

Dr. Elina STEINERTE
Human Rights Implementation Centre,
University of Bristol, UK

Implementation of paragraph 17, the UN Committee on Human Rights report on the execution of Kazakhstan of the International Covenant on Civil and Political Rights¹

Introduction

The present report has been commissioned by the Legal Policy and Research Centre (LPRC) in Kazakhstan. It aims to examine some issues raised by the UN Human Rights Committee (HRC) in its Concluding Observations regarding the periodic report by Kazakhstan on the implementation of the International Covenant on Civil and Political Rights (ICCPR) in 2011.² Specifically, it was requested to examine para 17 of the Concluding Observations which reads as follows:

‘The Committee is concerned that overcrowding in detention centres and prisons continues to be a problem. The Committee is also concerned at the increased number of reported cases of inter-prisoner violence, self-mutilation and deaths in prisons. The Committee notes the State party’s efforts to construct new prison facilities in order to improve prison conditions (arts. 6 and 10).

The State party should take urgent measures to address overcrowding in detention centres and prisons, including through increased resort to alternative forms of punishment, such as electronic monitoring, parole and community service. The State party should end the practice of tolerating inter-prisoner violence and should take measures to address the underlying causes of self-mutilation by prisoners. In this regard, the State party should ensure that all cases of inter-prisoner violence and deaths are thoroughly investigated and that the perpetrators are prosecuted and punished with appropriate sanctions. Furthermore, public oversight commissions should be granted the ability to conduct unannounced inspections of all prisons and detention facilities.’

On the basis of the above recommendation by the HRC, the present report is divided in four thematic sections: (1) overcrowding; (2) inter-prisoner violence; (3) self-mutilation and deaths in custody; and (4) public oversight over the places of detention. Each of these sections examine the problem in Kazakhstan and offer insight into international standards and practice to address problems. The report concludes with some recommendations how Kazakh authorities could tackle the issues.

1. Overcrowding

According to the International Centre for Prison Studies (ICPS), as of 1 January 2013 Kazakhstan ranks 35th among the world nations with 295 prisoners per 100 000 of the national population. Over

¹ This expert opinion has been prepared with financial support of the NED.

² Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee. Kazakhstan. UN Doc CCPR/C/KAZ/CO/1 (2011).

the recent years, Kazakhstan has experienced a steady decline in the prison population as, for example, in 2010 there were 62 997 people in prisons³ while in 2011 this figure was at 55 552.⁴ This means that over the past couple of years the prison population in Kazakhstan has declined by about 7000 people per year, which is a positive development. Albeit, the prison population rate of 295 in 2013 is still higher than in its neighbouring countries: in Kyrgyzstan it is 181 and in Uzbekistan it is 130; and in fact, in the whole Asia region, Kazakhstan ranks third among the countries with the most prison population rates, preceded only by Thailand and the Maldives.⁵

The ICPS also note that the official capacity of prison system in Kazakhstan stands at 71 690 which means that with the total of 48 684 prison population in 2013, the occupancy level, based on these official capacity levels, is 67.9%.⁶

On the face, these figures do not indicate that overcrowding would be an issue in the country. However the HRC has expressed concerns about the overcrowding.⁷ This seeming discrepancy can be explained by two key factors. First, while overcrowding might not be a problem if the capacity of all prisons together is examined, it might still occur in individual places, as described by the Special Rapporteur on Torture⁸ and national experts.⁹ Second, prison capacity is measured differently in different countries, varying according to the space allocated for each prisoner in national legislation and rules or other reference. In addition, the rate of overcrowding has no clear value as an indicator of the conditions in which prisoners are housed or of the severity of the problems they may face. Thus, the comparison of overcrowding levels can be misleading which explains the assessment of the international actors.

Kazakhstan is not the only country in the world facing the problem of overcrowding. The prison populations grew in 78% of countries between 2008 and 2011, and in 71% of countries in the previous two years.¹⁰ Indeed, it is estimated that more than 10.1 million people, including sentenced and pre-trial prisoners, were held in penal institutions worldwide in May 2011 which means that 146 out of every 100,000 people of the world were in prison at that time.¹¹

There is no internationally accepted standard for the minimum space requirement for each prisoner albeit there is some guidance on the matter. The United Nations Standard Minimum Rules for the Treatment of Prisoners (1957) Rule 10 states:

‘accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation’.

The commentary to Rule 18 of the European Prison Rules indicates that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) considers

³ World Prison Population List, Ninth Edition, International Centre for Prison Studies. URL: http://www.prisonstudies.org/images/news_events/wppl9.pdf

⁴ Ibid.

⁵ ICPS. Asia (excl. Middle East) - Prison Population Rates per 100,000 of the national population. URL: http://www.prisonstudies.org/info/worldbrief/wp_stats.php?area=contasia&category=wb_poprate

⁶ ICPS. Kazakhstan. Available at: http://www.prisonstudies.org/info/worldbrief/wp_country.php?country=98

⁷ Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee. Kazakhstan. UN Doc CCPR/C/KAZ/CO/1 (2011), at para 17.

⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Kazakhstan. UN Doc A/HRC/13/39/Add.3 (2009); Appendix, paras 13 and 69.

⁹ See, for example, ОТЧЕТ О результатах мониторинга мест содержания под стражей ОФ «Хартия за права человека» в городах Алматы, Актобе, Актау, Шымкент и Тараз За февраль 2012 года.

¹⁰ World Prison Population List, Ninth Edition, International Centre for Prison Studies. URL: http://www.prisonstudies.org/images/news_events/wppl9.pdf

¹¹ Ibid.

4 sqm per person as a minimum requirement in shared accommodation and 6 sqm for a single occupancy prison cell. The Commentary also notes that whilst the CPT has never laid down such a norm directly, indications are that it would consider 9 to 10 sqm as a desirable size for a cell for one prisoner.¹²

The International Committee of the Red Cross (ICRC) has also developed specifications concerning space requirements¹³ and it is important to note that the ICRC does not set minimum standards but instead has established recommended specifications which include 1.6 sqm for sleeping space and 1.2sqm for toilets and showers space. The overall specifications are as follows:

- 5.4 sqm per person in single cell accommodation.
- 3.4 sqm per person in shared or dormitory accommodation, including where bunk-beds are used.

Crucially, in setting these specifications, the ICRC clearly states that the appropriate amount of space cannot be assessed by a simple measure of space alone. The application of these specifications is dependent on the actual situation in a given context and thus factors that may be relevant in any given detention situation include:¹⁴

- condition of the building;
- amount of time prisoners spend in the sleeping area;
- number of people in that area;
- the frequency and extent of opportunities to take physical exercise, work and be involved in other activities outside the accommodation area;
- ventilation and light;
- other activities being undertaken in the accommodation area (e.g. cooking, washing, drying);
- facilities and services available in the prison;
- extent of supervision available.

This makes it clear the variety of factors that have direct bearings upon the determination of overcrowding which makes the task of such determination very complex.

There are various causes for overcrowding in prisons identified which include:

- underlying socio-economic and political factors;
- obstacles and delays in accessing justice;
- excessive pre-trial detention;
- punitive criminal justice policies;
- drug control policies;
- inappropriate use of imprisonment;
- inadequate use of alternatives to imprisonment;
- inefficient measures to promote social reintegration;
- breaches of early conditional release and probation orders;
- crisis overcrowding;
- inadequate prison infrastructure and capacity.

Equally, there are various ways how the issue of overcrowding can be addressed and these include:

- (a) Developing comprehensive evidence based strategies and gaining public support;
- (b) Reducing the scope of imprisonment and developing fair sentencing policies;

¹² See Commentary to Rule 18 of the European Prison Rules (2006). URL: <http://www.coe.int/t/dghl/standardsetting/prisons/E%20commentary%20to%20the%20EPR.pdf>

¹³ ICRC, Water, Sanitation, Hygiene and Habitat in Prisons (2005) and ICRC, Water, Sanitation, Hygiene and Habitat in Prisons 'Supplementary Guidance', 2012.

¹⁴ ICRC, Water, Sanitation, Hygiene and Habitat in Prisons 'Supplementary Guidance', 2012; p. 34.

- (c) Improving the efficiency of the criminal justice system;
- (d) Improving access to legal assistance and legal aid;
- (e) Reducing pre-trial detention;
- (f) Wider use of alternatives to imprisonment;
- (g) Assisting with social reintegration and reducing reoffending;
- (h) Managing prison capacity.

In order to bring about effective reduction of prison overcrowding, it is important that the authorities develop short, medium and long term strategies and to achieve this, it is crucial that initially a thorough assessment of the situation is carried out. Such an assessment may cover a review of criminal legislation, the operation of the criminal justice system and challenges faced, the use of pre-trial detention, the implementation of legislation in practice, sentencing policies and trends, implementation of noncustodial measures and sanctions, overcrowding levels in prisons, profile of prisoners, trends in imprisonment rates, services offered in the community for non-custodial measures and sanctions, cooperation between services in the community and criminal justice authorities, access to legal aid.

To the best of the authors' knowledge, there have been no such assessments carried out in Kazakhstan albeit the Concept Paper of the new draft of the Execution of Criminal Code contains some elements of it. Equally, some analysis of the situation can be found in the National Human Rights Plan for years 2009-2012. However there is no comprehensive analysis of the prison system and its challenges which is unfortunate as any reforms currently carried out by the authorities may not be properly grounded and thus may not be most appropriate to address the existing problems.

1.1 Short-term strategies. There are a number of immediate measures that can be considered in order to address overcrowding immediately. These include amnesties; compassionate release and use of national pardoning mechanisms; reviewing the legality of detention. It must be stressed that all these measures should only be carried out if the requisite safeguards and applicable international norms are observed. For example, there are various crimes for which amnesties are not permissible under international law (e.g. war crimes or crimes against humanity). On this note, national expert Mr Rahimberdin notes that through the use of amnesties 2511 inmates were released and the sentences were reduced to further 665 individuals in 2011-2012.¹⁵ This is a welcome development and the practice ought to be encouraged. However, as Mr Rahimberdin points out, there are a number of challenging issues with the institution of amnesties in Kazakhstan. He argues that proper implementation of amnesties must include not only the release of prisoners but also provisions for their settlement in the society which are currently absent in the country.¹⁶ This is a crucial aspect which the Kazakh authorities must address in order to make amnesties meaningful.

1.2. Short to Mid-term strategies. These should focus on measures aimed at enhancing the cooperation between criminal justice agencies which would address the causes for delays in the criminal justice process so that the case backlogs can be approached in a systemic manner and pressure on the prison system can be relieved.

There may also be a need to simplify and speed up the criminal justice process with consideration being given to reforming procedural law and reducing any bureaucratic practices that lead to excessive delays. Measures to reduce excessive use of pre-trial detention must be scrutinised. There is also a need to consider ways of increasing transparency and accountability in prisons as internal prison inspections may be used as an opportunity to assess the levels of overcrowding in individual prisons, the possible causes for such overcrowding and examine ways of addressing these.

¹⁵Rahimberdin K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012); p. 2.

¹⁶ Ibid, p. 3.

It is also crucial to consider the operation of legal aid system in the country and ways of enhancing its effectiveness through such measures as increasing funding, further diversification of legal aid provision and strengthening the cooperation with the non-State legal aid providers.

Finally, it is vital that alternatives to imprisonment are introduced and their use must be improved. To this end, there is a need to review legislation and practical measures taken to reduce arbitrary arrests, increasing possibilities to divert suitable cases from the criminal justice system, prohibiting the use of pre-trial detention in some cases and removing any obligation for pre-trial detention in the case of others, and by increasing possibilities for alternatives other than monetary bail. It must also be noted that the use of monetary bail itself is relatively rare and this needs to be addressed. Legislation may also be reviewed to ensure that it includes a wide range of non-custodial sanctions, suitable for different types of offences, and applicable to individual circumstances. To this it is equally important that measures are introduced to encourage courts to use non-custodial sentences in response to specific offences or instead of short prison sentences, taking into account the vulnerabilities, needs and circumstances of the offenders.

Deprivation of liberty is the most common penalty applied in Kazakhstan. For example, in 2009 there were 39 391 guilty verdicts pronounced and of those 18 788 carried prison service; in 2010 there were 31 968 guilty verdicts and of those 12 030 carried prison service.¹⁷ This means that imprisonment follows about a half of all guilty verdicts which is relatively high ratio.

There are also alternatives to imprisonment but these appear to be relatively under-utilised as for example, in 2009 there were 1764 fines and 1212 community services imposed while in 2010 these figures were at 1643 and 1864 respectively.¹⁸ National expert Mr Salamatov argues that as of 1 January 2010 community service was imposed to only 0.68% of all those sentenced while on 1 January 2011 this figure was at 0.92% and at the same time in 2012- 0.27%.¹⁹ He also notes that the statistics for imprisonment as a form of punishment as of 1 July 2012 showed that it is applied in 78.1% of cases, comparing it to average of 10% in most European countries.²⁰ In his analysis on why such alternatives to imprisonment as community service are rarely utilised he points out to a number of issues which make it fairly cumbersome and burdensome for the employer who, in addition to suffering financial disadvantage by taking on people in community service also effectively subsumes the role of supervisor over the offender.²¹

It must be noted here that Kazakhstan has introduced a system of probation which is a commendable achievement. It is crucial however that this system is properly implemented which must include the involvement of social services and this must be secured in legislation, a vital aspect currently missing in Kazakhstan.²²

As LPRC point out in their extensive and delayed study on reduction of overcrowding in Kazakhstan and alternatives to imprisonment,²³ there are numerous ways of how the application of alternatives to imprisonment can be further developed and strengthened in the country. This is also highly recommended by national experts²⁴ and endorsed by the present report.

¹⁷ LPRC 'Сокращение тюремного населения в Казахстане' (2011), Almaty, p. 89 and 97.

¹⁸ Ibid, at p. 97.

¹⁹ Salamatov E.A. Expert opinion on the draft Concept of the Criminal Executive Code of the Republic of Kazakhstan (new edition) at p.3.

²⁰ Ibid, at p. 9.

²¹ Ibid, at pp. 4-5.

²² Rahimberdin K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012), at p. 4.

²³ LPRC 'Сокращение тюремного населения в Казахстане' (2011), Almaty, p. 89 and 97.

²⁴ Rahimberdin K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012), at p. 9, Recommendation No 16; Salamatov E.A. Expert opinion on the draft Concept of the Criminal Executive Code of the Republic of Kazakhstan (new edition).

1.3. Long-term strategies. It is advisable that a thorough review and revision of criminal justice legislation is carried out which may include such measures as decriminalization of certain offences, the increase in the age of criminal responsibility for children and the development of a juvenile justice system aiming to reduce children's institutionalization, a reduction of sentence lengths, a review and restriction of the number of offences carrying life sentences, repeal of mandatory minimum sentencing laws in whole or in part, developing non-custodial sentences and other diversion schemes, allowing more discretion for judges, reviewing drug control policies and modifying them with a view to reducing the imprisonment of minor offenders.

There is also a need to take measures to improve the efficiency of the criminal justice system by building the capacity of criminal justice actors, reviewing and revising recruitment procedures and practices and criteria to evaluate performance and by allocating adequate funding for the administration of criminal justice.

It is also important that measures are taken to ensure that the criminal justice system produces relevant data on an on-going basis to inform policy development, including with the establishment and improvement of prisoner data management systems. Equally, there is a need to generate similar data in other relevant spheres of government responsibility, such as social welfare, education and healthcare policies in order to ensure development of comprehensive and holistic policies aimed at reducing factors that can contribute to social exclusion and criminal behaviour in order to reduce imprisonment in the long-term.

Finally, it is important that measures are introduced to raise public awareness and ensure public support for reforms.

2. Inter-prisoner violence

The UN Special Rapporteur in his mission report to Kazakhstan observed the following:

'The Special Rapporteur learned that a hierarchical order among prisoners had been inherited from Soviet times. Those who do not comply with the hierarchy and the "shadow law" it represents are subjected to violence and discrimination by fellow prisoners, with the consent and sometimes active approval and solicitation of prison administrations. As a result, a certain degree of violence, including sexual violence, among prisoners is widely alleged to be quite common (for example, towards the so-called "humiliated ones", who are totally excluded from the prisoner society). Moreover, in Kazakhstan, there are two types of prison colonies: the "black" and the "red" zones. In the red zones, prison management uses prisoners to intimidate other prisoners to maintain order. In the black zones, the administration simply hands the task of maintaining discipline to the prisoner hierarchy. Both are incompatible with international standards. The Special Rapporteur recalls that inter-prisoner violence can amount to torture or ill-treatment if the State fails to act with due diligence to prevent it.'²⁵

Also national NGOs report that:

'According to public monitoring commissions prisoners often complain not only on torture/ill-treatment by prison administration but also by other inmates. There is a legal provision in the law, which allows delegation of certain functions to a group of inmates, referred to as a "counsel on law & order" in order to "assist prison administration in ensuring discipline and order" in the institution. These inmates enjoy certain privileges for cooperation with the prison administration. During the

²⁵Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Kazakhstan. UN Doc A/HRC/13/39/Add.3 (2009), at para 28.

campaign on self-mutilation, the prisoners complained that they were beaten by other inmates from such counsels along with the prison guards'.²⁶

The UN Subcommittee on Prevention of Torture (SPT) also notes the presence of such prisoner self-governance arrangements in many states parties but argues that this does not relieve the state from its responsibilities towards the prisoners and their safety:

'(...) It is axiomatic that the State party remains responsible at all times for the safety and well-being of all detainees and it is unacceptable for there to be sections of institutions which are not under the actual and effective control of the official staff. (...)The Subcommittee is aware that such self-governance systems may themselves be connected to or influenced by more general problems of corruption within the criminal justice system, which must also be addressed. In addition, the authorities must ensure that all inmates are treated equally and that any advantages enjoyed by those exercising such functions do not exceed what is reasonably necessary to enable them to perform their recognized and legitimate functions. If such systems do exist, they should be officially recognized, with clear and transparent terms of reference and criteria for the selection of those exercising positions of internal responsibility. Such persons should be closely supervised. In no circumstances should such persons be able to control access to the authorities responsible for the places or detention, including access to medical staff or to complaints mechanisms, or to exercise any disciplinary powers over fellow inmates.'²⁷

This however means that by allowing such prisoner 'self-governance' systems, Kazakhstan is effectively responsible for their actions by acquiescence. Furthermore, up until recently, one of the crucial issues was the definition of torture adopted in Kazakh legislation which was not in conformity with international standards and Article 1 of the UN Convention against Torture (UNCAT) in particular. The definition limited criminal responsibility to public officials and did not criminalise torture committed by any other person acting in official capacity or by individuals acting at the instigation or with the consent or acquiescence of public officials.²⁸ This meant that therefore in practice ill-treatment inflicted by other inmates could not be punished as the crime of torture. While this has now been addressed,²⁹ the definition of torture still falls short of international standards as it does not refer to physical and mental suffering arising from unlawful actions of public officials. Moreover, the specific offence of torture is not punishable by appropriate penalties commensurate with the gravity of the offence as required by Article 4 (2) of UNCAT.

Finally, an issue that must be mentioned here is the fact that most prisons in Kazakhstan were inherited from the Soviet times and so are the so-called colony type institutions. This means housing prisoners in barrack style accommodation where 50-100 prisoners are held together. As national experts point out, such housing style makes it very difficult, if not impossible, to ensure

²⁶ Kazakhstan NGO Report to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights by the Republic of Kazakhstan. Submitted to the 102 session of the Human Rights Committee 11-29 July, Geneva. Almaty, June 2011; at p. 14.

²⁷ Subcommittee on Prevention of Torture. *Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc CAT/C/46/2 (2011) at para 57.

²⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Kazakhstan. UN Doc A/HRC/13/39/Add.3 (2009), at para 13.

²⁹ See: Law RK "On amendments and additions to some legislative acts of Kazakhstan on further humanization of criminal legislation and strengthen the guarantees of legality in criminal proceedings" from January 18, 2011; see also: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E.Méndez. Addendum. Follow-up to the recommendations made by the Special Rapporteur visits to China, Denmark, Equatorial Guinea, Georgia, Greece, Indonesia, Jamaica, Jordan, Kazakhstan, Mongolia, Nepal, Nigeria, Paraguay, Papua New Guinea, the Republic of Moldova, Spain, Sri Lanka, Togo, Uruguay and Uzbekistan. UN Doc A/HRC/19/61/Add.3 (2012) at p. 164, para 64.

safety of prisoners.³⁰ It is therefore recommended and indeed, according to the Concept Paper accompanying the new draft on the Execution of Criminal Code, the government is planning to move away from the colony type system by adapting the existing facilities to prisons with accommodation arranged in cells. While this move *per se* is welcomed by the national experts,³¹ there are also concerns expressed that the existing facilities, given their current state, may not be easily converted to cell-type prisons.³² It therefore essential that the authorities carry out a thorough examination on best ways for this transition can take place which would lead to a result compatible with the international standards.

3. Self-mutilation and deaths in custody

The HRC notes the increase of self-harm phenomena in the places of detention in Kazakhstan.³³ Indeed, also the Special Rapporteur on Torture reported a case of self-harm as a protest over ill-treatment and noted that the particular incident of self-harm only lead to further ill-treatment by the authorities.³⁴ National NGOs also report instances of self-mutilation and even mass self-mutilation which took place in April 2007 in a protest to lack of proper delivery and independent investigation of prisoners' complaints.³⁵ Equally, national NGOs report the findings of Public Monitoring Commissions (PMCs) that another reason for mass self-mutilation campaign was to express protest against the so-called 'prisoner self-governance' which effectively allows ill-treatment to be inflicted by other inmates.³⁶ These examples are illustrative of self-mutilation problems in the prisons of Kazakhstan.

Furthermore it also appears that self-harming is a punishable offence and so self-harming prisoners can find themselves in, for example, segregation for 15 days for the breach of internal prison regulations which prohibit actions that endanger the life and health of the prisoner or others.³⁷ In this regard it must be noted that the Constitutional Council of the Republic of Kazakhstan adopted explanatory ruling clarifying that self-harm by those deprived of their liberty is a way of expressing their protest against ill-treatment and conditions of detention. This however seems to have had little effect in practice as self-harming prisoners are still punished³⁸ which is not only counter-productive as tends to escalate the prevailing circumstances which have lead to self-harm in the first place but also constitutes a breach of care on behalf of the authorities. It must be recalled that those deprived of their liberty are in the care of the authorities and these authorities bear responsibility for their well-being. By neglecting the underlying causes of self-harming phenomena and imposing penalties for self-harm, the Kazakh authorities are not fulfilling their duty of care towards those deprived of their liberty.

In relation to deaths in custody, national NGOs report that in the first six months of 2009 there were 222 deaths in prisons recorded, which included 33 suicides, 7 from HIV/AIDS, 88 from tuberculosis

³⁰ Salamatov E.A. Expert opinion on the draft Concept of the Criminal Executive Code of the Republic of Kazakhstan (new edition), at p. 7.

³¹ Ibid, at p. 7; Rahimberdin K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012), Recommendation No 12.

³² Salamatov E.A. Expert opinion on the draft Concept of the Criminal Executive Code of the Republic of Kazakhstan (new edition), at p. 7.

³³ Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee. Kazakhstan. UN Doc CCPR/C/KAZ/CO/1 (2011), at para 17.

³⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Kazakhstan. UN Doc A/HRC/13/39/Add.3 (2009), Appendix, para 82.

³⁵ Kazakhstan NGO Report to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights by the Republic of Kazakhstan. Submitted to the 102 session of the Human Rights Committee 11-29 July, Geneva. Almaty, June 2011, at p. 14.

³⁶ Ibid.

³⁷ JUDGMENT 2k-212/2013, Case 2-9364, April 17, 2013.

³⁸ Ibid.

and 94 attributed to other health conditions. The NGOs however argue that 'there is no mention in government reports whether the cases of death in custody were investigated and what were the outcomes of investigations'.³⁹ This is also noted by the HRC who has recommended that Kazakhstan 'should ensure that all cases of inter-prisoner violence and deaths are thoroughly investigated and that the perpetrators are prosecuted and punished with appropriate sanctions'.⁴⁰

The phenomenon of self-harm is present also in other countries but it is crucial to remember that it is the state which is responsible for the safety and well-being of those in custody. This means that state must take measures to ensure this. Thus, for example, in the United Kingdom, there is an Instruction on Safer Custody⁴¹ issued by the Ministry of Justice which, *inter alia*, aims to identify, manage and support prisoners and detainees who are at risk of harm to self, other, and from others as well as reduce deaths in custody.⁴² This Instruction is addressed to all prison staff and details the measures that staff must undertake in order to identify those at risk and support them. It is crucial to note that this Instruction is observed in practice in the prisons in England and Wales and the Instruction is public document, which can be easily accessed by anyone. This means that the measures that the authorities are obliged to undertake in order to manage prisoners at the risk of self-harm are public which means that anyone, like independent monitoring mechanisms and families of prisoners, are able to ascertain whether these are followed in practice.

At the heart of this Instruction is the need to set up a system of how prisoners at risk of self-harm and/or suicide are managed and supported while in custody. The core component of this the idea of information sharing among the staff and this is achieved with the use of individual Assessment, Care in Custody, Teamwork (ACCT) procedures which is 'a prisoner-centred, flexible care-planning system which, when used effectively, can reduce risk'.⁴³ Crucially, the Instruction notes that:

'The identification and management of prisoners at risk of suicide and/or self-harm is everyone's responsibility. Good staff/prisoner relationships are integral to reducing risk. Other factors which are fundamental to reducing risk are regular participation in regime activities, positive family and peer relationships, and referral to appropriate specialist services such as mental health in reach'.⁴⁴

This also alludes to the need for a complex approach required to address the problem of self-harm and suicides in custody which, as multi-faceted problems, cannot be addressed by prison officers alone but require involvement of other specialists.

What the system involves in practice is that the ACCT form is compiled in relation to any prisoner who is deemed to be at a risk of self-harm and/or suicide. It can be initiated by any member of staff, be they prison officers or health care staff or even member of public oversight, like members of Independent Monitoring Boards (IMBs) which are attached to every prison in England and Wales. The opening of the ACCT form means that an Immediate Action Plan (IAP) is set up in collaboration with the prisoner in question so as to ensure his/her safety from harm. The healthcare department is also involved and the Plan usually includes such measures as conversations and observations with the prisoner at a set frequency. This Plan must 'travel' with the prisoner to and from any location the prisoner moves to when he/she participates in activities like work or exercise so as to ensure that the receiving staff is informed of the prisoner's risk status and is able to input

³⁹ Kazakhstan NGO Report to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights by the Republic of Kazakhstan. Submitted to the 102 session of the Human Rights Committee 11-29 July, Geneva. Almaty, June 2011, at p. 13.

⁴⁰ Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee. Kazakhstan. UN Doc CCPR/C/KAZ/CO/1 (2011), at para 17.

⁴¹ Ministry of Justice *Management of prisoners at risk of harm to self, to others and from others (Safer Custody)* PSI 64/2011 (updated) of 17 February 2012. URL: <http://www.insidetime.org/info-rules-results.asp?rID=804>.

⁴² *Ibid*, at p. 2.

⁴³ *Ibid*, at p.24.

⁴⁴ *Ibid*.

to the ACCT Plan On-Going Record. The receiving staff also must ensure the level of observations and conversations at the frequency required by the Plan and these must be recorded in the ACCT. The continued need for the ACCT is reviewed at regular case reviews and even when it has been closed, post-closure interviews with the prisoner in question must be carried out no later than 7 days after the ACCT closure so as to ensure his/her continued safety.

Further to the ACCT, the Instruction also requires such further measures as cell sharing risk management and the need to, for example, accommodate prisoners at risk in safe cells which are designed not only to minimise ligature points but to create a more normalising environment.⁴⁵ There are also specific provisions for dealing with prisoners who are at immediate risk of suicide or fatal self-harm. These include the use of CCTV⁴⁶ and constant supervision by a member of staff who provides appropriate levels of support in order to reduce risk of suicide or potentially fatal self-harm.⁴⁷

The Instruction also tackles issues concerning managing prisoners who refuse food and/or fluids and medical treatment;⁴⁸ managing prisoners who are terminally ill;⁴⁹ managing violent prisoners⁵⁰ and those with complex behaviour which is so challenging and disruptive that they cannot be managed within the normal custodial regime.⁵¹

Finally, the Instruction also details the actions required following a death in custody. Prompt and accurate reporting of the fatal incident, including the appropriate notification of the next of kin, is first of all required. Following this a prompt investigation of the death is carried out and staff are required to cooperate fully with the investigators, including those by the police, the Prisons and Probation Ombudsman, the Health and Safety Executive where applicable and the coroner's inquest.⁵² It must be noted that as a rule, every death in custody is treated as suspicious by the police.

The Prisons and Probation Ombudsman (PPO) investigates all deaths in prisons and young offender institutions. The Ombudsman's office is operationally independent of, though it is sponsored by, the Ministry of Justice; the PPO reports to the Secretary of State.⁵³ The PPO Office investigation into a death in custody⁵⁴ is carried out by a named investigator who leads the investigation and a family liaison officer who liaises with the bereaved family. The investigator will find out as much as possible about what was happening to the person before their death. This includes examining all the relevant documents and policies, together with interviews with relevant staff and prisoners or residents, if required. After the investigation is complete a report is produced which outlines the investigation findings. It may also recommend changes to improve the quality of care given by the prison, approved premises or immigration removal centre in the future. The final report is sent to the bereaved family and the service. It is also sent to the Coroner who will conduct the inquest to establish how the person died. The reports are also published on the PPO website albeit all names are removed from the report so that no one can be identified.⁵⁵

The system of addressing issues of self-harm and deaths in custody as outlined in the example of England and Wales is of course only one an example of the way one state is dealing with these complex issues. What is crucial however is that there is a system in place which is clearly set out

⁴⁵ Ibid, at p. 28.

⁴⁶ Ibid, at p. 33.

⁴⁷ Ibid, at p. 31.

⁴⁸ Ibid, at p. 48.

⁴⁹ Ibid, at p. 50.

⁵⁰ Ibid, at p. 35.

⁵¹ Ibid, at p. 42.

⁵² Ibid, at p. 53.

⁵³ PPO 'Terms of Reference' at <http://www.ppo.gov.uk/terms-of-reference.html>

⁵⁴ PPO 'How we Investigate Fatal Incidents' at <http://www.ppo.gov.uk/how-we-investigate-fatal-incidents.html>

⁵⁵ Such anonymised reports regarding deaths in prisons can be found at <http://www.ppo.gov.uk/prison-investigations.html>

and observed in practice and that this system is a transparent one. This latter feature is particularly crucial as the fact that the Instruction is a publicly available document allows all relevant stakeholders, be these civil society, monitoring mechanisms or families of prisoners, ascertain whether the measures are being implemented in practice and whether this is done efficiently. These are the crucial characteristics, which Kazakh authorities must ensure when elaborating upon a system to be put in place in the country.

4. Public oversight over the places of detention

The final recommendation of the HRC in para 17 of its Concluding Observations on Kazakhstan was to ensure public oversight over the places of deprivation of liberty. In this regard the HRC made a special mention of the Public Monitoring Commissions (PMCs).

The PMCs were established through legislative amendments of 29th December 2004,⁵⁶ their existence is also prescribed by Article 50 of the Law on the Order and Conditions of Deprivation of Liberty⁵⁷ and thus these bodies are 'anchored' in the regular legislation of Kazakhstan. However the details of the establishment of these Commissions as well as their operational details are set out in the Decision of the Government,⁵⁸ which according to Article 1 of the Law on Legal Acts⁵⁹ is not considered to be a legislative act in the country. Thus the operational aspects of the PMCs are subjected to the regulation of the executive which gives rise to concerns in terms of the independence of these bodies. This has been noted as a shortcoming by the national experts who highlight the dependence of the PMCs upon the authorities.⁶⁰ To this end, the new draft law on the Public Oversight over the Conditions of Human Rights in the Places of Detention which is to be discussed by the legislature in September 2013⁶¹ must be noted. It is very much hoped that this draft will ensure requisite level of independence of PMCs of the executive.

There are 15 public monitoring commissions acting throughout the country which is considered to be inadequate given the sheer size of the country, the number of places of deprivation of liberty and the remoteness of some of such institutions.⁶² Moreover, the national NGOs report a recent trend which indicates that the prison administrations often deny access of public monitoring commissions to prisons under various pretexts.⁶³ Equally, the PMCs lack one of the key powers to ensure rigorous public oversight over the places of deprivation of liberty; namely they lack the

⁵⁶ Law RK "On amendments and additions to some legislative acts of the Republic of Kazakhstan on issues of justice," December 29, 2004 № 25-III.

⁵⁷ Law of the Republic of Kazakhstan "On the procedure and conditions of detention of persons in institutions that provide temporary isolation from society," March 30, 1999 № 353-I.

⁵⁸ Постановление Правительства Республики Казахстан от 24 июня 2011 года № 702 *Об утверждении Правил образования общественных наблюдательных комиссий областей, городов республиканского значения и столицы для осуществления общественного контроля в специальных учреждениях.*

⁵⁹ Constitutional Law of the Republic of Kazakhstan About the President the Republic of Kazakhstan. December 26, 1995 № 2733.

⁶⁰ Supra note 15, at p. 5; ОБЗОР выполнения рекомендаций Национального плана действий в области прав человека за 2009-2012 годы, at p. 21; Yevgeni Zhovtis *Summary of Remarks at the International Conference "OPCAT in an OSCE region: its meaning and implementation"* Presentation in the Conference *OPACT in the OSCE region: What it means and how to make it work?*, Prague, Czech Republic, 25-16 November 2008. URL: <http://www.bris.ac.uk/law/research/centres-themes/opcat/law/research/centres-themes/opcat/pragueseminar.html#docs>

⁶¹ Draft Law of the Republic of Kazakhstan "On public control over the observance of human rights in places of detention".

⁶² Steinerte, E., Background paper. Inventory of Existing Mechanisms of Monitoring in Kazakhstan and their Compliance with OPCAT standards for National Prevention Mechanisms (2009). Available at: <http://www.bristol.ac.uk/law/research/centres-themes/opcat/index.html> (last accessed on 12 August 2013).

⁶³ Kazakhstan NGO Report to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights by the Republic of Kazakhstan. Submitted to the 102 session of the Human Rights Committee 11-29 July, Geneva. Almaty, June 2011, at p. 13.

ability to carry out unannounced visits.⁶⁴ It is therefore unsurprising that the national NGOs have noted that the public monitoring of places of detentions needs drastic improvement,⁶⁵ a recommendation which is strongly supported by the present report.

As a positive development it is noted that the representatives of the main religious denominations are now allowed to establish contacts with prisoners with the aim of offering inmates religious support.⁶⁶ In the light of this the recent decision taken by Kazakh authorities to close prayer rooms in penal institutions has been criticised as directly contradictory and in fact, hampering the abilities of the religious organisations to interact with inmates.⁶⁷ It is important to note that such religious organisations also play an important role in ensuring transparency in places of deprivation of liberty and must be considered to form part of public oversight over the places of deprivation of liberty. It is therefore important that the Kazakh authorities allow them unfettered access to places of deprivation of liberty and re-instate the prayer rooms.⁶⁸

Finally, note must be made of the progress made in relation to the establishment of the National Preventive Mechanism for Kazakhstan as per the obligations the country undertook when it became a party to the Optional Protocol to the UN Convention against Torture (OPCAT). Kazakhstan signed OPCAT on 25 September 2007 and ratified the instrument on 22 October 2008.⁶⁹ Thus the country was to designate its NPM by the 22 October 2009, as prescribed by Article 17 of OPCAT. Kazakhstan however entered a declaration under Article 24 which allowed postponement of the NPM designation for three years thus making the final deadline as 22 October 2012. The requisite NPM legislation was adopted in July 2013⁷⁰ which means that Kazakhstan is in *de facto* breach of its obligations under OPCAT especially given the fact that the adoption of the requisite NPM legislation does not mean that the NPM has been established in real life. Nevertheless the adoption of the NPM legislation is a positive development and the Kazakh authorities must also be commended for the wide consultation process which accompanied the drafting and adoption process of the NPM legislation.

Still, the adoption of NPM legislation was a lengthy and cumbersome process culminating with the law which on the face of it corresponds to the key provisions of OPCAT. There are however some points which must be carefully implemented so as to ensure that the basic remit of the NPMs' mandate correspond to the requirements of OPCAT. One of the key problems with the NPM legislation is that despite numerous recommendations⁷¹ the Kazakh authorities did not adopt a new, separate law on NPM but rather opted for a number of legislative amendments to be carried

⁶⁴ Rahimberdin K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012), at p. 5; Review recommendations of the National Action Plan for Human Rights 2009-2012, at p. 21.

⁶⁵ Kazakhstan NGO Report to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights by the Republic of Kazakhstan. Submitted to the 102 session of the Human Rights Committee 11-29 July, Geneva. Almaty, June 2011, at p. 13.

⁶⁶ Rahimberdin K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012), at p. 5.

⁶⁷ *Ibid.*

⁶⁸ This is also a recommendation of national experts. See: Rahimberdin K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012), at p.9; Recommendation No 15.

⁶⁹ See: United Nations Treaty Series. URL: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en

⁷⁰ Закон Республики Казахстан от 2 июля 2013 года № 111-V *О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам создания национального превентивного механизма, направленного на предупреждение пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания.*

⁷¹ See, for example, Human Rights Implementation Centre. Expert Advice letter to the Members of the Working Group on Draft Law on the Amendments and Additions to certain legislative acts of the Republic of Kazakhstan on the matter of the establishment of national preventive mechanisms aimed at the prevention of torture and other inhuman or degrading treatment or punishment of 23 May 2012; URL: <http://www.bristol.ac.uk/law/research/centres-themes/hric/expertadvicebyhric/kazakhstan.html>

out in the existing legislation of Kazakhstan. This means that currently there are amendments adopted in 16 various legislative acts which makes it very difficult to ascertain of the precise remit of the NPM mandate.⁷²

Moreover, this approach has also lead to potential disagreement with one of the key provisions of OPCAT, Article 4 which sets out the scope of the term 'deprivation of liberty'. This provisions encapsulates a rather wide understanding of 'deprivation of liberty',⁷³ which means that NPM visits must be allowed not only to 'traditional' places like prisons and police cells, but also to 'untraditional' ones like psychiatric institutions and social care homes for elderly, for example. The legislative changes carried out in the 16 existing Kazakh laws indicated that the NPM will have access to prisons, army detention places, SIZOs, juvenile institutions and variety of health care institutions such as psychiatric institutions and centres for treatment of drug addiction etc. It does however appear that amendments have not been carried out in relation to, for example, centres where asylum seekers and refugees are processed/held and social care homes for elderly.

Additionally, Article 4 of OPCAT states that visits must be allowed to all places 'where persons are or *may be* deprived of their liberty' (emphasis added). This means that not only existing places are to be subjected to the NPM scrutiny but also potential places of deprivation of liberty. This is especially important in the context of Kazakhstan given that the country is about to embark upon the complex task of reforming its colony-type prisons and move to cell-type accommodation prisons which may involve both the reorganisation of existing places as well as construction of new facilities. The advice of the NPM in this process would be key to ensure that this transition is carried out in the manner that would ensure prevention of any ill-treatment.

Finally, the new NPM legislation has moved away from the mode of financing the work of NPM which was proposed by earlier drafts, namely, the use of social procurement procedure, criticised by both national⁷⁴ and international⁷⁵ experts. However the current law only states that the compensation of the expenses bourn by the NPM members shall be reimbursed according to the order established by the government. It is essential that this order is such as to allow the requisite degree of financial independence of the NPM as per Article 18 of OPCAT and the Paris Principles⁷⁶ and that there are also direct provisions adopted on the mode of financing the work of the NPM as such.⁷⁷

Consequently the newly adopted NPM legislation appears to be incomplete in relation to some of the key OPCAT provisions in relation to the basic remit of the NPM mandate. It is therefore crucial that the Kazakh authorities continue the work on the requisite legislative framework which is then followed by proper implementation.

Recommendations

⁷² Miller, A. 'Expert Review of the Implementation of the National Human Rights Plan of the Republic of Kazakhstan for years 2009-2012 by the State Organs', at p. 7.

⁷³ For detailed discussion on the scope of Article 4 of OPCAT see: Human Rights Implementation Centre '*Deprivation of liberty*' as per Article 4 of OPCAT: the scope. Policy Paper (October 2011). URL: <http://www.bristol.ac.uk/law/research/centres-themes/hric/policypapers.html>

⁷⁴ Miller, A. 'Expert Review of the Implementation of the National Human Rights Plan of the Republic of Kazakhstan for years 2009-2012 by the State Organs'.

⁷⁵ See, for example, Human Rights Implementation Centre. Expert Advice letter to the Members of the Working Group on Draft Law on the Amendments and Additions to certain legislative acts of the Republic of Kazakhstan on the matter of the establishment of national preventive mechanisms aimed at the prevention of torture and other inhuman or degrading treatment or punishment of 23 May 2012.

⁷⁶ UNGA Res 1992/54, Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (The Paris Principles), endorsed by the UN General Assembly Resolution 48/134, 20 December 1993.

⁷⁷ Article 18 (1) of OPCAT.

1. While there are significant positive developments in adjusting the national legislative framework of Kazakhstan to international standards, it is the implementation of this legislation which is noted as hugely problematic by both international and national experts. It is therefore recommended that as a matter of priority the Kazakh authorities elaborate on detailed implementation strategies so as to bring about tangible results envisaged by the legislative reforms that have been carried out.
2. It is recommended that a comprehensive analysis of the prison system and its challenges is carried out so that the reforms currently carried out by the authorities can be properly grounded and adjusted to address the challenges identified through such analysis.
3. The definition of torture in the Kazakh legislation still does not conform to the international standards and Article 1 of UNCAT in particular as it does not refer to physical and mental suffering arising from unlawful actions of public officials. Moreover, the specific offence of torture is not punishable by appropriate penalties commensurate with the gravity of the offence as required by Article 4 (2) of UNCAT. It is therefore recommended that the definition of torture and penalties applicable for the offence of torture in Kazakh legislation are brought in line with the international standards.
4. There is a need to examine in detail the modalities of moving away from the colony-type prisons to accommodation in cells type institutions and whether mere converting of the existing places of deprivation of liberty into cell-type accommodation would ensure compliance with international standards regarding prisoner accommodation. It is therefore recommended that the Kazakh authorities carry out the examination of these issues, involving national civil society in these discussions in a meaningful way. It is also recommended that the prospective NPM is involved in the process of this transition so as to ensure it is carried out in the manner which would allow prevention of any ill-treatment of those in places of deprivation of liberty.
5. It is recommended that due consideration is given to the proper implementation of amnesties which must include not only the release of prisoners but also provisions for their settlement in the society.
6. It is recommended that the system of probation is properly implemented which must include the involvement of social services which must be secured in the legislation.
7. It is recommended that the Kazakh authorities examine the legislation on alternatives to imprisonment and carry out a study to determine the underlying causes for the low use of these alternatives with the view of eliminating them and thus making the application of alternatives to imprisonment a real and meaningful possibility.
8. It is recommended that the Kazakh authorities urgently abolish the system of prisoner self-governance and adopt effective measures to eliminate this practice on the ground totally.
9. It is recommended that the Kazakh authorities formulate strategy on the prevention of self-harm and deaths in custody and adopt a Manual or Instruction which would set out a uniform practice on the ways prison staff must identify, manage and support prisoners and detainees who are at risk of harm to self, others, and from others and ensure its effective implementation in practice. Such Manual or Instruction must be clear and publicly available document so that the relevant stakeholders can ascertain of its effective implementation in practice.
10. It is recommended that the Kazakh authorities ensure the ability of Public Monitoring Commissions (PMCs) to visit places of deprivation of liberty unannounced and take effective measure to strengthen their independence from the executive by adopting a separate legislative act on their operation. The authorities must also ensure that the PMCs are allowed unfettered access to places of deprivation of liberty in practice.

11. It is recommended that the Kazakh authorities allow the representatives of religious organisations unfettered access to places of deprivation of liberty and re-instate the prayer rooms.

12. While the adoption of the new legislation regarding the establishment of the National Preventive Mechanism (NPM) in Kazakhstan is commendable, it is recommended that the Kazakh authorities continue their work on further legislative amendments so as to ensure that the remit of NPM mandate corresponds to all basic requirements set out in the text of OPCAT and especially in relation to Article 4.

13. It is recommended that the both the mode of financing the NPM work as a whole as well as reimbursement the individual NPM members is such as to allow the financial independence of the NPM as required by Article 18 of OPCAT and the Paris Principles.

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