

KAZAKHSTAN

SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE

**53RD SESSION OF THE UNITED NATIONS
COMMITTEE AGAINST TORTURE (3-28
NOVEMBER 2014)**

**AMNESTY
INTERNATIONAL**



Amnesty International Publications

First published in 2014 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

© Amnesty International Publications 2014

Index: EUR 57/002/2014
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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INTRODUCTION

Amnesty International submits this briefing to the United Nations (UN) Committee against Torture (the Committee) ahead of its examination, in November 2014, of Kazakhstan's third periodic report on the implementation of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention or the Convention against Torture).

The following submission outlines a number of issues of concern to Amnesty International about Kazakhstan's implementation of the Convention, in particular under Articles 1, 2, 3, 4, 5, 11, 12, 13, 14, 15 and 16. This briefing will also complement other submissions to the Committee against Torture by domestic and international NGOs with which Amnesty International cooperates.

When Kazakhstan's human rights record was assessed under the UN Universal Periodic Review (UPR) in February 2010, the government delegation reiterated in its presentation that the Kazakhstani authorities were committed to a policy of zero tolerance on torture, and that they "would not rest until all vestiges of torture had been fully and totally eliminated".¹ Unfortunately this bold promise has not been borne out by reality. Kazakhstan will be reviewed in the second cycle of the UPR in October 2014.

The authorities also announced the introduction of a number of measures intended to strengthen safeguards against torture, including widening access to places of detention to independent public monitors and ensuring that no statement obtained through torture could be used in court. They also pledged to implement the recommendations of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on torture) who had visited the country in 2009 and who had concluded in his February 2010 report that "the use of torture and ill-treatment certainly goes beyond isolated instances" and that "considerable gaps between the law and reality remain".²

A National Human Rights Action Plan for 2009-2012 acknowledged that human rights violations committed by law enforcement agencies, including arbitrary detentions, torture or other ill-treatment, were widespread and proposed measures to effectively address its human rights commitment, especially on the prevention of torture and other cruel, inhuman or degrading treatment.³ However, despite the fact that independent non-governmental organizations (NGO) register between 350 and 400 complaints of torture and other ill-treatment in Kazakhstan every year, Kazakhstani NGOs estimate that during the period since 2010 the authorities have succeeded in bringing only some 50 officials to justice. Statistics from the website of the Prosecutor General's Office⁴ state that in 2013 and the first half of 2014, 31 police officers were convicted of torture related crimes (including for crimes committed in earlier years). However, the website does not specify the precise nature of the crimes committed by these individuals, nor the number of cases in relation to which these convictions took place. From January to September 2014, according to the information on the website of the Office of the Prosecutor General,⁵ 43 crimes of torture were registered, (with no details as to how many criminal cases were opened), with 47 individuals identified as alleged victims, including 11 prisoners, three underage college students and one elderly

person. During the same period, 17 torture-related cases were submitted to court for trial and 30 cases were closed because of the absence of indications of a crime.

In a positive move which may help to address the issues of impunity, the new Criminal Code signed into law by the president in July 2014 and expected to come into force in January 2015, abolishes the statute of limitations applicable to the offence of torture. The new Criminal Code also excludes those charged and/or convicted of torture from benefitting from amnesties.

Additionally, in line with its obligations under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), in 2013 Kazakhstan adopted the necessary legislation to set up a National Preventive Mechanism (NPM) and members were elected to this on 19 February 2014, since which time the Ombudsman's Office and civil society activists started to jointly monitor detention facilities across Kazakhstan as part of the NPM.

However, despite these steps, Amnesty International continues to receive credible reports of torture and other ill-treatment by police and security services and the organization believes that a substantial gap remains between law and practice in the field of the prevention of torture in Kazakhstan.

DEFINITIONS OF TORTURE (ARTICLES 1 AND 4)

Since Kazakhstan's previous report to the Committee in 2008, its Criminal Code has been amended several times. In 2011, Article 141.1 prohibiting torture was moved from the chapter "Crimes against Justice and the Order of Execution of Punishments" to the chapter "Crimes against Constitutional and Other Rights and Freedoms of a Person and a Citizen". This was a positive move as torture is now officially reflected in domestic legislation as a violation of the Constitution and not simply a procedural violation as the heading of the former chapter suggested.

At the same time, an attempt was made to bring Article 141.1 in line with the provision defining torture. The Article now extends criminal responsibility for torture to individuals acting at the instigation of, or with the consent or acquiescence of public officials. However, the notion of "all persons acting in an official capacity" is not explicitly included, hence leaving room for impunity for torture when committed by, for example, other state employees, such as some of the staff of psychiatric institutions like janitors or guards, for instance.

Under Article 141.1 of the current Criminal Code, torture is punishable by anything from a fine up to 10 years' imprisonment (up to 12 years – in cases leading to death or serious damage to health – under Article 146 of the forthcoming Criminal Code). This very broad sentencing range means that the offence of torture can be used to cover minor to serious crimes including degrading, inhuman or cruel treatment or punishment. Amnesty International would argue for more precision in the definition of crimes of torture and those

of other cruel, inhuman and degrading treatment or punishment.

According to Article 78 of the new Criminal Code, the person found guilty of the crime of torture cannot be amnestied. The new Criminal Code has also eliminated the statute of limitations for the crime of torture. However, the article which regulates the exemptions from punishment for a crime, “Exemption from criminal responsibility in connection with reconciliation” (Article 67 of the current Criminal Code and Article 68 of the forthcoming Criminal Code), was not amended. Accordingly, if charged under parts 1 or 2 of Article 141.1 (part 1 or 2 of Article 146 in the new Criminal Code), the maximum punishment for which is five years and whereby this is not a “serious” crime under the official classification, a first-time offender can, during the pre-conviction period, “reconcile” with the victim and compensate them for their loss, following which criminal prosecution is ended altogether.

CIRCUMVENTION OF SAFEGUARDS AGAINST TORTURE BY ARRESTING OFFICIALS

In April 2012, Kazakhstan’s Constitutional Council issued a decree defining the moment of detention as the “precise moment when a person is deprived of his/her liberty and freedom of movement”.⁶ However, despite this welcome clarification of the law, lawyers and human rights defenders report that detention times are sometimes deliberately recorded inaccurately by law enforcement officials, leading to periods of unrecorded detention. During these periods, detainees are sometimes subjected to torture and other ill-treatment as they are outside the protection of the law and continue to be deprived of key safeguards such as the right to know their rights, right to access legal counsel and inform their relatives of their whereabouts. Indeed, Amnesty International has continued to receive reports of torture and other ill-treatment, which occur before a suspect’s detention is registered at a police station.

The Criminal Procedural Code stipulates that a suspect has the right to see a lawyer within the first 24 hours after the registration of the arrest, before the first interrogation. However, in many cases detainees are not able to afford an independent lawyer and are provided with state-appointed lawyers. The lawyers who regularly take up cases by appointment often tend to depend on such appointments for a steady income; they are also paid by the hour and depend on the investigator for the number of reported hours of work on the case. In some cases the investigators reportedly directly invited specific lawyers. This undermines the independence of state-appointed lawyers and discourages them from actively defending the rights of their clients, even if they suspect torture or other ill-treatment or are aware of procedural violations.

The forthcoming Criminal Procedural Code provides for informing a detainee of his/her rights at the moment of deprivation of liberty and immediate notification of relatives. Under the current Criminal Procedural Code, rights should be explained to the detainee within three hours from the moment of deprivation of liberty, when the arrest report (protocol) is drawn

up, and within 12 hours of the same moment relatives should be notified. However, even these requirements have not been consistently enforced, and in practice sanctions are not routinely taken in cases where it is clear that police officers have not complied with these requirements.

HUMAN RIGHTS VIOLATIONS BY SECURITY OFFICIALS IN THE CONTEXT OF COUNTER-TERRORISM (ARTICLES 2, 15 AND 16)

Countering terrorism and other threats to national security continue to be invoked by the authorities in Kazakhstan as crucial to securing national and regional stability. There are frequent reports of Committee of National Security (KNB) officers violating human rights, including by resorting to torture and other ill-treatment, ostensibly in pursuance of these ends, including to obtain confessions.

Since 2011, the authorities have significantly stepped up counter-terrorism operations following a number of bomb explosions, suspected suicide bombings and violent attacks by unidentified armed groups throughout the country. Many people, including security forces and bystanders, were killed during these violent incidents, which the authorities described as terrorist attacks by Islamist groups.

Among those particularly targeted by the KNB are members or presumed members of Islamic groups and Islamist parties, which are either unregistered or banned in Kazakhstan; members of religious minorities; and asylum-seekers from neighbouring countries, in particular from China and Uzbekistan.

Although presumption of innocence is enshrined in law, it is violated on a regular basis, particularly in the context national security and the fight against terrorism, with suspects often branded guilty in public by state officials before the start of the trials.

Some of those convicted of terrorist crimes are reported by relatives of prisoners to be serving prison sentences in cruel, inhuman and degrading conditions⁷ in high security prisons in Shymkent or Arkalyk. No independent monitoring access has been allowed to these prisons. In January 2013, new counter-terrorism legislation was introduced which provides for broader measures for countering terrorism and extremism,⁸ and the newly-adopted Criminal Code lowers the age of criminal liability for terrorist offences to 14 years. The crime of “terrorism with loss of life”, in Article 49.1 of the Criminal Code, is the only one punishable by death (Kazakhstan is abolitionist for ordinary crimes only).

VIOLATION OF *NON-REFOULEMENT* OBLIGATIONS (ARTICLE 3)

In 2010 during its UPR Kazakhstan gave undertakings to the UN Human Rights Council that the *non-refoulement* principle would be upheld.⁹ In January 2011 legislation was amended to include a new provision guaranteeing judicial review of extradition orders¹⁰ and prohibiting extradition to a country where there is a real risk of torture¹¹ although not other ill-treatment.

However, this requirement continues to be ignored by courts and there have been incidents over the reporting period when Kazakhstan has returned asylum seekers and refugees to countries where they were at real risk of torture or other ill-treatment.

The Law on Refugees which came into force in 2010 excludes certain categories of asylum seekers from qualifying for refugee status, such as those charged in their country of origin with membership of illegal, unregistered or banned political or religious groups.¹²

28 Uzbek refugees and asylum seekers who were detained in Kazakhstan in 2010 were extradited to Uzbekistan in 2011, due to security concerns. Of these, 17 had been recognized by the office in Almaty as UNHCR mandate refugees between 2005 and March 2010. Several among them had been accepted for resettlement and were awaiting departure to a third country in 2009. However, the coming into force of the Law on Refugee meant that all status determination procedures were handed to the relevant Kazakhstani authorities. The Kazakhstani authorities reviewed all asylum applications handled by the UNHCR office in Almaty, and revoked the mandate refugee statuses of the 17 detained Uzbek men. The grounds for this decision were that the men belonged to Islamic movements and Islamist groups banned in Uzbekistan and that therefore they posed a security risk and were not deserving of international protection under the provisions of the Kazakhstan Refugee Law. According to information available to Amnesty International, following the revocation decisions by the Kazakhstani authorities, UNHCR cancelled the refugee status that it had previously granted under its mandate to 17 of these men.¹³

The men were at real risk of torture in case of return to Uzbekistan, but nevertheless they were extradited there in June 2011. The Uzbekistani government offered “diplomatic assurances” to Kazakhstan, the sending state, to secure the returns, pledging free access to detention centres for independent monitors and diplomats. In practice, they have not honoured these guarantees.¹⁴

In June 2012 the Committee against Torture, following an unprecedented oral hearing in May 2012 into a complaint lodged by the Uzbek men against the decision by Kazakhstan to extradite them to Uzbekistan, concluded “that the State party’s extradition of the complainants to Uzbekistan was in breach of Article 3 of the Convention.”¹⁵

The Committee went on to comment on the procurement of diplomatic assurances as protection against torture “[recalling] that they cannot be used as an instrument to avoid the application of the principle of non-refoulement”.¹⁶ In November 2012 the Prosecutor

General's Office informed the Committee that Kazakhstani diplomatic representatives had been able to visit 18 of the extradited men in prison between 3 and 14 August 2012, but only after the men had spent more than one year in detention in Uzbekistan. The information submitted by Kazakhstan, that "none of the visited convicts indicated to have been subjected to torture, unlawful measures of physical and moral pressure or other impermissible methods of investigation. All of them were assigned *ex officio* lawyers and could retain lawyers privately. None of them complained about the conditions of detention, the food or the medical care provided"¹⁷, must be viewed in the light of reports of human rights organizations and relatives of the detainees that most of the men had spent most of the 14 months in incommunicado detention and that they had been tortured but were too frightened to report this to the representatives of Kazakhstan for fear of reprisals. The medical examinations requested by Kazakhstan apparently showed no signs that the men had been tortured. However, Amnesty International has long been concerned by the lack of independent and timely medical investigations available in Uzbekistan. Despite the "diplomatic assurances" Kazakhstani officials did not manage to visit seven of the 28 men extradited on the grounds that criminal investigations were still ongoing at the time of the visit and in spite of the fact that it is during investigation that torture is often practiced in order to extract confessions. The Kazakhstani authorities are reportedly planning to meet them at a later stage. However, Amnesty International is not aware that they have done so at the time of writing.

Amnesty International has subsequently received credible reports that the extradited men were subjected to torture in detention in Uzbekistan.

LACK OF PROMPT INDEPENDENT, IMPARTIAL AND THOROUGH INVESTIGATIONS INTO ALLEGATIONS OF TORTURE OR OTHER ILL- TREATMENT RESULTING IN IMPUNITY AND FAILURE TO ENSURE ADEQUATE REPARATION (ARTICLES 1, 5, 12, 13 AND 14)

The government of Kazakhstan has a poor track record of investigating reports of human

rights violations by law enforcement and security services and bringing alleged perpetrators to justice, and this has not improved markedly over the reporting period.

The Kazakhstani authorities have repeatedly asserted their commitment to upholding and implementing Kazakhstan's international human rights obligations, for example, in September 2013 the Prosecutor General instructed national prosecutors to "open a criminal investigation into every incident of torture".¹⁸

However, in practice the investigations into allegations of torture and other ill-treatment undertaken have fallen far short of international standards of prompt, thorough and impartial investigations and have failed to deliver justice. Indeed, over the reporting period only a small number of cases have been brought against members of the law enforcement and security services for alleged torture or other ill-treatment, despite hundreds of credible reports received annually in the reporting period. Impunity for human rights violations by the police and security services including torture and other ill-treatment remains fundamentally unchallenged.

In January 2012, following an investigation into the lethal use of force by security forces, five senior security officers were charged with abuse of office in relation to the use of force in Zhanaozen. However, the number of deaths and serious injuries from gunshot wounds indicated that many more security officers had used firearms. The trial followed the events on 16 December 2011 in Zhanaozen, where celebrations of the 20th anniversary of Kazakhstan's independence in this south-western city were marred by violent clashes between protesters and police. At least 15 people were killed and more than 100 seriously injured. Reportedly, security forces had no specific training in using non-violent and proportionate methods of crowd control while policing protest demonstrations and strikes, despite months of being confronted by striking and protesting oil industry workers and their families and supporters in 2011.

In the immediate aftermath of the violence, hundreds of people were detained for participating in violent mass disorders. According to some sources, lists seen at the central police station in Zhanaozen contained the names of as many as 700 individuals detained in the aftermath of the clashes. The majority of these were released after a few days. A number of those who were released and some relatives of detainees reported that scores of people, including young women, had been rounded up and taken to unofficial places of detention or kept incommunicado in overcrowded cells, often underground, in police custody. They described how they were tortured or otherwise ill-treated in detention by being stripped naked, made to lie or crouch on a cold concrete floor, doused with cold water, beaten and kicked by security officers, often to the point of losing consciousness. They would then be doused with cold water again and beaten at regular intervals in cycles lasting for hours.¹⁹

After her visit to Kazakhstan in July 2012 the UN High Commissioner for Human Rights expressed concern over allegations of torture and other ill-treatment of those arrested in connection with the strike actions and protests in Zhanaozen. She noted that questions remained about the use of force by police and security services and that allegations of torture of detainees in order to obtain forced confessions had not been effectively investigated. She recommended an independent international investigation as "the only way to credibly answer these questions once and for all".²⁰

In response to calls for further investigations into all cases of deaths and injuries related to the events in Zhanaozen, including those not recorded officially, in order to establish the true number of fatalities and casualties and bring all those responsible for unlawful killings or arbitrary or abusive use of force to justice, the Prosecutor General's Office asserted in a letter to Amnesty International in October 2012 that all available evidence had been thoroughly investigated by the Regional Department of Internal Affairs and that there was no need to bring further criminal charges against other security officers.

Five senior security officers from Mangistau Region and Zhanaozen city were charged in late January 2012 with abuse of office in relation to the use of firearms. According to the court records, the Prosecutor General's Office stated that some of them had been identified using video footage. They were sentenced to between five and seven years in prison in May 2012. Several police officers testifying at the trial as witnesses confirmed that they had used firearms to shoot directly at protesters. However, no charges were brought against them.

Most of the 37 defendants put on trial in March 2012 in the regional capital Aktau for organizing or participating in the violence in Zhanaozen²¹ alleged that they were tortured or otherwise ill-treated in detention by security forces in order to extract confessions, and recanted their confessions in court. The torture methods described by the defendants were consistent with the allegations made by many of the released detainees in December 2011. Ten of the witnesses for the prosecution withdrew their testimonies against the defendants during the trial proceedings and complained that they had been tortured or otherwise ill-treated into giving evidence implicating the defendants.

Some of the defendants identified police and security officers who had subjected them to torture and other ill-treatment. The Aktau City Court ordered the Prosecutor General's Office to investigate the defendants' allegations. The Prosecutor General's Office instructed its Special Prosecutor's Unit (SPU) to investigate but instead the SPU referred the case to the Internal Investigations Department of the Zhanaozen Division of the Ministry of Internal Affairs, a branch of the very same body whose officers had been accused of committing the crime. The Internal Investigations Department carried out an initial review and dismissed the case as unfounded.

No details of their review were made public. Lawyers for the victims of torture and other ill-treatment requested the police to share information about the review, but the internal investigation department only provided them with general replies about the lack of evidence against the alleged perpetrators. At a subsequent hearing in May 2012, the court did not question the objectivity of the review carried out by the internal investigation department and the trial of the defendants continued on the assumption that no torture or other ill-treatment had occurred. Seven of the defendants were sentenced to prison terms of up to seven years.

Despite torture being reflected in national legislation as a violation of the Constitution and not simply a procedural violation, it continues to be regarded as a procedural violation.²² Under Article 108 of the current Criminal Procedural Code (and Article 105 of the forthcoming Criminal Procedural Code) which governs the complaints procedure against "actions or decisions of persons carrying out pre-trial investigation" in the course of arrest, search, seizure and other pre-trial activities, torture is mentioned as one amongst several relevant "violations of law" (alongside the use of "violence" and "threats", and "violation of

the right to defense"). The relevant Article prescribes that complaints about these "violations" are considered by the prosecutor who has up to seven days (or three days under the forthcoming Criminal Procedural Code) to review the complaint, decide whether to take any action or decline the complaint, and respond to the complainant accordingly. This provision contravenes the new provision in the forthcoming Criminal Procedural Code which mandates that reports of crimes, including torture, are not subject to any preliminary screening and should lead directly to a criminal investigation as soon as the relevant crime report is registered.

The Criminal Procedural Code provides that an official body should not investigate complaints against its own officials²³, but despite this, complaints of torture and other ill-treatment against law enforcement and national security officials are routinely referred to the internal investigations departments of the Ministry of Internal Affairs, Financial Police or the Committee for National Security. These internal investigation departments are vested with wide-ranging and unspecified powers, one of which is the consideration of complaints concerning illegal acts committed by law enforcement officials.²⁴ The activities of these internal investigation departments are regulated by internal directives which are not accessible to the public.

Torture complaints are often automatically referred for preliminary screening to the internal investigation department of the law enforcement agency members of which stand accused of torture. In practice this means that instead of an impartial investigation by a separate authority, the torture complaint is instead put through an internal screening process which usually fails to check the complaint objectively and with due diligence. In the majority of cases screening procedures conclude that the complaints are unfounded or they find that the perpetrators cannot be identified.

Following recommendations from the UN Special Rapporteur on torture after his visit to Kazakhstan in 2009,²⁵ the government of Kazakhstan promised that it would "ensure that investigations into allegations of torture are conducted by a body independent from the body investigating the case against the alleged victim", and in 2011 the Criminal Procedural Code was amended to stipulate that if a complaint of torture is brought against the criminal police, the investigation will be conducted by the financial police,²⁶ and vice versa. However, reports indicate that the division of responsibility for investigations between the criminal and financial police has not addressed effectively the issue of independence and impartiality, and the two respective forces are still part of the same system, and are disinclined to take steps that might be seen as undermining each other. In the majority of cases the respective internal investigations departments conclude that there is no evidence of wrongdoing by law enforcement officials from the counterpart agency even when the allegations of torture and other ill-treatment are supported by strong evidence.

In December 2012, R.O., a 22-year-old man, told the NGO KIBHR²⁷ that on 21 December 2012 he had been detained by police at his home in Almaty, and taken to the Zhetisu District Police Station where police officers tortured him by burning him with an iron and a cigarette lighter and suffocating him with a plastic bag. The police officers also threatened him with sexual abuse in order to make him testify against his father who had been detained on suspicion of murder. R.O. was kept in unregistered detention for 17 hours. Upon his release he underwent a medical examination and filed a complaint with the Zhetisu District Prosecutor's Office which referred the complaint to the Zhetisu Police Internal Investigations Department for internal screening. Two

months later, in February 2012, the Police Internal Investigations Department of Zhetisu concluded that no criminal case could be opened against the officers accused of torturing R.O. as there was no evidence of a crime. The city Prosecutor's Office supported this decision. Both agencies effectively brushed aside the results of R.O.'s medical examination and his detailed statement to come to this conclusion. R.O. was discouraged by this and subsequently refused to pursue his complaint further.

Despite the fact that in 2011 Specialized Prosecutors Units, within the Prosecutor General's Office, were given a mandate to investigate cases involving allegations of torture or other ill-treatment, they have not investigated such cases as proactively as they could have done, as the Zhanaozhen case (above) illustrates, and are over-reliant on the conclusions of screening reviews carried out by the internal investigation departments of security bodies.

The new Criminal Procedure Code²⁸ will introduce a new approach on criminal investigations in Kazakhstan. From 1 January 2015, no preliminary screening will be required before instigating an investigation. Investigations will be carried out once a report of a crime is registered, and will be terminated if the investigating body fails to establish that a crime took place after having "exhaust[ed] all possibilities to collect additional evidence".²⁹ This step may help to reduce barriers for victims seeking justice. However, as explained above, the new Criminal Procedure Code does not abolish the approach according to which torture is regarded as a violation of criminal procedure in cases where complaints of torture come from suspects in criminal proceedings.

REPARATIONS (ARTICLE 14)

States have an obligation under international law to ensure effective remedy and reparation to those whose rights have been violated. Such reparation includes compensation.

A Supreme Court regulatory decree of 28 December 2009³⁰ and the 2009-2012 Plan of Action provided for the implementation of legislation regulating compensation for torture and other ill-treatment.³¹ However, the provision in the Civil Code on compensation for moral damages for unlawful acts committed by police and other security officials does not include torture. Additionally, there is no provision in the law in Kazakhstan which would allow for the effective implementation of decisions and opinions by UN treaty bodies in individual cases, including on reparations.

The following two cases are the only ones that Amnesty International is aware of in which compensation has been awarded to victims of torture.

In November 2013, Kostanai court awarded 2 million Kazakhstani Tenge (roughly equivalent to USD 13,000) in compensation to **Aleksandr Gerasimov** following a UN Committee against Torture decision in May 2012 which found Kazakhstan responsible for torture in 2007.³² However, the authorities have yet to carry out a full and independent investigation into Aleksandr Gerasimov's complaint of torture.

In November 2013, two police officers were found guilty of torturing 20 year-old **Ivan Rozhnov** to make him confess to stealing a laptop from a high school where he worked as a laboratory assistant. Fearing more torture, Ivan jumped out of the police car when he was being taken to town from his village. He ran into the

woods, got lost, and, lost his legs to frostbite in temperatures of below 30°C.

Ivan Rozhnov was never charged with theft of the computer. The convicted police officers appealed against the decision by Petropavlosk City Court and had their sentences reduced by the Northern Kazakhstan Regional Court from five and a half years each to four and a half and three years in prison respectively. Ivan Rozhnov was awarded 700 thousand Kazakhstani Tenge (USD 3,850) for moral damages.

INDEPENDENT INSPECTION OF DETENTION FACILITIES (ARTICLE 11) AND NATIONAL PREVENTIVE MECHANISM (OPCAT)

In July 2011, the UN Human Rights Committee discussed Kazakhstan's report on implementing the International Covenant on Civil and Political Rights (ICCPR).³³ It regretted that Kazakhstan had not made more progress in eliminating torture and questioned the political will of the authorities to fulfill their commitments, especially in initiating effective investigations into allegations of torture or other ill-treatment. In a retrograde step the same month, the President signed a decree authorizing the transfer of the prison system from the Ministry of Justice back to the authority of the Ministry of Internal Affairs. The Kazakhstani authorities had allowed some independent public monitoring of places of detention under the authority of the Ministry of Justice from 2005 to 2011, but access for independent monitors to police cells under the Ministry of Internal Affairs and detention facilities under the National Security Service were more problematic and most allegations of torture were received from these institutions.

In 2013 Kazakhstan adopted the necessary legislation to set up a National Preventive Mechanism (NPM). In January 2014, a Coordination Council was established under the chairmanship of the Human Rights Ombudsman to coordinate the activities of all NPM members and on 19 February 2014, at its first session, the Council elected members of the NPM. Subsequently, civil society activists started monitoring detention facilities across Kazakhstan. While acknowledging that the creation of the NPM has been a positive development, Amnesty International is concerned that the current mandate does not cover monitoring of all places of deprivation of liberty. For example, the monitoring group is not permitted to inspect offices of police departments, and has no access to closed state institutions such as orphanages, nursing homes for the elderly and military barracks. The NPM is not as effective as it could be due to bureaucratic obstacles: in order to undertake an urgent and unplanned visit the NPM members have to obtain written permission from the Ombudsman and this can only be obtained during working hours which further restricts the NPMs' ability to respond rapidly to incoming reports of torture. The NPM is not allowed to publish the results of its findings until its annual report is approved by the Ombudsman. It is important to note that in Kazakhstan the Ombudsman is appointed by the President, and

his/her activities are governed by Presidential decree.

Public monitoring commissions (PMCs) are another instrument of public oversight of closed institutions in addition to the NPM. PMC monitoring is restricted to facilities under the Ministry of Internal Affairs (MVD): prisons, pre-trial detention centres, police detention facilities. PMCs cannot make unannounced visits, nor can they undertake cross-regional visits.

The existing instruments of independent monitoring of closed institutions in Kazakhstan do not address the issue of lack of transparency as they are not allowed to disclose information directly to the general public on what is happening inside detention facilities but are instructed to pass the information directly to the relevant authorities.

JUDICIAL SUPERVISION OF ARREST (ARTICLES 2, 4 AND 11)

The new Criminal Procedural Code provides for judges at remand hearings to decide on pre-trial detention including on the basis of the gravity of the crime. In very few cases do judges rule not to remand suspects in custody at the request of prosecutors at remand hearings, but this – while the law mandates exactly the opposite – is an exception rather than the rule. The UN Special Rapporteur on torture, who visited Kazakhstan in May 2009, concluded that “judges are seen as being formally present at certain points of the criminal process to rubberstamp prosecutorial decisions rather than interested in finding out the truth and meaningfully following up on torture allegation”.³⁴ This problematic issue persists today.

For example, **Bakhtzhan Kashkumbayev**, a 67-year-old pastor from the Congressional Grace Church, was held in pre-trial detention for nine months in 2013. He was detained on 17 May 2013 in Astana on charges of intentional infliction of mental damage to one of his female parishioners. On 8 October 2013, immediately upon his release from detention until trial, Kashkumbayev was detained again on additional charges of religious extremism and “inciting social hatred”, which were later withdrawn. On 17 February 2014, the Almaty District Court of Astana city found him guilty of intentional infliction of mental damage and sentenced him to 4 years probation.

Despite Bakhtzhan Kashkumbayev’s age and ill-health, the court did not intervene to prevent him spending such a long time in pre-trial detention, nor did the court intervene when the pre-trial detention period was extended on additional charges.

FAILURE TO EXCLUDE EVIDENCE ELICITED AS A RESULT OF TORTURE (ARTICLE 15)

In November 2008 the Committee against Torture welcomed assurances by the Kazakhstan delegation that judges no longer admitted evidence obtained through torture as evidence but nevertheless expressed grave concerns at reports that judges continued to ignore requests for investigations into torture allegations and failed to stop court proceedings.³⁵ A normative ruling by the Supreme Court on 28 December 2009 reaffirmed the absolute inadmissibility of evidence based on statements alleged to have been elicited as a result of torture or other ill-treatment. In practice, according to defence lawyers, independent trial monitors, diplomats, NGOs, IGOs, relatives of accused persons and accused persons themselves, allegations of torture made by defendants in court are often dismissed by judges as attempts to escape punishment, without giving them due consideration even when there is strong evidence, for instance visible signs of injuries, in support of such allegations.

For example, in the case of **Anatoly Krivobokov**, in May 2013 the judge of Almaty Oblast Inter-District Specialised Court found no grounds for checking the defendant's allegations of torture by police during arrest and pre-trial detention, saying instead that Anatoly Krivobokov was attempting to evade justice by making these allegations. This decision was upheld on July 19 2013, by the Appeal Board of the Almaty Oblast Inter-District Specialised Court.

In June 2009 officials at the Prosecutor General's Office and the Ministry of Internal Affairs told Amnesty International that in the majority of cases defendants who raised allegations of torture during court proceedings only did so in order to avoid responsibility for the crimes they had committed. In December 2009 the Special Rapporteur on torture stated that he had not received information on cases where evidence had been excluded because it was found to have been obtained under torture.³⁶

RECOMMENDATIONS

Ineffectiveness of the Existing Safeguards against Torture (Article 2)

- Ensure that detainees have access to the lawyer of their choice and that consultations between a detainee and their lawyer take place confidentially and in private;
- Legislate that no statement or confession made by a person deprived of their liberty, other than that made in the presence of a judge or a lawyer, should have a probative value in court;
- Ensure appropriate disciplinary, and where necessary criminal, measures are taken

against law enforcement officials who violate the procedural rights of suspects and persons in detention.

Violation of non-refoulement obligations (Article 3)

- Ensure that no one within their jurisdiction is returned, by means of extradition or otherwise, to any country where they would be at risk of torture or other ill-treatment;
- Refrain from the use of and reliance on diplomatic assurances to circumvent this obligation and extradite or otherwise return persons to places where they are at risk of torture and other ill-treatment;
- Where it is proposed to return a person to any country, whether by extradition or otherwise, ensure that the person has an effective opportunity to seek a review of that decision. This review must include a full consideration of the risks they would face in the country of return. Ultimately, they must be able to appeal to the courts against a decision to return them. No one should be returned in a way which circumvents such procedures;
- Ensure that international human rights obligations are reflected in, and prevail over, bilateral and regional security and other criminal justice cooperation agreements.

Lack of Prompt Independent, Impartial and Thorough Investigations into Allegations of Torture or Other Ill-Treatment Resulting in Impunity and Failure to Ensure Adequate Reparation (Articles 1, 5, 12, 13 And 14)

- Authorize and facilitate an independent, thorough and impartial international investigation, as recommended by the UN High Commissioner for Human Rights, into the use of lethal force by security forces in Zhanaozen in December 2011, establishing the true number of fatalities and casualties, and into the reports of subsequent arbitrary detentions and the use of torture by security forces to extract confessions;
- Establish a fully resourced, transparent and accountable independent agency to investigate all allegations of human rights violations committed by officers of all law enforcement agencies or by anyone acting with the knowledge or complicity of such agencies.

Reparations (Article 14)

- Ensure that a judicial review of the convictions of those individuals who claim to have been forced to confess under duress takes place, and allow for truly independent and impartial investigations into all allegations of torture and other ill-treatment by law enforcement agencies and security forces;
- Ensure that victims of torture or other ill-treatment receive prompt reparation from the state, including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation regardless of whether the perpetrators have been brought to justice.

Independent Inspection of Detention Facilities (Article 11) and National Preventive Mechanism (OPCAT)

- Ensure that the National Preventative Mechanism fully complies with the Optional Protocol to the UN Convention against Torture;
- Amend legislation regulating the NPM to ensure that members of the NPM can carry out unannounced visits to any place of deprivation of liberty as set out by the Optional Protocol to the UN Convention against Torture.

Judicial Supervision Of Arrest (Articles 2, 4 And 11)

- Ensure that judges inquire fully and impartially into the legality of, or the need for, police detention and into how the detainee has been treated in custody, and if the detainee makes any complaint, or if there is any other reason to believe that they have been tortured or ill-treated, initiate a prompt, effective and impartial investigation.

Failure to Exclude Evidence Elicited as a Result of Torture (Article 15)

- Ensure that any information or confession elicited as a result of torture or other ill-treatment is not used as evidence in any proceedings except those brought against the alleged perpetrators;
- When allegations of torture or other forms of ill-treatment are raised by a defendant during trial or at any other time, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that such treatment did not take place and that any statement or confession made by them was not obtained by unlawful means.

ENDNOTES

¹ Universal Periodic Review of Kazakhstan 12 February 2010 <http://www.upr-info.org/en/review/Kazakhstan/Session-07---February-2010/National-report#top>

² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Kazakhstan, A/HRC/13/39/Add.3, 16 December 2009, pp 2, 8.

³ Kazakhstan's National Human Rights Action Plan, available at http://www.undp.kz/userfiles/plan_ru.pdf.

⁴ Official website of the Office of Prosecutor General, statistics, available at <http://service.pravstat.kz/portal/page/portal/POPPageGroup/Services/Pravstat>.

⁵ Ibid.

⁶ Decision #2 of the Constitutional Council of Kazakhstan on the definition of deprivation of liberty, 13 April 2012 , available at <http://ksrk.gov.kz/rus/resheniya/?cid=11&rid=783>.

⁷ For example, in 2012 Aron Atabek, a 60-year old dissident writer and poet who was detained first in 2006 and convicted for taking part in mass disorder, following a prevent against the demolition of self-built houses in Almaty, and for taking hostage and killing a police officer under disputed circumstances, was charged with multiple violations of prison rules and sentenced to two years' solitary confinement in Arkalyk, where he was kept under 24 hour video surveillance. Prisoners in solitary confinement at this institution were forced to lie down between 2 and 4 pm but forbidden from lying down at other times of the day; taken out for exercise daily with their hands handcuffed behind their backs and blindfolded to prevent them from seeing and talking to other prisoners . See Amnesty International, *Old Habits: The routine use of torture and other ill-treatment in Kazakhstan*, 11 July 2013, EUR 57/001/2013 <http://www.amnesty.org/fr/library/info/EUR57/001/2013/en>.

⁸ Law No. 63 "On the introduction and amendments to several legislative acts of the Republic of Kazakhstan on the issue of counter-terrorism".

⁹ Accepting recommendation 92 (Belgium); and to review recommendation 7 (Czech Republic).

¹⁰ Article 531-1, Criminal Procedural Code.

¹¹ Ibid, article 532.

¹² This exclusion affects in particular observant Muslims from Uzbekistan who worship in mosques that are not under state control or are members or suspected members of Islamist parties or Islamic movements banned in Uzbekistan. The exclusion also affects asylum seekers of Uighur origin from the Xinjiang Autonomous Republic (XUAR) in North West China who are charged with or suspected of belonging to separatist movements or parties.

¹³ For more information see Amnesty International, *Return to Torture: Extradition, forcible returns and removals to Central Asia*, 3 July 2013, EUR 04/001/2013, pages 41-43.

¹⁴ At least 12 of the 28 Uzbekistani asylum-seekers and refugees extradited from Kazakhstan to Uzbekistan in June 2011 were put on trial on charges of religious extremism and alleged membership of the previously unknown "Jihadchilar" Islamist organization. All of them were held incommunicado following their extradition and human rights organizations believed they were at grave risk of torture and other ill-treatment. Relatives reported that they were intimidated by police and security services and prevented from discovering the whereabouts of the men. Three of the returned refugees were sentenced to prison terms of between four and 13 years in separate trials in August and September 2011. They had been held incommunicado for two months and were only allowed to meet their relatives after the trial. They were not given permission to hire lawyers of their own choice and had only limited access to their state-appointed lawyers.

¹⁵ UN Committee against Torture Communication No. 444/2010 Decision adopted at 48th session 7 May - 1 June 2012,Submitted by : Toirjon Abdussamatov and 28 other complainants (represented by counsel, Christine Laroque, ACAT France), available at http://www.ohchr.org/documents/hrbodies/cat/jurisprudence/cat-c-48-d-444-2010_en.pdf.

¹⁶ UN Committee against Torture Communication No. 444/2010 Decision adopted at 48th session 7 May- 1 June 2012 Submitted by : Toirjon Abdussamatov and 28 other complainants (represented by counsel, Christine Laroque, ACAT France, available at http://www.ohchr.org/documents/hrbodies/cat/jurisprudence/cat-c-48-d-444-2010_en.pdf#page=3&zoom=auto,-118,842

¹⁷ Letter from Kazakhstani authorities received by ACAT France on 5 December 2012, available at www.acatfrance.fr/public/acatcomments_followup_cat444_2010/pdf. See also Amnesty International: *Uzbekistan Submission To The United Nations Committee Against Torture 51st Session Of The United Nations Committee Against Torture* (28 October – 22 November 2013) AI Index: 62/011/2013 ACAT.

¹⁸ Tengri news 20 September 2013, http://tengrinews.kz/kazakhstan_news/vozbujdat-ugolovnyie-dela-za-primenenie-pyitok-potreboval-prokuror-kazahstana-242052/.

²⁰ Opening remarks by UN High Commissioner for Human Rights Navi Pillay at a press conference during her mission to Kazakhstan Astana, 12 July 2012, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12343&LangID=E>.

²¹ See Amnesty International, *Kazakhstan: Progress and nature of official investigations called into question 100 days after violent clashes between police and protesters in Zhanaozen* (AI Index: 57/001/2012), 21 March 2012, available at <http://www.amnesty.org/en/library/info/EUR57/001/2012>; and Amnesty International, “Old Habits: The routine use of torture and other ill-treatment in Kazakhstan” (AI Index: EUR 57/001/2013), 11 July 2013, available at <http://www.amnesty.org/fr/library/info/EUR57/001/2013/en>.

²² In 2011, the Article 141.1 prohibiting torture was moved from the chapter on “Crimes against Justice and the Order of Execution of Punishments” to the chapter on “Crimes against Constitutional and Other Rights”.

²³ Article 107, part 1, of the current Criminal Procedural Code (Article 104, part 1, of the new Criminal Procedural Code).

²⁴ Provisions on the Department of Internal Security of the Ministry of Internal Affairs of the Republic of Kazakhstan # 13 of 27 October 2011.

²⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Mission to the Republic of Kazakhstan in 2009. Available at www.ohchr.org/English/bodies/hrcouncil/docs/13specialsession/A.HRC.13.39Add 3_en.pdf.

²⁶ Financial police is vested with the investigatory powers over complaints of torture, as torture is deemed an official malfeasance, which falls within the investigatory authority of financial police.

²⁷ Kazakhstan International Bureau on Human Rights and Rule of Law.

²⁹ Part 2 of Article 35 of the forthcoming Criminal Procedural Code.

³⁰ Supreme Court of Republic of Kazakhstan ruling of 28 December 2007, No. 7, available at http://online.zakon.kz/Document/?doc_id=30548283.

³¹ National Plan of Action on Human Rights for Republic of Kazakhstan, 2009 – 2012, available at http://www.undp.kz/userfiles/plan_ru.pdf.

³² UN Committee against Torture Communication No. 433/2010, Decision adopted by the Committee at its Forty-Eighth session, 7 May - 1 June 2012. Submitted by: Alexander Gerasimov. Available at http://www.ohchr.org/Documents/HRBodies/CAT/Jurisprudence/CAT-C-48-D-433-2010_en.pdf

³⁴ Concluding statement following visit to Kazakhstan, Manfred Nowak, UN Special Rapporteur on torture and other forms of cruel, inhuman, degrading treatment or punishment, 13 May 2009, available at <http://www2.ohchr.org/english/issues/torture/rapportuer/index.htm>.

³⁵ Concluding Observations of the Committee against Torture, 12 December 2008, at para 18.

³⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Kazakhstan, UN Doc: A/HRC/13/39/Add.3 at para 51, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/175/80/PDF/G0917580.pdf?OpenElement>.

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