



Joint NGO Submission to the 76th Session of the United Nations Committee Against Torture on Kazakhstan

21 March 2023



This report is submitted by the **NGO Coalition of Kazakhstan against Torture** (www.notorture.kz) and its partners International Partnership for Human Rights and the World Organization Against Torture. The Coalition currently has over 56 members¹, including human rights NGOs, human rights experts, doctors, and lawyers.

The Coalition of NGOs of Kazakhstan against Torture provides direct assistance to victims of torture and ill-treatment by providing lawyers, paying for medical examinations, and providing medical and psychological assistance, as well as informational support and trial observation. In addition, the Coalition's lawyers prepare and submit individual communications to the UN Committee against Torture, the UN Human Rights Committee, the Special Procedures of the UN Human Rights Council, and other UN mechanisms. In several regions, Coalition participants are members of the National Preventive Mechanism (NPM) and the Public Monitoring Commissions (PMCs). The Coalition also works to prevent torture and ill-treatment by initiating legislative amendments, advocating towards state bodies and the Ombudsman's Office in Kazakhstan, preparing reports to UN bodies, and holding training and educational events.

International Partnership for Human Rights (IPHR) is an independent, non-governmental organisation founded in 2008. Based in Brussels, IPHR works closely together with civil society groups from different countries to raise human rights concerns at the international level and promote respect for the rights of vulnerable communities.

The World Organisation against Torture (OMCT) works with around 200 member organisations which constitute its SOS-Torture Network, to end torture, fight impunity and protect human rights defenders worldwide. OMCT SOS-Torture Network is the largest global group actively standing up to torture in more than 90 countries. The international secretariat is based in Geneva, with offices in Brussels and Tunis.

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Contents

Positive developments.....	2
I. <i>Legislative changes</i>	2
II. <i>Implementation of UN CAT Views on individual communications</i>	3
III. <i>Accountability for torture</i>	3
Criminalisation of torture and ill-treatment.....	4
I. <i>Criminalisation of inhuman, degrading, or cruel treatment or punishment</i>	4
II. <i>Exclusion Note to Article 146 (Torture) of the Criminal Code</i>	5
Legal safeguards.....	6
I. <i>Violation of safeguards against torture during the January 2022 events</i>	7
II. <i>Violation of legal safeguards against torture in other than January 2022 events</i>	8
III. <i>Absence of the Habeas Corpus Procedure</i>	9
Investigation and accountability for torture.....	10
I. <i>State agencies responsible for investigation of torture and ill-treatment</i>	11
II. <i>Actions of state bodies following a complaint of torture</i>	12
III. <i>Ineffective investigation of torture during the January 2022 events</i>	12
IV. <i>Investigations into the deaths resulting from torture in relation to January 2022</i>	14
V. <i>Plea bargaining as an obstacle to the effective investigation of complaints about torture</i>	15
Non-Refoulement	16
Detention conditions	18
I. <i>Conditions of Detention in the Ministry of Interior Facilities</i>	18
II. <i>Conditions of detention in facilities run by the Ministries of Healthcare, Education, and Social Protection</i>	20
III. <i>Problems with lodging complaints</i>	20
IV. <i>Inability to transfer prisoners reporting torture from Ministry of Interior facilities</i> ..	21
Rehabilitation and redress for victims of torture and ill-treatment.....	21
National Preventive Mechanism and institution of the Ombudsperson	24
New concerns that have not been raised in the previous reporting cycles	26
I. <i>Police kettling</i>	26
II. <i>Complicity of medical workers in ill-treatment or torture</i>	28

Positive developments

I. Legislative changes

Since Kazakhstan last reported on its obligations under the UN Convention against Torture at the end of 2014, a new Criminal Code² and Code of Criminal Procedure³ have been introduced which toughened punishment for the crime of torture (article 146 of the Criminal Code) resulting in death by negligence to 12 years' imprisonment. The new legislation also stated that torture is no longer subject to a statute of limitations and that those convicted for the crime of torture cannot qualify for amnesty.

In 2015, Kazakhstan ratified the UN Convention on the Rights of Persons with Disabilities, which specifically prohibits torture, cruel, inhuman, degrading treatment or punishment of persons with disabilities.

In June 2018 the law "On Victims Compensation Fund" was passed and entered into force in July 2020, providing for lump sum compensation for victims of sexualised crimes, domestic violence, human trafficking, and torture of 30, 40 and 50 Monthly Calculation Index (MCI) for moderate, severe harm or death (equivalent to €210, €280 and €350 for 2023). The fund's resources come from the fines paid by the persons found guilty by the courts and sentenced to fines.

From 2018 due to changes to the Criminal Procedure Code of 1 March 2018, detention periods were reduced from 72 to 48 hours for adults, and for juveniles to 24 hours.

From 2019 based on Law "On Changes and Amendments to selected Legislative Acts Regulating Functioning of Child Protection Institutions" from 1 April 2019, the mandate of the NPM also covers special childcare and social welfare institutions.

In July 2022, the Ministry of Health approved an electronic form for documenting traces of injuries and psychological traumas based on the principles of the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). Doctors of primary health care organisations, such as trauma clinics and outpatient clinics, are now required to document signs of bodily injury as a result of torture using the Istanbul Protocol standards.

Also in July 2022, the process of transfer of the healthcare services of the penitentiary and police detention system from the Ministry of Interior to the Ministry of Healthcare began due to the reform provided by the Decree of the President 'On measures to improve the system of governmental management of the Republic of Kazakhstan' from 19 July 2022. In July 2022, the pre-trial detention facilities and in January 2023 the remaining facilities of the Ministry of Interior Penitentiary System were transferred to the Ministry of Healthcare.

² Law No. 226-V of 3 July 2014

³ Law No. 231-V of 4 July 2014

In November 2022, the Constitutional Law 'On the Commissioner for Human Rights'⁴ was passed, enshrining the constitutional status of the Commissioner for Human Rights and expanding his/her mandate.

Following the 2022 amendment of Article 193 of the Criminal Procedure Code, from 1 January 2023, Special Prosecutors are exclusively responsible for investigations into torture.⁵

At the time of writing, the draft law "On introducing amendments and additions to certain legislative acts of the Republic of Kazakhstan on improving law enforcement and further humanisation of criminal legislation"⁶ has been approved by the Parliament and submitted to the President for signature. The draft law provides for amendments to the article 146 of the Criminal Code prohibiting torture and introduces prohibition of cruel, inhuman, and degrading treatment. This, according to its drafters, will allow for the prosecution of "persons acting in an official capacity" for the deliberate infliction of pain or suffering in educational, medical, and social institutions. By "persons acting in an official capacity", the draft law refers to employees of these institutions who have authority over persons detained, treated, trained, or educated on a permanent, temporary or periodic basis. At the time of submission of this report, only the October 2021 version of the draft law is publicly available.⁷

II. Implementation of UN CAT Views on individual communications

In 2015, the UN CAT's Views on Rasim Bayramov's complaint (No. 497/2012), which found a violation of Kazakhstan's obligations to prohibit torture and ill-treatment (namely Article 1, in conjunction with Article 2, paragraph 1, and Articles 12, 13, 14 and 15 of the Convention), were partially implemented. Kostanay Regional Court ordered the local Department of Internal Affairs to pay 100,000 tenge (approximately EUR 500 at the time) in damages to the victim.

A year earlier, in 2014, in the same region, a court ordered the payment of 2 million tenge (then EUR 10,000) for harm suffered by Aleksandr Gerasimov, another victim of torture, also based on the views of the UN CAT (No 433/2010). In that case the Committee found a violation of article 1 by Kazakhstan, read in conjunction with article 2, paragraph 1, and articles 12, 13, 14 and 22 of the Convention. No other treaty body decisions have been implemented in Kazakhstan since then.

III. Accountability for torture

In 2016, in the first case of its kind in Kazakhstan, an employee of pre-trial detention facility in Almaty was prosecuted for the rape of a woman in pre-trial detention. He was sentenced to nine years in prison for rape (article 120 of Criminal Code), torture (article 146 of Criminal Code) and abuse of power with violence (Article 362, Part 4, Para. 1 of Criminal Code). The other three officers identified by the victim were not prosecuted, as the semen of only the convicted officer was identified.

⁴ <https://adilet.zan.kz/rus/docs/Z2200000154>

⁵ Law № 157-VII <https://adilet.zan.kz/rus/docs/Z2200000157>

⁶ <https://legalacts.egov.kz/npa/view?id=11955171>

⁷ <https://legalacts.egov.kz/npa/view?id=11955171>

Criminalisation of torture and ill-treatment

In the 2014 reporting cycle, the Committee recommended that Kazakhstan adhere to "the stated policy of zero tolerance of torture and cruel, inhuman or degrading treatment or punishment by publicly and unambiguously condemning torture in all its forms" (Recommendation 7. a), and "include in the Criminal Code a definition of torture that is fully in conformity with the Convention" (Recommendation 24), covering "persons acting in an official capacity" and ensuring that the reference to the "legitimate acts" that are beyond the scope of "lawful sanctions" are removed from the definition.

I. Criminalisation of inhuman, degrading, or cruel treatment or punishment

Torture was criminalised in Kazakhstan in 2002 in article 146 of the Criminal Code. In 2010, during the Universal Periodic Review of Kazakhstan, the head of the governmental delegation declared "zero tolerance for torture" from the podium of the UN.⁸ Although the definition of torture in the Criminal Code is broadly in line with the Convention definition, it lacks the word "severe" in the description of pain and/or suffering, which distinguishes torture as defined in Article 1 of the Convention from "other acts of cruel, inhuman or degrading treatment or punishment" prohibited by Article 16. In the state report to the Committee in 2018, Kazakhstan agreed that "the definition of torture under the Kazakhstani law is broader than that set out in the Convention", but considered the inclusion of "physical suffering in the form of minor or even absent bodily injury" as "torture" to be positive.

Now such infliction of physical suffering (article 146 paragraph 1) is punishable by a fine of up to 5,000 monthly calculation rates (over 35,000 Euros for 2023), or correctional labour of the same amount, or up to five years' restriction of freedom, or imprisonment for the same term with disqualification from holding certain positions or engaging in certain activities.

The authors of this report believe that the infliction of physical suffering causing no or very slight injury should be prohibited and prosecuted accordingly. Otherwise, a situation arises where torture is trivialised instead of being seen as a very serious offence. There is also a reluctance on the part of the prosecuting authorities to qualify cases of de facto cruel, inhuman, or degrading treatment as "torture". As a result, such cases often tend to be qualified as "Abuse of power or authority". The Coalition therefore welcomes the planned amendment⁹ of Article 146 of the Criminal Code on "Torture", which will distinguish torture from other forms of ill-treatment.

However, it is worrying that in its justification¹⁰ for amending the existing Criminal Code article "Torture" (article 146), the Ministry of the Interior, as the drafter of the bill, explained the need to distinguish torture from cruel and other treatment only by "unjustified criminalisation of actions of state authorities, which may cause significant harm to the country's image in the international arena" as a result of "artificial increase in the number of complaints to human rights organisations about such treatment".

⁸ OHCHR, Universal Periodic Review, Kazakhstan <https://www.ohchr.org/en/hr-bodies/upr/kz-index>

⁹ See Positive Developments above

¹⁰ <https://legalacts.egov.kz/npa/view?id=11955171>

II. Exclusion Note to Article 146 (Torture) of the Criminal Code

The wording of the Convention against Torture as translated into Russian has led to a confusion over the application of exclusion clauses in relation to the definition of torture in the national legislation.

The Convention against Torture stipulates an exclusion clause in its definition of torture, namely that "It [torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The Russian translation of the Convention uses the word "санкции" (Eng. For 'sanctions'), which can be interpreted both as punishment and as actions in Russian. It appears that this has led to misinterpretation in the Kazakhstani legislation, in which the exclusion clause to Article 146 (Torture) of the Criminal Code uses the word "действия" (Eng. For 'actions') and reads: "Note: Physical and mental suffering caused by lawful **actions** of officials shall not be recognised as torture".¹¹

Worryingly, amendments to Article 146 of the Criminal Code adopted by the Senate on 9 March 2023, reinforce this interpretation: the new wording states that "physical and mental suffering caused by the lawful **actions** of persons acting in an official capacity or by other persons" **would not be recognized as torture and ill-treatment**.

This means that Kazakhstan's definition of torture is not in line with that of the Convention as it provides for the exclusion of a much broader scope of actions by a significantly larger number of persons acting in an official capacity.

This new wording directly contradicts the Committee's recommendation, which states not to interpret 'lawful acts' as 'sanctions' outside the meaning of the Convention. According to the Commentary to the UN Convention against Torture,¹² 'lawful sanctions' refer to measures of state coercion against an individual which conform to both national and international standards such as the Standard Minimum Rules for the Treatment of Prisoners or the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Examples of lawful sanctions could be court-ordered detention per se or the short-term placement of a prisoner in solitary confinement as a disciplinary measure. In such cases a person's integrity and dignity will inevitably suffer, but derogation from the guarantees under Articles 1 and 16 of the Convention will be admissible, provided that "no exceptional circumstances whatsoever [...] may be invoked as a justification of torture" (Article 2 of the Convention).

The wording of the exclusion note to article 146 adopted by the Kazakhstani Parliament, which covers the actions of "persons acting in an official capacity or other persons", risks leading to impunity for many officials with power or authority over persons "detained, treated, trained or educated on a permanent, temporary or periodic basis in an institution employing the person acting in an official capacity, including: an employee in an educational, training, treatment, health

¹¹ Exclusionary Clause to Article 146 "Torture" of the Criminal Code of Kazakhstan

¹² Manfred Nowak and Elizabeth McArthur. UN Convention against Torture. A Commentary. New York City: Oxford University Press, 2008, pages 79-85.

care or education institution.” This is a state-proposed clarification of the notion of “person acting in an official capacity” in exclusion clause in the draft Law.¹³

Recommendations:

- Bring the exclusion clause in the article 146 of the Criminal Code prohibiting torture and other cruel, inhuman, or degrading treatment or punishment fully in line with the exclusion to Article 1 of the UN Convention against Torture, by removing the possible interpretation of the term “lawful acts” that goes beyond the “lawful sanctions” allowed by the Convention.

Legal safeguards

In its 2014 Concluding Observations (Recommendations 7.b, 11 and 12) and in the List of Issues for the fourth periodic report of 2022 (Recommendation 6), the Committee recommended that Kazakhstan put in place legal safeguards against torture “from the very outset of deprivation of liberty” including: the right of detainees to be informed of their rights; the right to promptly and privately meet with a lawyer of their choice or to have the services of a state-appointed lawyer; the right to inform a relative or any other person of their detention and whereabouts. The Committee also recommended for Kazakhstan to ensure respect for: the legal time limit of three hours for the “delivery of a detainee [to a police station]”; registration of the exact date, time and place of detention, including the hours of “delivery”; sanctions against officers who falsify the time of actual detention; the right of detainees to request and receive an independent and confidential medical examination, and that audio or video recordings of interrogations are systematically used in criminal investigations as a basic safeguard and as part of efforts to prevent torture and ill-treatment.

As a further important safeguard against torture, the Committee recommended that Kazakhstan ensures that “all persons deprived of their liberty have the right to effectively and expeditiously challenge the lawfulness, necessity or proportionality of their detention.”

In its report to the Committee in 2018,¹⁴ the government of Kazakhstan refers to “interrogation rooms with glass walls equipped with video cameras”, the footage from which, according to the government report, is “kept for 30 days and also broadcast live to the office of the duty prosecutor and to internal affairs agencies”.¹⁵

In the replies to the List of Issues¹⁶ of February 2023, the Government of Kazakhstan reports about the institution of the “on duty prosecutor”; about criminal liability for violations of detainees’ rights to notify relatives and falsification of the time of actual detention and the time of the

¹³ <https://legalacts.egov.kz/npa/view?id=11955171>

¹⁴ <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsp2DytAl2p2q0VZmhsW8WRvzM64F%2B8uoAvlZgCz%2ByGWQYr2OhfAnKJEok9aC7t1enG2sEQYjirTyzl7p7Y%2BdrkZPFJTzqSqmaaNgRX5zifL>

¹⁵ idem. Point 26

¹⁶ <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsp2DytAl2p2q0VZmhsW8WRvqDXjf9sZ9mrzby6XxGrPSm4N1NUDeUPIP2mPzjRZDsU6LpSOgKjzvj8al2j8QinOvf8uOn0r7C3d6WVQKl2T>

completion of the detention register; about the January 2023 order by the Prosecutor General to ensure legality in the application of coercive and preventive measures, including the mandatory video recording of transportation of the arrestee and investigations; about conducting investigative actions under obligatory video-recording; about the right of detainees to assistance from a lawyer of their choice and that the investigator has no right to suggest a certain person to act as defence counsel; as well as the right to appeal against a restrain measure ordered by the investigating judge.

Indeed, according to the law, police officers are obliged to take video recordings, but in practice, video recorders are not always in good working condition at the time of apprehension and delivery to detention centres. The Coalition has also documented cases of video recordings disappearing from the servers. The other systematic violations of the legal safeguards are described in details below.

1. Violation of safeguards against torture during the January 2022 events

The most flagrant violations of legal safeguards against torture took place during the state of emergency declared across the country after the January 2022 protests. The Coalition's joint report with International Partnership for Human Rights (IPHHR) and World Organisation against Torture (OMCT): "We Don't Even Cry Anymore"¹⁷, on torture following the January protests and its investigation, describes the situation of people detained following the protests:

"According to official information, nearly 10,000 people were detained in connection with the January events. The vast majority of detainees were not provided with lawyers and/or were deprived of the opportunity to contact their relatives during the first days of detention, which, in many cases, was not officially registered for several days. Many were initially held in places not intended for temporary detention, as was the case in Atyrau and Ust-Kamenogorsk, where detainees were taken to the Dynamo police sports hall, or in Taraz, where detainees were held in military units. In other cities, detainees spent days in police temporary detention centres despite the fact that the national legislation stipulates that adults can only be held there for 48 hours and minors for 24 hours. Some were placed in pre-trial detention centres or in National Security Committee detention facilities, where access to prison inspectors and even pre-trial detention centre staff was not permitted. In the days that followed the initial protests, police and special forces rounded up those that they believed were connected with the protests."

According to a survey¹⁸ conducted by the Kazakhstan International Bureau for Human Rights and Rule of Law (KIBHR) on violations of the rights of detainees during investigation of the January events, in most cases "medical examinations of detainees after arrest and on admission to pre-trial detention facilities were not carried out. The study also found that 71 per cent of detainees interviewed had suffered injuries and that none of them achieved results in response to their complaints about torture and other ill-treatment".¹⁹

¹⁷ Page 9, <https://www.iphronline.org/we-don-t-even-cry-anymore.html>

¹⁸ https://bureau.kz/monitoring_2/doklady_i_otchety_kmbpc/o-soblyudenii-prav-licz-v-yanvare/

¹⁹ See 7 above

In another report²⁰ published on the anniversary of the January 2022 events by the documentation centre of the Human Rights Alliance for Fundamental Rights,²¹ (set up in January 2022) cites examples of violations of legal safeguards against torture which occurred since the January events. These include holding of a suspect without registering the detention and without providing access to a lawyer, which resulted in torture to obtain a confession:

“On January 13, 2022, at about 11 am, Kuanysh, together with his 13-year-old son, was taken from home by police officers and brought to the military unit on Tole-bi street in his native Taraz city, where the city police were stationed at that time. There Kuanysh was beaten with fists, kicked, with rubber truncheons on his thighs and back, demanding a confession. According to Kuanysh, six officers dressed as civilians took part in the beating. All this time, his underage son was nearby, who was very scared and asked not to beat his dad. In response to the boy's requests, one of the officers put a gun to his head and threatened to shoot him. The son was released later that day, and Kuanysh - on January 15. All this time, until his release, he was periodically beaten. ”

The investigation into Kuanysh Aynizov's allegations of torture was dropped for "lack of evidence", and a denial of the arresting authorities that he had been illegally detained. This would not have been possible if safeguards against torture had been in place.

II. Violation of legal safeguards against torture in other than January 2022 events

The Coalition documents cases of violations of legal guarantees in many cases, not only those related to the January 2022 events. One egregious example is the case of 15-year-old Mikhail Kazantsev:

On the night of 7-8 January 2021, Y. T., a successful businesswoman, was killed in her home in the city of Almaty. Her son Mikhail, aged 15 at the time, reportedly witnessed the murder and followed the perpetrator outside on the street, according to Mikhail's lawyer.

At around 3.00 am on 8 January, a police patrol saw the boy outside on the street, in a state of shock and wearing neither coat nor shoes, although temperatures were around -18 degrees Celsius. The officers took him to the police station of Almaty District in the city of Almaty. Mikhail's fingers and toes were visibly frostbitten but the police failed to provide any medical assistance, and, without the presence of his father, a lawyer or a legal representative Mikhail was interrogated in the presence of five or six police officers, who used foul language towards the child and threatened, as he recalls, to "shove a biro up his anus if I do not speak normally". Later that night, Mikhail was questioned again in the presence of his teacher J. Temirbek, after which he was taken to hospital, where bandages were put on his feet and hands, and then he was driven back to the police station.

In violation of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), which require the immediate notification of family members (Rule 10.1), Mikhail's father was contacted more than five hours into his detention and was only allowed to see him at 9 am on 8 January 2021. The interrogation continued until 11.30 am, when, at his father's insistence, an ambulance was called and the boy's wounds were bandaged again. Afterwards, Mikhail was taken to the drug treatment centre to be tested for signs of drug use or other intoxication. The boy could not

²⁰ <https://bureau.kz/goryachee/na-godovshhinu-qandy-qantar/>

²¹ <https://bureau.kz/novosti/zayavlenie-o-sozdanii-pravozashhitnogo-alyansa/>

walk on his own, so his father had to carry him. Mikhail was then returned to the police department. There at about 8 p. m. they tried to take his fingerprints, forcing his frostbitten palms open so that the blisters on his hands burst. It was impossible to take his fingerprints. At 10:30 p.m. on 8 January, the boy was taken to the Almaty Police Department's Temporary Detention Facility, accompanied by his father. The facility's medical officer said that Mikhail should be hospitalised. Police took him to an emergency clinic, but although the doctor there also recommended hospitalisation, the officers only allowed the doctor to fix a better bandage and prescribe further treatment.

It was only on 9 January that Mikhail was hospitalised. Hospital staff refused his father access to his son, referring to the covid-related quarantine measures. On 11 January, an independent lawyer, whom Mikhail's father had hired the previous day, was able to visit him in hospital and saw that he was chained to the bed and two security officers were in his room, armed with guns and truncheons. Mikhail was reportedly chained to the bed around the clock for 11 days. The chain was only removed for eating and going to the toilet.

After his release from the hospital on 21 January, Mikhail's bandages were removed and it was found that the nails on his fingers and left big toe had fallen off and his hands were black. After his discharge from the hospital, he was placed in Detention Centre No. 18 in Almaty, where he was held in a cell with adult detainees who had previous criminal convictions.

While he was in pre-trial detention, police officers demanded that Mikhail withdraw his complaint of ill-treatment. Subsequently, he was declared unfit by a court and the boy was placed in the high security Republican Specialised Psychiatric Hospital in Aktas, Almaty region, where he remains now.

Although Mikhail's lawyers lodged several complaints about his treatment in detention and the failure to provide prompt and appropriate medical treatment, on 30 April 2021 the Anti-Corruption Agency issued a decision to terminate the investigation into allegations of ill-treatment.

According to Ms. Vitkovskaya, the lawyer responsible for complaining that Mikhail had been tortured, the initial investigation into the allegations was flawed. A letter confirming that a decision had been taken to close the investigation into allegations that Mikhail was subjected to torture and ill-treatment had been sent, however the boy's father maintains that he did not receive this. The lawyer managed to read the decision at the Prosecutor's Office but was not given a copy. The deadlines for appeal had by then passed.

The Kazakhstan International Bureau for Human Rights and Rule of Law has lodged complaints with all bodies including the General Prosecutor's office. However, the investigation into Mikhail's torture was closed on the grounds of "lack of evidence of a crime" and none of the police officers involved in the torture and ill-treatment have been brought to account. The case is currently being submitted to the UN Human Rights Committee.

III. Absence of the Habeas Corpus Procedure

As regards the Committee's recommendation on the right of detainees to be brought before a judge to challenge "the lawfulness, necessity and proportionality of their detention in habeas corpus proceedings", in Kazakhstan - and the Government's responses to the Committee's List

of Issues confirm this²² - habeas corpus proceedings are still understood to be an authorisation of pre-trial detention by an investigative court, rather than as an independent procedure for challenging the lawfulness of detention.

Thus, in paras. 60 and 61 in the Reply to the List of Issues the Government, commenting on Question 6.e., states that during the pre-trial investigation the suspect or his defence counsel "may appeal and the prosecutor may bring an application against the judge's decision to authorise pre-trial detention or to extend the period of detention" and cited statistics of appellate courts' consideration of complaints against decisions of investigative courts "to apply remand in custody".

In practice, it is possible to appeal against the lawfulness, necessity and proportionality of detention pending authorisation by a court only by directly applying to court and not to the administration staff of a detention centre with a request to be brought immediately before the court, as the habeas corpus procedure suggests.

Recommendations:

- Given the absolute nature of freedom from torture, the government should not derogate from fundamental legal safeguards under any circumstances, including during state of emergency; ensure that registration of detainees is mandatory, detention takes place in designated places, the detainees rights to access to a lawyer of choice, to inform family members, to independent medical examinations and others are fully respected in practice. Investigate all violations of legal safeguards against torture during detentions since the January 2022 protests.
- Ensure uninterrupted and mandatory video-recording, with guaranteed data security, of both the process of transportation and the actual apprehension of the person being detained.
- Ensure that a detainee can be brought before a court immediately upon request to the administration of the detention centre to challenge the lawfulness, necessity and proportionality of detention, in accordance with the principles of habeas corpus.

Investigation and accountability for torture

In 2014 the Committee recommended to Kazakhstan to "Establish an effective, fully resourced, independent and accountable body that is able to carry out prompt, impartial, thorough and effective investigations, including preliminary investigations, into all allegations of torture and ill-treatment, ensuring that such investigations are never undertaken by personnel employed by the same ministry as the accused" (Recommendation 8.a.), and "authorise this mechanism to investigate complaints of sexual violence (Recommendation 8.b.).

²² See 14 above

The Committee then justified its recommendations, inter alia, by "data received from official sources showing that only 2% of the complaints of torture received by the State have been prosecuted".

I. State agencies responsible for investigation of torture and ill-treatment

The situation regarding bringing torture cases to court has not changed. In 2017, speaking at the Fourth Penal Reform Forum, the First Deputy Prosecutor General of Kazakhstan I. D. Merkel reported that only 2% of torture cases reach trial, giving the reason as "corporatism and a high level of loyalty to violence". The Joint report "We don't even cry anymore" also noted: "according to figures from the Prosecutor General's Office - only one or two per cent of complaints ever reach court. Cases where the perpetrators of torture have been found guilty are even less common."

Following the November 2022 amendment²³ of Article 193 of the Criminal Procedure Code on prosecutorial powers during pre-trial investigations, in January 2023 the responsibility for the investigation of torture complaints was transferred to the exclusive jurisdiction of the prosecutor's office.

Previously, torture investigations were handled by either the Anti-Corruption Agency or the police, depending on the departmental affiliation of the accused, to ensure there was no conflict of interest. But as stated in paragraph 65 of the 2018 state report within the 4th reporting cycle²⁴: "Despite alternative investigative jurisdiction, the Prosecutor's Office is the principal body responsible for investigating allegations of torture". The state report said that "since 2015, 89% of all torture cases sent to court were completed by prosecutors"²⁵. Data from the Coalition confirms this.

At the time of submission of this report, a draft law on human rights in criminal proceedings is awaiting signature by the President. The Senate has passed the draft law but this version is not publicly available. It became known from media comments in early March 2023 that as well as the changes to Article 146 (Torture) of the Criminal Code dividing crimes into cruel, inhuman, degrading treatment and more serious crime of torture, changes have also been made to the Code of Criminal Procedure regarding the investigation of these acts.

While torture is now solely the responsibility of the Public Prosecutor's Office, cases of cruel, inhuman, and degrading treatment will be investigated only by the Police forces' internal security agencies.

Presenting the draft proposals in the Senate on 9 March 2023, Interior Minister Marat Akhmetzhanov spoke about the investigation of torture and ill-treatment: "A new offence of "cruel or degrading treatment" is being introduced to Article 146 of the Criminal Code (Torture). In terms of investigative jurisdiction: Part 1 will be investigated by the IAB [internal affairs bodies] in the form of an inquest (minor gravity) by analogy with Article 110 of the Criminal Code

²³ Law № 157-VII <https://adilet.zan.kz/rus/docs/Z2200000157>

²⁴ See 12 above

²⁵ Ibid., Point 65

("Torment/Physical Abuse"). Part 2 is under the exclusive jurisdiction of the Prosecutor's Office. Parts 3 and 4 relating to cases of cruel, inhuman, or degrading treatment not involving torture would be investigated by the Ministry of Interior (police). This will make it possible to distinguish between cases of torture and ill-treatment and to fill the gap in the law relating to lack of responsibility [for the commission of these crimes]".²⁶

This development is worrying as it means that cases of cruel, inhuman and degrading treatment or punishment will be investigated by the police, which are most likely to be responsible for these unlawful practices.

II. Actions of state bodies following a complaint of torture

In paragraph 183 of the replies to the Committee's list of issues,²⁷ the Government describes the actions of the relevant services upon receipt of a complaint about torture: "Upon receiving a complaint about torture, the investigation team and the prosecutor immediately go to the scene of the incident, interview the possible torture victim, inspect and take physical evidence and identify those involved in the torture. The case is entered into the Unified Registry of Pre-Trial Investigations and a forensic medical examination is organised to establish bodily injuries."

The Coalition's monitoring has shown that even if the complaint about torture is registered by the Anti-corruption Agency, the body responsible for registering crimes often passes it directly to the departments of internal security of local police departments which usually conclude that there are no signs of torture and dismiss the case before it is opened.

The Criminal Procedure Code facilitates the referral of victims' torture complaints directly to the police for verification stating: "in the absence of sufficient data indicating a criminal offence, statements and communications which require checking by the competent authorities in order to establish whether there are indications of a criminal offence, can be sent for consideration to the relevant State authorities within three days, without being registered in the Unified Register of Pre-Trial Investigations." (Article 181 paragraph 5 of the Criminal Procedure Code)

On 7 November 2022, the Commissioner for Human Rights of Kazakhstan told the press that "about 80% of cases involving unlawful methods of investigation are closed before trial".

III. Ineffective investigation of torture during the January 2022 events

The problem of ineffective investigations into torture in Kazakhstan came to the fore during investigations into allegations of torture as a result of the January events.

The joint report "We don't even cry any more"²⁸ describes the investigations into torture allegations in connection with the January 2022 events:

²⁶<https://www.zakon.kz/6386519-parlament-kazakhstana-odobril-zakonoproekt-po-voprosam-preduprezhdeniya-pytok.html>

²⁷ See 6 above

²⁸ see 15 above

“As of late December 2022, the investigations into 104 of the 190 torture complaints, which were registered by the NGO Coalition in connection with the January events and subsequently passed on to the authorities, had been closed because of the alleged lack of evidence of crime or the alleged exhaustion of leads. According to monitoring by KIBHR and the Coalition, the cases which were closed include: 33 cases (from 33) from Taraz; 31 (from 46) from Almaty; 11 (from 11) from Kyzylorda (where plea bargains were reached with the suspects); six each from Shymkent, Ekibastuz and Uralsk; five from Aktobe; three from Kostanay; and one case each from Ust-Kamenogorsk, Semey and Karaganda.

The exact, overall numbers of torture complaints received by the authorities in relation to the January events and the investigations opened into such allegations are not known as comprehensive statistics have not been made public and only selective - and partly contradictory - information has been shared publicly by representatives of the authorities.

On 14 March 2022, when speaking at a parliamentary assembly, the General Prosecutor stated that 301 complaints about “unlawful methods of interrogation” had been registered and that 243 criminal cases on “torture and abuse of power” had been opened based on these complaints, with 234 the cases being under investigation by the Anti-Corruption Agency and 9 by special prosecutors. Later, on 12 July 2022 the Anti-Corruption Agency, the state body with main responsibility for investigating allegations of torture, stated that it was investigating 177 cases of torture and ill-treatment against detainees in relation to the January unrest and that the investigations into another 171 cases had been finished. The same day, the Ministry of Justice announced that 137 of those cases had been closed as unsubstantiated. The Minister of Interior Marat Akhmetzhanov claimed that “the majority of applicants (96.3 percent) do not name specific persons. In general, complaints about the use of force by the police are unsubstantiated.”

According to information from the Ministry of Interior made public on 27 October 2022, criminal cases on torture had been opened against 17 police officers and 12 security officials. [...]

Most recently, on 5 January 2023, when speaking at a parliamentary session concerning an inquiry into the January events, General Prosecutor Berik Asylov stated that a total of 329 criminal cases on torture had been opened in relation to the January events, with special prosecutors investigating cases involving 34 law enforcement and security officials. The same day, the head of the Anti-Corruption Agency, Olzhas Bektenov, provided a different figure, saying that his agency had investigated 432 complaints concerning unlawful actions by law enforcement officers in connection with the January events. Bektenov also stated that 347 cases had been closed due to the alleged lack of a crime. He claimed that complaints about torture “in most cases were filed in order to avoid criminal liability for unlawful actions”. [...]

Lawyers representing victims of torture have identified the reluctance of officials overseeing investigations into torture to accept victims’ statements as sufficient proof of torture as a major barrier to justice. As many torture victims report: “Many of us have independently confirmed the names, titles and places of work of the police officers who tortured us. But despite this, the number of cases linked with torture continues to shrink... over half of the cases have been closed. It doesn’t suit the authorities [to continue the investigations]”

International law (the Istanbul Protocol and treaty body jurisprudence) is clear that in reviews of torture allegations, the burden of proof clearly falls on the alleged perpetrator of torture, rather than on the victim. It is thus not incumbent on the victim to be able to recall the names of their abusers. If the victim of alleged torture provides sufficient evidence to indicate that torture has occurred, it is the duty of the state to prove that it has not.

The staggeringly high rate of closures of investigations into allegations of torture and ill-treatment in relation to January 2022 by the investigating authorities clearly shows that the Kazakhstani authorities have failed to carry out official investigations in an effective, transparent or independent manner in line with the country's international obligations.

Torture victim Kuanysh Ayniyazov, (see 'Legal safeguards against torture') attempted to hold his abusers accountable but his efforts have come to nothing.

"After his release on 19 January 2022, Kuanysh went to the trauma centre. There he received medical treatment and was diagnosed with multiple beatings and a fracture of the left hand. On 9 February 2022, after repeated summons for interrogations, Kuanysh was arrested on suspicion of participation in mass disorder and taken to the detention centre. When he arrived there, Kuanysh still had marks from beatings and a fractured wrist. According to Kuanysh, he can still easily identify those who beat him. Moreover, he provides the names of two policemen who beat him, as well as two prosecutors who were present.

Kuanysh's complaint of torture to the Prosecutor's Office was forwarded to the Department of Internal Security (DIS) of Zhambyl Oblast's Department of Internal Affairs (DIA). The DIS of the Regional Police Administration closed the investigation without instituting criminal proceedings on the grounds of "lack of evidence". After a second statement from K. Ayniyazov a criminal case was opened under Article 146(2) of the Criminal Code (Torture). However, at the beginning of May 2022 the case was also closed "for lack of evidence". The General Prosecutor's Office's reply to Ayniyazov's complaint about the closure of the torture case stated that "arguments about the unlawful actions of the DP [Police Department] of Zhambyl Region, apart from the testimony of Ayniyazov K. himself, could not be objectively confirmed.

The investigation ignored the conclusion of the forensic medical and forensic examinations, which did not exclude that the injuries had been inflicted upon Ayniyazov "under the circumstances stated by him" and confirmed that "the closed fracture of the 5th metacarpal bone on the left side and bruises on the left shoulder and left thigh by the localisation and mechanism of infliction correspond to the testimony of the victim". The investigation, however, was satisfied with the testimony of the police officers and their superiors, who told them that none of them "had taken any unlawful action in relation to K.A. Ainiyazov".²⁹

IV. Investigations into the deaths resulting from torture in relation to January 2022

Investigations into the deaths resulting from torture in relation to January 2022 is ongoing at the time of submission of this report.

²⁹ See 18 above

"According to official and civil society sources, at least six people detained in connection with the January 2022 protests died as a result of torture in detention. On 5 January 2023, for the first time, authorities publicly named three people believed to have died as a result of torture and said the cases would go to trial. Of these six men, two died in Almaty, three in East Kazakhstan province and one in Taldykorgan (named Zhetysu District since June 2022). The names of those who died in detention which are known to the authors of this report at the time of writing: Zhandos Zhotabaev (Semey city), Zhasulan Anafiaev (Almaty city), Yerbol Otepbayev (Almaty city), Yeldos Kaliyev (Semey city) and Almas Mukashev (Taldykorgan city).³⁰

V. Plea bargaining as an obstacle to the effective investigation of complaints about torture

The investigation into the January 2022 events also revealed that many torture cases were dropped as a result of procedural agreements with defendants in the form of a plea bargain.

Under Article 612 of the Criminal Procedure Code, if the suspect or accused agrees to the suspicion or accusation, plea bargaining is possible for crimes of minor, medium gravity or serious crimes which include both torture and abuse of power.

Under Article 67 of the Criminal Code, 'a person who has fulfilled the conditions of a plea bargain may be exempted from criminal liability'.

The only exceptions to plea bargaining under Article 67(2) of the Criminal Code are "crimes against the sexual inviolability of minors, except when such a crime has been committed by a minor against a minor aged between fourteen and eighteen".

Recommendations:

- Take steps to ensure that the internal affairs authorities (police) are not responsible for investigating complaints of cruel, inhuman, degrading treatment or punishment and ensure that such investigations are carried out by a body completely independent of the suspected police officers, such as the Service of Special Prosecutors.
- Add Article 146 of the Criminal Code to the list of exceptions under Part 2 of Article 67 of the Criminal Procedure Code, and thus exclude the possibility of plea bargaining with subsequent release from liability in cases of torture;
- Do not carry out pre-trial investigations or checking into allegations of torture where there is reasonable reason to believe that torture has taken place.
- Ensure that all instructions regulating the investigation of cases of torture and cruel, inhuman, degrading treatment or punishment are in line with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).
- Conduct prompt, thorough, independent, and impartial investigations into all allegations of torture or other ill-treatment during the January events, involving recognised independent international experts as well as experts from Kazakhstani civil society, and ensure that they are conducted transparently with findings made public, including:

³⁰ *ibid.*

- Review the cases where investigations have been suspended or discontinued.
- Provide the necessary social and legal assistance to victims of torture whose cases are being investigated and ensure that the burden of proof is shifted to the suspects and state authorities.
- Ensure that cases of civilian deaths due to the disproportionate use of force and deaths resulting from torture are thoroughly and effectively investigated and that the results of these investigations are made public.
- Provide reliable and consistent public information on the progress of investigations into allegations of torture.

Non-Refoulement

In its Concluding Observations of 2014 (Recommendation 16), the Committee recommended that Kazakhstan ensure effective implementation of the principle of non-refoulement, in particular by bringing its law, procedures and practice into conformity with article 3 of the Convention; ensure that all asylum-seekers and refugees are afforded equal protection under the law; ensure that adequate judicial mechanisms exist for review of decisions on extradition and return; establish administrative and judicial guidelines and criteria to determine the risk of torture; ensure that no one is expelled, extradited or return to a country where he or she would be at risk of torture or other ill-treatment; and that diplomatic assurances should not be used to alter the absolute prohibition of non-refoulement.

Kazakhstan is a party to the 1951 Convention relating to the Status of Refugees. In its state report, Kazakhstan assures the Committee that its laws "fully comply with Articles 3, 8 and 9 of the Convention".³¹

The principle of non-refoulement is indeed reflected in the legislation: in the Law on Refugees³², the Criminal Code and the Criminal Procedure Code.

However, there is a pressing need to bring its implementation and other legislative acts into line with the 1951 Convention relating to the Status of Refugees and the Convention against Torture. The legislation regulating expulsion and deportation does not contain provisions to prevent refoulement and can be used without regard to the provisions of the Law on Refugees and can lead to expulsion.

Kazakhstan is also party to bilateral, multilateral and regional agreements, such as the Minsk and Chisinau Conventions on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters and the Shanghai Convention on Combating Terrorism, Separatism and Extremism³³. These Conventions do not contain safeguards to protect persons against return to territories where there is a threat to life and liberty on the grounds of race, religion, nationality, citizenship (nationality), membership of a particular social group or political opinion and may lead to expulsion. There are no provisions in these treaties for a proper risk assessment procedure, nor

³¹ Point 42, see 4 above

³² Law of 4 December, 2009 № 216-IV

³³ Law of 10 March 2004 № 531

provisions outlining obligations for state authorities to inform persons who have not applied for refugee status that they are under consideration for expulsion or deportation.

According to the Code of Administrative Offences, Article 517 para.4 'violation by a foreigner or stateless person of the law of the Republic of Kazakhstan in the field of migration, through evading departure for a period of more than ten days after the expiry of the period established by law, shall incur a fine of twenty-five monthly calculation indices or administrative expulsion for a period of more than ten days.

The main problem stems from the fact that in Kazakhstan, the procedure for appealing against an expulsion order exceeds the time limits set for compulsory departure determined by the court. This violates the right to defence and the right to *non-refoulement* in cases where there are threats of torture in the country of origin.

The recent expulsion of Mikhail Zhilin, a Russian national, officer of the Russian Federal Security Service, who fled to Kazakhstan escaping imminent risk of being enlisted to the war in Ukraine as a front line recruit is an example of a violation of Article 3 of the Convention:

On 27 September 2022, Mikhail Zhilin crossed the border of Kazakhstan illegally for fear of being sent to fight in a war he did not support, as he later claimed in court. Immediately upon arrival, Zhilin applied to the Office for the Coordination of Employment and Social Programmes of the Abay Province (the "Office") for refugee status. On 30 November 2022, the Office refused to grant him refugee status, citing Section 12 (1) of the Law on Refugees, i.e. "absence of reasonable grounds to believe that a person may be persecuted for reasons of race, nationality, religion, citizenship, membership of a particular social group or political convictions". According to the Administrative Procedure and Proceedings Code, Mikhail had one month to appeal the Office's refusal. During the appeal process the Office's decision to refuse refugee status could not be enforced. However, on 2 December 2022, in violation of Zhilin's right to challenge the denial of refugee status, Abay region Beskaragay village court ruled on a motion by the National Security Committee Department of Border Guards of Abay Region and found Zhilin guilty of illegally crossing the border and sentenced him to six months' imprisonment and deportation to Russia with a ban on entering Kazakhstan for five years. Zhilin was escorted from Astana to Abay and on the night of 29 to 30 December 2022, deported to the Russian Federation by the national security services and the police. Commenting on M. Zhilin's expulsion to the media, a representative of the General Prosecutor's Office said that there was no data confirming that Zhilin was at risk of being subjected to torture in the Russian Federation. According to unconfirmed information, at the time of this report, Mikhail was being held in the Investigative Detention Centre in Rubtsovsk, Russia, on charges of desertion and illegal crossing of the Russian border. The Kazakhstani authorities have not made official enquiries about Zhilin's fate and whereabouts.

Recommendations:

- Adhere to and ensure appropriate implementation of the principle of non-refoulement in the implementation of existing bilateral and multilateral agreements related to extradition.
- Remove the provision on the procedure for the entry into force of a court ruling on the expulsion of a foreigner or stateless person from Kazakhstan from the date of its issuance (Article 829-14 and Article 883 of the Code of Administrative Offences), thus allowing

foreigners (who may also be asylum seekers) the opportunity to appeal against the court decision through the appeals procedure.

- Legislate to prohibit courts from expelling asylum-seekers from Kazakhstan until the entire refugee determination procedure, including the appeal stages (from the filing of an administrative claim to court to an appeal at the Supreme Court) is complete.
- Establish effective mechanisms for post-return monitoring for persons who have been expelled, extradited, or returned by a State Party to the Convention Relating to the Status of Refugees.
- Refrain from using or relying on diplomatic assurances or using them to substitute for the absolute principle of non-refoulement.

Detention conditions

I. Conditions of Detention in the Ministry of Interior Facilities

In relation to detention conditions, the Committee recommended, inter alia, that Kazakhstan transfer detention authority to the Ministry of Justice (Recommendation 10, Paragraph 1 of the List of Issues) and also transfer the administration of healthcare in temporary detention facilities and the penal correctional system to the Ministry of Healthcare (Recommendation 17.c); improve the material conditions of detention, in particular “by providing adequate quality and quantity of nutrition; ensuring living space in accordance with existing international norms” (Recommendation 17.a.), including juveniles, women and mothers with children (Paragraph 16 of the List of Issues); renovating existing prison facilities, building new prisons and closing those unfit for use (Recommendation 17.a.); providing adequate medical care to prisoners (Recommendation 17.b.); establishing an independent complaint mechanism for prisoners (Recommendation 17.d.); increase the use of alternatives to imprisonment (Recommendation 17.f.); apply disciplinary sanctions to convicted persons, and in particular juveniles, ensuring “that they are proportional and imposed only where strictly necessary” (paragraph 18 of the List of Issues); ensure regular monitoring and visits to “all places of detention” by independent monitoring bodies (Recommendation 17.e.) and others.

According to the law "On amendments and supplements to some legislative acts of the Republic of Kazakhstan on human rights in the field of criminal proceedings, execution of punishment, as well as prevention of torture and other cruel, inhuman or degrading treatment" adopted by the Parliament in March 2023, children of mothers serving sentences in places of detention will be allowed to stay with their mothers until they reach the age of four, if the mother has less than one year of her sentence left to serve. Also, first-time offenders will be held separately from those who have previous convictions. Convicted persons suffering from severe incurable diseases will be released by court decision immediately, without waiting for the statutory term for the court decision to come into effect as was previously the case.

As noted in the "Positive Developments" section above, from 2019, the NPM mandate also covers special institutions for children and social security institutions. In July 2022, the transfer of the medical services of penal institutions and detention facilities of the Committee for the Execution of Sentences of the Ministry of Internal Affairs to the Ministry of Healthcare began. In July 2022 healthcare services of pre-trial detention facilities and from January 2023 - the remaining facilities

of the Criminal Executive System of the Ministry of Internal Affairs were transferred to the Ministry of Healthcare.

However, according to information from NGOs, members of the Coalition and the NPM, so far the conditions in penitentiary institutions and detention facilities in the country have not been brought in line with the Committee's recommendations.

For instance, many penitentiary institutions are old and require major repair or even demolition. For example, human rights defenders report that the buildings and premises in the facility LA 155/14 (medium security facility near Almaty), have long required major repairs or demolition. In some buildings of the facility water supplies do not reach the second floor, and so inmates must carry water in buckets. The conditions are unsanitary: the toilets have an unpleasant smell, especially in summer. The same institution has inadequate facilities for persons with disabilities and people with limited mobility. At the time of submission of this report, Vadim Kodintsev, a prisoner who is a wheelchair user and disabled person (group 1) staying in the facility, cannot move around independently. He has not been provided with the necessary medical care (proper medication, or orthopaedic and rehabilitation equipment to treat his illness).

The Special Reception and Distribution Facility of the Police Department in Shymkent, which was built in 1962, also needs reconstruction. According to KIBHR staff, who are NPM participants, the detainees live in constantly overcrowded conditions, and those serving sentences for administrative offences there sometimes have to share beds and take turns sleeping.

Institution No. 78 of the Department of the Criminal Executive System of the MIA for the Shymkent and Turkestan regions located in Shymkent is the only high-security correctional facility in the country for women. The buildings were converted from stables built in the mid-19th century and require major repair or demolition.

In the Karaganda region, pre-trial detention facility No. 61 and the temporary detention facility (IVS) in Saran have been criticised by human rights activists, NPM members and staff members of the Coalition organisations. Facility No.61 urgently requires demolition: in winter the temperature in the cells does not rise above 14 degrees Celsius and there are constant problems with the sewage system, there are inadequate sanitary conditions, no sanitary checkup unit, despite that this institution is used to house transit prisoners being moved around the country.

The second facility, the IVS, is located in a semi-basement space - there is not enough room to sit down in the poorly equipped cells. Due to the limited space available it is impossible to comply with sanitation and hygiene standards. A new building is required.

The Committee of the Penitentiary and Correctional System (CPCS) has failed to act on recommendations of NPM participants on the need to demolish these two facilities and build new ones.

In the north of the country, in Aktobe City the conditions of penitentiary facilities are also alarming: cells in detention centre No. 70 are in a deplorable condition - the plaster is crumbling and the walls are damp, the windows cannot be closed, so they are covered with plastic film in winter.

Apart from mattresses, detainees are not given bed linen and not everyone has pillows. The centre was built in 1949 and has never been renovated due to lack of funds.

In West Kazakhstan, in Atyrau, remand prison No. 75 has been assessed by the NPM as unfit to live in. The building is dilapidated, the plaster is crumbling, there are problems with the sewage system, there are no refrigerators, air conditioners, TV sets. There is no hot water or showers in the cells. There is a problem with drying laundry, as there is no dryer, and this creates dampness in the cells. Six to eight people are held in one cell with inadequate space. There are no sports grounds, not all exercise yards are equipped with horizontal bars or even benches. In the same region, inhumane detention conditions exist in Prison Colony No. 15 where there were complaints about rats.

In the town of Ust-Kamenogorsk, in the eastern part of the country, pretrial detention facility No. 73 is in a 1720 building which fails to meet national or international standards.

In all institutions of the penitentiary system food is insufficient in quantity and nutritional value; medical care is inadequate and often there is a lack of necessary medication. Penitentiary institutions are not adapted for people with disabilities: there are no ramps, access to toilets and showers.

The transfer of medical services from the Ministry of Internal Affairs to the Ministry of Healthcare has not alleviated the situation of medical care for prisoners or detainees – the same staff provide the medical care as before the transfer to the Ministry of Healthcare. Medical personnel are not aware of the law; unwilling to work according to their new job descriptions, which is exacerbated by a disconnect between the management of institutions and medical services.

II. Conditions of detention in facilities run by the Ministries of Healthcare, Education, and Social Protection

Conditions in medical and special institutions of the Ministries of Healthcare, Education, and Social Protection are also worrying. For example, the Regional Child Psychoneurological Center for Special Social Services of Pavlodar Oblast Administration for Coordination and Social Programmes has neither elevator; walkways, handrails or pictograms.

In other similar social, medical or educational institutions, patients often have no privacy: even the toilets and showers do not always have partitions or curtains. There are often no opportunities to work, do physical training and sports, for leisure activities, or even to go outside for a walk.

In the Atyrau region, there are now plans to build a new regional Mental Health Center. There is a probability that it will be built far away from the regional centre, which will complicate both patients' socialisation and their access to medical institutions in the city.

III. Problems with lodging complaints

Prisoners have difficulty in lodging complaints from places of detention. The computers for electronic complaints in penitentiary institutions are not easy to use, and inmates who are

inexperienced with computers and the Internet find it difficult to use them on their own; they are also located in administrative buildings, which prisoners cannot easily access. Prisoners often report that their complaints are not registered and not sent to the addressees.

Prisoners are still wary of passing on complaints to visiting NPM members. Article 14 point 3 of the Criminal Executive Code states that there is no right of censorship of prisoners' complaints to state bodies supervising penitentiary institutions (prosecutors, courts) and the Commissioner for Human Rights. Paragraph 5 of the same Article allows prisoners to send complaints about torture and other cruel, inhuman, or degrading treatment or punishment "through NPM members", but the law does not stipulate the prohibition of censorship in communications addressed directly to the NPM.

IV. Inability to transfer prisoners reporting torture from Ministry of Interior facilities

An additional problem is that as all penal and pre-trial detention facilities are under the authority of the Ministry of Interior, prisoners or suspects alleging torture or ill-treatment cannot be transferred to other secure facilities. The only alternatives are the detention facilities of the National Security Committee and the guardrooms of the Ministry of Defence.

Recommendations:

- Implement previous recommendations of the CAT and other treaty bodies regarding conditions in detention facilities.
- Equip all places of detention (in the meaning of Article 4 of the Optional Protocol to the Convention against Torture) with facilities for persons with disabilities: provide adequate accommodation and follow the principles of universal design in the future.
- Prohibit the censorship/control of complaints from prisoners or detainees under investigation to the National Preventive Mechanism.
- Ensure, at the legislation level, that prisoners or detainees whose complaints of torture or ill-treatment are under investigation are transferred to facilities outside the jurisdiction of the Committee of the Penitentiary System, such as the guardhouses of the Ministry of Defence.
- Provide an unimpeded, accessible, and secure mechanism for complaints and referrals from places of detention.
- Ensure that healthcare services in the prison and pre-trial detention systems under the Ministry of Interior meet the healthcare standards for the general public, and the medical staff adhere to these standards in law and practice.

Rehabilitation and redress for victims of torture and ill-treatment

In Recommendation No. 22, the Committee recommended that Kazakhstan should: "amend its legislation to include explicit provisions on the right of victims of torture and ill-treatment to redress, including fair and adequate compensation and rehabilitation, in accordance with article 14 of the Convention; provide in practice redress for all victims of torture and ill-treatment,

including fair and adequate compensation and as full rehabilitation as possible and should allocate the necessary resources for the effective implementation of rehabilitation programmes”.

As of 1 July 2020, there is a Law “On the Victims Compensation Fund”, which provides for lump sum compensation from the Fund, including for torture victims, of 30, 40 and 50 Monthly Calculation Index (MCI) for moderate, severe harm or death respectively, which for 2023 is equivalent to €210, €280 and €350. The funding comes from fines, paid by persons found guilty by the courts. But the amounts awarded to victims of torture are neither fair nor adequate.

In addition, Article 923 of the Civil Code provides for the possibility of damages for unlawful acts of law enforcement and criminal justice personnel. However, the article provides a limited list of actions of the investigative bodies for which compensation is provided, and does not include compensation for torture.

The consequences of the January 2022 events highlighted many problems in the national law, including on the right to fair and adequate compensation and rehabilitation. Hundreds of people suffered from torture during the January events. In the city of Taldykorgan (Almaty region) alone, more than 40 people, including minors, filed complaints of torture. Almost all victims of torture had bodily injuries, fractures, bruises of internal organs, consequences of contusions and concussions of the brain, thermal burns, burns from electric shockers, post-traumatic syndrome.

On 20 June 2022, 25 of them became the first people in Kazakhstan to be recognised as victims of torture in relation to the January events. Three officers of the Criminal Police Department, one inspector of the Administrative Police Department, and one officer of the Special Combat Response Unit (SOBR) were charged with torture. On 10 February 2023, Taldykorgan court sentenced five police officers for torture in this case: two police officers were sentenced to four years' imprisonment, one to 3.5 years' imprisonment, and two to three years' imprisonment. The court also ruled to ban the officers from holding positions in security agencies for three years.

A few victims in this case received compensation from the above-mentioned Victims Compensation Fund. Payments averaged at between €100 and €245, although the Victims Compensation Fund Act establishes a minimum level of payments of €210 to victims in cases of torture (as at the beginning of 2023).

In addition to monetary compensation victims of torture or ill-treatment require comprehensive examinations, treatment, and psychological rehabilitation. In Kazakhstan, the state does not provide such services to victims of torture.

Only those victims who have been recognised as victims by a court verdict are eligible to claim for compensation of moral and material damage through the courts. For victims whose cases have been suspended or terminated, the law fails to provide a mechanism for compensation for damage caused by the actions of state representatives.

In Kazakhstan it is possible to obtain compensation from perpetrators through civil proceedings for the recovery of moral damages. The Supreme Court Regulatory Resolution No. 7 of 27 November 2015 defines moral damage as a manifestation of moral or physical suffering. This is

always present in torture cases because torture, according to the disposition of Article 146 of the Criminal Code is "intentional infliction of physical and (or) mental suffering".

The fact that it is possible to recover damages for torture only if the perpetrators are identified and found guilty is contrary to UN CAT General Comment No. 3 of 2012, which states that "a person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted", and the basis for redress is "reasonable grounds to believe that acts of torture or ill-treatment have been committed". In its observations on several individual complaints against Kazakhstan, such as in *Gerasimov v. Kazakhstan* (No. 433/2010), *Yevloyev v. Kazakhstan* (No. 441/2010), *Bayramov v. Kazakhstan* (No. 497/2012), as well as in General Comment 3, the UN CAT observes that "civil proceedings and victims' claims for reparation should not be dependent on the conclusion of a criminal proceeding".

However, in Kazakhstan it is not possible to claim moral damages for torture unless the perpetrators have been found guilty by a court. The reasons for this include: the Kazakhstani legislation stipulates compensation for harm at the expense of the state treasury in three cases: 1) under state loan agreements, when the borrower is the state (Article 726 of the Civil Code); 2) for harm caused by state bodies, local self-government bodies, and their officials (Article 922 of the Civil Code); and 3) for harm caused by illegal actions of bodies of inquiry, preliminary investigation, prosecutors and courts (Article 923 of the Civil Code).

However, according to Article 38 of the Code of Criminal Procedure, torture is not included in the list of unlawful actions of the bodies of inquiry and pretrial investigation that entail compensation for harm. This list contains only: unlawful detention, custody, house arrest, temporary suspension from office, placement in a special medical organisation, conviction, application of compulsory measures of medical nature. According to Article 38 part 6, "other circumstances do not constitute grounds for compensation for damages".

The normative Resolution No.7 of the Plenum of the Supreme Court of the Republic of Kazakhstan of 9 July 1999 "On the Practice of Application of the Legislation on Damage Caused by Illegal Actions of the Bodies conducting the Criminal Process" which points out, with reference to paragraph 2 of Article 13 and paragraph 8 of Article 14 of the Criminal Procedure Code, that detainees, suspects, accused, defendants and convicted persons have the right to compensation for the damage they have suffered also in cases when "during legal proceedings on the case they were subject to violence or cruel treatment, when decisions or actions of the bodies conducting the criminal process were humiliating their honour and dignity." However, in the same paragraph 10, the Supreme Court specifies that in torture cases, "a civil action shall be brought directly against the suspect, accused, defendant, or persons charged with responsibility for their acts or the acts of the insane," thus depriving the victim of the opportunity to recover damages from the State for torture committed by its representatives.

Recommendations:

- Amend Article 923 part 1 of the Civil Code which lists the harm caused by illegal actions of bodies of inquiry, preliminary investigation, prosecutor's office and court, to include torture or cruel, inhuman or degrading treatment or punishment as

qualifying for compensation from the state (from the state treasury) regardless of whether the abuser has been found guilty by a criminal court.

- Provide adequate compensation from the Victims Compensation Fund for the moral and physical suffering incurred.
- Ensure that governmental and/or non-governmental support centres for victims of criminal offences, especially torture, governmental and/or non-governmental rehabilitation programmes and initiatives are sufficiently funded by the Victims Compensation Fund or other budgetary programmes and torture victims have access to such programmes.
- Ensure that the compensations and rehabilitation provided to torture victims are not dependent on the conclusion of criminal proceedings.

National Preventive Mechanism and institution of the Ombudsperson

In the recommendations to Kazakhstan from the previous reporting cycle, the Committee recommended: allowing monitoring groups to conduct unannounced inspections (Recommendation 14); expanding the NPM's mandate to ensure visits to "all places of detention, such as offices of police department and of the National Security Service, orphanages, medical and social institutions for children with disabilities, special boarding schools, nursing homes and military barracks, and examining the conditions and treatment of children in penitentiary and non-penitentiary institutions" (Recommendation 13); publish monitoring reports more regularly (Recommendation 13); adopt an Ombudsman law to ensure its independence and broaden mandate (Recommendation 13); ensure control of implementation of NPM's recommendations related to closed institutions (Recommendations 13 and 14); ensure in practice safety of convicted persons and detainees after communication with monitoring groups (Recommendation 14).

In the 2018 state report for the 4th reporting cycle of the CAT, Kazakhstan stated that "the rights of participants in the National Preventive Mechanism ("NPM") are explicitly enshrined in law. This is a guarantee of their independence from the state bodies. At the same time, the duties and responsibilities of the state authorities for interaction with the participants are clearly specified".

In 2021-2022, the NPM consisted of 105 participants from 20 regions of Kazakhstan and 29 members of the Coordination Council. The NPM Coordinator in Kazakhstan is the Commissioner (Ombudsperson) for Human Rights.

In November 2022 a Constitutional Law on the Human Rights Commissioner was adopted, which consolidated the constitutional status of the Ombudsperson and expanded his/her powers and capacity.

Together with that, the Coalition is concerned with the dominant and censorial role of the Human Rights Ombudsperson as the coordinator of the NPM.

Rules on NPM visits are adopted and approved by the executive (the government). The NPM Coordination Council headed by the Ombudsperson is formed on his/her orders and elected by

secret ballot "by the commission created by the Ombudsman from citizens of the Republic of Kazakhstan"³⁴. The Regulation on the Commission to elect the members of the Coordinating Council under the Ombudsperson was adopted by instruction of the Ombudsperson himself. The Commission consists of 17 members and its composition is approved by the Ombudsperson every five years.

According to the law "On the Commissioner for Human Rights in the Republic of Kazakhstan", the Ombudsperson is elected by the Senate of the Parliament upon the proposal of the President. In essence, however, the Senate approves the candidate nominated by the President.

One of the requirements for candidates for the position of the Commissioner for Human Rights is "at least five years of experience in protection of human and civil rights and freedoms"³⁵. However, Artur Lastayev, the current Ombudsperson who was appointed on 29 December 2022, had previously worked only for the Office of the Prosecutor General and as a representative of the General Prosecutor's Office at the Permanent Mission of the Republic of Kazakhstan to the UN Office and other international organisations in Geneva.

With the adoption of the new law, the Commissioner for Human Rights has representatives in all main regions and cities who are appointed and dismissed by the Commissioner himself. Currently, none of the representatives appointed by the Ombudsperson has any experience in the field of human rights.

Thus, commenting on the appointment of the representative of the Commissioner for Human Rights in the North-Kazakhstan region - Zhanat Zhenisovich Zhumabaev, the local media wrote that the regional representative of the Commissioner for Human Rights "has extensive experience in public service - in the Office of the Public Service Agency of Kazakhstan in the NKR"³⁶. In Almaty, the largest city of the country, the representative of the Ombudsman had worked in the Legal Department of the Eurasian Economic Community in the past; the representative of the Ombudsman for Kostanai Region, Amantai Amirjanovich Yesimov, was head of the branch of the Veterans of Anticorruption Service. The main requirement for candidates was to have experience in public service.

According to Paragraph 3 of the "Rules of preventive visits by groups formed by the participants of the national preventive mechanism" adopted by the Government in February 2023, preventive NPM visits in the regions are "accompanied and coordinated" by a representative of the Commissioner on the ground, who is not a member of the NPM.

There are also legal restrictions on the number of participants in the visiting team, no more than three for regular visits and no more than two for special (emergency) visits.

While in the past the annual Consolidated Reports on NPM activities were compiled by members of the Coordinating Council, under the previous Commissioner for Human Rights, Elvira Azimova, the practice of compiling these reports by outside experts who are not members of either the

³⁴ Point 6 of Decree № 1 of the Commissioner for Human Rights of the Republic of Kazakhstan of 20 January 2023 On Passing the Regulation on the Coordinating Council under the Commissioner for Human Rights

³⁵ Subparagraph 3, Paragraph 2 of Article 4 of the law On the Commissioner for Human Rights

³⁶ <https://izdatelstvo-sk.kz/news/v-severo-kazahstanskoi-oblasti-poyavilsya-upolnomochenniy5039/>

NPM or the Coordinating Council was introduced, whose selection and appointment did not involve NPM members and members of the Coordinating Council.

Recommendations:

- Bring the NPM and the institution of the Ombudsperson in Kazakhstan into full compliance with the Paris Principles.
- Ensure that the Ombudsperson is elected by Parliament with subsequent approval by the President, and not vice versa.
- Adhere to the provision of Article 4 of the Law "On the Commissioner for Human Rights in the Republic of Kazakhstan" in terms of the requirement to have experience in human rights and freedoms protection for candidates for the position of the Ombudsman and to apply the same rule to Ombudsman's representatives in the regions.
- Abolish the provision in the national legislation on accompanying and coordinating visits of the NPM participants in the regions by representatives of the Ombudsman
- Abolish the requirement to limit the number of NPM participants on visits, allowing groups to decide on the number of participants to be involved in the visit
- Ensure parliamentary oversight of the Human Rights Ombudsman's activities.

New concerns that have not been raised in the previous reporting cycles

I. Police kettling

Since the entry into force of the Law "On the Procedure for organising and holding peaceful assemblies" in June 2020, so-called police kettling tactics were used to disperse peaceful demonstrators in various cities in Kazakhstan for violation of the above-mentioned law.

In the 2nd edition of the OSCE ODIHR Guidelines on Monitoring Freedom of Peaceful Assembly, "kettling" is defined as "restraint" in a particular area or "localisation", where law enforcement officers surround or separate some of the assembly participants.

Since 2020, kettling has been use at least eight times in Kazakhstan, in particular:

- On 6 June 2020, in Almaty against supporters of the unregistered Democratic Party of Kazakhstan ("DPK") during protests across the country;
- On 16 December 2020, in Almaty against a group of participants of the youth movement for political reforms "Oyan, Qazaqstan" and DPK supporters;
- On 10 January 2021, at the day of the parliamentary elections, in Almaty, against the same group of participants of the "Oyan, QazaQstan" and separately to a group of supporters of the DPK;
- On 28 February 2021 in Almaty, in relation to supporters of the DPK and in Nur-Sultan (now Astana) and to participants of a memorial dinner in memory of Dulat Agadil, a

supporter of the party "Democratic Choice of Kazakhstan" recognized an extremist organisation in Kazakhstan;

- On 5 April 2021 in the settlement of Altyntobe near Shymkent towards participants of a spontaneous manifestation in support of an arrested businessman;
- On 25 May 2021, against the Orynbekov family with nine children in Nur-Sultan (now Astana), who tried to march to the Presidential residence to ask him to resolve their social problems;
- On 6 July 2021, in Almaty, against supporters of the Democratic Party of Kazakhstan;
- and on 13 July 2021 against artist Askhat Akhmedyarov and eco-activist Aliya Akhmalisheva in Nur-Sultan (now Astana) during their action against the commercialisation of a protected area, the Bozshyra tract in western Kazakhstan.

On average, police kettling in Kazakhstan lasts from 3 to 10 hours. The longest was on 28 February 2021 in Almaty, when detainees were held in a police circle for over 10 hours. Commenting to the press on this detention, Elvira Azimova, then Commissioner for Human Rights and now chairwoman of the Constitutional Court, said: "There are OSCE recommendations on this. This is a measure exclusively related to security. The use of this measure should be approved as a norm based on an open dialogue with community activists".

However, the OSCE/ODIHR Guidelines for Monitoring Freedom of Peaceful Assembly recommends to use this tactic "only in exceptional cases, when it is necessary and proportionate to prevent violence during the assembly". The Handbook quotes the UN Special Rapporteur on the rights to freedom of peaceful assembly and association Maina Kiai, who denounced the tactic of police kettling as "fundamentally detrimental to the exercise of the right to freedom of peaceful assembly due to its indiscriminate and disproportionate nature".

The official position of the Kazakhstan authorities was not to consider kettling illegal. In June 2021, the Minister of Internal Affairs Yerlan Turgumbayev commented on the use of kettling on 10 January 2021 (see above) as: "It was an unsanctioned manifestation. In terms of unsanctioned, illegal demonstrations all over the world the method of blocking is used. Those demonstrating are blocked by turnstiles, vehicles, using water cannon, as well as police personnel. [...] Yes, they did block in an unspecified place, because these citizens were trying to hold an illegal march, demonstration, and calling for illegal action".

On 10 January 2021, detainees in the police circle were not allowed to disperse, go to the toilet, or get something to drink or eat. At least three detainees including a 18-year-old girl (who wished to remain anonymous, data available) from the DPK supporters group, almost lost consciousness due to inability to go to the toilet, and two members of "Oyan, Qazaqstan" were taken away by ambulance: Assem Zhapisheva - with a suspected compression fracture of the spine (later not confirmed) and Darkhan Sharipov - with severe hypothermia. Another participant of "Oyan, Qazaqstan", Fariza Ospan, who was kept for six hours, had to undergo hospital treatment for a kidney complaint, brought on by hypothermia on 10 January.

On 18, 19 and 21 January 2021 four activists exposed to kettling on 10 January 2021 in Almaty - Gulzada Serzhan, Darkhan Sharipov, Assem Zhapisheva and Aizat Abilseitova - submitted applications to the Anti-Corruption Agency in Almaty for violation of Article 146 of the Criminal Code "Torture", which also prohibits humiliating, cruel or inhumane treatment in Kazakhstan. The

day after their statements were submitted, and they were referred to the Department of Internal Security of the Almaty City Police Department without registration in the Uniform Register of Pre-Trial Investigations. In this way the complaints were sent back to the body which actions the applicants complained for 'an internal investigation and appropriate action'.

After complaining to the prosecutor's office about the referral of their allegations of cruel or degrading treatment to the Department's Directorate of Internal Security, G. Serzhan, D. Sharipov, A. Zhapisheva and A. Abilseitova received responses from the Almaty City Prosecutor's Office informing them that "the official investigation conducted by the Almaty City Police Department Directorate of Internal Security had found no criminal offence in the actions of the police officers". The applicants were also told that their statements ("materials") had been "written off to the nomenclature file" (archive), and that the Almaty City Prosecutor's Office had "agreed with the procedural decision taken".

Subsequent appeals to the court against the refusal to initiate an investigation into the complaints were fruitless. On 12, 15 and 16 March the Specialized Inter-district Investigative Court of Almaty considered the complaints of Aizat Abilseitova, Darkhan Sharipov, and Gulzada Serzhan, and refused to satisfy them, saying: "The court finds no grounds to recognize the decision of the investigator [of the Investigation Department of the Department of the Anti-Corruption Agency in Almaty] A. Rakhimbay as unlawful and to cancel it». The court of appeal left the decision of the lower court in force.

The practice of holding peaceful protesters in a police ring as punishment for violating the law on peaceful assembly (failure to notify) is a violation of the right to freedom from, at least, degrading or cruel treatment, as well as the right to liberty and security of person and the right to freedom of peaceful assembly.

Recommendations:

- Cease using kettling tactics (keeping peaceful protesters in a ring of police or other security forces) when patrolling peaceful assemblies.
- Conduct an objective legal assessment of the actions of law enforcement agencies that resorted to kettling in Kazakhstan, identify and punish the perpetrators.
- Ensure that the victims have the right to compensation for damages.
- Strictly adhere to international obligations to guarantee the right to freedom of peaceful assembly.

II. Complicity of medical workers in ill-treatment or torture

Details of health workers' complicity in torture, cruel, inhuman, or degrading treatment during the January 2022 events are reflected in the report "We don't even cry anymore":

"According to the NGO Coalition, available information indicates that some representatives of medical institutions served as accomplices of law enforcement and security officials in cases of torture and ill-treatment both by failing to prevent prohibited treatment and by failing to provide adequate assistance to victims of such treatment. Human rights defenders and journalists in Kazakhstan have reported cases of people who were injured during the protests being turned

away from state hospitals and detainees not being treated by doctors in police detention as specified by law. However, the vast majority of cases reported involve allegations of patients being mercilessly dragged out of hospitals to be sent to police and pre-trial detention centres from their state hospital beds. In Almaty this was done by members of the Rapid Action Security or police officers, without any visible objections from doctors or other medical personnel. In many cases those who were taken to detention centres from hospitals were subjected to torture and ill-treatment by law enforcement officials. In some cases people were ill-treated while still in intensive-care units before being taken to nearby police department detention centres where they were tortured."

"The healthcare professionals in Kazakhstan, who - either independently or following orders from national security or other state officials - handed over their patients to imminent torture or ill-treatment, not only violated their professional rules of ethics but also could be considered to have participated in torture. "Participation in torture", according to the Istanbul Protocol, and other legal frameworks, includes "evaluating an individual's capacity to withstand ill-treatment" and "resuscitating individuals for the purposes of further ill-treatment or providing medical treatment immediately before, during or after torture on the instructions of those likely to be responsible for it; providing professional knowledge or individuals' personal health information to torturers". The Tokyo Declaration (adopted by the World Medical Assembly), which is also cited in the Istanbul Protocol, instructs doctors "to insist on being free to act in patients' interests, regardless of other considerations, including the instructions of employers, prison authorities or security forces". Similar principles are prescribed for nurses in the International Council of Nurses (ICN) Code of Ethics for Nurses"

Recommendations:

- Investigate cases of alleged involvement of healthcare workers in torture and ill-treatment and ensure that all healthcare workers are aware of the role of doctors in preventing torture.