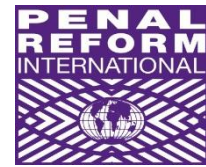


Definition of 'torture' and the issue of appropriate sanctions in the legislation of Kazakhstan, Kyrgyzstan and Tajikistan



Applicable international standards

Kazakhstan, Kyrgyzstan and Tajikistan have all ratified the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture (UNCAT). They have also recognised the jurisdiction of the UN Human Rights Committee and the Committee against Torture respectively. Thus, the countries bear an obligation to implement the binding provisions of these international treaties and recommendations of the treaty bodies.

Under these conventions the countries are required to take legislative, administrative, judicial and other measures to prevent and punish any acts of torture. The specific obligations are aimed at:

- absolute prohibition of torture, medical or scientific experimentation without the free consent of a person, without any justification or extenuating circumstances, including those based on an order from a superior officer or public authority;¹
- providing special protection of persons not capable of giving valid consent, in particular those under any form of experimentation, detention or imprisonment;²
- prohibition of prolonged solitary detention, imprisonment,³ as it amounts to prohibited forms of ill-treatment and punishment;
- strict limitation of the death penalty in accordance with Article 6 of the ICCPR, but if it is applied by the State it is only for the most serious crimes, and it must be carried out in such a way as to cause the least possible physical and mental suffering;⁴
- prohibition of expulsion, extradition or return of persons to a country where they can be in danger of torture or cruel, inhuman or degrading treatment or punishment;⁵

- prohibition of the use or admissibility of statements or confessions obtained through torture or other prohibited treatment;⁶
- criminal liability of persons responsible of encouraging, ordering, tolerating or perpetrating prohibited acts of torture and ill-treatment; persons who refuse to obey such orders must not be punished;⁷
- recognition of the right to lodge complaints against torture and ill-treatment;⁸
- prompt and impartial investigation of complaints by the competent authorities in order to ensure effective remedy to victims;⁹
- prohibition of the use of amnesty and reconciliation to persons guilty of committing torture;¹⁰
- ensuring the right to an effective remedy and reparation, including compensation, full rehabilitation, restitution, satisfaction and guarantees of non-repetition;¹¹
- access to civil remedies for victims of torture available independently of the criminal proceeding against perpetrators;¹²
- obligation of officials conducting investigation to gather as much physical evidence as possible and document the chain of custody involved in recovering and preserving physical evidence in order to use it in future legal proceedings, including criminal prosecution;¹³
- obligation of investigative authority to arrange for a medical examination of the alleged victim, regardless of the length of time since alleged torture and ill-treatment.¹⁴

If a person is in custody or deprived of his/her liberty, the threshold for determining whether a person has suffered 'other Cruel, Inhuman or Degrading Treatment or Punishment' is lower. If treatment or punishment causes intense physical or mental suffering, but is not severe enough to

¹ General Comment No. 20 on Article 7 of the International Covenant on Civil and Political Rights, UN Human Rights Committee, p.3.

² Ibid., p. 7.

³ Ibid., p. 6.

⁴ Ibid..

⁵ Ibid., p.9.

⁶ Ibid., p.12.

⁷ Ibid., p. 13.

⁸ Ibid., p.14.

⁹ *Evloev vs. Kazakhstan*, Communication No. 441/2010, UN Human Rights Committee.

¹⁰ Committee Against Torture, General Comment 2, CAT/C/GC/2, 24 January 2008.

¹¹ *Supra* note 1, p. 15.

¹² *Supra* note 9.

¹³ Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

¹⁴ Ibid.

amount to torture, it is defined as cruel, inhuman or degrading treatment.

To prevent such treatment measures must be put in place, including the following:

- prisoners must be guaranteed enjoyment of all the rights enshrined in the International Covenant on Civil and Political Rights (ICCPR), subject to restrictions that are unavoidable in custody;¹⁵
- ensure humane treatment of all persons deprived of their liberty and respect for their dignity, regardless on the material resources available in the state;¹⁶
- only detain persons in locations that are officially recognised as places of detention and prisons;
- mandatory registration of names of detained persons and places of detention, as well as names of persons responsible for their detention, in the open registry, accessible to all those concerned, including relatives and friends;
- mandatory recording of the time and place of all interrogations, together with the names of all those present and availability of this information for purposes of judicial or administrative proceedings;
- prompt and regular access to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.¹⁷

Definition of torture

Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides the internationally agreed legal definition of torture. It states that torture is 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

The Committee notes that states must make the offence of torture punishable under its criminal law in accordance with the elements of torture

¹⁵ General Comment No. 21 on Article 10 of the International Covenant on Civil and Political Rights, UN Human Rights Committee on Human Rights, p. 3.

¹⁶ Ibid., p. 4.

¹⁷ Supra note 1, p.11.

defined in the Article 1 above. The Committee points out that such criminalisation of torture must ensure absolute prohibition and the non-derogable nature of the obligation, meaning the prohibition of torture must be upheld regardless of the circumstances.

The Committee stresses that all government bodies, including law enforcement and the judiciary, must adhere to the definitions set forth in the Convention. At the same time, the Committee recognises that broader domestic definitions also advance the object and purpose of the Convention.¹⁸

Definition of torture in the criminal law of Kazakhstan, Kyrgyzstan and Tajikistan

Since their independence, countries in Central Asia have gone through several stages of reforming their criminal justice systems. Each country has undertaken reforms at varying speeds and with different scope. However as Soviet criminal law is a common basis, their legislation and criminal policies are comparable on a number of issues. Despite ratification of key human rights treaties in the late 1990s, no separate offence on torture was introduced in criminal legislation of Kazakhstan, Kyrgyzstan and Tajikistan. Rather torture was primarily defined as a general criminal act of private persons. It also appeared as an aggravating circumstance in the crimes on abuse of power by public persons. There was no interpretation of torture within the meaning of the UNCAT existing in the criminal law of these three countries until the 2000's.

From 2003 Kazakhstan, Kyrgyzstan and Tajikistan began to criminalise torture comprehensively in their respective criminal legislation, following specific recommendations been made by the UN treaty bodies through reporting procedures.¹⁹ Currently the criminal articles on torture consist of three detailed parts. The following table shows how the three pieces of legislation vary with regards to the scope of prohibition.²⁰

¹⁸ Committee against Torture, General Comment 2, CAT/C/GC/2, 24 January 2008.

¹⁹ Kyrgyzstan: Article 305-1 "Torture" was introduced on 15 November 2003 and further amended in 2012; Kazakhstan: Article 347-1 "Torture" was introduced on 18 January 2011 and changed to Article 141-1 on 9 November 2011; Tajikistan: Article 143-1 "Torture" was introduced on 16 April 2012.

²⁰ It has to be noted that the term "torture" in the Russian language is used either in the singular form, for instance in Kyrgyz Criminal Code (art. 305-1) or in plural, as in Kazakhstan or Tajikistan criminal laws (art 141-1, 143 (1) respectively).

Criminal Code of Kyrgyzstan	Criminal Code of Tajikistan	Criminal Code of Kazakhstan
Article 305-1. Torture	Article 143(1). Torture	Article 141-1. Torture
<p>(1) Intentional infliction on a person of physical or mental suffering committed for the purpose of obtaining from him or another person information or a confession, punishing him for an act which he or another person has committed or is suspected of having committed, or intimidating or coercing him or another person to commit certain acts, or for any other reason based on discrimination of any kind, when such an act is committed by or at the instigation of or with the consent or acquiescence of a public official –</p> <p>is punishable by imprisonment for a term of four to eight years with deprivation of the right to occupy certain positions or engage in certain activities for a term of one to three years.</p>	<p>1) Intentional infliction of physical and (or) mental suffering committed by a public official conducting an inquiry or preliminary investigation, or other official person or at their instigation, acquiescence or knowledge by another person for the purpose of obtaining from the victim or a third person information or a confession, or punishing him for an act which he has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any other reason based on discrimination of any kind –</p> <p>is punishable by a fine based on the rate of three hundred sixty-five to nine hundred twelve calculation indices;</p> <p>deprivation of the right to occupy certain positions or engage in certain activities for a term up to five years, or</p> <p>imprisonment for a term of two to five years with deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.</p>	<p>1. Intentional infliction of physical and (or) mental suffering, by an investigator, a public official conducting an inquiry or other official person or with their instigation, acquiescence or consent by another person, for the purpose of obtaining from a victim or a third person information or a confession, or punishing him for an act which he has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind –</p> <p>is punishable by a fine of two hundred to five hundred of monthly calculation indices;</p> <p>deprivation of the right to hold certain positions for up to three years, or restraint of liberty for a term up to five years, or imprisonment for the same term.</p>
<p>(2) The same act committed by:</p> <p>1) a group of persons;</p> <p>2) a group of persons by prior conspiracy, -</p> <p>is punishable by imprisonment for a term of seven to ten years with deprivation of the right to occupy certain positions or engage in certain activities for a term of one to three years.</p>	<p>2) The same act, if committed:</p> <p>a) repeatedly;</p> <p>b) by a group of persons by prior agreement;</p> <p>c) in respect to a woman known to the perpetrator to be pregnant, or persons, known to be a minor or disabled.</p> <p>g) with the infliction of bodily harm,</p> <p>- is punishable by imprisonment for a term of five</p>	<p>2. The same act committed:</p> <p>a) by a group of persons or group of persons by prior agreement;</p> <p>b) repeatedly;</p> <p>c) with the infliction of bodily harm;</p> <p>g) in respect to a woman known to the perpetrator to be pregnant, or minor -</p> <p>is punishable by imprisonment for up to seven years with deprivation of the right to</p>

	to eight years, with deprivation of the right to occupy certain positions or engage in certain activities for up to five years.	occupy certain positions or engage in certain activities for a term up to three years.
<p>(3) Actions envisaged in parts 1 and 2 of this Article :</p> <p>1) committed against a woman known to the perpetrator to be pregnant , or minor;</p> <p>2) committed against a person in a helpless state ;</p> <p>3) committed with particular cruelty;</p> <p>4) committed by an organized group;</p> <p>5) resulted in grave consequences, as well as grievous bodily harm or death of the victim –</p> <p>is punishable by imprisonment for a term of ten to fifteen years with deprivation of the right to occupy certain positions or engage in certain activities for a term of one to three years.</p>	<p>3) Acts envisaged in the first and second parts of this Article, if they are:</p> <p>a) committed with causing grievous bodily harm;</p> <p>b) resulted in the death of the victim or other grave consequences –</p> <p>is punishable by imprisonment for a term of ten to fifteen years, with deprivation of the right to occupy certain positions or engage in certain activities for up to five years.</p>	<p>3. The same act that has caused serious bodily injury or death of the victim –</p> <p>is punishable by imprisonment for a term of five to ten years with deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.</p> <p>Note.</p> <p>Physical and mental suffering caused as a result of lawful actions of officials is not recognized as torture.</p>

Subject and subjective elements of the crime of torture

With reference to all three countries' legislation, it can be noted that the criminal articles on torture provide for general and specified subjects – public officials, with various types of complicity, such as: instigation, consent or acquiescence. However common articles on recognised types of complicity in the criminal law only indicate instigation, leaving out consent and acquiescence.²¹ Thus, the relevant legislation of the three countries contain contradictions between the definitions of torture and general criminal law provisions.

The definitions used by Kazakhstan and Tajikistan refer to 'investigator or person conducting an inquiry' or 'a public official conducting an inquiry or preliminary investigation' respectively. According to relevant commentaries, these categories can be included within the meaning of 'official persons' thus rendering the references redundant.²²

²¹ Art. 30 (5) of the Criminal Code of Kyrgyzstan; Art. 36 (4) of the Criminal Code of Tajikistan; Art. 28 (4) of the Criminal Code of Kazakhstan.

²² Commentary to Art. 314 of the Criminal Code of Tajikistan and Art.307 of the Criminal Code of Kazakhstan.

The definitions also lack a reference to other persons 'acting in an official capacity' required by Article 1 of UNCAT. For instance, staff of child care centres, are not recognised as official persons, nor do they act at the instigation of or with the consent or acquiescence of public officials in the performance of their duties. Unlawful actions by such persons would therefore not be covered by the definitions of torture in all three countries. This discrepancy creates a potential loophole and could lead to cases of impunity.

The subjective element of the crime of torture in the relevant national legislation envisages direct intention by the perpetrator, with some specified purpose in mind. It is important for legislators to bear in mind that the elements of intent and purpose do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances.²³

²³ Committee Against Torture, General Comment 2, CAT/C/GC/2, 24 January 2008.

Object and objective elements of the crime of torture

All three pieces of legislation allow for the possibility to evade criminal responsibility for the crime of torture through the use of amnesty and reconciliation of parties. This is in direct violation of the UNCAT which states that the principle is non-derogable and absolute.

Under the 'Special Parts' of the criminal codes list offences grouped according to the public interests and social values they protect.

Each of the three countries has placed the crime of torture in the chapter on different groups of offences. In Kazakhstan and Tajikistan torture is included in the section 'Crimes against Constitutional Rights and Freedoms of a Person and a Citizen', while Kyrgyzstan places it in the section on 'Crimes Committed by Public Officers.'

As torture violates the basic human right to dignity it would be better placed within the criminal codes as a crime against constitutional rights and freedoms. This would reinforce the non-derogable nature of the absolute prohibition of torture. Shifting the offence under a different section will shift the focus from other interests and values, such as integrity of the public office.

The elements of the purpose of torture are for the most part in compliance with the Article 1 of the UNCAT in all three countries. The definition in the criminal law of Kyrgyzstan contains the closest interpretation of the UNCAT provision. The other two definitions fail to mention punishment for an act committed by another person as one more element of the purpose.

Evolution of penalties in criminal codes

	Kyrgyzstan		Tajikistan	Kazakhstan	
	Law as of 15.11.2003	Law as of 31.07.2012	Law as of 16.04.2012	Law as of 21.12.2002	Law as of 18.01.2011
Part1	imprisonment for a term of 3-5 years with deprivation of the right to engage in certain activities for a period of 1-3 years or without it.	imprisonment for a term of 4-8 years with deprivation of the right to occupy certain positions or engage in certain activities for a period of 1-3 years	a fine in the amount of 365 – 912 values of the calculation index or deprivation of the right to occupy certain positions or engage in certain activities for up to 5 years or imprisonment for a period of 2-5 years with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years.	fine in the amount of 200-500 values of the monthly calculation index or salary or other income of the convicted person for a period 2-5 months or deprivation of the right to hold certain positions for up to 3 years, or restriction of liberty for up to 5 years, or imprisonment for the same term	fine in the amount of 200-500 values of the monthly calculation index or deprivation of the right to hold certain positions for up to 3 years, or restriction of freedom for up to 5 years, or imprisonment for the same term.
Part 2	Absent	imprisonment for a term of 7-10 years with	imprisonment for a term of 5-8 years with	imprisonment for up to 7 years with	imprisonment for up to 7 years with deprivation

		deprivation of the right to occupy certain positions or engage in certain activities for a period of 1-3 years	deprivation of the right to occupy certain positions or engage in certain activities for up to 5 years.	deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years.	of the right to occupy certain positions or engage in certain activities for up to 3 years.
Part 3	Absent	imprisonment for a term of 10-15 years with deprivation of the right to occupy certain positions or engage in certain activities for a period of 1-3 years.	imprisonment for a term of 10-15 years with deprivation of the right to occupy certain positions or engage in certain activities for up to 5 years.	imprisonment for a term of 5-10 years with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years.	imprisonment for a term of 5-10 years with deprivation of the right to occupy certain positions or engage in certain activities for up to 3 years.

Although international standards do not prescribe specific levels of sanctions, the Committee against Torture noted the need to establish 'appropriate sanctions' given the special gravity of the crime of torture.²⁴

Such sentencing policies ensure that perpetrators, victims, and the public, etc. are aware of the special gravity of the crime of torture and its absolute prohibition.

Sanctions for various elements of the crime of torture vary among the three criminal codes.

There are noticeable differences between the maximum level of imprisonment which lie at 15 years in Kyrgyzstan and Tajikistan, and 10 years in Kazakhstan. There is no consistent indication of the minimum level of sanction for torture.

The most successful approach is undertaken in the Criminal Code of Kyrgyzstan. Firstly it provides for mandatory application of a primary penalty of imprisonment in combination with a deprivation of the right to hold certain positions or engage in certain activities. This sanction is arguably adequate in terms of reflecting the gravity of torture, in comparison with other crimes in the national law and also with regard to international standards. It envisages imprisonment for 4-8 years (part 1), 7-10 years (part 2) and 10 -15 years (part 3). Indication of both the minimum and maximum level of punishment prevents lenient sentencing for perpetrators of torture. These terms are also considerably higher than the punishment range in Kazakhstan and Tajikistan, where due to low penalties torture is considered a crime of medium gravity.

Furthermore, the sentencing options in Kyrgyzstan do not allow for alternative sanctions, such as fines and other forms of restriction liberty.

Recommendations

- Implement international standards relating to the prohibition and prevention of torture in domestic legislation of Kazakhstan, Kyrgyzstan and Tajikistan, namely the Convention against Torture.
- Ensure the definition of torture in the relevant criminal laws is consistent with the text and the aims of the Convention against torture.
- Amend the relevant articles on torture in criminal codes to uphold the non-derogable nature of the absolute prohibition of torture including by:
 - a) including a reference to 'other persons acting in an official capacity' to prevent any loopholes in the comprehensive coverage of the crime of torture;
 - b) amending general provisions of the criminal law to ensure inclusion of other types of complicity, such as consent and acquiescence, consistent with the crime of torture.
- Reconsider sentencing options to ensure adequate sanctions including by:

²⁴ Ibid.

- a) indicating the minimum length of imprisonment and other sanctions;
 - b) increasing the maximum length of imprisonment and other sanctions adequately in comparison to other types of crimes;
 - c) removing fines, and restriction of liberty as non-custodial sentencing options for the crime of torture;
 - d) ensuring a combination of penalties including imprisonment and deprivation of the right to occupy certain positions or engage in certain activities.
- Strengthen the non-derogability and absolute nature of the prohibition of torture by shifting the relevant articles to the group of crimes against constitutional rights and freedoms.

- Amend the criminal law to introduce a clear prohibition of amnesties, reconciliation of parties and other measures to escape criminal responsibility for the crime of torture.

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