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Procedural safeguards against torture in Kazakhstan¹

Introduction

Safeguards against torture are referred to as “positive obligations” of a state, due to which a state is obliged not only to use torture (“negative obligation”) but also it agrees, according to Article 2 of the UN Convention against Torture, to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.

The safeguards against torture and other cruel, inhuman, or degrading treatment or punishment promote realization of the right of each human being to dignity and personal integrity. The right to dignity is proclaimed in Preamble to the International Covenant on Civil and Political Rights, and in Kazakhstan – in Article 17 of the Constitution, where inviolability of human dignity is recognized and torture is prohibited. The right to personal integrity is stated in Article 9 of the International Covenant on Civil and Political Rights and in Kazakhstan, it is guaranteed by the principles of the criminal and administrative proceedings

In this paper, we will consider some of the most typical circumstances, in which torture is committed in Kazakhstan. We shall compare the rights of persons vulnerable to the use of torture with the rights of the state actors in these circumstances. We will then offer some recommendations. This paper covers not all possible but only most widely-spread circumstances of the use of torture answering the question: “What gaps in the law allow for torture to be practiced?”. The main recommendations are to fight the “black holes” in the legislation, to not allow for the circumstances of “lawlessness”, to provide for the increased safeguards against torture in circumstances of the forced or enforced dependency of a person on the state.

I. The scope of action of the safeguards against torture. International standards

Safeguards against torture cover all possible cases of threat to human dignity and personal integrity by the state represented by its public officials or other persons acting in official capacity, at their consent or instigation, when such threats arise in relation to a certain goal the perpetrator has (then, such acts qualify as torture) or without any goal. In the latter case, it will be a threat of cruel, inhuman, or degrading treatment or punishment.

[...]

Circumstances, in which one’s dignity and personal inviolability, or his or her physical and psychological integrity, can be threatened by an action or inaction² of a state, usually arise in cases

of power-subordinate relationships, when a person is dependent on a public official/officials or third persons at an open or covert laissez-faire attitude of the state. Such circumstances, first of all, include criminal prosecution, administrative proceedings, and execution of sentencing, such as: arrest, personal search, taking into custody or being in custody, carrying out investigating actions with participation of an accused or a suspect, including interrogation, deprivation of freedom, or forceful medical treatment or examination. Since, any custody involves significant restriction on personal freedom, the safeguards against torture work in “any place under [the state’s] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence”³, including in “prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm”⁴.

In these circumstances and in these places, the persons who may exude a threat of torture are the persons “who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party”⁵. These persons besides state officials also can be “agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law”⁶.

The persons, who the safeguards against torture protect are “any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party”⁷. They include “all persons, regardless of race, color, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction”⁸.

II. The main safeguards against torture. International standards

The basic safeguards against torture for all persons who are de jure or de facto find themselves under control of a state, according to the UN Committee against Torture, include⁹: • maintaining an official register of detainees; • the right of detainees to be informed of their rights; • the right promptly to receive independent legal assistance; • independent medical assistance; and • to contact relatives; • impartial mechanisms for inspecting and visiting places of detention and confinement; and • the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.

² “The failure of the State to exercise due diligence to intervene to stop, sanction [...] torture [by] non-State actors [shall constitute] a form of encouragement and/or de facto permission [by the State]”. (The UN Committee against Torture. General comment no. 2. Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by states parties. Point 18.)

³ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Entered into force on 22 June 2006. Article 4.

⁴ UN Committee against Torture. General comment no. 2. Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by states parties. Point 15.

⁵ UN Committee against Torture. General comment no. 2. Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by states parties. Point 7.

⁶ See 3.

⁷ See 4.

⁸ UN Committee against Torture. General comment no. 2. Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by states parties. Point 21.

⁹ UN Committee against Torture. General comment no. 2. Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by states parties. Point 13.

This list is not exhaustive. With time, new safeguards emerge providing additional protection against torture. However, according to the existing international practice¹⁰, the main safeguards against torture for all persons deprived de jure or de facto of their liberty are: 1) the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate); 2) the right of access to a lawyer; and 3) the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).

The safeguards against torture, as we can see, are aimed at creation of legal and administrative obstacles to the commission of torture, reduction of so-called territories beyond the reach of the law, taking all spheres of interrelations of state actors with private individuals who are – de jure or de facto – deprived of their liberty, under control and oversight.

The safeguards against torture can be looked at from two angles, first, by comparing the rights of persons who these safeguards protect with the rights or power of those who by their actions or by failure to act can cause harm to these persons, and second, by looking at obligations of the state to promote observance of the safeguards against torture.

III. Circumstances, in which torture happens in Kazakhstan

1. Apprehension of a suspect

Due to the fact that in Kazakhstan most often torture happens during criminal proceedings and in places of detention, persons who are subject to this protection in these circumstances shall be: witnesses, detainees, administrative detainees, suspects, accused individuals, defendants, convicted individuals, and prisoners; and persons who by their actions impose threat of torture shall be staff workers of interrogation and query bodies, who have been entitled to carry out operative and search functions: they are internal affairs bodies, national security bodies, financial police, and some others.

Let us look at the most typical circumstances of when torture is committed. In Kazakhstan, it is arrest, detention, and imprisonment. Indeed, in 2010, the Supreme Court upon summarizing court practice regarding the rights and freedoms of people in criminal proceedings confirmed, that “sometimes, detention is used as a means of getting confessions of guilt from suspects, [...] which totally is prohibited by the law”¹¹.

Apprehension for the purpose of criminal proceedings is used toward persons suspected of crimes that involve imprisonment. In Article 132 of the Criminal Procedure Code, detention is defined as a means of procedural enforcement, which is used to find out whether the detainee is complicit to the crime, of which he or she is suspected.

1.1. Rights of detainees from the point of view of the safeguards against torture.

During apprehension, persons who are under protection of the safeguards against torture are called detained suspects. Consequently, a person who is being apprehended on grounds of suspicion of a crime cannot be anyone but a suspect, and that the rights of a suspect apply to any detainee from the moment of apprehension¹². These rights are to be found in Article 68 of the Criminal Procedure Code of the Republic of Kazakhstan and include:

¹⁰ For example, see the Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. (CPT) in [CPT/Inf (92) 3].

¹¹ Generalization of judicial practice on the application of certain provisions of the Criminal Procedure Code of the Republic of Kazakhstan on the rights and freedoms of citizens in criminal proceedings (inviolability of the person, privacy, home, correspondence, telephone conversations, postal, telegraph and other messages). Published in the "Bulletin of the Supreme Court of the Republic of Kazakhstan» № 4, 2010.

¹² According to the Ruling #2 of the Constitutional Council of Kazakhstan of 13 April 2012, the moment of apprehension shall be understood as “the hour with the precision to a minute when the restriction of liberty of

- “the right to notify immediately by phone or otherwise those at the place of one’s residence or work of one’s detention and the place of detention”¹³;
- “the right to be informed by the person who carried out the apprehension about one’s rights”¹⁴;
- “the right to know, of what one is suspected”¹⁵;
- “the right to call via one’s relatives or trusted persons a legal counsel of one’s choice; in case, if a counsel has not been invited by a suspect, an interrogator shall provide for a counsel in the order stipulated for in the [Criminal Procedure Code]. The suspect shall “have a confidential meeting with a counsel before a first interrogation”¹⁶;
- “the right to refuse to testify or give explanations”¹⁷;
- “the right to testify only in presence of a counsel, except for the cases of refusal from a counsel”¹⁸. Also, the criminal procedure legislation of Kazakhstan provides that¹⁹
- all detained suspects be placed in temporary detention facilities, protecting them from being detained in places other than the official places of detention. Upon admission to a temporary detention facility, detained suspects shall be
 - “interviewed by a medical nurse on duty about their health condition. In cases of complaints of bad health or at obvious symptoms of an illness, the nurse shall call an ambulance. If a suspect has bodily injuries and visible signs of injuries, the person on duty shall establish the causes of the injuries and report the incident in writing to the head of the detention facility and/or the head of the body of internal affairs”²⁰.

As we can see, in comparison to the main international requirements about safeguards against torture, in Kazakhstan, the list of the rights of persons deprived of liberty, does not include the right to be examined by an independent doctor at the choice of the detainee and the right to challenge the legality of one’s detention as a measure of procedural enforcement before a court.

The standards²¹ of the European Committee for the Prevention of Torture (ECPT) provide that persons in custody, regardless of their procedural status, should have an officially established right of “immediate” access to a doctor at one’s first request “in addition to any medical examination carried out by a doctor called by the police” and that “All medical examinations of persons in police custody must be conducted out of the hearing of law enforcement officials and, unless the doctor concerned requests otherwise in a particular case, out of the sight of such officials”.

The right to challenge one’s detention, also known as habeas corpus, guarantees judicial protection against illegal infringements on a person’s liberty and personal integrity. It is to be found in Articles 3, 9, and 10 of the Universal Declaration of Human Rights in Article 9 of the International Covenant on Civil and Political Rights, in Point 1 of Principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which says that “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law”. One should distinguish this right from the duty of a court “to review as appropriate the continuance of detention.”²², - which is what in Kazakhstan’s criminal

a detained person, including his freedom of movement – forceful detention in a given place, forceful delivery to an investigative body (capture, locking up in a room, forcing the person to go somewhere or remain where he is), as well as other actions, significantly restricting one’s personal liberty, have become real regardless of whether the person detained has or has not any procedural status”.

¹³ Part 2, Article 68 of the Criminal Procedure Code of Kazakhstan.

¹⁴ Part 7, Article 68 of the Criminal Procedure Code of Kazakhstan.

¹⁵ Point 2, Part 7, Article 68 of the Criminal Procedure Code of Kazakhstan.

¹⁶ Points 3, 4, Part 7, Article 68 of the Criminal Procedure Code of Kazakhstan.

¹⁷ Point 7, Part 7, Article 68 of the Criminal Procedure Code of Kazakhstan.

¹⁸ Point 5, Part 7, Article 68 of the Criminal Procedure Code of Kazakhstan.

¹⁹ Criminal Procedure Code of the Republic of Kazakhstan of 13.12.1997 N 206-I, Art. 137.

²⁰ Decree of the Minister of Internal Affairs of the Republic of Kazakhstan of 1 June 2002 N 385 registered at the Ministry of Justice of the Republic of Kazakhstan on 13 June 2002 N 1883 approving The Internal Rules for Temporary Detention Facilities of the Bodies of Internal Affairs, Point 13.

²¹ CPT Standards. Extracts from the 12th General Report [CPT/Inf (2002) 15], Point 42.

²² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Point 3, Principle 11.

procedure law is called “judicial sanctioning of arrest [pre-trial detention]” and should be distinguished from habeas corpus, as it does not guarantee immediate judicial protection in cases of illegal detention right after apprehension.

Also, Kazakhstani law enforcers do not have common understanding about whether a detainee and a suspect in the sense of Article 68 of the Criminal Procedure Code of the Republic of Kazakhstan are one and the same person, or whether until “the question about the detainee’s procedural status is resolved”²³, the detainee is considered “a person suspected of having committed a crime”²⁴. The Criminal Procedure Code of Kazakhstan does not regard either “a person suspected of having committed a crime” or “a detainee” as “participants of criminal proceedings”²⁵ or “other participants of criminal proceedings”²⁶. Thus, according to a commentary to the Supreme Court’s Normative Regulation № 7²⁷ of December 28, 2009, these persons “by not being those whose procedural status has been officially defined” cannot be considered “rights bears”. This makes us conclude that detainees who have been detained on suspicion of having committed a crime, until they are recognized as suspects, do not have procedural rights of criminal suspects and are thus deprived of safeguards against torture. This conclusion is confirmed by that according to Article 134 of the Criminal Procedure Code of Kazakhstan, a detainee becomes a suspect not at the moment of his or her physical apprehension²⁸, but from the moment of when the arrest report has been completed within 3-hour period that the law establishes for registering arrests. It is at this time only that the detainee is first time informed of his or her rights as a suspect. Besides, due to Part 3 of Article 70 of the Criminal Procedure Code of Kazakhstan, a legal counsel is admitted to a case “from the moment of recognising a detainee a criminal suspect or an accused”, not before that. This means that until a detainee becomes a suspect in the sense of Article 68 of the Criminal Procedure Code of Kazakhstan, during the period between his or her physical apprehension and entering his or her arrest in police records, he or she may not have access to a lawyer.

The same stands true about other rights of suspects guaranteeing them protection against torture. For instance, according to Part 2 of Article 68 of the Criminal Procedure Code, “a detained suspect” shall have the right to notify “by phone or by other means” a third party “at the place of one’s residence or employment” about his or her arrest and place of detention “immediately”. Yet, Article 138 of the Criminal Procedure Code, vests the primary right of notification of arrest of “a full-age member of the detained suspect’s family or, in the absence of those, his or her other relatives or closed ones” with the investigator or interrogator and not the suspect himself or herself. Not only does this provision narrow the circle of persons who may be notified of the suspect’s arrest, but it also extends the time of such notification to up to 12 hours in violation of international standards for the protection from torture. According to ECPT’s standards²⁹, this right along with the right to independent medical examination “should apply as from the outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.)”. ECPT allows for deviation from this right “in order to protect the legitimate interests of the police investigation” on condition that “such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons thereof, and to require the approval of a senior police officer unconnected with the case or a prosecutor)”³⁰. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment says that

²³ Supreme Court of Kazakhstan’s Normative Regulation #7 of 28 December 2009.

²⁴ Ibid.

²⁵ See Criminal Procedure Code of the Republic of Kazakhstan, Section 9 “Participants of Criminal Proceedings Defending Their Own or Others’ Rights or Interests”.

²⁶ See Criminal Procedure Code of the Republic of Kazakhstan, Section 10 “Other Participants of Criminal Proceedings”.

²⁷ Comments to the normative decision of the Supreme Court of the Republic of Kazakhstan dated December 28, 2009 number 7.

²⁸ See 11.

²⁹ CPT Standards. Extracts from the 12th General Report [CPT/Inf (2002) 15], Point 36.

³⁰ CPT Standards. Extracts from the 12th General Report [CPT/Inf (2002) 15], Point 43.

“where exceptional needs of the investigation so require”³¹, “communication of the detained or imprisoned person with the outside world, and in particular his family or counsel”³² may be denied, but that such delay should not extend “a reasonable period”³³. In the previous version of Part 3 of Article 138 of the Criminal Procedure Code of Kazakhstan, the delay in notification of the relatives or closed ones of the suspect could be extended to up to 72 hours. When this provision was finally taken out in 2011, it also took away with it the conditions for a delay of notification. It is advisable that these conditions be returned to Article 138 of the Criminal Procedure Code, which should establish the right of detained suspects to notify a third party of their choice of their arrest and place of detention right after the moment of their physical apprehension or “in exceptional circumstances when a special nature of the case so dictates, for the purpose of due promotion of secrecy of the internal stage of investigation, with the permission of a prosecutor or prosecutor’s deputy” – within, but no later, than 12 hours from the moment of arrest.

Given the above said, until such terms as “actual apprehension”, “moment of apprehension”, “moment of registration of arrest”, “detained suspect”, “a person suspected of having committed a crime”, “a detainee”, “a suspect” are coordinated among themselves, we cannot confidently talk about safeguards against torture for people deprived of their liberty in the meaning of article 9 and 14 of the International Covenant on Civil and Political Rights.

To promote the safeguards against torture in Kazakhstan, the rights of suspects stipulated by Article 68 of the Criminal Procedure Code, provided they comply with the established international standards, should also extend to those deprived of their liberty on suspicion of having committed a crime starting from the moment of their actual arrest.

1.2. The power of the bodies carrying out arrest from the point of view of safeguards against torture

In order to understand how good the safeguards provided by Kazakhstani legislation to persons deprived of their liberty are, we need to compare the rights of persons who are being arrested with the rights and power of those who carry out arrests.

1.2.1. Operative and search activities

As a matter of practice, it is the bodies that are empowered with arrest functions who may endanger suspects’ dignity and personal integrity. Usually, this happens during operative and search operations.

In Kazakhstan, only strictly specific bodies can carry out operative and search functions. They are internal affairs bodies, national security bodies, financial police, and some others. In these bodies, administration creates specialised services or departments that can carry out operative and search activities. According to Point 1 of Article 22 of the Law of Kazakhstan on Operative and Search Activities³⁴, “staff workers who carry out operative and search actions shall be considered state actors”.

³¹ The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Point. 4, Principle 16.

³² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 15.

³³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16.

³⁴ The Law of the Republic of Kazakhstan of 15 September 1994 № 154-XIII “On Operative and Search Activities”.

Disobedience to a staff member of a body carrying out operative and search actions can serve as grounds for the use of special police ammunition, force, or firearms against him or her³⁵.

Only persons “directly appointed by law”³⁶ can interfere with lawful actions of staff members and bodies carrying out operative and search functions. These persons are the heads of the bodies that carry out operative and search activities and prosecutor’s offices within the framework of their overseeing functions.

These operative and search actions can be carried out in the interests of criminal proceedings – to prepare and perform investigative and court actions – and for other tasks as well provided for by the Law on Operative and Search Activities.

The operative and search actions that may endanger a person’s dignity and personal integrity, based on the Law on Operative and Search Activities, include: inquiry; following and apprehending a person who is committing or have already committed a crime; personal search of detained individuals, search and seizure of their documents or objects that may relate to a crime; and apprehension of armed criminals.

The circle of individuals who may become objects of operative and search activities, as compared to the circle of participants of criminal proceedings, is indefinitely broad. Besides the obvious participants of criminal proceedings such as “suspects”, “accused”, “defendants”, whose rights are regulated by the criminal procedure code, the operative and search activities objects also include individuals whose procedural status is not defined: “a person under inquiry”, “a sought after person”, “an examined individual”, “a concrete person”, “a checked-out individual”, “a person who has fled interrogation, investigation, or court order”, “a detained person”, and “armed criminals”. Perhaps, it should be understood that these persons should be treated as free persons. But are they really free? “Interrogation”, “personal search”, “detention”, “capture” - such actions presuppose, as a minimum, dependency of the person who has become an object thereof from the persons who carry out these actions, and according to the international standards, these actions represent in fact deprivation of liberty of action. For instance, according to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, “the act of apprehending a person for the alleged commission of an offence or by the action of an authority” is considered “arrest”, and “any person deprived of personal liberty except as a result of conviction for an offence” is considered a “detained person”.

Consequently, individuals without a clear procedural status who have become targets of operative and search operations such as inquiry, detention, personal search, and capture, should enjoy the rights of participants of criminal proceedings that can guard them from torture, including the right of notification of a third party, the right to medical assistance, and the right to a counsel as well as the right to be informed of the grounds for one’s detention. Presently, a person who has become an object of operative and search activities can learn about “the information that served as grounds for the inquiry against him or her”³⁷ (within the legal limits) only “if his guilt in preparation and commitment of a crime”³⁸ has *not* been proved, i.e. post-factum. Taking into consideration, that one’s guilt can only be established by court, this means that a person who has been charged with a crime as a result of a prior inquiry against him or her can only learn about and appeal the information, based on which he was charged, not earlier than in court, and only after this court acquits him. This violates the right to effective defense and the principle of equality of arms, and increases the risk of torture in these conditions.

³⁵ See Articles 59, 60, 61 of the Law on Law Enforcement Service in the Republic of Kazakhstan of 06.01.2011; Article 14 of the Law on the Bodies of National Security of the Republic of Kazakhstan of 21.12.1995; Section 4 of the Law on Financial Police Bodies of 04.07.2002; and Section 3 of the Law on the Body of Internal Affairs of 21.12.1995.

³⁶ The Law on Operative and Search Activities, Article 22.

³⁷ Ibid., Point 3, Article 5.

³⁸ The Law on Operative and Search Activities, Point 1, Article 5.

Besides, according to the Law on Operative and Search Activities, such operative and search actions as inquiry, apprehension, capture, and personal search are referred to as “general”³⁹ actions and unlike certain “special” actions do not require an order from a prosecutor. Also, a personal search “during anti-terroristic operations” can even be carried out without any witnesses⁴⁰.

Another problem is that the grounds for carrying out operative and search actions are not quite clear. Out of the five possible grounds for operative and search actions, provided for in Article 10 of the Law, two do not require any documentary confirmation: “information that was received by the bodies that carry out operative and search functions”⁴¹ and “the need of receiving [...] information in the interests of the society and the state”⁴². All other grounds⁴³ presume documentary confirmation: “an instituted criminal case”, “written instruction from the investigator in charge of the investigated cases”, “order by the Prosecutor General [...] or written instructions by other prosecutors”, “a court order”, and “requests from international law enforcement organizations”.

The Law on Operative and Search Activities admits in Article 15 that these activities can endanger life, health, and property of citizens. The Law limits these situations to cases of “extreme necessity and necessary defense”, within the limits of actions that do not cause “real”⁴⁴ threat to life, health, and property of people. The law does not clarify who and how should assess the “reality” of such threats.

Based on the above said, it can be concluded that the circumstances, in which operative and search actions are carried out, included “based on secret grounds” and by combining “open” methods with “covert”⁴⁵ ones, and the overly broad functions of the bodies and staff of the operative and search bodies, require increased protection of persons who fall objects of such actions by the state.

These persons should enjoy the rights of “persons under any form of detention or imprisonment” in the meaning of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Their procedural status should be clearly defined.

The operative and search actions that risk endangering a person’s dignity and personal integrity (inquiry, personal search, capture, and detention) should be carried out with an order from a prosecutor or a judge. The suggestion by the Supreme Court of Kazakhstan to transfer the *special* operative and search actions from prosecutors to a court⁴⁶ should also extend to the above-mentioned operations, in line with the Supreme Court’s opinion that “prosecutorial bodies, by being a party in criminal proceedings, by passing the accused over to a court, are interested in the outcomes of the case, namely, in that the guilty verdict is pronounced, [...] and when approving special actions [and we believe also those actions that put a person’s dignity and physical integrity at risk] cannot be truly unbiased”⁴⁷.

The Law on Operative and Search Activities should be amended to exclude any misunderstanding, vagueness, and references to unidentified normative legal acts. All grounds for carrying out operative and search actions should have documentary confirmation.

³⁹ The Law on Operative and Search Activities, Article 11.

⁴⁰ The Law on Operative and Search Activities, Point 16, Article 11.

⁴¹ The Law on Operative and Search Activities, Sub-Point “B”, Point 1, Article 10.

⁴² The Law on Operative and Search Activities, Sub-Point “D”, Point 1, Article 10.

⁴³ The Law on Operative and Search Activities, Sub-Points “A”, “C”, “C-1”, “C-2”, and “D”, Point 1, Article 10.

⁴⁴ The Law on Operative and Search Activities, Article 15.

⁴⁵ The Law on Operative and Search Activities, Point 1, Article 4.

⁴⁶ See 22.

⁴⁷ Ibid.

1.2.2. Administrative arrest

Besides the circumstances of the operative and search actions and the criminal proceedings, the threat of torture also exists during administrative arrest process. In comparison to the criminal process, the process of administrative arrest as defined in law offers a limited range of safeguards against torture.

Administrative arrest is a measure that helps to promote administrative proceedings and consists in “temporary deprivation of a physical person of his or her liberty, particularly, the liberty of action and movement, and placing the detainee into a special facility for a certain period of time in order to prevent him or her from committing illegal acts”⁴⁸.

The list of grounds for administrative arrest and of the bodies that can perform this type of arrests are defined in law.

Same as during criminal proceedings, a fact of administrative arrest and delivery is confirmed by an entry in a police record. In the Code of Administrative Offences of Kazakhstan, without any reference to any other normative legal acts, it is not said during what time an administrative detainee should be brought to a relevant inquiry body for completion of an arrest record, in cases when this record cannot be entered on spot. The Code only says that such delivery should be made “within a possibly short period”⁴⁹. It is alarming that even this vague provision allows for deviations. Besides, the Administrative Code does not require that administrative detainees be informed of their rights at all. The right to notify a third party works only if the detainee requests so, and the Code does not clarify when this third party can be informed and whether the detainee can inform a third party of his choice himself or herself.

In order to avoid the risk of torture or cruel, inhuman or degrading treatment in these circumstances, the Code of Administrative Offences of Kazakhstan should be amended to include more weighty safeguards against torture, particularly, the right to be informed of one's rights at the moment of arrest, the right to independently notify a third party of one's choice of one's arrest and place of detention, and the limits on the time of when a record of arrest should be entered in the registry.

2. Placement in custody. Detention

Another circumstance, in which torture may arise is when a detainee is placed in custody.

International standards⁵⁰ establish that detainees should be placed in official places of custody. These standards prohibit detention in the absence of access to the outside world or incommunicado detention.

In Kazakhstan, the absence of the outer control over a detained suspect (de jure or de facto) can happen: • during the period of delivery of a detained suspect to an inquiry body; • before the period for required notification of a prosecutor and relatives of the detainee elapse (between the moment of apprehension and registration of the detainee); • before an official registration of a detainee.

⁴⁸ The Code of the Republic of Kazakhstan on Administrative Offences of 29 January 2013.

⁴⁹ The Code of the Republic of Kazakhstan on Administrative Offences of 29 January 2013, Point 3, Article 619.

⁵⁰ See, General Comment №20 (44 Session, 1992) by CCPR, to Article 7, Point 11: “To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends”.

As it is known, the period between the official acknowledgement of arrest, when an arrest record is entered in police register, and the actual arrest can be as long as 3 hours⁵¹. The time of arrest that is entered in the register is based on the words of those persons who had carried out that arrest, and not the detainee himself or herself. Besides, the criminal procedure legislation provides for obligatory notification of a prosecutor⁵² and the family of the suspect⁵³ within 12 hours following the moment of *when the arrest was officially registered*. This means that a suspect can be in the hands of a law enforcement body, without his arrest being nowhere registered, for up to 15 hours from the moment of his or her physical apprehension, provided that the time of his or her arrest (“that hour with the precision of a minute”⁵⁴) has not been falsified. The chance that the time of actual arrest can be falsified is confirmed, for example, in the Resolution of the Supreme Court of Kazakhstan № 7 dated 28 December 2009: “Often times, citizens are detained without significant enough legal grounds for their detention, and then [...] the time of their detention in arrest reports is falsified “to correspond” to the date and time in the report, and the reports are often entered much later than when the person was detained in reality”.

During this time, the detainees can be held in private or police duty cars, police offices, private apartments - outside the reach of law and outside protective safeguards whatsoever.

From newspaper publications placed on the web-site of Kazakhstan International Bureau for Human Rights and Rule of Law for 2011-2012:⁵⁵

“In the village of Aschessay (Western Kazakhstan), a police officer and the village district mayor beat up a young man, Alexey Lozhkin, after taking him in a car trunk out to a neighbouring village”.
“In Raiymbek district (Almaty oblast), several police officers systematically tortured innocent citizens forcing them to confess to the thefts they had not committed. Not only did the police officers do that in the police station, but also in their own barns. During the investigation, the investigator found in their barns the signs of brutal torture”.

“On 21 December 2011, police officers of Zhetussu district (Almaty) detained four members of the Oglee family – the father, mother, and their two sons. They were detained right in their apartment and were taken to the district police station, where they were placed in different offices and were interrogated for many hours. From 6 in the morning till 23 in the evening they were methodically beaten in order to have them confess to one murder. This means that the police during 17 long hours were torturing the detainees, beating out of them the guilty confessions”.

“In Tulkubass district (Southern Kazakhstan), one detainee was locked up in the recreation hall until the morning, when he was taken to a rented apartment, where the police continued torturing the man. By the lunch time, they ‘cracked’ him and he wrote all what they wanted. That man and other detainees were released only in the evening, they were told that they had nothing to be scared about anymore, and that they would be summoned to court soon as witnesses. The fact of the detention of these “witnesses” in custody for almost 24 hours was nowhere registered”.

In order not to allow for such situations of legal vacuum to happen, when detainees, in fact, are placed beyond the frameworks of the law, it is needed that the law covered all possible circumstances of when detainees can be placed in the law enforcers’ total disposal.

One of such protective measures is obligatory registration of the moment of arrest at the moment of arrest. At present, the law does not require immediate fixation or registration of the moment of actual deprivation of liberty. The time of arrest, as it was said above, should be registered within 3

⁵¹ Criminal Procedure Code of the Republic of Kazakhstan of 13.12.1997 N 206-I, Part1 Article 134.

⁵² Ibid.

⁵³ Criminal Procedure Code of the Republic of Kazakhstan of 13.12.1997 N 206-I, Part1 Article 138.

⁵⁴ See 11.

⁵⁵ URL: <http://bureau.kz/>.

hours at the time of when the arrest record is entered in the arrest register. The time of when the arrest took place is registered based on the words of the persons who carried out this arrest, and who are, naturally, not unbiased. The moment of arrest does not oblige the police officers greatly. At the moment of arrest, the detainee is not informed of his or her rights, he or she cannot notify his or her family of his or her whereabouts and of the fact of the arrest, nor does he or she have any procedural status.

The registration of the moment of arrest at the time of the arrest and informing the detainee of his or her rights could serve as additional guarantees against torture. The registration of arrest at the time of such arrest could be carried out in the form of immediate telephone notification of a third party (e.g. an oversight body or a legal counsel) about the arrest and about the planned route of the delivery of the detainee to the police station, or by way of video-taping the process of apprehension with a car or forehead video-camera with date and time fixation and immediate transmission of the recording to an oversight body.

Another important protective measure against torture is obligatory registration of detainees and all visitors in law enforcement offices.

At the end of 2012, the General Prosecutor and the Minister of Internal Affairs of Kazakhstan issued a joint decree called "Instruction on the order of electronic registration of visitors at the bodies of internal affairs in large regional centers and large cities"⁵⁶. This instruction is aimed at the promotion of control over constitutional rights of people when they are taken to or come to police buildings. According to this Instruction, in the case of any visit to a building of a body of internal affairs "in extension of three (for arrested suspects) or four (all other types of visitors) hours" based on the data of the system of electronic registration of visitors, an officer on duty "shall immediately inform his supervising officer on duty", who shall then inform of this "the head of the inquiring body and prosecutor on duty". If such cases prove "unlawful and ungrounded", the prosecutor on duty shall take measures to the release of the persons concerned and shall inform his supervising prosecutor of the incident.

The office on duty shall enter the following information about visitors in the electronic register: the visitor's procedural status, date and time of arrival, name and title of the staff intended to be visited, the number of the office intended to be visited, reasons for the visit. The database according to the Instruction should be updated every three hours.

This initiative is surely very good. It is advisable that it can be extended to all other law enforcement bodies, not just the police, to all of these bodies' departments, throughout the entire country, and not remain limited to "the large regional centers and large cities".

Besides, all pre-trial detention centers should be returned back to (and from the National Security Committee they should be transferred) to a civic ministry. The detained accused individuals should in no way be kept in custody of that same body that carries investigation of their charges. This contradicts the principle of the presumption of innocence and violates Article 14 of the International Covenant on Civil and Political Rights and is derogation from obligations under Article 2 of the UN Convention against Torture about effective administrative and legal measures promoting protection against torture.

⁵⁶ Approved by the Joint Decree by the Prosecutor General of the Republic of Kazakhstan of 25.12.12 № 156 and the Minister of Internal Affairs of the Republic of Kazakhstan of 25.12.12 № 697.

3. Torture in prisons

The next most common place where torture may happen is prisons.

In prisons, torture, as a rule, happens with the aim to punish prisoners for disciplinary offences when they violate or are provoked to violate prison rules. Torture in prisons may also be used to punish prisoners for non-compliance and disobedience.

The most common types of illegal treatment of prisoners are:

- group punishment of large groups of prisoners for any, even insignificant, violation of the prison rules by even one of the prisoners;
- enforcement to joining different kinds of prisoner voluntary communities that are known to collaborate with prison administrations;
- enforcement to performing military-like routine: exhausting marching, collective signing, purposeless labour (digging out and digging in holes in the ground, etc.).

Any attempt to avoid these illegal requirements is followed by repressive measures: beatings, torture, placing in solitary confinement.

Prisoners' complaints of torture rarely result in full criminal investigations. As a rule, complaints are checked internally, after which the complaint is claimed ungrounded.

Prisoners themselves do not see point in complaining: their complaints are not investigated; they are confirmed of the unlawfulness and impunity of the prison staff and administration; they are afraid of retaliation by the administration; they cannot prove the fact of torture nor the guilt of the prison staff or administration (rarely can they take a photo of the signs of torture or ill-treatment or demand the visit by the public monitoring commission). The prisoners often complain of the apathy and the failure to act of the medical personnel who, one might think, could be relied on for registering signs of torture or other forms of ill-treatment.

The UN Special Reporter on Torture after his visit to Kazakhstan in May 2009 said that de facto there is no effective complaint mechanism in Kazakhstan.

That is why an effective system of launching and investigating complaints of prisoners and persons in custody shall be an effective measure to protect those persons from encroachment on their life and dignity.

Prisoners should have the right of confidential placement of complaints to the external bodies, as the European⁵⁷ and international⁵⁸ rules require. Every complaint should be thoroughly investigated. A reply to the complaint should be detailed enough to allow for its motivated appeal should such need arise. During the investigation, the prisoners concerned should be transferred to other prisons in order to protect them from possible harassment or persecution by the officials whose actions they challenge.

The rights of prisoners and of detainees to be free from torture can be supported by the creation of a mechanism of unrestricted, effective.

⁵⁷ Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules¹ (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

⁵⁸ Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

IV. Recommendations

In order to prevent torture and other types of cruel, inhuman, and degrading treatment or punishment, to promote the rights of participants of criminal proceedings, the rights of persons deprived of their liberty, and the human rights in general, and to comply with the international human rights obligations, it is recommended that in Kazakhstan:

1. The terms “actual apprehension”, “moment of apprehension”, “moment of registration of arrest”, “detained suspect”, “a person suspected of having committed a crime”, “a detainee”, “a suspect” are coordinated among themselves to promote the safeguards against torture for people deprived of their liberty in the meaning of article 9 and 14 of the International Covenant on Civil and Political Rights.
2. The rights of suspects stipulated for by Article 68 of the Criminal Procedure Code (provided they fully comply with the established international standards) should also extend to those deprived of their liberty on suspicion of having committed a crime starting from the moment of their actual arrest.
3. The rights of persons who have become objects of operational and search actions should be safeguarded in law and in practice to protect them against torture:
 - a. The rights of persons who have become objects of operational and search actions should be that of persons “under any form of detention or imprisonment”. Their procedural status should be clearly defined.
 - b. The operative and search actions that risk endangering a person’s dignity and physical integrity (inquiry, personal search, capture, and detention) should be carried out with an order from a prosecutor or better – a judge.
 - c. The Law on Operative and Search Activities should be amended to exclude any misunderstanding, vagueness, and references to unidentified normative legal acts. All grounds for carrying out operative and search actions should have documentary confirmation.
4. The Code of Administrative Offences of Kazakhstan should be amended to include more substantial safeguards against torture, particularly, the right to be informed of one’s rights at the moment of arrest, the right to independently notify a third party of one’s choice of the arrest and place of detention. The limits on the time of when a record of arrest should be entered in the registry should be set in law.
5. The time and date of arrest should be registered at the time of the arrest, either by way of obligatory telephone notification of a third unbiased party (e.g. prosecutor or a legal counsel), or by automatic video-registration with immediate transmission of the recording to an oversight body or another controlling body.
6. The system of electronic registration of all visitors in all law enforcement bodies should be introduced throughout the entire country.
7. Pre-trial detention facilities should be returned or transferred (from NSC) to a civic ministry’s authority.
8. The system of penalty execution including the medical services thereof should be transferred to a civic ministry’s administration.
9. An effective complaint mechanism system should be established in prisons. Prisoner complaints of torture should be investigated in a fast, unbiased, and thorough manner.
 - a. Prisoners should be able to launch their complaints to the outside bodies in a confidential way.
 - b. Every single complaint should be immediately investigated.

- c. A reply to the complaint should be detailed enough to allow for its motivated appeal should such need arises.
- d. During the investigation, the prisoners concerned should be transferred to other prisons in order to protect them from possible harassment or persecution by the officials whose actions they challenge.

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