

The concept of torture and other cruel, inhuman or degrading treatment or punishment: a comparative analysis



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Kazakhstan is taking a range of measures to combat torture. The Republic of Kazakhstan has zero tolerance for torture and it is prohibited at the constitutional level.

In 1998, Kazakhstan acceded to the Convention against Torture and in 2008 ratified the Optional Protocol to the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment. In pursuance of the obligations assumed by Kazakhstan under the Optional Protocol, the National Preventive Mechanism against Torture was established, which has been functioning in Kazakhstan since 2014. The NPM in Kazakhstan is based on the Ombudsman+ model, which provides for a partnership between the Human Rights Commissioner and representatives of civil society in the prevention of torture and ill-treatment.

At the Government level, the "Plan of Further Measures in the Field of Human Rights and the Rule of Law" has been approved, which covers human rights measures in the field of criminal justice, execution of punishment, and prevention of torture and cruel treatment.

The President Kassym-Jomart Tokayev in his Address to the People of Kazakhstan dated March 16, 2022 "New Kazakhstan: the Path of Renewal and Modernization" noted the importance of a systematic approach to investigating crimes related to torture and the absence of a specific body responsible for this area. In this regard, he instructed to assign to the Prosecutor General's Office the function of investigating crimes related to torture, justifying this by the fact that such an approach will ensure the objectivity and impartiality of the investigation, and will confirm the inevitability of punishment for arbitrariness in the law enforcement sphere.

The prohibition of torture in international law is a customary law norm that is binding on all states. Moreover, the prohibition of torture is considered a norm of jus cogens (a peremptory norm of international law) and has priority over other norms that conflict with it ¹.

¹General Comment No. 2 on the implementation of article 2 of the Convention against Torture, Committee against Torture, 2008.
https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZ hDDP8yaSRi%2Fv43pYTgmQ54orrkufnTR7Lf5n0R2%2BsWQX2NyXI9PwL4_r62hybBuijOp3O75Fd1hUEfh1qSpQHW

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is enshrined in several international legal instruments:

- Universal Declaration of Human Rights, adopted in 1948 (Article 5);
- International Covenant on Civil and Political Rights, adopted in 1966 (Article 7);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention against Torture), adopted in 1984.

On June 29, 1998, Kazakhstan ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The International Covenant on Civil and Political Rights was ratified on November 28, 2005. Thus, Kazakhstan assumed obligations to implement the provisions of these international treaties.

Also, the prohibition of torture is enshrined in the following international documents, which are of a recommendatory nature, but at the same time are universal and recognized by the international community: The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules); the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Code of Conduct for Law Enforcement Officials; the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Kazakhstan is a member of many international organizations, one of which is the Organization for Security and Cooperation in Europe (OSCE). Kazakhstan joined the OSCE in January 1992. The prohibition of torture is also enshrined in OSCE documents, such as: Final Document of the OSCE Vienna Meeting of 1989, Final Document of the OSCE Copenhagen Meeting of 1990, the Charter of Paris for a New Europe of 1990, the Final Document of the Moscow Meeting of 1991, the Final Document of the OSCE Budapest Summit of 1994, Resolution on the Fight against Torture, 2014 (Baku), Decision No. 7/20. Prevention and Eradication of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 2020, etc.²

In national legislation, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is prescribed in several normative legal acts:

- Article 17 of the Constitution of the Republic of Kazakhstan ³:
 1. *Human dignity is inviolable.*
 2. *No one shall be subjected to torture, violence or other cruel or degrading treatment or punishment.*
- Articles 14, 197 and 275 of the Criminal Procedure Code of the Republic of Kazakhstan ⁴.
Clause 5 of Article 14

Preventing Torture: An Operational Guide for National Human Rights Institutions (Asia Pacific Forum/Association for the Prevention of Torture) (2010)

<https://www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf>

Removing Incentives for Torture: A Baseline Research and Practical Guide for the OSCE Region, 2020.

https://www.osce.org/files/f/documents/4/7/471720_0.pdf

² Preventing Torture: A Handbook for OSCE Field Staff, 2009

<https://www.refworld.org/rw/reference/handbook/osce/2009/ru/64753>

³Constitution of the Republic of Kazakhstan, dated August 30, 1995, https://online.zakon.kz/Document/?doc_id=1005029

⁴Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014, <https://adilet.zan.kz/rus/docs/K1400000231>

5. No person participating in criminal proceedings may be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Clause 4 of Article 197

4. During investigative actions, the use of torture, violence, threats and other illegal measures, cruel treatment, as well as the creation of a danger to the life and health of persons participating in them is unacceptable.

Subparagraph 1 of paragraph 1 of Article 275

*1. When conducting a forensic examination of living persons, the following is prohibited:
1) deprivation or restriction of their rights guaranteed by law (including through deception, torture, cruel treatment, violence, threats and other illegal measures) in order to obtain information from them;*

- Subparagraph 4 of paragraph 1 of Article 10 of the Criminal Executive Code of the Republic of Kazakhstan ⁵:

1. Convicts have the right to:

4) recognition of their human dignity, protection from torture, violence, other cruel or degrading treatment or punishment;

- Article 4 of the Law of the Republic of Kazakhstan “On the procedure and conditions for keeping persons in special institutions, special premises ensuring temporary isolation from society” ⁶:

Detention in special institutions, special premises, guardhouses, and premises for temporary detention shall be carried out in accordance with the principles of legality, the presumption of innocence, equality of citizens before the law, humanism, respect for the honor and dignity of the individual, the norms of international law, and shall not be accompanied by actions aimed at causing physical or moral suffering to suspects and accused of committing crimes held in special institutions, guardhouses.

- Subparagraph 4 of paragraph 5 of Article 19 of the Law on the Internal Affairs Bodies of the Republic of Kazakhstan ⁷:

5. When exercising the powers of the internal affairs bodies, employees are obliged to:

4) respect the rights and legitimate interests of individuals, do not use torture, violence, cruel, inhuman, degrading treatment, intentional infliction of physical pain and mental suffering. It is prohibited to force anyone to give testimony or admit guilt in committing a criminal or administrative offense.

⁵Criminal Executive Code of the Republic of Kazakhstan, dated July 5, 2014, https://online.zakon.kz/Document/?doc_id=31577723&pos=3:-88#pos=3:-88

⁶ Law of the Republic of Kazakhstan “On the procedure and conditions for keeping persons in special institutions, special premises providing temporary isolation from society”, dated March 30, 1999, <https://adilet.zan.kz/rus/docs/Z990000353>

⁷ Law of the Republic of Kazakhstan “On the Internal Affairs Bodies of the Republic of Kazakhstan”, dated April 23, 2014, https://online.zakon.kz/Document/?doc_id=31538985

- Clause 2 of Article 18 of the Law of the Republic of Kazakhstan on family-type children's villages and youth homes ⁸:

2. In exercising her powers, the mother-educator shall not have the right to cause harm to the physical and mental health of children, their moral development. Methods of education must exclude disdainful, cruel, rude, degrading treatment, insulting the honor and dignity of children.

- 16 paragraph of the Order of the Minister of Internal Affairs of the Republic of Kazakhstan dated November 17, 2014 No. 819 “On approval of the Internal Regulations of the institutions of the penal system” ⁹:

16. The personnel of the institutions are not allowed to enter into any relations with convicted persons and their relatives that are not in the interests of the service, or to use their services that are not regulated by criminal-executive legislation and these Rules.

No convicted person shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

The administration of the institution ensures the security and safety of prisoners, employees of the institution and visitors to the institution.

An important aspect in enshrining the prohibition of torture in regulatory legal acts is the correct definition of the concept of torture in the country's legislation, which will correspond to the concept enshrined in the Convention against Torture.

According to Article 1 of the Convention against Torture, “torture” means: *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.*

Based on the concept enshrined in the Convention against Torture, the following elements can be identified, which together constitute the concept of “torture” ¹⁰:

1. An intentional act that causes severe physical or mental pain and suffering
2. An official or a person acting in an official capacity who participates indirectly or directly
3. Specific purpose: obtaining information, obtaining a confession, punishing, intimidating, coercing, or other reason based on discrimination of any kind.

The definition of torture in the legislation of Kazakhstan is enshrined in paragraph 2 of Article 146 of the Criminal Code of the Republic of Kazakhstan ¹¹. According to this article, torture is understood as “ *the intentional infliction of physical and (or) mental suffering by an official or a person acting in an official capacity, or by another person at their instigation or with their knowledge or tacit consent, committed with the purpose of obtaining information or confession from the tortured person or another person or punishing him for an act that he or another person has committed or of which he is suspected, as well as intimidating or coercing*

⁸ Law of the Republic of Kazakhstan “On family-type children's villages and youth homes”, dated December 13, 2000, <https://adilet.zan.kz/rus/docs/Z000000113>

⁹ Order of the Minister of Internal Affairs of the Republic of Kazakhstan dated November 17, 2014 No. 819 “On approval of the Internal Regulations of the institutions of the penal system”, <https://adilet.zan.kz/rus/docs/V14C0009984>

¹⁰ Preventing Torture: An Operational Guide for National Human Rights Institutions (Asia Pacific Forum/Association for the Prevention of Torture) (2010) <https://www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf>

¹¹ Criminal Code of the Republic of Kazakhstan, dated July 3, 2014, https://online.zakon.kz/Document/?doc_id=31575252

him or a third party or for any reason based on discrimination of any nature .” This concept fully coincides with the definition prescribed in the Convention against Torture, and also includes the above three elements.

It is worth noting that the conventional concept implies the infliction of severe pain and suffering, while national legislation does not specify that the suffering must be severe. That is, Kazakhstani legislation provides for a broader application of this concept, since it is implied that torture does not necessarily have to cause “severe” suffering. This provision does not contradict the Convention against Torture in any way. Since, according to paragraph 2 of Article 1 of the Convention against Torture, national legislation may contain a broader definition of torture. For example, the Inter-American Convention to Prevent and Punish Torture (1985) also does not require that pain or suffering be “severe” and this does not contradict the Convention against Torture ¹².

It should be emphasized that previously, Part 1 of Article 146 of the Criminal Code of the Republic of Kazakhstan had a narrow circle of subjects, it indicated only *the investigator, the person conducting the inquiry, or another official or another person with their instigation or with their knowledge or tacit consent*. On March 17, 2023, the article was amended in accordance with the Law of the Republic of Kazakhstan No. 212-VII "On Amendments and Supplements to Certain Legislative Acts of the Republic of Kazakhstan on Human Rights in the Sphere of Criminal Procedure, Execution of Punishment, and Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment¹³." After the amendment, the circle of subjects expanded and covers not only officials, but also persons acting in an official capacity, i.e. a person who has reached the age of 16. ¹⁴In our opinion, this reformulation is progress in the prevention and fight against torture.

In accordance with the note to Article 146 of the Criminal Code of the Republic of Kazakhstan, an official is understood to be *a person who does not fall under the definitions of an official or representative of authority used in this Code, who has administrative powers in relation to a person who is kept, undergoing treatment, studying or being educated on a permanent, temporary or periodic basis in an organization with which the person is in an employment relationship, including: an employee of an educational, educational, medical, medical and social institution (organization), a teacher, instructor, medical worker, as well as employees under a contract*. This note to the article in no way contradicts the conventional concept of an official or other person in an official capacity.

The definition of “cruel treatment” in international law remains more ambiguous. There is no specific concept of “cruel, inhuman or degrading treatment or punishment” enshrined in international legal acts.

According to Article 16 of the Convention against Torture, other acts of cruel, inhuman or degrading treatment or punishment are acts *which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. From this it can be concluded that

¹²Preventing Torture: An Operational Guide for National Human Rights Institutions (Asia Pacific Forum/Association for the Prevention of Torture) (2010)

<https://www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf>

¹³ Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Human Rights in the Sphere of Criminal Procedure, Execution of Punishments, and Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment”, dated March 17, 2023, <https://adilet.zan.kz/rus/docs/Z2300000212/history>

¹⁴Features of the investigation of torture in the penitentiary system, INTERDEPARTMENTAL RESEARCH INSTITUTE SCIENTIFIC AND PRACTICAL COMPLEX, Academy of Law Enforcement Agencies under the General Prosecutor's Office of the Republic of Kazakhstan, Koshy , 2021

cruel treatment differs from torture on one of three counts: the purpose of the conduct, the intent of the perpetrator and the powerlessness of the victim ¹⁵.

In the Commentary on the Convention against Torture, written by Manfred Nowak , Moritz Bircom , Juliana Monina , offers the following definition of cruel, inhuman or degrading treatment: “...*may be defined as the infliction of severe pain or suffering, whether physical or mental, at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. Such conduct may be either intentional or negligent, with or without a specific purpose. It does not require the special situation of detention or the direct control of the victim by the perpetrator, which is characteristic only of torture.*”¹⁶

In some international documents, cruel, inhuman or degrading treatment or punishment are defined as actions (inactions) that do not fall under one of the criteria of torture ¹⁷, i.e. do not have a purpose, do not cause severe pain and suffering, or are done unintentionally. For example, lack of exercise, unsanitary conditions, overcrowding, insufficient lighting in closed institutions are considered inhuman or degrading treatment (Decision of the European Commission on Human Rights in 1969) ¹⁸.

In its General Comment No. 2 of 2008, the Committee against Torture noted that torture differs from ill-treatment in the degree of pain and suffering inflicted ¹⁹. However, the UN Special Rapporteur on Torture considers that ill-treatment differs from torture in the purpose of the conduct, the intent of the perpetrator and the powerlessness of the victim, and is not necessarily distinguished by the degree of pain inflicted ²⁰.

For example, the European Court of Human Rights has recognized as degrading treatment situations where there was no evidence of intent to humiliate or insult the victim (Pugzlis v. Poland, No. 446/10; Svinarenko and Slyadnev v. Russia, Applications No. 32541/08 and 43441/08; Ashot Harutyunyan v. Armenia, Application No. 34334/04; Piruzyan v. Armenia, Application No. 33376/07; Bouyid v. Belgium, Application No. 23380/09). This may include: forced and discriminatory testing for HIV and hepatitis C, shackling or handcuffing in public, or even unjustified use of force during detention that does not reach the level of severity (for example, a slap in the face of a minor).²¹

In Kazakhstani legislation, the definition of cruel, inhuman or degrading treatment is enshrined in paragraph 1 of Article 146 of the Criminal Code of the Republic of Kazakhstan and states: *Cruel, inhuman or degrading treatment, that is, the intentional infliction of physical and (or) mental suffering by an official or a person acting in an official capacity, or by another person at their instigation or with their knowledge or tacit consent in the absence of signs of torture.*

¹⁵3. Issues of Interpretation, The United Nations Convention against torture and its optional protocols, A Commentary, second edition, edited by Manfred Nowak, Moritz Birk, Giuliana Monina, Oxford University Press, 2019

¹⁶ ibid

¹⁷Preventing Torture: An Operational Guide for National Human Rights Institutions (Asia Pacific Forum/Association for the Prevention of Torture) (2010)

<https://www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf>

¹⁸ Preventing Torture: A Handbook for OSCE Field Staff, 2009 <https://www.refworld.org/ru/reference/handbook/osce/2009/ru/64753>

¹⁹ General Comment No. 2 on the implementation of article 2 of the Convention against Torture, Committee against Torture, 2008. <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ54orrkufnTR7Lf5n0R2%2BsWQX2NyXI9Pwl.4.r62hybBUiJOp3O75Ed1hUEfh1qSpQHW>

²⁰ Torture in International Law: A Guide to Jurisprudence; Association for the Prevention of Torture, Center for Justice and International Law; 2008 <https://www.apr.ch/sites/default/files/publications/jurisprudenceguide.pdf>
Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), §39

²¹3. Issues of Interpretation, The United Nations Convention against torture and its optional protocols, A Commentary, second edition, edited by Manfred Nowak, Moritz Birk, Giuliana Monina, Oxford University Press, 2019

At first glance, the concept of cruel treatment in Kazakhstani legislation coincides with the conventional definition. From the analysis of international practice and experience it is clear that cruel treatment is not always committed intentionally and may be the result of negligent behavior of a person, or it may be completely unintentional. This definition, indicating intentional intent, is a narrowing of the concept of “cruel, inhuman or degrading treatment” and does not comply with Article 16 of the Convention against Torture.

Article 1 of the Convention against Torture states that: *This definition does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.* Torture does not include pain or suffering arising as a result of lawful sanctions.

In determining the legality of sanctions, one must rely on international norms and norms of national legislation. For example, corporal punishment, which is a legitimate sanction under national law, cannot be justified, since in general international practice corporal punishment is prohibited and is considered a violation of the Convention against Torture ²².

If force is used lawfully (under domestic law) and for a lawful purpose, and the force used is not excessive and is necessary to achieve the purpose (i.e. proportionate), it will generally not amount to torture or ill-treatment. “Legitimate purposes” include effecting a lawful arrest, preventing the escape of a person lawfully detained, self-defence or defence of others from unlawful violence, and action lawfully taken to suppress a riot or insurrection ²³.

A similar clause is included in the note to Article 146 of the Criminal Code of the Republic of Kazakhstan and reads:

1. Physical and/or mental suffering caused as a result of lawful actions of officials and persons acting in an official capacity, or other persons, shall not be recognized as cruel, inhuman or degrading treatment or torture.

Legal actions include actions by officials to apply the prescribed measures of procedural coercion:

- suppression of illegal actions of a suspect (accused, defendant, convicted person);
- lawful use of weapons and special means (handcuffs, batons, etc.);
- detention;
- deprivation of liberty by court order and other actions of the criminal prosecution body aimed at fulfilling the objectives of the criminal process ²⁴.

Therefore, this note complies with international law and does not in any way contradict the Convention against Torture.

²²Preventing Torture: An Operational Guide for National Human Rights Institutions (Asia Pacific Forum/Association for the Prevention of Torture) (2010)

<https://www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf>

²³ Torture in International Law: A Guide to Jurisprudence; Association for the Prevention of Torture, Center for Justice and International Law; 2008 <https://www.aapt.ch/sites/default/files/publications/jurisprudenceguide.pdf>

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), §39

²⁴Clause 17, Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated December 28, 2009 No. 7. - On the application of the norms of criminal and criminal procedural legislation on issues of respect for personal freedom and inviolability of human dignity, counteraction to torture, violence, other cruel or degrading treatment and punishment, <https://adilet.zan.kz/rus/docs/P09000007S>