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effective criminal justice

## Written submission to the UN Committee against Torture 53rd session (3 to 28 November 2014)

17 October 2014

### Submission: Examination of Kazakhstan's third periodic report under Article 19 of the Convention

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Penal Reform International (PRI)<sup>1</sup> welcomes this opportunity to provide information to the Committee against Torture (CAT) regarding the implementation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ('the Convention') in Kazakhstan on the occasion of the examination of Kazakhstan's third periodic report under Article 19 of the Convention.

This submission draws on PRI's long-standing work on the criminal justice system, penal policies and prison conditions in Kazakhstan.

Our observations and recommendations relate to the recently adopted new Criminal Code, which defines and penalises torture as a distinct offence, to conditions of detention amounting to torture and ill-treatment and to the newly established National Preventive Mechanism. The issues relate to Articles 1, 2, 4 and 11 of the Convention as well as the Option Protocol to the Convention (OPCAT) and draw on other relevant standards applicable in the context of detention conditions (e.g. Articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child, and the UN Bangkok Rules<sup>2</sup>).

The points highlighted in this submission do not cover all issues relevant under the Convention, but reflect particular areas PRI is working on currently and which are presumably not covered by a joint NGO report we are aware is going to be submitted to the Committee.

Some concerns in this submission relate to so-called 'Special schools'. These are state-run institutions, where children are deprived of their liberty subject to 'educational measures', including offenders under the age of criminal liability or children who committed repeated administrative offences. Children are placed in these institutions by a court order or an order from a local authority and in effect are deprived of their liberty as they are not permitted to leave on their own will.

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<sup>1</sup> Penal Reform International (PRI) is an independent non-governmental organisation with consultative status with ECOSOC that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide. PRI has a Regional Office based in Astana.

<sup>2</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted unanimously by the UN General Assembly on 21 December 2010 (A/RES/65/229). For the full text see [www.penalreform.org/priorities/women-in-the-criminal-justice-system/international-standards/](http://www.penalreform.org/priorities/women-in-the-criminal-justice-system/international-standards/). For further guidance on the Rules see [www.penalreform.org/wp-content/uploads/2013/10/PRI-TIJ-Guidance-Documents-on-Bangkok-Rules-October-2013.pdf](http://www.penalreform.org/wp-content/uploads/2013/10/PRI-TIJ-Guidance-Documents-on-Bangkok-Rules-October-2013.pdf)

## Article 1: Definition of torture

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PRI welcomes the incorporation of a definition penalising torture as a distinct offence in the new Criminal Code. However, we would like to highlight that Article 141-1 of the current national Criminal Code and Article 146 of the new Criminal Code which will come into force in January 2015 are not fully in line with Article 1 of the Convention against Torture. The Convention requires liability if severe pain or suffering is ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.

However, legislation in Kazakhstan fails to include a reference to ‘persons acting in an official capacity’. This omission results in impunity, for example of security staff of ‘special schools’ for which – although state-run – private companies are engaged for securing the external parameters and for security within the institution. Abuse of children by such security staff has been reported (see below), however Article 141-1 and new Article 146 respectively do not apply as these members of staff do not represent public officials and are therefore not prosecutable, creating a loophole and impunity.<sup>3</sup>

**PRI recommends that the definition provided in Article 146 of the new Criminal Code is amended, as required by Article 1 of the Convention, to include ‘persons acting in an official capacity’.**

PRI welcomes the precedent verdict by the Constitutional Council relating to the interpretation of the ‘moment of arrest’, addressing a previous practice that was not compliant with international standards and constituted a considerable risk factor for torture upon arrest.

In March 2012, the Constitutional Council of Kazakhstan had to rule on the interpretation of Article 16 (2) of the Constitution, according to which a person may only be detained for a period of 72 hours before being brought before a judge. There had been differing opinions on what triggers the start of this time period, with the prevailing interpretation being that it should start from the arrival of the suspect in a detention centre or the registration of the detainee. However, such an interpretation would mean that authorities could determine – and manipulate – access to safeguards, by delaying the transfer or registration of the arrestee and thereby undermining their protection. In part based on a submission by Penal Reform International Central Asia, the Constitutional Council established<sup>4</sup> that ‘arrest’ refers to the moment when a person is apprehended.<sup>5</sup>

**PRI recommends that judges are made aware of this verdict by the Constitutional Council and that the consistent application of this interpretation in practice is monitored.**

## Article 2: Conditions of detention

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### Reducing overcrowding

Kazakhstan has successfully reduced its prison population over the last years (notably through a 10-point plan to decrease the prison population, including the establishment of a probation system), with a positive impact on the situation of overcrowding and hence prison conditions.

<sup>3</sup> For more information see PRI’s Factsheet ‘Definition of ‘torture’ and the issue of appropriate sanctions in the legislation of Kazakhstan, Kyrgyzstan and Tajikistan’ (2014) at: [www.penalreform.org/resource/definition-torture-issue-sanctions-legislation-kazakhstan-kyrgyzstan-tajikistan/](http://www.penalreform.org/resource/definition-torture-issue-sanctions-legislation-kazakhstan-kyrgyzstan-tajikistan/)

<sup>4</sup> Decision of the Constitutional Council of Kazakhstan, 13 April 2012 # 2. Full text (in Russian) available at: [www.constcouncil.kz/rus/resheniya/?cid=11&rid=783](http://www.constcouncil.kz/rus/resheniya/?cid=11&rid=783) <Accessed 30 September 2013>.

<sup>5</sup> See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Use of terms, lit. (a), adopted by General Assembly resolution 43/173 of 9 December 1988.

However, this measure to prevent overcrowding will only be effective if adequate financial and staff support is allocated to the probation service. Current staffing,<sup>6</sup> however, means that one probation officer will be responsible to oversee 40 cases at any one time, which will inevitably result in little support for parolees and lead to breaches of parole conditions and imprisonment as a result.

**PRI recommends that adequate financial and staff resources are allocated to the probation system so it can function in an efficient and effective manner, and contribute to the reduction of overcrowded prison conditions.**

## Conditions in prisons

A number of prisons - specifically those built between 1930 and 1940 - fail to meet basic material standards for housing prisoners. In the majority of prisons, both prisoners and staff have little or no access to clean or warm water and adequate heating is lacking. There are no proper sewerage systems in many prisons, impeding the right to health, in many cases amounting to ill-treatment.

PRI notes that some resources were dedicated to repairing prisons, however remains concerned that the conditions are still inadequate and that the currently applicable government strategy (see below) is lacking a commitment on renovating prisons and that funds urgently required to improve prison conditions may be diverted to the construction of a new type of facility.

While the Government's strategy on the reform of the prison system for 2012-2015 ('Programma razvitiya ugovovno-ispolnitelnoy sistemy na 2012-2015 gody') among other penitentiary reforms included plans for re-building and renovating prisons, the strategy was superseded by the Governmental Programme on Further Modernization of Law-enforcement bodies in Kazakhstan. This later document does not incorporate plans for re-building and renovating prisons.

Rather, a decision of the Republican Budget Commission in June 2013 allocated nearly USD \$177 million (2017-2021) to the construction of facilities for a new type of sanction introduced by the new Criminal Code, so-called short-term imprisonment (using the Russian term 'аpест', the verbatim translation of which would be 'arrest'). This new form of detention (applicable from 2017) affects existing offences, however for a number of these it introduces detention instead of previously applied fines. These include misdemeanors for which deprivation of liberty appears to be unnecessary and disproportionate.

Thus, PRI is concerned that funds urgently needed for improvements in the national penitentiary system may be diverted into the construction of this new type of detention facility causing an increase in the number of persons deprived of their liberty, rather than addressing the inadequate conditions in existing facilities which house prisoners for longer periods.

**PRI strongly recommends that sufficient funds are allocated to the re-building and renovation of existing prison facilities to address prison conditions amounting to ill-treatment as a matter of priority and recommends consideration of the re-allocation of funds ear-marked for building new facilities to improving existing prisons.**

PRI welcomes changes relating to the protection of prisoners from inter-prisoner violence through Article 12 of the new Criminal Executive Code. Previously, prisoners claiming a risk for their safety had been transferred to a SIZO or 'disciplinary isolator cells', which had the nature of a punishment and resulted in restrictions unjustified in such situations. The new provision allows – and obliges – prison staff to move detainees to so-called 'secure places' for their

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<sup>6</sup> From January 2015 the probation service will be made up of 1,359 probation officers who will be responsible for managing some 55,000 cases.

protection. However, PRI remains concerned at whether the application of this process will be used in practice and that solitary confinement cells may be used without alteration as such 'secure places'.

**PRI urges that distinct 'secure places' are allocated and the necessary financial and technical resources are made available in order to provide protection to prisoners at risk of violence. PRI also strongly recommends monitoring the implementation of this new provision in practice, in particular with a view to ensuring that this means of protection does not in effect constitute a punishment.**

### Healthcare, including the provision of gender-specific healthcare

Currently, healthcare services in the Kazakh prisons do not meet the minimum requirements set out in international standards, including the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Bangkok Rules in the case of women prisoners.

Lack of adequate healthcare for prisoners is mainly caused by insufficient medical staff. While previously, prison facilities had a certain number of doctors on staff, under a changed system most healthcare functions are now contracted out to physicians on part-time contracts. However, due to contract salaries being lower than in the community, stigmatisation from working in prisons, poor working conditions and the remote location of prison facilities, contracted medical work for and in prisons is not attractive to healthcare staff. As a consequence, according to official statistics provided by the Prosecutor General's Office, 26 per cent of the positions for healthcare in the penitentiary remain vacant. Moreover, PRI is concerned about reports that the lack of supervision of contracted healthcare staff means that the contracted services at prisons are often not provided in practice.

According to official statistics from the General Prosecutor's Office, mortality rates in prisons increased by 1.5 times during the past 10 years.<sup>7</sup> Furthermore, there are credible reports according to which prisoners are required to pay for a referral to prison hospitals.

PRI would also like to highlight the need for **healthcare in women's prisons** to reflect the gender-specific – mental and physical - healthcare needs of this vulnerable group, which in research conducted in 2013 were identified as major shortcomings in women's prisons in Kazakhstan. Forty per cent of the women PRI surveyed identified treatment for health problems as their biggest need.<sup>8</sup>

Gender-specific healthcare should include preventive healthcare services (for instance education on preventing transmission of HIV as well as Papanicolaou tests and screenings for breast and gynecological cancer<sup>9</sup>), treatment reflective of the high number of women who have been subject to domestic violence prior to imprisonment,<sup>10</sup> treatment and care for mental health issues as well as gender-sensitive drug dependency treatment.

Research undertaken at a global level and confirmed by the survey amongst women prisoners in Kazakhstan conducted by PRI in 2013 indicates that there is a higher rate of mental health

<sup>7</sup> Report of the General Prosecutor, September 2014, <http://prokuror.gov.kz/rus/novosti/press-releasy/vystuplenie-generalnogo-prokurora-ashata-daulbaeva-na-zasedanii-kollegii-2>

<sup>8</sup> PRI, 'Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan' (2014), available in English and Russian at [www.penalreform.org/resource/women-prisoners-survey-results-kazakhstan-kyrgyzstan/](http://www.penalreform.org/resource/women-prisoners-survey-results-kazakhstan-kyrgyzstan/). Research undertaken by PRI in 2013 included surveying 288 women in Kazakh prisons, constituting 11 per cent of the female prison population.

<sup>9</sup> See Rules 17 and 19, UN Bangkok Rules.

<sup>10</sup> Nearly 20 per cent of women in Kazakhstan reported that they have experienced domestic violence and 10 per cent indicated systematic abuse. Eight per cent of women said that they had been sexually abused one or two times and four per cent many times. (PRI, 'Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan' (2014), p19).

issues amongst female compared to male prisoners and a higher prevalence of suicide and self-harm.

In PRI's survey of women prisoners, 50 per cent reported that they had experienced depression and 36 per cent reported anxiety as a consequence of imprisonment. However insufficient psychological and psychiatric support is provided for women prisoners; of the women PRI surveyed just three per cent had ever received treatment for mental health issues.

Currently drug treatment programmes are only available to a very limited number of prisoners, and only in men's prisons. However, given the high number of those charged or convicted of drug-related problems, there is a clear need to provide programmes that address dependency issues. Such programmes should not discriminate women prisoners and, when established, take account of the particular needs of women and children.

In 2013, the State Party decided to initiate a transfer of the prison's healthcare services from the Ministry of Interior to the Ministry of Health (see para. 70 of the State Party's report). This transfer would be in accordance with recommendations issued by UNODC and the World Health Organization that health ministries should provide and be accountable for prison.<sup>11</sup> However, regardless of the responsibility for the provision of healthcare services, immediate measures need to be implemented to prevent deficiencies in the provision of medical treatment that amount to ill-treatment and a violation of the prisoners' right to health.

**PRI recommends urgent measures in order to ensure prisoners' access to adequate healthcare, including the allocation of sufficient and qualified healthcare staff in all prison facilities and ensuring access for prisoners to prison hospitals as necessary.**

**In line with the UN Bangkok Rules healthcare services need to be gender-specific in women's prisons. PRI recommends that the process of transition from the Ministry of Interior to the Ministry of Health planned for 2015 is also used to holistically implement the relevant provisions of the UN Bangkok Rules.**

**Furthermore, evidence-based drug and alcohol treatment programmes should be established, which do not discriminate women and take into account their gender specific needs in line with Rule 15 of the Bangkok Rules.**

### **Gender-specific concerns**

PRI would also like to highlight concerns linked to the small number of women's prisons, their location far from the women's families and communities and subsequent disadvantages in receiving visits.

Visits are an important safeguard against violence and ill-treatment, as well as for the mental well-being of prisoners, particularly mothers. It also impacts on the health of women prisoners since many of them rely on visitors to bring medicine, food, warm clothes and toiletries.

While the State Party argues that convicted women are held 'in institutions located close to their families; arrangements are in place to support regular contact with families, which includes telephone calls and meetings',<sup>12</sup> in practice the size of the country, the limited number of facilities and differing regimes of security mean that women are often imprisoned far from home, family, friends and their community.

In the ninth largest country in the world, stretching more than 3,000 kilometres from east to west and 1,700 kilometres from north to south, there are only six prisons in Kazakhstan

<sup>11</sup> See UNODC, WHO, 'Good governance for prison health in the 21st century: A policy brief on the organization of prison health' (2013)

<sup>12</sup> Paragraph 203 of the State Report.



holding convicted women offenders. The problem of covering a large geographical area is exacerbated by the fact that different prisons have different security categories.

PRI's research in 2013 found that, for example in Koksun prison only 20 per cent of women have regular visits. The remoteness of many women's prisons exacerbates the impact of separation and the mental wellbeing of women as detailed above as it is difficult and expensive for family and friends to visit.<sup>13</sup>

**PRI recommends addressing the insufficient number and spread of women's prison facilities in order to ensure that women prisoners can be housed close to their families and communities in line with Rule 4 of the Bangkok Rules.**

**PRI further recommends that prison authorities, rather than courts, should be given the authority to determine security levels following a professional and comprehensive assessment of women offenders, taking into account the lower risk posed by women prisoners to others, as well as the particularly harmful effects of high-security measures and increased levels of isolation on women prisoners in line with Bangkok Rules 40 and 41.**

### **Violence against children in police custody**

In recent research<sup>14</sup> which involved interviews with 106 boys and six girls in conflict with the law, 55 per cent said that they were treated cruelly, badly or violently by police at the time of their arrest. Only half were offered legal assistance whilst in police detention and 62 per cent were held alongside adults - usually inside a police station cell but also whilst being transported.

Amongst those children who said that they had been abused at the police station, a third experienced this once and nearly a half more than once. A total of 45 per cent of those who complained of abuse experienced harsh verbal abuse and 16 per cent experienced psychological abuse. A third said they had endured moderate physical violence and 58 per cent severe physical violence.<sup>15</sup>

**PRI recommends to the State Party to take urgent steps in order to address the use of violence against children in police, including:**

- To reduce the time limit a child can be detained in police custody from 72 hours to 24 hours for all children under the age of 18 years, in line with the recommendations of the Committee on the Rights of the Child;
- To implement legislation that explicitly requires the separation of children and adults at all points of detention or deprivation of liberty (including during transportation to court/other facilities);
- To implement legislation requiring the presence of legal assistance and the mandatory presence of a parent, guardian and/ or legal representative during the interrogation of a child at a police station;

<sup>13</sup> PRI, 'Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan' (2014), p22.

<sup>14</sup> During May 2014, the NGO CREDO conducted research in five institutions where children are deprived of their liberty. In total 155 children were interviewed - 43 children living in state run residential institutions and 112 living in institutions for children in conflict with the law. At the time the survey was undertaken, there were 238 children held in these five institutions overall so the survey captured the views of 65 per cent of these children. PRI will be publishing the results of this research in 2014.

<sup>15</sup> 'Severe' was defined in the questionnaire completed by the children as, for example, to shake children; slap children in the face or on the head; slap children on the buttocks, back, leg, arm; grab, push, or knock children down; hit or kick children; hit children with a hard object or weapon, e.g., stick, belt, whip, ruler, or other little things that hurt; hit children so hard that they had marks or were injured; burn children with cigarettes or other hot items.

- To implement provisions in the Juvenile Justice System Development Concept approved by Presidential Decree on 18 August 2008 regarding specialised police officers.

## Conditions for children detained

Children are deprived of their liberty for a range of reasons in Kazakhstan. There are institutions for: children awaiting trial or who have been convicted; children who are in need of care and protection for example as a result of family break-down; and children living in state-run residential institutions, often referred to as 'Special Schools' where they are subject to 'educational measures' arising from concerns about their behaviour which nonetheless does not amount to criminal offences (see further details about 'Special schools' on page 1).

As for prisons, PRI welcomes the abolition of solitary confinement for children (known as 'disciplinary isolator') through the new Criminal Executive Code. However, we remain concerned at the conditions in the country's main detention facility for minors (Colony LA 155/6) remain worrying including lack of warm water, problems with heating, dilapidated infrastructure and poor healthcare.

The above-mentioned small number of facilities for women also affects girls. PRI is concerned that the remoteness of the main facility for minors and of the women's prison in Almaty, where girls are housed mean fewer visits for children in detention. Parents need to travel thousands of kilometers and families cannot afford to pay for the travel costs. Special measures need to be put in place, including support given to families, in recognition that visits are essential for children in detention to both prevent ill-treatment and abuse and to provide emotional support to this vulnerable group.

**PRI recommends that children should only be deprived of their liberty as a measure of last resort and for the shortest period of time in line with Article 37(b) of the UN Convention on the Rights of the Child. To this end, Kazakhstan should continue to increase and strengthen its use of pre-trial diversion measures and alternatives to detention including supervision and mediation.**

**Where children are detained, PRI urges to replace the 'centralised' accommodation in Almaty at present by special wings for minors in all districts of Kazakhstan to prevent alienation from their family and enable regular contact. Such wings must ensure an environment adequate for children and rehabilitation and reintegration should be implemented as the main objective of all policies and processes from the moment the child arrives.**

## Working conditions for prison staff

PRI is concerned at the lack of support and low remuneration to prison staff, which impact negatively on the treatment of prisoners and represent a risk factor for torture and other ill-treatment.

Remuneration and support should reflect the difficult working conditions for prison staff and wages should be in the range of other comparable public service professions, taking into account the complex and sometimes dangerous nature of the role. PRI notes that low salaries are a risk factor for corruption<sup>16</sup> and human rights abuses, including ill-treatment.

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<sup>16</sup> See Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 20 March 2014, UN-Doc. CAT/C/52/2, para. 84 (c): "In countries where State agents may not receive proper or adequate pay for their work, there will be a greater temptation to resort to corruption, abuse of power and extortion of money from detainees in vulnerable situations as a means of supplementing incomes."

**PRI recommends reviewing salary schemes and working conditions of prison staff, including as a measure of preventing ill-treatment of prisoners.**

### **Preventive monitoring bodies**

PRI welcomes the positive step of the State Party towards prevention of torture through its establishment of the National Preventative Mechanism under the Optional Protocol and the commencement of its work in April 2014 through regular visits and the widening scope of work for the Public Monitoring Commissions outlined in the new Criminal Executive Code.

However, PRI would like to highlight that the NPM's mandate does not include all types of detention facilities for children and thus is not fully in line with the Optional Protocol. For instance the NPM's mandate does not cover orphanages or places where children with disabilities are housed, both places of deprivation of liberty as they are not able to leave at their free will.

**PRI recommends that the scope of the NPM's mandate is expanded to include all relevant facilities, including orphanages and houses where children with disabilities are housed.**

PRI would like to highlight that Ombudsman staff ensuring the necessary logistical support to the NPM, including with regard to the arrangements of visits, is currently funded by international organisations and will require allocation in the State Party's budget at the end of this financial arrangement.

**PRI therefore recommends that the capacity of the Ombudsman's office is strengthened so it can continue to provide the logistical support to the NPM including increase of staff.**

PRI is also concerned that the Public Monitoring Commissions, pursuant to the new Criminal Executive Code adopted on 5 June 2014, are required to announce their visits to places of detention one day beforehand, compromising the effectiveness and preventive effect of their visits.

**PRI strongly recommends to remove the requirement of announcing visits to increase the preventive capacity of the Public Monitoring Commissions.**

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