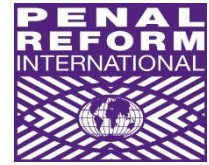


Analysis of legislation on prevention of violence against children in Central Asia



General demographic data¹

Country	General population	Juveniles
Kazakhstan (01.01.2014)	17,165,239	4,398,600
Kyrgyzstan (01.01.2013)	5,663,000	1,845,000
Tajikistan (01.01.2012)	7,807,200	3,118,786

Terminology:

- "Child" is defined as in Article 1 of the Convention on the Rights of the Child, as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier";
- "Child victims" are children under the age of 18 who are victims of crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders;
- "Children in contact with the justice system" are children who come into contact with the justice system as victims, witnesses or alleged offenders, or in any other situation that requires judicial intervention, such as custody, social care, or protection.
- "Crime prevention" comprises strategies and measures aimed at targeting the multiple causes of crime, reducing their risk and the potential harmful effects on individuals and society as a whole, including the fear of crime;
- "Violence" is understood as "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse", which are listed in paragraph 1 of Article 19 of the Convention on the Rights of the Child.

National legislation on protection of children from violence

Kazakhstan	Kyrgyzstan	Tajikistan
Criminal Code (16.07.1997)	Criminal Code (18.09.1997)	Criminal Code (21.05.1998)
Criminal Procedure Code (13.12.1997)	Criminal Procedure Code (30.06.1999)	Criminal Procedure Code (03.12.2009)
Law on the Rights of the Child in the Republic of Kazakhstan (8.08. 2002)	Code on the Rights of Children of the Republic of Kyrgyzstan (10.07. 2012)	-
Law on Prophylactics of Domestic Violence (4.12. 2009)	Law On Social and Legal Protection from Domestic Violence (25.03. 2003)	Law on Prevention of Domestic Violence (19.03. 2013)

International legal instruments on juvenile justice

Convention on the Rights of the Child of 1989 (CRC)

The CRC imposes mandatory obligations for all States Parties and establishes the rights of all children, including child victims, witnesses and offenders. It is complemented by other binding international instruments and specified by additional rules and guidelines on juvenile justice and child victims and witnesses, all of which are listed below.

Guidelines and rules on juvenile justice

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 (Havana Rules);

¹ Statistical data from the analytical reports of the National Statistics Agencies of Kyrgyzstan, Tajikistan and Kazakhstan.

- United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990 (Riyadh Guidelines);
- United Nations Standard Minimum Rules for Non-custodial Measures, 1990 (Tokyo Rules);
- Guidelines for Action on Children in the Criminal Justice System, ECOSOC Resolution 1997/30;
- Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Resolution 2002/12;
- General Comment No. 10 of the Committee on the Rights of the Child, Children's rights in juvenile justice, 2007. This document sets out the key elements of a comprehensive juvenile justice policy.
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012

In addition, international instruments regulating civil and political rights in general, as well as administration of justice and the treatment of prisoners, are equally applicable to children (e.g. Standard Minimum Rules for the Treatment of Prisoners (1955), International Convention on Civil and political Rights (1966) (ICCPR) and Convention against Torture (1984)).

International instruments relating to child victims and witnesses

Binding documents:

- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, 2000
- U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (supplementing the United Nations Convention Against Transnational Organized Crime, 2000)
- Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labor (ILO 182), 1999
- In situations of international armed conflict: the Geneva Convention; Part IV of the Additional Protocol I of 1977
- In situations of armed conflict not of an international character: Article 3 - common to the Geneva Conventions of 1949, Additional Protocol II of 1977

Additional rules and guiding principles:

- United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20, 2005
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, 1985

- Principles and guidelines on children associated with armed forces or armed groups (the Paris Principles), February 2007

Kazakhstan

The Criminal Procedure Code of the Republic of Kazakhstan (CPC) regulates issues pertaining to juveniles in a separate section, entitled "Criminal Proceedings Involving Minors". The provisions list the rights of children as suspects, defendants, victims and witnesses. An important safeguard for juvenile suspects (defendants) is mandatory access to a defense lawyer in a criminal case.² Violation of this rule leads to a ruling on inadmissibility of evidence obtained without the presence of a lawyer and on unlawful actions of law enforcement agency.

Regrettably, the criminal procedure law does not provide for mandatory access to a lawyer for child victims. At present, no legal aid is guaranteed for a child victim in criminal proceedings. Given the financial hardships of some parents, this means lawyers may therefore not be affordable. To ensure effective protection of children's rights in criminal proceedings, we believe that the criminal procedure law must stipulate a separate provision on mandatory participation of a representative of a minor in criminal proceedings, whether they are a defendant or victim.

In cases of suspected criminal activity, juveniles may be subjected to coercive or supervision measures, including detention. Article 132 (part 1) of the CPC provides that "detention of suspects to the crime is a measure of procedural coercion applied with the aim of ascertaining a person's involvement in the crime and to allow time to make a decision regarding the use of pre-trial detention".

By law, the initial arrest and detention of suspects, including juveniles, shall not exceed 72 hours, prior to appearance before the court. There is a general obligation to notify relatives of a suspect within 12 hours of arrest.³ With regards to juveniles, there is a special provision which requires immediate notification of relatives or other lawful guardians in all cases of arrest, detention or prolongation of any coercive measures.⁴ The law does not provide guidelines as to the meaning of "immediate".

² Section 2 Part 1 of Art . 71 the CPC of RK.

³ Article 138, part 2 of the Criminal Procedure Code.

⁴ Article 491, part 5 of the Criminal Procedure Code.

Given the vulnerable status of juveniles it would be reasonable to expect immediate notification upon apprehension of a juvenile when he or she is under any restriction of movement. It is advisable to provide this clarification in the language of the given provision or in the commentary.

Taking into account age and psychological characteristics of minors, the CPC establishes special rules for the questioning of victims and witnesses belonging to this age group. The rules, however, are different for minors younger than 14 years old and adolescents aged 14 to 18 years old.⁵ For the first group, it is mandatory to conduct questioning in the presence of a teacher. For the second group, participation of a teacher is at the discretion of an investigator.

It is not entirely clear why the legislation differentiates treatment of juveniles in relation to questioning. For children who become involved in the criminal process, especially those who have suffered prior victimization, it is crucial that they are interviewed in a comfortable and appropriate environment and have the assistance of a psychologist/teacher. Thus, it is recommended to complement Article 215 of the CPC with the following provision:

"...in the process of questioning a minor, age and psychological characteristics shall be taken into account. A minor less than 14 years old shall be provided necessary psychological assistance, while the length of questioning shall not exceed 1 hour".

The Criminal Code provides for the penalty of deprivation of liberty for juvenile offenders, which is served in special colonies for minors under the Prison Service's system. In the longer term it would be advisable to use deprivation of liberty for juveniles only in cases of serious felony and where there is a high criminogenic risk, as indicated by a probation report.

Penalties for other criminal acts of juvenile offenders should focus on measures of social support, as well psychological and special education, rather than deprivation of liberty.

In addition to forms of criminal liability of minors, the criminal code also includes crimes committed against minors, and the means to prevent abuse against children.

A specific section of the Criminal Code provides for "Crimes against the family and minors", which contains eight criminal acts that cause harm to the child: involving a minor in criminal activities

(Art. 131); enticement of a minor to commit antisocial acts (Art.132); enticement of a minor into prostitution (Article 132); trafficking of minors (Art.133); the substitution of a child (Art.134); disclosure of confidentiality of adoption (Art.135); wilful evasion of financial support to children or disabled parents (Art.136); improper performance of duties to ensure safety and health of children (Art. 138); abusing guardian or trustee rights (Art.139).

In principle, construction of these offences reflects the realities of modern criminology on the issue of crimes against children. However, it is advisable to improve some aspects of the existing criminal provisions. For example, Art.133 of the CC on "Trafficking of minors" can be improved by criminalizing trafficking and *other acts* affecting minors to ensure the preventive objectives of this article are met. Furthermore, it is necessary to include additional aggravating circumstances in the articles 131-133 of the CC, such as: "committing these acts against a minor less than 14 years of age". This is to avoid a narrow interpretation of the title of the Chapter "Crimes against the family and minors", to exclude children less than 14 years old. It is obvious that the impact of crimes against children of this lower age group is particularly destructive given their vulnerable status and therefore, the legislation should ensure more stringent protection of young children through setting a higher level of criminal liability for harm to their well-being.

Special attention should be given to criminal liability for violent and serious crimes against children, such as rape⁶, sexual intercourse and other sexual acts with a minor under 16 years of age⁷, coercion to sexual intercourse, sodomy, lesbianism or other sexual acts⁸, corruption of minors⁹. In this regard, the Criminal Code shows an unbalanced approach to the severity and scope of penalties. For instance, it is questionable that a large scale fraud is punishable by imprisonment for a term of five to ten years¹⁰, while corruption of minors (eg. sexual activity with a child under the age of consent) only calls for imprisonment of three to five years¹¹.

Along with punishment, it is justifiable to establish the institution of police oversight of perpetrators of crimes against sexual integrity of children as a preventive measure. For example, by registering 'sex offenders' at their place of residence.

⁶ Article 120 of the Criminal Code

⁷ Article 122 of the Criminal Code

⁸ Article 123 of the Criminal Code

⁹ Article 124 of the Criminal Code

¹⁰ Part 3 of Article 177 of the Criminal Code

¹¹ Part 1 of Article 124 of the Criminal Code

⁵ Article 215 of the Criminal Procedure Code.

Another component of the juvenile justice in Kazakhstan is the penitentiary system, which is regulated by Chapter 17 of the Penal Execution Code. The main facility designed for juvenile offenders convicted of crimes is the educational colony, which provides for normal, relaxed, special and strict regime conditions.

Thus, the Penal Execution Code envisages a progressive system of execution of imprisonment, amending the regime conditions based on improvement in behaviour and cooperation with the administration, aiming to stimulate social and lawful behaviour.

There is no transparent oversight mechanism to monitor the decision-making and procedure of the transfer of juveniles from one type of prison regime to another to ensure legality and fairness.

The legislation lacks clear guidelines for the decision-making criteria on the transfer of juveniles. There is no mention of the need for a social inquiry report on the study of juvenile behavior. Thus, insufficient regulation and lack of oversight create real risks of manipulation by prison administration.

The penitentiary system of Kazakhstan is based on the old Soviet model of colonies, which places inmates in open camps unlike western closed prisons. The colonies are conducive to the formation of prison gangs which lead to violation of security and prisoners' rights by fellow inmates and thriving criminal micro-environment within prison walls.

Due to this harsh reality of Kazakhstan prisons, it is paramount that juveniles are kept only in facilities for minors, avoiding their transfer to adult facility even when they reach age of 18. It is possible to introduce separate sections for younger and older juveniles to further reduce the risk of exploitation and abuse of immaturity and vulnerability of youth.

Given that isolation from society is more detrimental for mental and moral development of a child than for an adult, it is important that the State practices the use of non-custodial measures or placement in special schools instead of deprivation of liberty of juvenile offenders.

Kyrgyzstan

Juvenile suspects and defendants in Kyrgyzstan, may be "... in exceptional cases with the written consent of the prosecutor contained in the same cells with adults." This is in direct violation of

paragraph 134 of the UN Standard Minimum Rules for the Administration of Juvenile Justice. The legislation also fails to give detailed guidelines on what constitutes exceptional cases.¹² The law is insensitive to the special needs of juveniles and the potential risks and negative impact of adult criminal offenders on minors. It does not contain any provisions to ensure special care and protection of juveniles while in custody and pre-trial detention.

The Rules of Internal Regulation of Police Custody Cells provide a general rule that "minors must be placed in cells with a small capacity, categorised according to their age, physical development, the characteristics of their personality and psychological compatibility". In reality, there are no tools for police personnel to help them determine compatibility and other psychological factors when placing juveniles in cells. Thus, these rules serve merely as declarations without having noticeable impact on the practice of keeping juveniles in custody.

Contrary to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Kyrgyzstan legislation allows solitary confinement of juvenile suspects and defendants. International law unequivocally renders solitary confinement for juveniles as cruel, inhuman or degrading treatment or punishment, regardless of underlying motivation of protecting security of life and health or inability to separate detention of suspects and accused persons. The same standard of prohibition applies for the practice of placing inmates into disciplinary cells.¹³

There are some positive aspects relating to the protection of juvenile rights in detention. For instance, juvenile offenders are entitled to receive information about their rights, responsibilities, and the procedures and conditions of serving their sentence, imposed by the court.¹⁴ Article 14 of the Criminal Executive Code contains the right of the detainee to complain and to submit statements or any other types of appeal without censorship as to substance. The administration of the prison shall send the complaint or request by the detainee to the addressed authorities no later than 24 hours from receipt, with the exception of holidays and non-working days. For the effective exercise of this right, it is essential that juvenile detainees are promptly and appropriately informed of their right to complain, and provided with authorized complaint channels and addresses of authorities where written appeals

¹² Article 29 of the Law of the Kyrgyz Republic "On the procedure and conditions of detention of suspects and accused of committing crimes"

¹³ Article 108 of Criminal Executive Code of Kyrgyzstan

¹⁴ Article 11 of the Criminal Executive Code of Kyrgyzstan

can be sent. The legislation does not specifically regulate the obligation of prison authorities to provide information on the exercise of detainees' right to complain.

To prevent any violence against juveniles in penitentiary institutions and other closed facilities, it is important to put in place an effective mechanism of independent investigation and eradication of torture, ill-treatment and victimization of juveniles.

Elements of prevention mechanism

- Eliminate joint housing of juveniles and adult offenders in common cells and prohibit solitary and disciplinary confinement of juvenile detainees.
- Integrate into practice necessary tools for determining psychological compatibility of minors and timely assistance in interpersonal communication skills of juvenile offenders. Minors with increased risk of victimization should not be placed together with juveniles inclined to aggression and violence.
- Establish an appropriate legal framework for public oversight, allowing civil society organizations to be involved in prevention of torture and ill-treatment through monitoring and unannounced visits of correctional institutions, as well as public investigation of allegations of abuse of juveniles in detention.
- Provide legal and practical guarantees for clear and transparent complaint mechanism, as well as obligations and liability for prison authorities to provide information, explanation and assistance to juvenile detainees in the exercise of their right to complain.
- Use of technical means of prevention of torture and ill-treatment through instalment of surveillance cameras in the premises of correctional facilities and juvenile detention places, including regular public monitoring of such surveillance information. This should be done with due attention and respect to a child's right to privacy.
- Develop and implement educational and capacity building programs on the use of non-violent ways of resolving interpersonal conflicts, as well as informational materials

on the rights of juveniles including criminal liability for the violation of these rights.

Tajikistan

Appropriate safeguards against the abuse of minors deprived of liberty in the process of state prosecution must be contained in the criminal procedure legislation. The Code of Criminal Procedure of Tajikistan (CPC), similar to other Central Asian countries, prescribes a separate section on "Proceedings Involving Minors". The provision on safeguards, however, lacks an important guarantee of freedom of juveniles from torture and ill-treatment for juveniles. Such lack of absolute prohibition of torture and ill-treatment of juvenile suspects and defendants in criminal procedure puts them at high risk of such treatment especially in custody and detention.

Although Article 427 of CPC indicates the exceptional nature of detention for juvenile defendants, it still prescribes such preventive measure for serious crimes. This is in contradiction to international norms, which prohibit the use of detention based solely on the gravity of criminal charges as violating presumption of innocence and right to liberty. Consideration of additional conditions and individual circumstances, including the risk of committing a new crime, level of aggressive behaviour, possible impact on other minors, etc., must be made mandatory by law.

Most importantly, legislative grounds for detention must include evidence-based assessment by the court that the detention of a particular juvenile defendant will not lead to a greater harm and danger than leaving him/her at liberty. Such evidence must be collected through the input of psychologists and social workers and a social inquiry report to the court.

Criminal procedure legislation of Tajikistan does not provide immediate notification of parents or other legal representatives of a minor in cases of arrest and/or detention. This undoubtedly puts juveniles in an extremely vulnerable situation and creates a high probability of violation of a child's rights, including exposure to violence and torture by prosecuting authorities.

The Code of Criminal Procedure must be amended to include a mandatory obligation to notify a close relative or other legal representative of a juvenile no later than three hours after their arrest. In addition, a juvenile suspect or defendant

must immediately be granted access to a lawyer. Presence of a lawyer and a legal guardian must be guaranteed in the judicial hearing on authorization of pre-trial detention.

In order to ensure immediate access of a lawyer to juvenile suspects or defendants, a system of legal aid for juveniles must be put in place.

The Criminal Code of Tajikistan provides for a separate chapter on "Crimes against the family and minors" aimed to protect minors from violation of their rights. The construction of criminal acts, however, lacks reference to persons performing educational functions, as possible perpetrators of crimes against children. This weakens the protection of minors in private and state educational facilities.

The recent positive development in protecting the rights of juveniles has been the adoption of criminal liability for torture. However, application of this provision in relation to state practices in prisons is unknown.

It should be noted that reference to "the use of torture knowingly against a juvenile" creates a possible loophole to avoid strict criminal liability of law enforcement officials.¹⁵ In the context of criminal proceedings, it is redundant to set the condition of "knowing" the status of juveniles, as their status is established prior to any investigative actions. It is advisable to apply the presumption of knowledge for official persons authorised to oversee the rights of juveniles in detention facilities so they are aware of a detainee's age being less than 18 years.

An effective tool in the fight against torture is the possibility to file complaints against illegal actions (or inactions) of officials, timely response to these complaints and the possibility of an independent public inquiry into each case of child abuse in prison.

In 2009, the Commission on the Rights of the Child in Tajikistan adopted a document entitled "Complaint Procedure for Children in Closed Institutions". It is unclear how this document is applied in the practice of closed institutions and if minors are informed of their rights and have real opportunities to channel their complaints to effective resolution. The document does not have the binding status of the law or the by-law to be an operational instrument.

Conclusions

Systematic efforts should be taken to ensure that juveniles are protected from violence in penitentiary and other closed institutions.

Measures should target potential sources of violations:

- **wrongful conduct of prison staff;**
- **wrongful conduct of other persons (including juvenile and adult convicts)**

Effective prevention includes:

- Legislative developments expressed in the adoption of a universal legal act on the rights of children (in Kazakhstan and Kyrgyzstan there is such a law, while it is absent in Tajikistan).
- Establishing strict criminal liability for torture and ill-treatment of minors and create effective procedures of investigation for its implementation.
- Ensure mandatory early access of minors in contact with the law to qualified legal counsel (it is absent in all three countries under review).
- Establish a simple and clear complaint procedure, understandable and accessible to all juveniles in prisons and other closed institutions, including an immediate response procedure to such complaints.
- Develop a system of social, psychological and other type of assistance to children to prevent violence and victimization.
- Establish a mechanism of public investigation of allegations of torture and ill-treatment.

These measures, as well as further harmonization of national legislation with international standards on protection of children, minors, will bring tangible results in combating violence against children.

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¹⁵ Art. 143 (part 2) of the Criminal Procedure Code of Tajikistan.

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