КОАЛИЦИЯ
ПРОТИВ ПЫТОК

# KAZAKHSTAN

## RESPONSES TO THE LIST OF ISSUES ON IMPLEMENTATION OF CAT

**Submitted by national civil society organizations**

**for consideration at the 53rd session in Geneva 3-28 November, 2014**

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# INTRODUCTION

The civil society organizations of Kazakhstan express concern that despite measures taken by the government to reform the legal framework on prevention of torture, it continues to occur in more than exceptional cases. The enormous gap between the law and the everyday practice of state agencies is the main challenge facing the victims of torture. Absence of rule of law prevents to enforce regulations developed with good intentions but lacking effective implementation modalities. This is due to prevalent mentality of disrespect to human rights, impunity of state agents, endemic corruption and absence of genuine political will to end torture.

It has to be noted that since 2008 there has been significant deterioration of the human rights situation in the country. The government intensified the repression against free media, political parties, independent NGOs and trade unions. In December 2011, Kazakhstan authorities responded to outbreak of violence after seven-month strike in western Kazakhstan by using firearms, killing 16 and wounding more than 100 people. Kazakhstan, despite calls from the international community, including the UN High Commissioner for Human Rights Navanethem Pillay, has not conducted an open and thorough investigation into the events of 16 December. The senior officials, who authorized the use of firearms against the population, remain unknown. Instead, the government persecuted political activists and trade union leaders. The unregistered political party "Alga" was labeled "an organized crime group" and the instigator of the violence. Charges of instituting a social discord were brought against the party's leader, Vladimir Kozlov, and some of the members, Serik Sapargali and Akzhanat Aminov, who were convicted and sentenced to 7,6 years of imprisonment, 4 and 5 years of conditional imprisonment respectively.

From 2012, a number of independent and opposition newspapers and Internet media outlets have been suspended or shut down. Attacks on independent journalist and civil society activities have dramatically increased. After Zhanaozen events, the government tightened regulations concerning public demonstrations, leaving no room for any form of protests, assembly or demonstrations.

In June 2014 the government announced the adoption of a new Criminal Code, Code of Criminal Procedure (CCP) and Criminal Enforcement Code (CEC) as part of the comprehensive criminal justice reform process. The new statutes, which will enter into effect on 1 January 2015, were intended to ensure efficient system of justice and effective protection of constitutional rights through more adversarial trial. The noble intentions, however, already fell short at the stage of legislation drafting, which was dominated by the Office of Prosecutor General with no consideration for NGO's input. As a result, the new laws introduce disproportionate criminal and administrative sanctions for violations of media, religion, assembly and association laws. Some of the concerns raised by the Committee in its 2008 Concluding observations on Kazakhstan remained unaddressed by the new laws.

In this submission, civil society organizations highlight continuing problems regarding implementation of the UN Convention Against Torture ("UNCAT") in Kazakhstan, such as the *lack of custodial safeguards*, *ineffective oversight mechanisms*, *unfair justice system*, *inadequate response to human trafficking*, *disrespect to the principle of non-refoulement*, *poor record of prisoners' rights*, *impunity of state officials*, *insufficient compensation practices*, *admissibility of evidence obtained through torture* and *persecution of human rights defenders*

The report is based on the information, analysis and expert opinion of the civil society organizations and independent experts of Kazakhstan working in the area of combating torture through monitoring, litigation, legal reform and advocacy.[1]

[1] The following organizations and an independent human rights expert contributed to the report: NGO Coalition Against Torture, Human Rights Monitoring Center and Amangeldy Shormanbayev. NGO Coalition Against Torture is an informal association of 30 independent civil society organizations and experts specialising on anti-torture programs. They include: Kazakhstan International Bureau for Human Rights and Rule of Law, International Center for Journalism MediaNet , Charter for Human Rights, Legal Policy Research Centre, Center for Development and adaptation "Phoenix", Aman-Saulyk, Feminist League, Children's Fund of Kazakhstan, International Justice Initiative, Taldykorgan rights center, Union of Crisis

# ZHANAOZEN TRIALS

1. From May 2011 to December 2011, oil-workers in the city of Zhanaozen, in Mangystau region of Kazakhstan were on strike to demand improvement of working conditions and wage increase. During this period, various oil companies fired about 1000 people. The government failed to take adequate measures to resolve the labor dispute. Intimidation and pressure by the authorities against striking workers and their leaders led to escalation of the labor conflict.

2. On 16 December 2011, the independence day in Kazakhstan, the police opened fire on protesters during the riots. As a result of the use of firearms by law enforcement agencies, 16 people were killed and about a hundred injured, according to the official figures. Public authorities accused striking workers for fueling the civil disorder. On 17 December 2011, the President issued the decree declaring the state of emergency in Zhanaozen.

3. As a result of these events, the law enforcement officials opened criminal investigation on the following cases:
    a. Riots and public disorders in Zhanaozen
    b. Riots and public disorders in the station Shetpe
    c. Case against 5 police officers on charges of abuse of powers
    d. Case into the death of Bazarbay Kenzhebaev as a result of torture
    e. Case against the mayor of the city of Zhanaozen, Sarbopeev.
    f. Case against the political activists, Kozlov, Sapargaliev and Amirov.

4. All the defendants were held in the temporary isolation center (IVS) of Zhanaozen. The media reported widespread torture in the detention and police department building against detainees. Access to the detainees was mostly granted to state appointed lawyers.

5. Due to the fact that most of the trials in the city of Aktau were held at around the same time, civil society organizations and the media could only monitor certain trials. Therefore, not all of the court hearings were observed by independent monitors. For example, the trial of the death of Bazarbay Kenzhebaev in police custody was not monitored by any observers. Another difficulty was that the trials were held in the Kazakh language, while most of observers were Russian speakers. Even some defense lawyers involved in the case did not speak sufficient level of the Kazakh language.

6. On the case of riots and public disorders, the state brought charges against 37 oil workers. During the trial, the defendants and witness filed complaints of having been tortured during investigation. The following defendants submitted complaints in writing: Kaliev T. Dzharylgasinov N., Irmuhanov E., Askaruly N., Utkilov Sh., Dzhumagaliev M., Murynbaev F., Tuletaeva R., Muhammad R., Aspentaev S., Utebekov Zh., Edilov K., Dusenbaev P., Telegenov B., Eskulov J., Seydahmetov Z., Aminov M., Nepes B.

7. The court files do not contain the record of some of these complaints. For instance, the following are not registered in the final court decision: complaints of the witnesses - Eskulov J., Seydahmetov Z., including anonymous witness "Alpysbaeva Kairat"; complaints of defendants - Tuletaeva R. Muhammedov R. Aspentaev S., J. Utebekov, Edilov K. Dusenbaev P. Telegenov B., Dzharylgasinov N., Irmuhanov E., Askaruly N. Utkilov Sh, Dzhumagaliev M.

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Centers, Aru Ana, Republican Agency on Legal Information and Investigative journalism "Vityaz", Taldykorgan Regional Centre for Democracy Support , Public Association "Amulet", Legal Center for Women's Initiatives –Sana Sezim, Doctors Without Drugs, Women Support Center, Center for Youth, Center for Media Service, Public Fund "Reliable support", National Association of AIDS Service Organizations (NACA) Sociological Resource Center, NGO "Ray of Hope", Public Fund "Prometheus", Ramazanov Leila (lawyer), Tatiana Chernobil (expert), Gauhar Salimbayeva (expert), Turgunova Gulnara (doctor), Sergei Novikov (lawyer). The report was drafted by Nazgul Yergaliyeva, with the support of Tatiana Chernobyl, Anastassia Miller and Aina Shormanbayeva.

Murynbaeva J. The court only mentions the complaints of Aminov M. and Nepes B., however it fails to give any evaluation to these allegations.

8. As for the complaints of Kaliev T. and Koishibaev C., the court adopted its regular approach evaluating the defendants' allegation of torture as their "attempt to avoid prosecution". The court uses the police protocols of their interrogation as admissible evidence against the defendants, rather than their testimonies given at the trial. To justify this, the court applied narrow interpretation of the Supreme Court Resolution on admissibility of evidence, whereby the co-signature of the lawyer on the interrogation protocol suffices to rule on its admissibility. [2]

9. In addition to allegations of torture, the trials were described as being in violation of principle of fairness, impartiality and independence of judiciary, presumption of innocence, right to defense, public hearing, etc.

10. Thus, the right to public hearing was upheld only partially. Despite the fact that sufficiently large premises were selected for the trial, there were instances when the seats were filled with unrelated persons, in order to limit available places for relatives of victims and independent monitors. The use of media and electronic means of recording were gradually banned from the trial. At first, the judges ruled to ban all media, video, audio, photo recording in the courtroom proceedings. Further, it was banned to film the video monitors from the court room. Then, the independent observers were banned from using their laptops.

11. The trial was accompanied by serious violations of the presumption of innocence. In particular, long before the beginning of the trial the Attorney-General made a statement in which he named a number of defendants as the organizers of the riots.

12. The rights of defendants to a lawyer and to hear witnesses against them were not duly respected. The judge limited the time for confidential meetings with lawyers. The lawyers were not provided with the copy of written court proceedings and recorded audio protocols. The court used the testimony of anonymous witnesses who retracted their statements and declared openly in the court about torture and intimidation by investigators.

13. As a result of unfair trial, in June 2012, 34 out of 37 defendants were convicted on criminal charges of organizing massive riots. Only 3 defendants were acquitted, 13 – received prison sentences of three to seven years, 21 – received conditional sentences. The Supreme Court upheld all the verdicts, except for Tuletaeva, whose term of imprisonment was reduced from 7 to 5 years on the appeal. The Prosecutor General Office refused to open criminal investigation on any of the torture allegations made during the trial.

14. At present nine out 13 convicted prisoners were released: Askauryl N., Aminov M., Adilov K., Besmaganbetov Zh., Nepes B., Kosbarmakov, Saktaganov T., Kaliev T., Otkel Sh.. In 2013, the Supreme Court commuted the punishment of seven prisoners to conditional release. Currently, four of the convicts in "Zhanaozen case" remain in prison: Maxat Dosmagambetov, Naryn Zharylgasynov Kanat Zhusipbaev and Rosa Tuletaeva.

## RECOMMENDATIONS:

- **Conduct thorough and impartial investigation into the events of the 16th of December 2011 in Zhanaozen. Provide adequate punishment for all responsible for the use of firearms against the public.**
- **Conduct thorough and impartial investigation into the allegations of ill-treatment and torture of the defendants in the trial of 37 oil workers and others, and bring the perpetrators to justice, and provide rehabilitation and compensation to the victims.**

[2] Please see the section on Admissibility of Evidence for more explanation of the judicial practice.

# CRIMINALIZATION AND PUNISHMENT OF TORTURE (ARTICLE 1, ISSUES 1-2)

15. The definition of torture in the new Criminal Code of the Republic of Kazakhstan (CCRK) continues to have the same problems of non-conformity with the definition of torture, contained in article 1 of the Convention. While the requirement of criminalizing "instigation, consent or acquiescence of a public official" is upheld, the new Article 146 on torture does not extend to all persons acting in an official capacity. The text only refers to "investigators", "police inquirers", "public officials" and "other persons". Although these groups include wider range of subjects than the previous definition, they still do not cover the universe of "all persons acting in an official capacity".

16. Moreover, mentioning of an investigator and a police inquirer in the definition may lead to misconceptions that torture covers only the acts committed in the context of detection and investigation of crimes, and not other activities which involve representatives of the state. The current wording of Article 146 continues to refer to "legitimate actions" rather than "legitimate sanctions", the phrase prescribed by the Convention. This approach allows overly broad exemptions permissible under article 1 of Convention.

17. The punishment measures under the new article on torture remain incommensurate with the gravity of the crime. Based on the current classification, the crime of torture without aggravating circumstances is classified as moderate. The list of sanctions in part 1 of Article 146 include fine, community work, limitation of freedom for up to 5 years or imprisonment for the same length. This level of sanctions does not rule out exemption from criminal liability due to reconciliation, application of the so-called "effective remorse" and conditional sentencing, which are all inconsistent with the article 4 of the Convention.

### RECOMMENDATIONS:

- **Ensure that the wording of the new Article 146 of the Criminal Code is in full conformity with the definition in article 1 of the Convention Against Torture.**
- **Establish penalties for torture according to their severity. Exclude fine and disqualification to hold certain positions as the main form of punishment for torture, as it is currently prescribed by part 1 of the Article 141-1 of the Criminal Code, as well as the possibility of reconciliation and parole for persons convicted for the crime of "Torture".**
- **Adopt provisions in the new criminal code, establishing prohibition of amnesty and the statute of limitations for torture.**

# SAFEGUARDS AT THE TIME OF ARREST/ APPREHENSION (ARTICLE 2, ISSUES 4-9)

18. NGOs welcome the measures taken by the government to clarify the exact moment of deprivation of liberty, which according to the decision of the Constitutional Council begins "from the moment that his or her freedom of movement is restricted, that is from the moment that he or she is forcible detained in a given location, brought to an internal affairs office or taken into custody".[3]

[3] Paragraph 50, Third periodic report of Kazakhstan. CAT/C/KAZ/3.

19. These legislative developments, introduced in 2012 did not translate into practice. The survey of criminal lawyers in 2013 indicates that the registration of arrests continues to be delayed, jeopardizing their procedural safeguards and personal integrity. Notification of relatives is usually postponed until after drawing up the report on arrest.

20. No steps have been taken by the government to introduce habeas corpus procedure in full conformity with international standards. Absence of this legal safeguard against unlawful deprivation of liberty leads to continuing practice of abuse of police powers to conduct arrests. For instance, the State report indicates that in 2008 - 823 individuals were released by procurators from police custody owing to a lack of grounds for their arrest, in 2009 - 1,243 persons; in 20l0 - 1,224 and in 2011 - 1,423.[4] These growing numbers of illegal custody reflect government's ineffective approach of dealing with this problem.

21. Regardless of the requirement of the acting Criminal Procedure Code (CPC) to guarantee a suspect an access to a lawyer within the first 24 hours upon arrest, independent defence lawyers rarely see their clients at this stage of criminal proceedings. The strategy of the police at this point is to either obtain the waiver of the right to council of his/her own choosing or to impose a legal aid lawyer, who is friendly to investigation. They are known as "pocket legal aid lawyers". Due to absence of effective system of legal aid administration, the investigators are able to employ such lawyers, in order to endorse initial interrogation protocols. These are used as evidence against defendants later at the trial. Lawyers chosen by defendants usually access their clients at a later stage after the police have drawn up important "pieces of evidence", such as the record of arrest, confession or first interrogation protocols. In addition, there are no facilities to provide defendants confidential meetings with lawyers.

22. There are no signs of diminishing scope of police practice whereby they seek confessions at an early stage of criminal proceedings – *javka s povinnoi*. This is due to lack of effective disincentives to impact police behaviour. On the one hand, police confessions (*javka s povinnoi* ) are largely admitted by courts as evidence regardless of violations of due process requirements; on the other, no sanctions are used against the police to prevent such practices. It is unfortunate, that the new Criminal Procedure Code fails to exclude self-incriminating statements and confessions given to the police as evidence in criminal trials. Despite NGO recommendations to introduce judicial confessions, whereby only confessions given to the judge may have the value of evidence, the drafters kept the relics of the old soviet legal system (*javka s povinnoi*), when suspects were encouraged to write self-incriminating statements in return for lesser punishment.

23. With regards to places of interrogation, the State has not taken any measures to provide designated facilities for interrogation of suspects/defendants that would be subject to scrutiny by video recording, strict registration rules, transparency, oversight and other measures to ensure respect of defendants' rights. At present, interrogation continues to take place in police offices, which are free from any such control measures. In rural areas, the practice of transporting the arrested persons in the car trunks and holding them in private venues, remote and desolate places in order to subject them to torture/ill-treatment is in abundance.[5]

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[4] Paragraph 115, CAT/C/KAZ/3.

[5] Legal Policy Research Center, «Procedural Safeguards Against Torture in Kazakhstan», 2013 (report in Russian): "In Raiymbek District Police Department (Almaty region), local law enforcement officers routinely tortured innocent citizens by forcing them to take on someone else's crime. Moreover, the guards subjected the detainees to ill-treatment not only in the detention center, but also in their own barns. During the investigation, the investigators found the traces of atrocities. On 21 December 2011, police officers of Zhetussu district (Almaty) detained four members of the Oglee family – the father, mother, and their two sons. They were detained right in their apartment and were taken to the district police station, where they were placed in different office rooms and were interrogated for several hours. From 6 in the morning till 23.00 they were systematically beaten in order to have them confess to the murder. In Tulkubass district (Southern Kazakhstan), one person was locked up in the recreation hall of the Department of Internal Affairs until the morning. After that he was taken to the rented apartment, where the police continued torturing him. By the lunch time, they managed to force out the required witness confession from him. He was then let go and told to appear in the court as a witness to confirm his statement. There was no registration of the person being in custody for 24 hours."

24. It is noteworthy that the new CPC addresses the issue of safeguards at the time of arrests/detention. For instance, there is a mandatory reading of the suspect's rights at the time of the arrest, as well as the rule of immediate notification of relatives. These improvements, however, are not backed by sufficiently itemised rules on inadmissibility of evidence obtained as a result of violations of such guarantees.

25. With regards to judicial sanctioning of pre-trial detention, the new CPC has dangerous provision of mandatory detention in Article 136, part 2. According to it, the gravity of criminal charges alone can be the basis for pre-trial detention of suspects with regards to 12 types of crimes. Such provision creates de facto presumption of guilt rather than innocence. Moreover, the new CPC kept the old provision when the period of pre-trial detention can be suspended for various reasons, such as conducting expertise, or studying the case materials, etc., and thus, extending the "real time" in pre-trial detention for much longer periods than permissible limit of 18 months under the law.

### RECOMMENDATIONS:

- **Introduce practical measures to ensure that the rights of arrested persons are guaranteed from the moment of actual apprehension, including compulsory and immediate notification of all procedural rights;**
- **Amend regulations to introduce designated places of interrogation, open for monitoring and oversight, by putting an end to practice of unlawful custody and interrogations in police office rooms and other unregistered places.**
- **Provide in practice immediate access to a lawyer, including legal aid lawyer, guaranteed by the state to all arrested persons by developing appropriate early access to legal aid schemes;**
- **Ensure that judicial control over the legality and grounds for arrest, including observance of the rights of arrested persons, takes place within 48 hours of arrest; Judicial review must include consideration of safeguards against torture;**
- **Amend criminal legislation to ensure that procedure for judicial sanctioning of pre-trial detention is in accordance with international standards, including prohibition of pre-trial detention solely on the basis of gravity of criminal charges. Remove any provision in new criminal procedure law allowing for suspension of pre-trial detention periods and de facto extending detention periods beyond permissible limits in the law.**

# INDEPENDENT OVERSIGHT OF DETENTION PLACES (ARTICLE 2, ISSUES 10-13)

26. On 26 of July 2011, the President by its executive decree № 129 ordered the transfer of all penitentiary institutions including pre-trial detention centers (SIZO) to the jurisdiction of the Ministry of the Interior. Previously, Kazakhstan government proudly reported its prison reform achievements, stressing the fact that it was the first country in the region to transfer prisons to the Ministry of Justice. Ironically, only 10 days prior to this decision on July 15, 2011, reporting to the Human Rights Committee under the ICCPR, Kazakhstan delegation reiterated its commitment to further integrate international standards to prison management. No mention was made about government's plan to return prisons back to the Ministry of Interior. This decision came as a surprise to civil society organizations and even prison staff. Due to the fact that it was governed by the Presidential decree, there was neither any public discussion nor voting on this issue. Similarly, there was no evidence that such decision was prompted by serious public interest concerns. Given the swiftness and concealed nature of the decision making, it was explained by analysts as institutional politics advanced by the Ministry of the Interior.

27. The period right after the transfer was particularly vulnerable with regards to prisoners' rights. The independent monitoring of penitentiary institutions was temporarily suspended. The relatives of prisoners were concerned that the inmates were subjected to particularly harsh methods of disciplining. Defense lawyers complained that they could not get timely access to defendants in pre-trial detention centers (SIZO), while police investigators had unlimited access to detainees without registration. (For more on substantive changes in prison regulation under the Ministry of Interior, please see information below on Article 11 "Rights of Prisoners").

28. At present, public monitoring commissions (PMCs) have regulated access to penitentiary institutions. However, their record of monitoring visits to prisons across different regions of Kazakhstan is inconsistent. Most critical and efficient PMCs are usually denied access or experience various kinds of obstacles that prevent them effectively record violations.[6]

29. In 2011, the Prison Department prohibited cross-regional monitoring of prisons, which allowed for PMCs from one region to visit facilities in another region. In 2010 such cross-regional monitoring helped to uncover high profile cases of torture in prisons. The advantage of such approach is that it ensures impartiality and fairness, while in some regions, continued cooperation of the same PMCs and prison authorities results in collegial and partnership relations, which at times prevent objectivity.

30. The most positive achievement over the reporting period has been the establishment of the National Preventative Mechanism (NPM) according to the model "Ombudsman +". The civil society's input at the drafting stage was decisive in significantly improving the original draft of the government to ensure that NPM complies with the the OPCAT requirements. The improvements included the provisions on the types of institutions covered by the NPM, funding options, general powers, etc. For instance, according to the law the pre-trial detention centers (SIZO) of the Committee on National Security and temporary isolation facilities for police custody (IVS) are now subject to NPM mandate.

31. There are still some concerns that need to be addressed by the government with regards to the NPM. First of all, not all the detention places are covered by the new law. Due to lack of unified definition of the term "places of detention", such institutions as the homes for the elderly and disabled, orphanages, military barracks, and offices of police departments were left out from the NPM mandate.

32. Secondly, the first year of the practice demonstrated some failures of the regulation. For instance, NPM members have little opportunity to conduct unannounced visits and adequately respond to allegations of torture. In general, NPM members are allowed by law to conduct planned visits, follow-up visits and special visits. The plan of visits must be drawn and approved in advance. In practice the plan of visits includes specific dates, which defeats the purpose of discovering violations through unannounced visits.

33. As for special visits, which are aimed at responding to urgent complaints of torture and providing immediate response, they must be approved by the Ombudsman office. There are, however, no written guidelines as to how, when and by whom the approval must be made. NPM members reported that approval of special visits was often denied or took long time to respond. There were instances when requests were reviewed by junior staff of the Ombudsman office, who denied approval due to the fact that allegations of prisoner's relatives were based merely on suspicion rather than "factual information on instances of torture". This is too high of threshold for the relatives of prisoners to comply with given that they don't

[6] In 2012, the Public Monitoring Commission of Kostanay region issued a press-release about terminating its activities due to numerous impediments or unlawful restrictions arbitrarily imposed by local prison administrations that might compromise the objectivity and effectiveness of their monitoring work. Similarly, PMC of Karaganda region terminated its activities in 2011 as a protest against unlawful denial of monitoring visits. These PMCs reasoned that the prison authorities may no longer use the argument that they are subject to public oversight, hence there are no problems with prisoners' rights.

have access to them. It defeats the whole purpose of special visits and seriously limits NPM members in providing adequate and timely response to urgent cases of torture complaints.

34. There is also a concern that limited funds of the NPM are not being used for the direct purpose when the Ombudsman office approves visits to regular health care institutions open to the general public. This is due to the lack of capacity of the Ombudsman office and the NPM members to provide equally high level of competence regarding the NPM mandate and activities.

35. Civil society organizations also express concern that NPM's decision making structure is no democratic. Its Coordinating Council is an executive rather than a governing body, with the real power belonging to the Ombudsman who by law is a civil servant and a state employee required to abide inter alia by the Ethics Code for Civil Servants, which forbids civil servants to undertake "any discrediting actions against the institutes of the State".

36. The new law is not clear about the circumstances, which may cause a removal of a NPM member from a monitoring group. The law uses such vague wording as "causing a threat to the functioning safety of the facility", or "interference with the activities of the facility", or "circumstances causing a doubt about impartiality of the NPM participant".

### RECOMMENDATIONS:

- **Ensure unhindered access of public monitoring commissions to penitentiary institutions, including conducting cross-regional monitoring.**
- **National Preventive Mechanism should extend to all places of detention in the meaning of Article 4 of the Optional Protocol to the UN Convention against Torture.**
- **Introduce standard operating procedures for the NMP members to ensure practice of unannounced visits and that complaints of torture are adequately and timely addressed within its mandate through special visits.**
- **Amend regulations to guarantee NPM's financial independence and decision making on budgetary needs;**
- **Amend statutory documents of the NPM to ensure independent and democratic character of decision making.**

# INDEPENDENCE OF THE JUDICIARY AND CRIMINAL JUSTICE REFORM (ARTICLE 2, ISSUES 14-15)

37. Legislation and practice in Kazakhstan fail to comply with international standards on independence of the judiciary and fair trial. Appointment of judges continues to be under the direct control of the President.[7] While Supreme Court judges are formally approved by the Senate, their nominations are submitted by the President, based on recommendations of the Supreme Judicial Council, which is also formed by the President.[8]

38. Grounds for disciplinary liability of judges, such as violation of legality in adjudication of cases, committing disreputable act contrary to judicial ethics, gross violation of work discipline, etc., are not clearly defined in the law and allow punishment of judges for minor infractions and controversial interpretation of the law.[9] The procedure regulating disciplinary cases against

[7] The courts of the Republic of Kazakhstan are formed, reorganized, renamed and abolished by the President upon request by the Chairman of the Supreme Court, with the agreement of the Supreme Judicial Council (Constitutional Law "On the Judicial System and Status of Judges" Article 6, 10).
[8] The Constitution of the Republic of Kazakhstan, Article 82, the Law "On the Supreme Judicial Council of the Republic of Kazakhstan", Article 3.
[9] Constitutional Law "On the Judicial System and Status of Judges", Art. 34, 38-1.

judges is not adversarial and does not provide for the judicial review of imposed disciplinary sanctions.[10]

39. Dismissal of judges may be the result of reducing the government budget allocated for the maintenance of the judiciary. For instance, in November 2010 as part of the optimization of government agencies, financed by the state budget, 70 judges were dismissed in violation of the Constitution.[11]

40. Lack of independence of the judiciary system leads to denial of impartiality and fairness in conducting trials. The criminal procedure law is contrary to principles of adversarial proceedings. The prosecutors remain the dominant actor in the justice process. They are vested with broad powers, such as: sanctioning limitation of constitutional rights (search, seizure, inspection of correspondence and many others); bring protest against judicial decisions, including the ones that have entered into force; rule on the issue of removing defense counsel from the case during pretrial proceedings, etc.

41. The criminal justice system is deeply engraved with prosecution bias. Judges rarely acquit criminal defendants. In about 99% the indictments of prosecutors are supported by judges. The conviction is ensured, despite the flagrant violations of the criminal procedure, international standards of fair trial.

## RECOMMENDATIONS:

- **Ensure that the members of the Supreme Judicial Council are appointed by the judges themselves to limit the influence of the executive over the judicial nomination process;**
- **Amend legislation to ensure that the grounds for disciplinary liability of judges (including dismissal) are clearly defined, as well as the criteria for establishing judge's "failure to satisfy requirements of the office" to exclude liability for conscientious judicial interpretation of the law, which may be contrary to the opinion of the Supreme Court.**
- **The disciplinary procedure must comply with international principles of fair trial and adversary process, respecting the right of judges for judicial review of imposed disciplinary sanctions;**
- **Exclude from the legislation any provisions that would allow for practice of dismissal of judges under the financial pretext of budget cuts;**
- **Exclude from the Criminal Procedure Code exclusive powers of prosecutors contrary to the requirement of equality of parties before the court, such as to claim case files from the court, to protest against the court decision, including those that entered into force, to suspend its execution and others.**
- **Amend the legislation to ensure that any interference with the enjoyment of human rights, including the right to counsel, right to privacy of the home, the correspondence, etc., are carried out only with the approval of the court on the basis of objective criteria established by law.**
- **Develop and implement new quality performance indicators for the law enforcement and the judiciary to eradicate the accusatory nature of the justice process. The judicial decision of acquittal in itself should not be used as the basis for disciplining a prosecutor or a judge.**

[10] Regulation on Judicial Jury approved by Presidential Decree of June 26, 2001 N 643, Article 2, 7.

[11] Decree of the President of the Republic of Kazakhstan dated November 1, 2010 № 1089 "On the appointment and dismissal of the Chairman, the chairmen of the judicial boards and judges of the courts of the Republic of Kazakhstan."

# HUMAN TRAFFICKING (ARTICLE 2, ISSUE 19)

42. Coalition of Kazakhstan NGOs recognizes the positive measures taken by the government to combat trafficking of persons. In addition to the information provided by the state, the following issues have to be considered when assessing the present situation on trafficking.

43. Article 128 of the Criminal Code on trafficking has been substantially revised to comply with international standards. It fails, however, to provide for a definition of trafficking in persons that is consistent with the definition in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. Equally there is no constitutional ban on slavery in Kazakhstan.

44. The number of criminal cases opened into trafficking-related crimes has increased considerably in recent years. An overwhelming number of all criminal cases related to trafficking in persons are currently pursued under CC Article 271 ("Organization or maintenance of brothels for prostitution and pimping") which covers only certain elements of the complex process of trafficking, rather than directly under Article 128 on trafficking. This is problematic for two major reasons. First, the maximum penalty foreseen under Article 271, part 1 (up to five years' imprisonment) is significantly less severe than that punishment Article 128 (up to 15 year's imprisonment with confiscation of property). Second, the use of Article 271 often means that only those individuals that are on the "executing" end of the trafficking process (e.g. managers of brothels) are held criminally accountable. The actual owners of brothels and other places where exploitation of trafficking victims takes place (in most cases, these are members of organized criminal groups) are at best given administrative penalties for violations of migration regulations (concerning the use of foreign labor)[12], and are often not punished at all.

45. Another matter of concern is that trafficking victims are not provided adequate protection and assistance. Existing legislation[13] allows for the possibility of adopting protection measures even before a criminal case has been opened with respect to individuals who help avert or disclose a crime if they are deemed to be at a real risk of violence or other unlawful action. However, in practice, protection measures are typically only adopted after trafficking victims have been recognized as participants in a criminal process and have submitted a special request for protection. The protection is only in force as long as the criminal process is under way, meaning that the victims are left without protection when the criminal process has ended.

46. Moreover, in many cases, trafficking victims who have been brought illegally into Kazakhstan from other countries are charged with violations of immigration rules and subsequently expelled from the country on the basis of administrative court decisions. This means that they are punished instead of receiving assistance and protection as victims of crimes. According to existing legislation[14], foreigners who are victims in legal processes concerning serious or especially serious crimes (to which trafficking belongs) have the right to remain in country until these processes are over. However, this provision appears to be rarely implemented in practice.

47. According to the monitoring report of the NGO "International Legal Initiative" conducted for the period of 2010-2012, the actual number of victims of trafficking in Kazakhstan is much greater than the number of victims reported by law enforcement authorities and that more systematic efforts to identify victims urgently are needed.15 The interviewed victims were reluctant to

[12] Such penalties are handed out under article 396 of the Code on Administrative Violations of the Republic of Kazakhstan, which concerns violations of regulations on engaging and using foreign work force in Kazakhstan and provides for penalties in the form of fines.
[13] Law No 72-11 (on state protection of participants in criminal processes) from 5 July 2000.
[14] See Article 4 of the Law "On the Legal Status of Foreigners in the Republic of Kazakhstan" and Article 56 of the Administrative Violations Code of the Republic of Kazakhstan.
[15] A total of 4583 people were interviewed. Out of these, 90 adults and 14 children were determined to be victims of trafficking. Among the victims were citizens of Kazakhstan, Kyrgyzstan, Uzbekistan and the Russian Federation, as well as

seek the assistance of law enforcement authorities because of fear and mistrust, which often were related to previous bad experiences. A number of victims recounted how law enforcement officials provided "protection" to the owners of prostitution establishments in return for bribes. For example, law enforcement officials warned the owners of upcoming police raids and brought back trafficking victims who had managed to escape. In some cases, the accounts of victims suggested that police officers were directly involved in trafficking. These observations underscore the need for more effective measures to fight corruption among law enforcement authorities in this area.

48. The monitoring also showed that a major factor contributing to the vulnerability of trafficking victims is the lack of ID documents. The trafficking victims who originated from other countries had often had their documents confiscated while they were still in their home countries and had thereafter been brought illegally to Kazakhstan. Among the trafficking victims identified were also citizens of Kazakhstan who had lost their ID documents for different reasons and were driven into hands of exploiters because they were not able to work legally. Moreover, the monitoring indicated that children from risk groups, such as orphans, mentally handicapped and other institutionalized children, are particularly vulnerable to becoming victims of trafficking.

### RECOMMENDATIONS:

- **Ensure that legislation on trafficking in persons is implemented adequately and consistently and that criminal cases related to trafficking, whenever possible, are opened under the general trafficking provision of the CC (Article 128);**
- **Elaborate and implement a more systematic approach to identifying trafficking victims. To this end, ensure that law enforcement officials working in detention facilities and institutions regularly conduct interviews, using specially designed questionnaires, with a view of identifying trafficking victims;**
- **Provide specialized training to law enforcement officials on identification of victims of trafficking and investigating trafficking cases;**
- **Take adequate measures to ensure the safety of victims and witnesses in criminal processes in trafficking-related cases and provide state assistance to all trafficking victims;**
- **Take effective measures to counteract and put an end to corruption among law enforcement authorities in this area, including by promptly and thoroughly investigating any allegations that law enforcement officials have cooperated with traffickers and by bringing to justice those responsible;**
- **Cooperate closely with civil society on measures taken in the fight against trafficking, in particular on identifying and assisting victims;**

# NON-REFOULEMENT (ARTICLE 3, ISSUES 21-25)

49. The principle of non-refoulement prescribed by the CAT is disregarded in cases of requests from countries - signatories of the Minsk Convention. For instance, on 14 May 2014l, a Russian citizen of Chechen origin, Almurziev O., was extradited to Russia, despite his application for the refugee status. He was fully denied asylum procedure in violation of national law and international norms.

50. Extradition requests are handled by the Prosecutor General's office. There are no administrative or judicial guidelines and criteria for determining the risk of torture. The appeal procedure following the administrative decision to deny an applicant the refugee status is superficial and routinely ends in sustaining the decision of the state body.

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stateless persons. Most were found to have been subjected to labour exploitation (73), and the rest to sexual (28) or mixed (3) forms of exploitation.

51. Civil courts reviewing the decisions on the appeal follow the civil law procedure rather than administrative procedure law, as in the European legal tradition. The asylum seeker, i.e. the plaintiff, has the burden of proof and the duty to present all evidence in support of the claim; while the respondent, the state body, has no obligation to present all materials, based on which the decision on asylum was made.

52. In the famous case of 29 Uzbek asylum seekers, who were denied the refugee status and extradited to Uzbekistan, the civil courts were satisfied with the denial of the Migration Committee to submit all requested materials on the asylum seekers, due to the cases' classified status. The judges rushed through the cases, without due deliberation given to plaintiffs' allegations of possible torture, if extradited. The independent monitors recorded numerous violations of the due process rights, including disregard to and lack of understanding of the UNCAT and its requirements under Article 3.

### RECOMMENDATIONS:

- **Introduce standard operating procedures for prosecutors and guidelines for judges on examination of cases involving application of the principle of non-refoulement;**
- **Take legislative and institutional measures to ensure that the Convention Against Torture take precedence over regional conventions when deciding on the issue of extradition;**
- **Take measures to guarantee effective judicial remedy against administrative decisions to grant asylum. Review the legal procedure applicable to the appeal of administrative decisions by the state concerning regulation of rights and freedoms to limit unproportional advantage of state bodies.**

# RIGHTS OF PRISONERS (ARTICLE 11, ISSUES 31-35)

53. According to public monitoring commissions (PMCs), under the Ministry of Interior, the prisons have come to resemble paramilitary camps where prisoners are forced to march under drumming, shave their hair upon admission, execute command-style orders, etc. Abuse of power by the administration, inadequate health care, poor nutrition, lack of employment, unfair wages and forced labor – these chronic problems of prisons continued under the new leadership.

54. Now, under the Ministry of Interior, law enforcement agencies conducting criminal investigation (criminal police) started to have ubiquitous access to prison facilities, which is a flagrant violation of both internal and international norms. Police and investigators have access to defendants under investigation and convicted prisoners without special permission. They can enter the facilities within the prison system with no restrictions in terms of visits, and even without the uniform. They closely interact and influence prison staff, including in decision making on punishment of prisoners and their transfer to different institutions.

55. Another significant change is the role of internal troops in maintaining security of prisons. While conducting security operations, the soldiers of internal troops wear full military gear, such as shields and masks. The prisoners when in contact with them, are not able to identify them. For instance, on February 14, 2014, the prisoner Dzhakishev was beaten by soldiers in masks upon admission to Karaganda Prison (AK – 159/6).

56. Under the military command, prison administrations conduct regular (every 3 months) search and seizure operations by internal troops and prison administration staff. The prisoners are taken outside to the parade ground at morning hours, usually in violation of regime requirements of rising at 6.30, while their belongings are searched. In addition to prohibited things, the prison staff may seize any personal belongings, such as towels, bed covers, toiletry, food, etc. The prisoners complain that these searches are conducted in a derogatory manner,

when their belongings are trampled underfoot and scattered on the floor. It is common that no written reports are drawn when property is confiscated.

57. On June 19-20, 2014, public monitors from Jambyl region observed the conduct of general search in prisons UZ 158/4 (strict regime) and UZ 158/7 (special regime). The prisoners were held on the parade ground under direct sun for a long time, while some inmates were stripped naked in front of others for bodily search. This is in direct violation of internal prison regulations whereby full search is performed in a special room.

58. Such inhuman and degrading treatment is not properly addressed by high level prison authorities. The prisoners are not able to complain in writing as their communications are withheld and they are punished for such attempts. In 2012, the Ministry of Interior adopted a new regulation for penitentiary facilities that establishes mandatory censorship of correspondence of detainees sent to public organizations.[16]

59. Usually violations of prisoners' rights became known only through contact with relatives and rare visits of public monitors. For instance, there are serious concerns about the safety of the prisoner Ushenin A., currently held in Arshaly (ЕЦ-166/5), who dared to complain to the regional PMC of systematic torture and corruption in the prison. The PMC visit to the prison confirmed the allegations of Ushenin. He is currently subjected to intimidation and threats by prison administration to prevent him pursing investigation of his torture allegations.[17]

60. In extreme cases, the prisoners resort to self-mutilation as a form of protest to draw public attention to their treatment. Such protests of prisoners against torture and ill-treatment in the form of group self-mutilation are counted in hundreds. Despite the widespread nature of this phenomenon, the authorities have never conducted any exhaustive study on the total number, dynamics and reasons leading prisoners to commit acts of self-mutilation. Change in prison leadership did not improve the situation. On the contrary, the number of such acts has increased in pre-trial detention centers (SIZO) in comparison to the period when they were under the Ministry of Justice.

61. Only in one region of Kostanay, the Prosecutor General office reported that in 6 months of 2014 there were 16 instances of self-mutilation in various prisons of Kazakhstan; in 2013 – 53. The largest number was registered in the Arkalyk prison, which has one of the strictest regimes among penitentiary institutions.[18]

62. The government reacted to this persistent problem by outlawing it. The first attempt was made in 2007, when the government criminalized self-mutilation as an act of non-compliance with prison regulations (CC Article 361). The inmates immediately protested and found themselves charged with new criminal offense. Human rights organizations brought the case to public attention that consequently led to the ruling of the Constitutional Council. The criminalization of self-mutilation was found to be unconstitutional under the freedom of speech provision. Self-mutilation was recognized as an extreme form of protected speech. Despite this revolutionary decision of the Constitutional Council, the government quietly reintroduced the ban under a different article of the criminal code (CC Article 360, part 3). The new Criminal Code of 2014 kept the same provision now in the Article 428, making self-mutilation by detainees as a criminal offense, punishable by deprivation of liberty from 5 to 10 years.

63. Civil society organizations are concerned with the fact that the number of deaths in custody and closed institutions has not declined since the last state report in 2008. The problems associated with deaths in the closed institutions also remained the same. The cases are not openly investigated. There is little information provided to the relatives or human rights groups about the circumstances of death. Authorities do not take responsibility and blame natural causes as the main reasons for deaths in custody.

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[16] Rules of internal order of correctional facilities, approved by the Order № 182 of the Interior Ministry as of 29.03.2012, section 94, § 1, sub-section 6.

[17] Report of the Western branch of the Kazakhstan Bureau for Human Rights.

[18] Press conference of Kostanay Prosecutor General Office: http://kstnews.kz/news/events?node=16044

64. According to the 2010 Coalition Against Torture report, there were 222 cases of death in places of detention for the period of January – June of 2009, out of which 33 cases were told to be suicides, 9 – HIV/AIDS, 88 – tuberculosis and 94 – of other causes.[19] In 2012 Penal Report International Kazakhstan reported of 220 cases of deaths in penitentiary institutions. These numbers can not be confirmed, due to absence of official aggregate statistics on the number of deaths in all closed institutions, including places of forced psychiatric treatment.

65. The state fails to provide adequate medical facilities in prisons. Deteriorating health and deaths due to poor medical treatment are common in many penitentiary facilities. For instance, Kostanai prison department alone reported 5 deaths in 2012 due to various diseases of inmates.[20]

66. Another common cause of deaths, cited by prison officials, is suicide. Investigations on such cases usually never result in prosecutions despite their suspicious circumstances. Below are just the few examples of suspicious deaths in penitentiary institutions:

    a. Nurlan Kulmirzaev died on 31 August 2011 in Dolinka prison (AK 159/11);
    b. Aleksandr Zaruchennikov, born 1989, committed suicide in the Karaganda pre-trial detention center (SI-16) after threats of rape;
    c. Maksim Kozhanov was found hanged in his cell in the prison Dolinka on July 2, 2010. Prior to his death, he recorded phone video of his prison mate Evgeny Karaush being beaten by prison guards, which was later leaked to the internet;
    d. Arman Kaparov, before he was found with a cut throat in Balhash prison (AK-159/2) in 2011, there was a leaked video, in which he blamed a prison official for his possible death. Prison authorities claimed that it was suicide.
    e. Sergey Grigoriev, was found dead with various wounds, including from dog bites, in the same Balhash prison (AK-159/2) on October 12, 2011.
    f. Dmitry Rakishev was found dead in Stepnogorsk temporary isolation facility. The cause of death was quoted as tuberculosis.
    g. Alexander Lei, born 1977, was found hanged in the prison of Kostanai (YK-161/11).

    No effective remedy in the form of investigation, punishment of perpetrators and adequate compensation to victims of relatives was provided in these cases.

67. Civil society organizations of Kazakhstan bring to the attention of the Committee the following list of penitentiary institutions, known for their records of self-mutilation instances, deaths in custody, rape and sexual violence, torture, ill-treatment and other violations of prisoners' rights.

| **Number of the penitentiary institutions** | **Location** |
|---|---|
| **ЕЦ-166/4 (Е** | **Atbasar** |
| **ЕЦ-166/25** | **Granitny** |
| **АК-159/5** | **Stepnogorsk** |
| **ИЧ-167/9** | **Lenger** |
| **ЕС-164/3** | **North Kazakhstan region** |
| **ЖД 158/7** | **Zhambyl oblast** |
| **УК 161/2** | **Kostanay** |
| **АП 162/4** | **Pavlodar** |
| **УК 161/4** | **Kushmurun** |
| **УК 61/12** | **Arkalyk** |

[19] 2010 Annual Report of the NGO Coalition Against Torture in Kazakhstan; available at: http://www.bureau.kz/data.php?n_id=2648&l=ru

[20] Mazur Ivan (YK-161/1), Rusakov Vyacheslav (UK-161/11), Kramarchuk Vladimir (YK-161/2), Zhalekeshev Manas (YK – 161/1). Official letter of the Deputy Head of DUIS for Kostanai region as of 21.05.2013, №14/28-10-ЮЛ-69.

| | |
|---|---|
| **АК-159/5** | **Karagan** |
| **АК-159/6** | **Dolinka** |
| **АК-159/741** | **Dolinka** |
| **АК-159/18** | **Karabas, Abay district** |
| **АК-159/20** | **Dolinka** |
| **АК-159/21** | **Balhash – 4** |
| **АК-159/22** | **Karazhal** |
| **АК-159/1 – SIZO** | **Karaganda** |
| **РУ 170/2** | **Uralsk** |
| **ЛА-155/12** | **Almaty oblast** |
| **АК-159/24 – SIZO (special institution with mixed regime)** | **Zheskazgan** |

68. As for prison facilities for women, it has to be noted that Kazakhstan does not have special prisons for women ex-government officials, including former law enforcement officials. For example, convicted women-former judges are kept together with other women – criminal convicts.

69. Civil society organizations are also concerned with the treatment of inmates sentenced to life imprisonment. Due to the rules of their confinement, they are not allowed to be taken to the outside hospitals in cases of specialized medical treatment. For instance, in the case of Alexandrov A., (held in YK 163/3), he needs an urgent operation on his leg, which cannot be conducted in prison facilities. However, due to prison regime, he is denied such service and left handicapped with his medical condition. According to the law, prisoners serving lifetime imprisonment are allowed their first family visit only upon 10 years of exemplary service. The persons convicted to death penalty, whose sentence was substituted with life imprisonment do have the right for parole. Under current prison conditions in Kazakhstan, such restrictions amount to inhuman and degrading treatment.

70. Despite ever increasing budget of the prison department, the conditions in some prisons remain abhorrent. The funds are mismanaged or squandered through corruption and lack of government accountability. For instance, the pre-trial detention center in Astana (SI-12) operates in violation of sanitary conditions, filled with rats, fleas, cockroaches, rotten collapsing floors. In some sections, the detainees are placed on three-tier beds.

## RECOMMENDATIONS:

- **Introduce strict regulations to prevent unregistered access of law enforcement officials to prisons and pre-trial detention centers (SIZO), including use of internal troops to conduct regular security procedures.**
- **Establish effective channels for submitting complains on prisoners' rights in places of detention. Reconsider a comprehensive censorship of prisoners' correspondence to bring the practice in line with requirements of the UN CAT and the Standard Minimum Rules for the Treatment of Prisoners.**
- **Conduct transparent and effective investigation of deaths in closed institutions by establishing ad-hoc public inquiry commissions in each case. Introduce the practice of annual reports on prisoners' rights, including official statistics on the numbers and causes of death, instances of torture and self-mutilation and results of investigation.**
- **Continue the reform of medical facilities in the prison system by ensuring independent and effective medical examination and treatment. Adopt measures to fight mortality rate in prisons relating from poor health care, including cases of HIV/AIDS, tuberculosis and other infectious diseases.**
- **Decriminalize the article of the Criminal Code, which stipulates liability for self-mutilation.**

- **Establish public oversight of penitentiary budget spending in order to fight corruption and ensure that resources allocated to reform prison facilities are used for direct purpose.**

# IMPUNITY (ARTICLE 12, 13, ISSUES 36-39)

71. According to the criminal law currently in force, torture is prohibited by the Article 141-1 of the Criminal Code.[21] The criminal procedure law was states that torture can be investigated either by the general police or the financial police[22], depending on against whom the allegations have been made. This, so-called alternative jurisdiction on torture, was instituted with the purpose of ensuring that any complaint of torture is investigated by an agency different from the one it is brought against.

72. The authorities, however, found the loop hole, whereby the complaint is sent to preliminary inquiry in order to ascertain sufficient grounds for launching criminal investigation. Since the law does not specify which agency should conduct such inquiry, the state authorities established a practice of sending the complaints to the Internal Security Department within the Ministry of the Interior. It has general powers of reviewing/investigating police officers' actions and their compliance with the law and ethics regulations. As a rule, they decline to go forward with criminal investigation and dismiss complaints as unfounded. Such inquiries are conducted briefly without any regard to the requirements of prompt and effective investigation under the Istanbul Protocol. The victims are not provided copies of documents in the inquiry file nor have any procedural rights to request certain investigative actions in order to secure evidence.

73. Despite measures taken by the government, described in paragraphs 24-27 of the state report, including instructions by the General Prosecutors office on investigation and handling of torture complaints, there is little change in the behavior of law enforcement officials, especially in rural areas. Oversight by prosecutors does not prove to be effective . In a majority of cases reviewed by the NGO Coalition against torture of Kazakhstan, prosecutors simply rubberstamped decisions by the Internal Security Departments of police approving denial of investigation.

74. Absence of change in the institutional behavior of law enforcement bodies is well demonstrated by dynamics in prosecution rates on torture. Below is the table with general statistics on the number of registered complaints and resulting prosecutions. The data is extracted from statistical reports compiled by the General Prosecutor's office for 2010 – 2013.

**Table 1.**[23]

| YEAR | Total number of complaints registered by law enforcement | Total number of opened criminal cases | Total number of prosecutions (cases sent to the court) | Rate of prosecution |
|---|---|---|---|---|
| **2010** | | | | |

[21] Article 146 of the new Criminal Code will enter in to force on January 1, 2015.
[22] Aka Agency of the Republic of Kazakhstan on Fighting with Economic and Corruption Crimes (http://finpol.gov.kz/eng/index.php).
[23] Form № 1 – M "Statistical report on registered crimes and results of law enforcement actions", Form №2-3C "Total report on the review of complaints and reports on crime by law enforcement agencies" Table A. The forms are available on the official website of the Committee for Legal statistics and Special Accounts of the Prosecutor General's office of the Republic of Kazakhstan" at: http://service.pravstat.kz.

| | | | | |
|---|---|---|---|---|
| Art.347-1 (Torture) | **36** | **11** | **7** | **19 %** |
| Art 308 (Excess of authority) | **17452** | **211** | **100** | **0.6 %** |
| Art 347 (Coercion to testify) | **58** | **4** | **3** | **5 %** |
| | | | | |
| **2011** | | | | |
| Art.347-1 (Torture) | **52** | **4** | **1** | **1.9 %** |
| Art 308 (Excess of authority) | **19900** | **276** | **183** | **0.91 %** |
| Art 347 (Coercion to testify) | **54** | **0** | **0** | **0 %** |
| | | | | |
| **2012** | | | | |
| Art.347-1 (Torture) | **602** | **27** | **10** | **1.66 %** |
| Art 308 (Excess of authority) | **20547** | **185** | **65** | **0.3 %** |
| Art 347 (Coercion to testify) | **61** | **1** | **1** | **1.6 %** |
| | | | | |
| **2013** | | | | |
| Art.347-1 (Torture) | **965** | **27** | **16** | **1.6 %** |
| Art 308 (Excess of authority) | **23022** | **207** | **99** | **0.4 %** |
| Art 347 (Coercion to testify) | **49** | **1** | **0** | **0 %** |

75. Several observations can be made from the government statistics:

*1) Hiding torture*
Before 2011, the crime of torture has not been visible in the official government statistics due to low rate of registration. Hiding crime in general in order to inflate solvency rate and deflate crime rate was a "normal" practice of law enforcement agencies. It's not until 2011, when the government criminalized non-registration of crime as a punishable offense, did the crime of torture became noticeable. This explains the significant rise in the number of complaints from 35 in 2010 to 602 in 2012 and 965 in 2013.
Secondly, the table shows other torture related offenses criminalized under Articles 308 and 347 of the Criminal Code ("Excess of authority or official power" or "Coercion to make a confession" respectively), because it has been a systematic practice that when prosecuted the charges are brought under these crimes rather than torture. This continues to take place in the practice of law enforcement agencies and courts. It is, therefore, important to look at prosecution rates on these crimes as well, in order to demonstrate the general behavior of the government when it comes to crimes committed by the official persons.

*2) Low rate of prosecution of torture*
The average rate of prosecution remains systematically low (less than 2% of all complaints). The outlier of 2010 can be explained by high profile prosecutions combined with low number of registered complaints on torture. When looking at torture related crimes under Articles 308 (Excess of authority) and 347 (Coercion to testify), the rate of prosecution is decreasing or absent all together. This can be explained by the fact that effective government measures taken to ensure proper registration of crimes have not been matched with measures aimed at improving investigation or prosecutions of offenses committed by the law enforcement agencies. Impunity for torture, ill-treatment and abuse of official powers remains the institutional policy and practice of Kazakhstan's law enforcement agencies.

76. Lack of independent body to investigate torture complaints or complaints of other police or security officials' misconduct or abuse can explain the persistent practice of impunity in Kazakhstan. Introduction of Special Prosecutors to conduct investigation on complaints of torture in 2013 was an important step on the part of the government to address impunity. This procedural novelty has not yet put an end to the practice of preliminary inquiries by Internal Security Departments.

77. Sentencing practice for perpetrators of torture does not reflect the severity of the crime and has no deterrent effect on the behavior of law enforcement officials. In 2013, out of 31 persons convicted for torture, 3 people were punished by up to one year of imprisonment, 22 people were sentenced for the period of 1 to 3 years; 5 people were sentenced for the period

of 3 to 5 years in prison; 1 person was fined.24 Also in 2013 out of 16 cases indicted by prosecutors, 1 case was terminated in connection with amnesty, which is contrary to obligations under the UNCAT.

78. Another persisting challenge is the lack of independent medical examinations. Medical reports are treated as the key piece of evidence, lack of which significantly affects the chances of victims to receive effective remedy. Medical services in pre-trial detention centers and prisons are still under the authority of the Ministry of Interior. Medical reports drawn in places of detention often misrepresent or ignore physical injuries or any other health failures of detainees. Reports of independent medical forensics are not treated in the equal manner as results of official forensics. The state forensics service does not adhere to the provisions of the Istanbul Protocol.

79. Victims of torture who dare to complain and pursue prosecution are regularly threatened, blackmailed or put in danger. In the case of detainees or prisoners they are subjected to new instances of torture/ill-treatment, some even resulting in death[25]. The official persons suspected of having committed torture continue to hold their positions in the law-enforcement agencies. This practice allows them to affect the course of investigation, including exerting pressure on victims.

80. Separate issue is the lack of public scrutiny over investigations of torture. Despite the Prosecutor General's order (№ 7 of 01.02.2010 ) to inform the public of measures taken to address the cases of torture published in the media, there is no consistency and follow up on the part of prosecutors. There is no practice of official press – conferences or annual reports of the General Prosecutor to address the issue of torture in Kazakhstan and present complete official statistics on the number of complaints, prosecution rates and measures taken to address these challenges. Statistics on cases of torture mentioned in different state reports significantly vary from agency to agency.[26]

## RECOMMENDATIONS:

- **Take measures to address impunity by establishing a tradition of annual reports of the Prosecutor General to the public, reaffirming government's "zero tolerance" policy to torture, as well as providing thorough analysis of aggregate data and dynamics of the use of torture and its prosecution, as well as outlining new measures to address these problems;**
- **Take measures to "unhide" torture and ill-treatment from criminal justice statistical reports in order to ensure proper diagnostics of the problem for any government policy on combating torture to be successful;**
- **Amend the legislation to avoid the existing alternative jurisdiction in cases of torture by giving the Department of Special Prosecutors and its field offices, the exclusive authority to investigate allegations of torture and related crimes. Develop rules of investigation to exclude any interaction of special prosecutors with the law enforcement bodies accused of committing torture. Establish public oversight mechanism over the work of the Department to include the following:**
  a. **Empowering NGOs with the authority of submitting materials related to ongoing investigation for consideration and inclusion in criminal files;**
  b. **Public access to documents regulating the work of the Department on the investigation of allegations of torture and inspection procedure;**

[24] Official legal statistics (statistical reports): Report Form No. 10, on total prosecutions and criminal punishment measures for 12 months of 2013.

[25] For example, suspicious deaths of prisoners Nurlan Kulmirzaev in the penitentiary institution AK 159/11, Arman Kaparov (AK – 159/2), Sergey Grigoriev (AK-159/21), Maksim Kozhanov (AK 159/11) after they brought complaints or reported about torture/ill-treatment in prisons. Please see the paragraph on Prisoner's rights for more description.

[26] For instance, law enforcement reports submitted under Forms № 1 – M and № 2 – 3C vary from judicial reports with regards to total number of cases on torture.

c. **Publication of regular reports on the work of the Department on the website of the General Prosecutor's Office of Kazakhstan;**

- **Increase capacity of the personnel involved in documenting and investigating cases of torture, including medical professionals and experts, in accordance with the Istanbul Protocol.**

# COMPENSATION PRACTICES
## (ARTICLE 14, ISSUES 40-41)

81. On compensation to victims of torture, Kazakhstan has made some progress by slowly starting the practice of awarding damages to plaintiffs in civil cases against the law enforcement bodies. The first precedent was set by the case of Alexander Gerasimov, who was awarded moral damages in the amount of 2 000 000 tenge [27] in the civil suit against the Department of Internal Affairs of Kostanay region.[28] It has to be noted that the decisive factor contributing to the positive outcome was the decision of the UN Committee Against Torture on the case of Gerasimov against Kazakhstan, where it found violations of Articles 12, 13, 14 by the state.

82. This legal precedent has not yet translated in to the judicial practice in Kazakhstan. The prevailing approach of civil courts is to deny compensation claims of victims of torture against the law enforcement agencies in the absence of criminal conviction. Indeed, the civil legislation is still in force, whereby victims of torture are not eligible to seek compensation against the wrongdoings of state agents. Article 923 of the Civil Code on "Responsibility for damage caused by unlawful actions of the inquiry, preliminary investigation, prosecution and trial" has not been amended to comply with the State party's obligations under article 14 of the Convention.

83. Equally Kazakhstan has not taken any measures to improve its criminal legislation and practice to ensure timely and effective remedy. For instance in the case of Kaidarov Arystan, the state failed to investigate his complaint of torture, which were allegedly used against him in order to extract confession on charges of murder. Because confession was the only evidence against him, he was subsequently acquitted in the trial, after having spent 9 months in pre-trial detention. He filed a civil suit to claim damages against the law enforcement department of Kostanay region for obtaining his confession under torture and resulting illegal detention. The court ruled that since his torture complaint was found unsubstantiated and no criminal case was open; his confession should be treated as a voluntary self-incriminating statement, which does not satisfy compensation grounds.[29] The court of appeals overturned this decision and awarded the victim with only equivalent of 2800 USD, without addressing the issue of investigation and rehabilitation.

84. In rare cases of criminal investigation against perpetrators of torture/ill-treatment, the amount of compensation awarded to victims is inadequately small and is usually placed on the convicted law enforcement officers rather than the responsible state bodies. There is no practice of awarding victims of torture with full range of reparations from the state, including rehabilitation, compensation, public apology and guarantees of non-repetition.

### RECOMMENDATIONS:

- **Amend the criminal legislation to guarantee victims of torture the right to claim compensation first and foremost against the state bodies in addition to individual perpetrators.**

[27] Approximately USD14,000 based on the 2013 exchange rate.
[28] Decision of the Kostanai City Court as of November 18, 2013 (Case № 2-7843/2013).
[29] Decision of the Kostanai City Court as of September 10, 2013 (Case № 2-6344/2013).

- **Amend the civil procedure legislation to ensure that victims of torture have independent civil remedy against the state, available to them even in the absence of criminal investigation and determination of individual guilt;**
- **Amend judicial guidelines on the types of remedy provided to victims of torture, including adequate compensation levels, rehabilitation services, satisfaction, restitution, guarantees of non-repetition and public apology.**
- **Increase capacity of judges to promote uniform application of such guidelines in practice.**

# ADMISSABILTY OF EVIDENCE
## (ARTICLE 15, ISSUES 42-43)

85. Judges in Kazakhstan continue to treat defendants' complaints of torture during the trial as their attempt to avoid prosecution and punishment. In the absence of any regulation, they had to prove the incidents of torture in order to challenge admissibility of evidence, presented by the prosecution.

86. The Supreme Court addressed this problem in 2009 in its special normative resolution, which serves as guidelines on judicial practice.[30] Unfortunately, the provision on inadmissibility of evidence, although shifted the burden of proof on the prosecution, was rather limited on procedural details with regards to rules of examination of complaints during the trial and guidance on inadmissibility.

87. The provisions, however, did contain some controversial rules that have negative impact on the judicial practice with regards to admissibility of evidence. Thus, the resolution dictates that if the criminal investigation on defendant's complaint of torture was launched, it does not lead to the suspension of the criminal trial. Such strict guidelines do not leave any room for judges' evaluation of circumstances of individual cases, when the results of torture investigation might have direct impact on criminal charges against the defendants.

88. This approach, taken by the Supreme Court, is consistent with its general policy of evaluating judges' performance by formal criteria, such as the length of proceedings or the number of overturned decisions on the appeal. These, so-called, performance standards that affect judicial careers, twist the behavior of judges in practice who act to maximize these indicators, rather than focus on fairness of justice.

89. Another controversial provision in paragraph 14 states the following:
*"If the defendant in the hearing stated that his testimony was given under physical or mental abuse of the prosecuting authorities, and he was not informed of the right to have a lawyer and not to testify against himself, and his interrogation was conducted without the participation of defense counsel, the disputed evidence should be recognized as inadmissible as evidence. If a lawyer is present during the interrogation, he/she **must** indicate such violations of the law in the protocol when it is signed."*
The problem in practice is that investigators when forcing defendants to sign interrogation protocols always ensure that there are "friendly" ex-officio lawyers who are ready to co-sign the documents, validating their legality. These, so-called "pocket lawyers", cooperate with investigation at the early stage of criminal proceedings before privately retained lawyers are allowed access to defendants. Judges, when they see the signature of the lawyer on the police protocol, which does not have any mentioning of procedural violations, do not rule on its inadmissibility, following the narrow reading of the above provision. They take the side of law-enforcement officials and give no consideration to explanations of defendants who claim that

[30] Normative Resolution of the Supreme Court N.7, as of 28 December 2009: "On the implementation of norms of criminal and criminal procedure legislation with regards to freedom of one's liberty and inviolability, prevention of torture, violence and other forms of cruel and degrading treatment and punishment".

they signed the protocols under duress and without any lawyer, while the signature of the lawyer appeared afterwards.

90. Another problem, which the Supreme Court resolution fails to addressed concerns the timing of when requests on inadmissibility must be addressed. The established practice is that the judge postpones the decision on admissibility till the end of the trial to announce it together with the verdict.

91. Due to these shortcomings, the Supreme Court resolution by large did not affect the negative practice of courts with regards to complaints of torture. The judicial statistics show very low numbers of registered complaints (See Table 2). The survey of criminal lawyers in 2013 indicates that the instances of defendants raising torture allegations during trials are more common, especially on grave crimes.

**Table 2.**[31]

| Year | Number of written complaints of torture | Number of oral complaints of torture | Allegations found confirmed | Allegations found unsubstantiated |
|---|---|---|---|---|
| **2010** | 18 | 8 | 3 | 23 |
| **2011** | 21 | 48 | 14 | 53 |
| **2012** | 30 | 34 | 15 | 44 |
| **2013** | 41 | 32 | 31 | 42 |

92. The high-profile criminal trials of Zhana Ozen oil-workers were good demonstrations of how courts handle complaints of torture and rule on admissibility. Ten witness and twenty seven out of thirty seven defendants claimed that their testimonies were obtained as the result of torture/ill-treatment. They identified specific law-enforcement officials and provided detailed account of violations, including absence of defense lawyers. The complaints were ignored, no official investigation followed and the guilty verdicts were based on disputed evidence.[32] (For more details, please see the section on Zhana Ozen).

## RECOMMENDATIONS:

- **Take urgent measures to amend the Supreme Court normative resolution №7 of 2009 to exclude any provisions that give rise to narrow interpretation of evidentiary rules and lead to admission of torture related evidence, especially in paragraph 14.**
- **Amend criminal procedure legislation to abolish provisions on extra-judicial confessions that are known to serve as incentive for police to use torture. Bring legislation in line with international norms whereby confessions and self-incriminating statements are subject to stringent tests before admission as evidence.**
- **Conduct annual analysis of judicial practice and report on the number and results of complaints of torture raised during trials and rulings on inadmissibility of evidence.**

[31] Form №1. "Report on the work of the courts of first instance in criminal matters" for 2010, 2011, 2012, 2013. Available at http://service.pravstat.kz.

[32] Report on the trial of the oil workers of Zhanaozen by the International Observation Mission of the Coalition of NGOs "Civil Solidarity»: http://www.bureau.kz/news/download/342.pdf

# HUMAN RIGHTS DEFENDERS (ISSUE 47)

1. The number of activists and human rights defenders subjected to threats from October 2012 to June 2013 decreased from 202 (for 9 months in 2012) to 139. The number of types of threats has increased from 84 in 9 months of 2012 to 107 (from October 2012 to June 2013), of which 88 were the cases of violent threats.
2. Most of the activists who have been threatened are public figures, leaders of religious groups, journalists, trade union leaders from the south of Kazakhstan. Incidents of threats were recorded in 37 cities of Kazakhstan. The map of threats expanded to 8 more cities in comparison to the last year.
3. On October 26, 2011, unknown persons opened fire on the journalist crew of the independent news website “Stan", who were in Mangystau region to cover the strike of oil workers in Zhanaozen. The journalist, Orken Bisenov, was wounded in the arm and in the back. The camera person, Asan Amilov, was wounded in the head and the leg, and then was beaten with a stick. The attackers were identified and are currently wanted by the police.
4. On February 25, 2012, the journalist of the Republican newspaper "Adilet" was attacked by unknown persons. He claimed that the attack was related to his professional duties of the leader of public movement against corruption. The attackers were not found.
5. The journalist of the closed opposition newspaper “Voice of the Republic”, Guzyal Baidalinova, was attacked in the evening of April 26, 2013. An unknown man attacked her with a sharp object and screamed that she was infected. Baidalinova claims that this was yet another attempt to intimidate her for carrying out her professional duties.

## RECOMMENDATIONS:

- **Take measures to ensure safety and protection of human rights defenders by monitoring all statements of threats brought by activities.**
- **Closely cooperate with civil society organizations to develop and implement risk assessment strategies for human rights activities to prevent any violence against them.**