstan and are of direct application according to the provisions of the Constitution, the Civil Procedure Code and the Environmental Code. The courts failed to provide adequate and effective remedies, including injunctive relief, thus violating the principles of impartiality and fairness.

Case 3.

On 3 July 2015, Green Salvation filed an application to Almaty Economic Court, requesting that the **conclusion of the State Environmental Review** (‘the SER Report’) on EIA materials for the Kok Zhailau Mountain Ski Resort Road Construction Project be recognized as unlawful and set aside. Defendant in the case was the City of Almaty Department of Natural Resources and Environmental Management, a municipal public authority (‘the Department for Natural Resources’).

On 13 July 2015, the court dismissed this application. The judge stated that ‘under Article 153(1)(1) of the Civil Procedure Code, **the case is not subject to consideration and settlement in civil proceedings**’. That is, the court proceeded on the basis that the NGO was not affected by the process in question. The court did not recognize Green Salvation as ‘the public concerned’ and refused it

‘access to a review procedure before a court of law’.

Green Salvation submits that this determination by Almaty Economic Court was unlawful, since it failed to comply with the provisions of article 2, paragraph 5, and article 9, paragraph 2, of the Aarhus Convention. These articles stipulate that non-governmental organizations may be ‘the public concerned’, both factually and legally.

On 21 July 2015, Green Salvation filed a private complaint before the appeal court.

On 14 August 2015, the appeal court overturned Almaty Economic Court’s determination of 13 July 2015 and sent the case to the same court to be reconsidered from the point of admission of the application.

On 6 November 2015, Almaty Economic Court dismissed Green Salvation’s application after consideration on the merits. The judge acknowledged that one of the documents put forward to the State Environmental Review was ‘**Materials for an inventory of the area’s vegetation and a survey of the forest pathology**’ (see **Case 1**), which had been drawn up on the basis of legislation that was (according to Ministry of Justice information) not in force in Kazakhstan. However, the judge considered this fact to provide insufficient grounds for recognizing the SER Report as unlawful.

The SER Report does not mention that the drafters of the EIA used the Rules for Maintenance and Protection of Vegetation in the City of Almaty, which do not apply to specially protected natural areas of national significance (Paragraph 55 of the Rules). The judge ignored this breach of the legislation.

In addition, he went beyond the scope of the claims made in the application: therefore the principles of fairness and impartiality were violated.

On 25 November 2015, Green Salvation lodged an appeal before Almaty City Court.

On 28 December 2015, the appeal court upheld the Almaty Economic Court ruling of 6 November 2015 and dismissed Green Salvation’s appeal. In its judgment, the appeal court said that ‘the court of first instance was justifiably guided by the Rules for Maintenance and Protection of Vegetation in the City of Almaty’. For the rest, the court repeated the arguments of the court of first instance.

On 30 April 2016, Green Salvation petitioned the Supreme Court, requesting review of these judicial acts in supervisory proceedings. The petition set out in detail all the violations tolerated by the courts that had examined the case, specifically:

1. The expert from the Department for Natural Resources was not guided by the provisions of Article 46 of the Environmental Code, under which an EIA shall be carried out in order:

- to define and limit the possible negative effects of the proposed administrative, economic, investment, rule-making and other activities on the environment and on public health;
- to balance the interests of economic development and environmental protection and to prevent harm to third parties in the course of environmental management.

2. The expert from the Department for Natural Resources did not confirm, in accordance with Paragraph 22(2) of the Rules for Conduct of State Environmental Review (‘the SER Rules’), **the availability and completeness of the materials put forward to the Review**. As a result, no materials **about the presence or absence of ‘Red Book plants’ and their habitats on the proposed road construction site were provided for checking**.

3. The expert did not check, in accordance with Paragraph 5 of the SER Rules, that the body commissioning the EIA had complied with environmental requirements – specifically, whether the provisions of the **CBD** and the requirements of the laws of the Republic of Kazakhstan were taken into account in the EIA.

4. The expert did not identify, in accordance with the provisions of the **CBD** and the requirements of the laws of the Republic of Kazakhstan, **the degree of environmental risk to ‘Red Book plants’ and their habitats** posed by the planned activity.

On 27 June 2016, a Supreme Court judge, after preliminary examination of Green Salvation’s petition, refused to forward it to the Judicial Review Panel of the Supreme Court. He accepted the findings of the local courts as lawful. The communicants would also like to point out that this judge made an exceptionally poor study of the case materials. He did not even grasp that the case was about the proposed destruction of ‘Red Book plants’, not about felling already carried out.

Thus Green Salvation was denied access to a review procedure before the highest court of law.

Outcome. The court of first instance was in breach of **article 2, paragraph 5, and article 9, paragraph 2**, of the Aarhus Convention. The courts of Kazakhstan at all levels **failed to comply with the provisions of article 9, paragraphs 2, 3 and 4**, of the Aarhus Convention. The courts failed to provide adequate and effective remedies, including injunctive relief, thus violating the principles of impartiality, fairness and timeliness.

IV. NATURE OF ALLEGED NON-COMPLIANCE

Green Salvation submits that, in examining and ruling on the three court cases described in this Communication, the judicial authorities were not guided by and did not apply the provisions of national legislation, specifically:

1. Article 4(3) of the Constitution, Article 2(3) of the Civil Procedure Code, Article 2(2) of the Environmental Code and articles of other laws of the Republic of Kazakhstan, which recognize the **primacy of international agreements over the laws of the Republic of Kazakhstan** and provide that the provisions of international agreements are of **direct application**.

2. Article 31 of the Constitution, which stipulates that ‘the state shall aim to protect the environment to the benefit of human life and health’.

3. Article 8(2) of the Civil Procedure Code and Article 14(1)(1-1) of the Environmental Code, which provide that public associations have **a right to apply to the courts** to protect the rights, freedoms and legitimate interests of individuals and legal entities on environmental protection issues, **including in the interests of an indefinite number of persons**.

4. Article 6(1) of the Civil Procedure Code, which stipulates that ‘the courts, in considering and settling civil cases **are obliged to strictly observe the requirements of the Constitution** of the Republic of Kazakhstan, ... of other applicable laws and regulations and of **international agreements** entered into by the Republic of Kazakhstan’.

5. Article 13(1) of the Civil Procedure Code, which stipulates that ‘the administration of justice in civil cases shall be based **upon the equality of all before the law and the courts**’.

6. Article 16(1) of the Civil Procedure Code, which stipulates that ‘a judge shall examine the available evidence in its entirety in a manner that is **impartial, full and all-encompassing, and in doing so shall be guided by the law** and by conscience: this is to provide the foundation for an assessment of the evidence directed by inner conviction’.

7. Paragraph 5 of regulatory Decision No. 5 of the Supreme Court of 11 July 2003 on judicial decisions, which stipulates that ‘the decision of a court must be lawful and well founded’.

8. Paragraph 19 of regulatory Decision No. 8 of the Supreme Court of 25 November 2016 on some issues of application by the courts of the environmental legislation of the Republic of Kazakhstan in civil cases, which stipulates that ‘in examining this category of cases, **the courts must keep in mind that the provisions of article 9 of the Aarhus Convention are applicable to disputes about access for members of the public** (natural persons and (or) legal entities) in respect of: ...

- **challenging decisions, acts and omissions by public authorities and non-governmental bodies, organizations** and/or natural persons connected with the violation of environmental legislation’.

In addition, Green Salvation submits that **preliminary examination**, under Article 443 of the Civil Procedure Code, of petitions submitted to the Supreme Court constitutes a barrier to access to fair, equitable, timely review of cases.

Green Salvation submits that, in examining and ruling on the three court cases described in this Communication, the judicial authorities were not guided by and did not apply the provisions of the Aarhus Convention.

Failure by the courts to apply the provisions of the Aarhus Convention has created an insurmountable barrier for citizens of the Republic of Kazakhstan to fulfilling their obligation to preserve nature, provided for by Article 38 of the Constitution.

In all three of the court cases described in this Communication, there is an evident synergy between the Aarhus Convention and the CBD.

Failure by the courts to apply the provisions of the Aarhus Convention has created an insurmountable barrier to applying the provisions of the CBD and has impaired the rights of the public to participate in the conservation of a natural environment which has special ecological and recreational value.

The threat to the biological diversity of this region, including Ile Alatau National Park, has continued to grow, as by 2016 the public authorities had already begun to build infrastructure for a mountain ski resort.

V. PROVISIONS OF THE CONVENTION RELEVANT FOR THE COMMUNICATION

This Communication concerns non-compliance with the Aarhus Convention by the legal authorities of a Party to the Convention, as follows:

- non-compliance with article 2, paragraph 5, of the Aarhus Convention, in that the courts failed to recognize a non-governmental organization promoting environmental protection and meeting requirements under national law as ‘the public concerned’;
- non-compliance with article 9, paragraph 2, of the Aarhus Convention, in that the Party failed to ensure that the public ‘have access to a review procedure before a court of law and/or another **independent and impartial body established by law**’;
- non-compliance with article 9, paragraph 3, of the Aarhus Convention, in that the Party failed to ensure that the public **have access to judicial procedures to challenge acts and omissions by public authorities which contravene provisions of international conventions ratified by the Republic of Kazakhstan and provisions of its own national law relating to the environment** (See ACCC/C/2004/6, ACCC/C/2005/11, ACCC/C/2011/58);
- non-compliance with article 9, paragraph 4, of the Aarhus Convention, in that the Party failed to ensure that the public **have access to adequate and effective remedies, including fair, equitable, timely review of a case** (see ACCC/C/2004/6).

VI. USE OF DOMESTIC REMEDIES

In the three court cases described in this Communication, all available domestic remedies provided for by the legislation of the Republic of Kazakhstan were used, by means of application to:

- 1) the Specialized Inter-District Economic Court for the City of Almaty;
- 2) the appeal court – Almaty City Court;
- 3) the supervisory (cassation) court – the Supreme Court.

VII. USE OF OTHER INTERNATIONAL PROCEDURES

No international procedures have been used.

VIII. CONFIDENTIALITY

All information and correspondence with respect to this Communication may be made freely available.

IX. SUPPORTING DOCUMENTATION

1) Extract from Resolution No. 1034 of the Government of the Republic of Kazakhstan of 31 October 2006 approving the List of Rare and Endangered Species of Plants and Animals (as [amended](#), 7 November 2012). The Central Asian Wild Apple is No. 114 on the List; the Wild Apricot is No. 117.

2) Extract from Rules for Conduct of State Environmental Review (as amended, 3 September 2013). Approved by Order No. 207-p of the Minister for Environmental Protection of the Republic of Kazakhstan of 28 June 2007. Ceased to be in force by Order No. 100 of the Minister for Energy of the Republic of Kazakhstan of 16 February 2015.

3) Case 1 – 6 June 2016: Determination by Almaty Economic Court.

- 4) Case 1 – 20 July 2016: Determination by the Appeal Panel of Almaty City Court.
- 5) Case 1 – 14 November 2016: Judgment of the Judicial Review Panel of the Supreme Court.
- 6) Case 2 – 11 March 2016: Ruling of Almaty Economic Court.
- 7) Case 2 – 29 June 2016: Judgment of the Appeal Panel of Almaty City Court.
- 8) Case 2 – 14 November 2016: Judgment of the Judicial Review Panel of the Supreme Court.
- 9) Case 3 – 6 November 2015: Ruling of Almaty Economic Court.
- 10) Case 3 – 28 December 2015: Judgment of the Appeal Panel of Almaty City Court.
- 11) Case 3 – 14 November 2016: Judgment of the Judicial Review Panel of the Supreme Court.
- 12) Extract from Rules for Maintenance and Protection of Vegetation in the City of Almaty (Paragraph 55).
- 13) References to legal databases.

X. SIGNATURES:

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|-------------------------------------|-----------------|
| Nadezhda Nikolaevna BERKOVA | <i>[signed]</i> |
| Valerii Vasil'evich KRYLOV | <i>[signed]</i> |
| Sergei Georgievich KURATOV | <i>[signed]</i> |
| Nataliya Ivanovna MEDVEDEVA | <i>[signed]</i> |
| Alma Zhanatovna OMARBKOVA | <i>[signed]</i> |
| Svetlana Gennad'evna SPATAR' | <i>[signed]</i> |
| Ravil' Nailevich NASYROV | <i>[signed]</i> |