

Research Article

ON MANOEUVRING KAZAKHSTAN'S CRIMINAL LAW IN DEFINING TORTURE AND OTHER CRUEL, INHUMANE, AND DEGRADING TREATMENT AND PUNISHMENT

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ABSTRACT

Background: *The issue of violence remains highly relevant in Kazakhstan today. Despite legal protections against violence and defence for individual rights, to date, there has been no resolution to the issue of torture by or on behalf of the state. The foundations of Kazakhstan as a rule-of-law state are undermined by violence. The state's efforts to address the current situation appear to be ineffective, fostering an environment where future violations of the rights, liberties, and legitimate interests of individuals, as protected by the Republic of Kazakhstan's Constitution, are encouraged. There is a trend towards governmental illegal violence being tolerated. It is unacceptable for law enforcement and prison personnel to conduct torture as a standard practice. Systemic measures, including criminal law measures, have a specific position in the fight against torture. This study's objectives are to analyse how torture and other cruel, inhumane treatment are criminalised under Kazakhstani criminal law, pinpoint issues with how these laws are applied, offer recommendations for addressing them, and contribute to the ongoing conversation surrounding these issues.*

Methods: *The method of normative-legal research was used in the analysis of Kazakhstani criminal legislation on the qualification of torture. The method of conceptual analysis was used in the study of a new conceptual apparatus in the disclosure of understanding of ill-treatment and torture. The comparative-legal method allowed the analysis of the history of the development of Kazakhstan's criminal legislation on the criminalisation of torture and ill-treatment to be subject to critical analysis of the current norms of criminal law in comparison with international legal acts. The qualitative method was used to analyse the situation with torture according to official data of the Committee on Legal Statistics and Special Records of the General Prosecutor's Office of the Republic of Kazakhstan, appeals of Kazakhstani citizens to the Commissioner for Human Rights in the Republic of Kazakhstan with complaints of torture.*

Results and conclusions: Based on the analysis of the provisions of the current Kazakhstani criminal and international legislation and relevant scientific literature, the authors come to a scientifically justified conclusion on the need to actualise the attention of the state to focus more actively on addressing torture and cruel, inhumane treatment. The authors make proposals for further development of criminal-legal measures to counter torture and cruel, inhumane treatment. One such recommendation is to remove the narrow definition of an official in relation to torture within the health care, education and medical and social spheres. Furthermore, the authors argue for the adjustment of Article 146 of the Criminal Code to more clearly differentiate between ill-treatment and torture.

1 INTRODUCTION

The criminalisation and prevention of torture, as well as cruel, inhumane or degrading treatment, serve as a kind of indicator of a state's real attitude to the observance and protection of fundamental human rights.¹ Following the recognition in international law that it is inadmissible to suppress a person in this way, Kazakhstan constitutionally enshrined the prohibition of torture: "No one shall be subjected to torture, violence, other cruel or degrading treatment or punishment".² The Constitution established a preventive legislative framework to combat torture and ill-treatment in accordance with international standards.

Despite the Republic of Kazakhstan's ratification of the UN Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (hereinafter: the UN Convention against Torture), torture was not criminalised as an independent *corpus delicti*. Torture was added to the Criminal Code of the Republic of Kazakhstan (hereinafter: the Criminal Code) as a separate *corpus delicti* in 2002.³ Individual complaints against Kazakhstan⁴ to the United Nations Committee Against Torture became possible following Kazakhstan's ratification of the International Covenant on Civil and Political Rights.⁵ Ten

1 Malcolm D Evans, 'The Criminalisation of Torture as a Part of the Human Right Framework' (2014) 2 *Crimen* 137.

2 Constitution of the Republic of Kazakhstan of 30 August 1995 (amended 19 April 2024) <https://adilet.zan.kz/eng/docs/K950001000_> accessed 20 March 2024.

3 Law of the Republic of Kazakhstan no 363 of 21 December 2002 'On amendments and additions to the Criminal Code, the Code of Criminal Procedure and the Code of Criminal Enforcement of the Republic of Kazakhstan' <https://adilet.zan.kz/rus/docs/Z020000363_> accessed 20 March 2024.

4 RK Sarpekov (ed), *Implementation of Norms of International Treaties in the Field of Human Rights (Civil and Political Rights) in the Legislation of the Republic of Kazakhstan: Analytical Report on the Topic of Fundamental and Applied Scientific Research 2018* (Institute of Legislation of the Republic of Kazakhstan 2018) 19 <<https://zan.kz/kk/Journal/View?id=da78d4cc-fafc-4ffb-a700-da569b050372>> accessed 20 March 2024.

5 Law of the Republic of Kazakhstan no 91 of 16 December 1966 'On Ratification of the International Covenant on Civil and Political Rights' <https://adilet.zan.kz/eng/docs/Z050000091_> accessed 20 March 2024.

years after ratifying the UN Convention against Torture, Kazakhstan ratified the Optional Protocol to the Convention,⁶ which establishes the National Preventive Mechanism for Combating Torture⁷ as a public institution whose members are entitled to free, unannounced, and regular access to closed institutions to monitor compliance with human rights, torture prevention, and other issues. In addition to these major international documents on preventing torture, Kazakhstan abides by a number of other international regulations and standards.⁸ Among these are the Standard Minimum Rules for the Treatment of Prisoners, the principal rules and concepts of which are incorporated into the Republic of Kazakhstan's current Penal Enforcement Code,⁹ Principles for Effective Investigation and Documentation of Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment.¹⁰

As a result, Kazakhstan has established robust foundations for a torture prevention framework. However, torture cannot be considered a turning point in the country's societal progress. The existing situation regarding torture is far from ideal, as certain principles of criminal law, among other things, make it easier to avoid responsibility for such acts. In our opinion, the most recent reform in criminal law is not a balanced response to the legislative challenges of defining torture and distinguishing it from other forms of abuse against a person. The possibility of convicting someone for torture rather than ill-treatment – a less severe crime – clearly demonstrates the existence of systemic uncertainty in the legislative definition of torture, reducing overall measures to combat torture as an extremely dangerous phenomenon in modern Kazakhstan.

Based on the achievements of Kazakhstani legal research, international legislation on torture, and its practical implementation, this paper attempts to demonstrate the

6 Law of the Republic of Kazakhstan no 48-IV of 26 June 2008 'On ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' <https://adilet.zan.kz/eng/docs/Z080000048_> accessed 20 March 2024.

7 Law of the Republic of Kazakhstan no 111-V of 2 July 2013 'On Introducing Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Creation of a National Preventive Mechanism Aimed at Preventing Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' <<https://adilet.zan.kz/rus/docs/Z1300000111>> accessed 20 March 2024.

8 Nurlan Agibaev, *Analysis of the Legislation of the Republic of Kazakhstan for Compliance with International Standards of Effective Investigation of Torture* (Public Association "Kadir-Kasiet" 2022) <https://online.zakon.kz/Document/?doc_id=32876848> accessed 20 March 2024.

9 Aidarkan B Skakov, 'Implementation of the Norms of the Standard Minimum Rules for the Treatment of Prisoners in the Novelities of the Criminal Executive Code of Kazakhstan' in *Information and Analytical Materials on Modernisation of Criminal, Criminal Procedure and Criminal Executive Legislation of the Republic of Kazakhstan*, pt 3 (Mazhilis of the Parliament of the Republic of Kazakhstan 2016) 185 <<https://www.parlam.kz/mazhilis/download/13641>> accessed 20 March 2024.

10 OHCHR, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Professional Training Series no 8/Re v2, UN 2022) <<https://www.ohchr.org/en/publications/policy-and-methodological-publications/istanbul-protocol-manual-effective-0>> accessed 20 March 2024.

problematic nature of the criminal law provisions on torture, which hinder the discovery of torture and other ill-treatment. The author's approach to resolving these issues will hopefully add to the inevitability of torture punishment. There are no significant studies in this context by Kazakhstani scientists, despite the fact that the high level of human rights breaches in torture and ill-treatment should prompt a broad scientific debate. This study is the only one in Kazakhstan that reveals the difficulties in separating torture from cruel, inhumane, or degrading treatment or punishment. Addressing these challenges requires the engagement of a broad spectrum of interested parties to foster meaningful progress in combating torture.

2 METHODOLOGY OF THE STUDY

A methodology of normative-legal research was used to conduct this research, based on normative-legal, conceptual, and comparative-legal approaches. It drew on international legal acts establishing the absolute prohibition of torture and intolerance to other acts of cruel, inhumane or degrading treatment or punishment. Additionally, the study examined analytical materials, recommendations and reports on the situation with torture in Europe and Kazakhstan, alongside current Kazakhstani criminal legislation and special legal literature to better understand the qualification of torture and ill-treatment. This study used a qualitative method of analysing official data on registered facts of torture in the register of pre-trial investigation to achieve clarity in the essence of the issue under discussion.

3 RESULTS AND DISCUSSION

3.1. Situation on torture in Kazakhstan

Torture is always evil¹¹ because it contradicts the entire concept of human rights.¹² It is used to place a person in a condition of extreme helplessness produced by the violation of cognitive, emotional, and physiological processes, as well as to restrict human will and humiliate one's dignity.¹³ Despite being a widely known form of human rights violation, torture persists even in states with high living standards.¹⁴ Kazakhstan is no exception.

11 Rebecca Evans, 'The Ethics of Torture' (2007) 7(1) *Human Rights & Human Welfare* 53.

12 Joseph S Nye, *Understanding International Conflicts: An Introduction to Theory and History* (Longman Classics in Political Science, 5th edn, Pearson 2005) 21.

13 I Gilyazetdinova and A Sydykov, *Criminal Liability for Torture: Textbook* (Supreme Court of the Kyrgyz Republic 2021) 31.

14 Amnesty International, *Report 2001* (Amnesty International Publ 2001) <<https://www.amnesty.org/en/documents/pol10/0001/2001/en/>> accessed 20 March 2024.

Several public organisations, such as the Kazakhstan International Bureau of Human Rights and Rule of Law, are engaged in extensive human rights activities to combat torture including the Kazakhstan International Bureau for Human Rights and Rule of Law, the Coalition against Torture, the Coalition “New Generation of Human Rights Defenders,” the Coalition for the Safety of Human Rights Defenders, NGO “For the Protection of Children's Rights,” as well as several organisations, including journalistic “Ədil sөz”, “Kadyr-kasiet”, “Erkindik kanaty”, the Youth Information Network of Kazakhstan, the Liberty Foundation, and “Ar.Rukh.Hak”. There is a call at the state level to adhere to zero tolerance of torture.

However, until January 2022, torture was not officially recognised as a systemic phenomenon in Kazakhstan but was dismissed as an isolated case, an exception. This perspective shifted after the tragic Bloody January events, where mass riots over rising gas prices escalated into nationwide unrest. In his address to the nation after the January events, the President of the Republic of Kazakhstan officially recognised the widespread use of torture against detainees,¹⁵ marking a shift in public discourse. With this confession, the President highlighted the entrenched problem of torture within the criminal justice system, breaking previous silences on the issue.

Nevertheless, despite the absolute nature of the right to freedom from torture, there has been no large-scale condemnation of police officers who tortured people. Today, civil society lacks a comprehensive understanding of the scope of torture detection and criminalisation. According to official statistics for 2022, the number of victims of January torture has decreased. The Committee on Statistics and Special Records of Kazakhstan's General Prosecutor's Office counts the number of victims of torture in open cases, and if the case is closed without identifying the perpetrator of torture, the victim is not officially recognised as a victim of torture. This can be clearly demonstrated in the following Figure 1.¹⁶

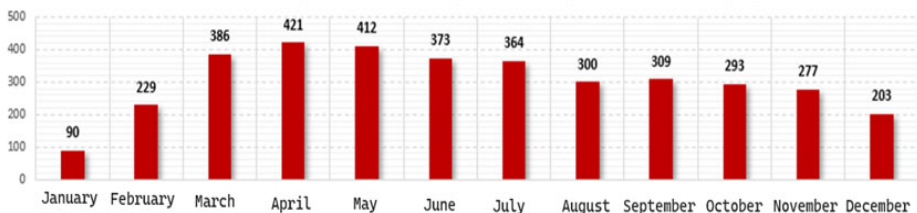


Figure 1. Number of victims of torture by criminal cases registered during the period. Monthly dynamics

15 Kassym-Jomart Tokayev, 'New Kazakhstan: The Path of Renewal and Modernization: State of the Nation Address by President of the Republic of Kazakhstan' (*President of the Republic of Kazakhstan: Website*, 16 March 2022) <<https://www.akorda.kz/en/state-of-the-nation-address-by-president-of-the-republic-of-kazakhstan-kassym-jomart-tokayev-17293>> accessed 20 March 2024.

16 Statistical reports of the Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan see: *Portal of Legal Statistics and Special Accounts* <<https://qamqor.gov.kz/crimestat/statistics>> accessed 20 March 2024.

As can be observed, there was an increase in the number of registered cases of torture from January to April 2022, with April recording the largest number of registered torture allegations at 421. By the end of 2022, less than half of these were still being investigated for torture. As a result, the official figure for torture victims in 2022 is 203. The practice of considering torture cases demonstrates a lack of disclosure of this crime, with many cases being fragmented due to an inability to prove the occurrence of torture. At the same time, when analysing the reports of the Ombudsman of Kazakhstan, 447 complaints of torture were submitted in 2022, including those from correctional institutions. The number of complaints to the Ombudsman and the Coalition of NGOs of Kazakhstan against Torture is growing annually, with 2022 showing the highest number of complaints, as presented in Figure 2¹⁷ and Figure 3.¹⁸

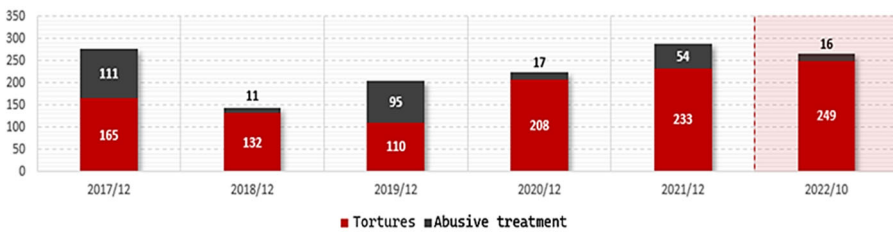


Figure 2. Number of appeals to the Coalition of Non-Governmental Organizations of Kazakhstan against torture



Figure 3. Number of complaints from Kazakhstan to the Human Rights Ombudsman of the Republic of Kazakhstan in regard to torture

For the last five years, official data from the Committee on Statistics and Special Records under the General Prosecutor's Office of Kazakhstan show that 95% of cases are terminated on rehabilitative grounds: for the absence of the event of a criminal offence, for the absence

17 KIBHR - Kazakhstan International Bureau for Human Rights and Rule of Law: Website <<https://bureau.kz/en/>> accessed 20 March 2024.

18 Human Rights Ombudsman in the Republic of Kazakhstan: Website <<https://www.gov.kz/memleket/entities/ombudsman/activities/52856?lang=en>> accessed 20 March 2024.

of *corpus delicti* of a criminal offence. It turns out that these are almost all criminal torture cases. Indeed, analysing data from the General Prosecutor's Office reveals a major difference between registered and terminated cases, as well as an incomparable disparity in the number of cases submitted to court (Figure 4).¹⁹

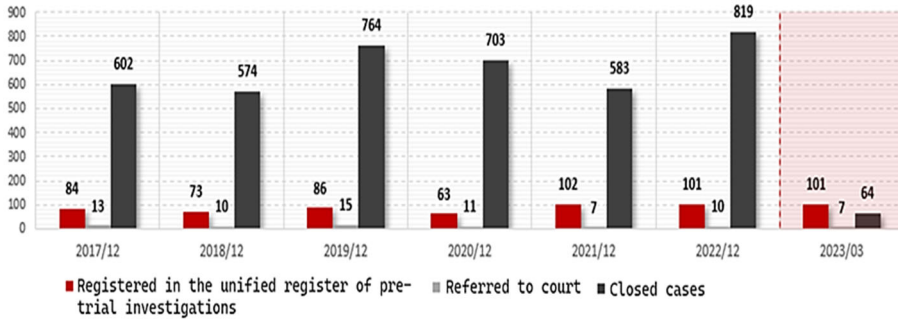


Figure 4. Information on criminal offences under Article 146 of the Criminal Code of the Republic of Kazakhstan “Torture”. During the reporting period

The data reveals a concerning reality: the number of torture cases brought to court is exceedingly low. The closure of cases for reasons other than exoneration raises critical questions about the systemic challenges in proving acts of torture and what needs to be done to address the problem.

In 2023 and 2024, the situation changed in a number of ways: the number of allegations of torture decreased, while the number of criminal cases brought to court increased compared to previous years. For example, in 2023, the number of allegations of torture nearly halved in comparison with the previous year, dropping from 791 to 417. Similarly, during the first half of 2024, the number of allegations decreased by one-third compared to the same period in 2023 (from 221 to 139).²⁰

Despite these improvements, concerns remain about how deeply the state intends to engage in the prevention of torture. For instance, in 2019, 24 people were convicted of torture, followed by 13 in 2020, seven in 2021, and two in 2022, even taking into account the January events.²¹ However, progress can be observed. Out of 148 criminal cases registered in 2023, 22 were sent to court (compared to 10 in 2022), resulting in 40 convictions – nearly four times the 12 convictions in 2022.

19 *Portal of Legal Statistics and Special Accounts* (n 16).

20 The work of the prosecutor's office in combating torture see: *The Prosecutor General's Office of the Republic of Kazakhstan: Website* <<https://www.gov.kz/memleket/entities/prokuror/press/news/details/810114?lang=en>> accessed 20 March 2024.

21 Global Affairs Canada, 'Human Rights Report [Kazakhstan], January 2022 - December 2022 : Full Report' (*Public Association Dignity*, 31 January 2023) <<https://kkassiyet.wordpress.com/reports/>> accessed 20 March 2024.

In the first six months of 2024, out of 99 criminal cases registered, 12 cases were sent to court against 33 public officials, resulting in the conviction of six of them. However, from 2017 to date, the number of reported cases of torture exceeds the number of cases sent to court and the number of people convicted of torture. This is a severe issue. Torture destroys the state's constitutional foundations, diminishing the rule of law, degrading the administration of justice, and, as a result, people's faith in justice in society.²² One cannot help but conclude that the appearance of proper opposition to torture creates a culture of torture and that it has become a widespread practice among law enforcement agents.²³

It is necessary to acknowledge the significant state already taken by the state to prevent torture. In Kazakhstan, there are 63 penitentiary institutions housing approximately 29,000 people, along with 17 pre-trial detention centres where about 6,000 people are held.

In 2013, the National Preventive Mechanism against Torture was established for public control over these institutions. The NPM's Coordination Council, consisting of 27 people, has the right to conduct inspections of premises and interview persons held in pre-trial detention centres and places of deprivation of liberty, as well as receive complaints regarding torture.

Prosecutors play a significant role in oversight, including opening mailboxes in penitentiary institutions on a weekly basis to address complaints about staff misconduct. Since 2019, it has been obligatory for a prosecutor to be present at the examination of torture crime scenes, ensuring special control of the prosecutor's office. Additionally, as of January 2023, cases of torture have been investigated exclusively by prosecutors.

To enhance accountability, correctional and prosecution facilities are gradually being equipped with video cameras to provide continuous video surveillance of all blind spots in the facilities. Additionally, the medical staff of penitentiary facilities has been transferred from the jurisdiction of the Ministry of Internal Affairs of the Republic of Kazakhstan to the Ministry of Health. This move aims to eliminate medical staff's dependency on managing these facilities as employees and employers.

Kazakhstan's criminal law has been repeatedly amended to increase liability for torture. In 2014, with the adoption of the new Criminal Code, the punishment for torture resulting in the death of the victim by negligence was increased from 10 to 12 years of imprisonment. In 2023, the punishment for group torture, torture of pregnant women and children, and repeated acts of torture, as well as those causing harm of medium severity, was increased from a minimum term of three years to a maximum of seven years, with the minimum term increased from four years to a maximum of ten years. The lower amount of punishment for

22 Dan Claudiu Danisor and Madalina Cristina Danisor, 'Totalitarianisms and the Establishment of Objective Legal Order' (2020) 10(1) *Juridical Tribune* 46.

23 Satnam Singh Deol and Rayees Ahmad Ganai, 'Custodial Violence in Kashmir by the Indian Security Forces: A Spontaneous Consequence or a Deliberate Counter-Insurgency Policy?' (2018) 13(2) *International Journal of Criminal Justice Sciences* 373, doi:110.5281/zenodo.2657636; James Welsh and Mary Rayner, 'The "Acceptable Enemy": Torture in Non-Political Cases' (1997) 7(1) *Torture* 10.

causing serious harm to health and causing the death of a victim by negligence as a result of torture was changed to imprisonment for a term of five to twelve years; now, it is imprisonment for a term of seven to twelve years.

In addition, the criminal law introduces a restriction on the exemption from criminal liability of persons who have committed torture, on amnesty, expiration of the statute of limitations, for active repentance, and reconciliation of the parties.

The latest amendment to criminal law introduced a new version of the article criminalising torture and ill-treatment. However, this revision raises concerns as it is unlikely to contribute to improving the effectiveness of the practical implementation of the criminal law prohibition of torture and other forms of violence. This necessitates discussion on the challenges associated with the qualification of torture and ill-treatment under Kazakhstani criminal law, particularly in light of these recent amendments.

3.2. Changing the legislative definition of “torture” and its inconsistency with the Convention definition of “torture”

While torture is a fundamental violation of fundamental human rights,²⁴ it was not immediately introduced into criminal law. Partly, this is due to the long refusal of the state to recognise the fact of its existence. Even now, law enforcement officials try not to use the word “torture”, correctly replacing it with “unauthorised methods of investigation”.

Torture was first recognised as a separate *corpus delicti* in criminal law in 2002. Torture was once classified as a crime against justice and the order of execution of punishment. However, it was later moved to the category of crimes against constitutional and other human and citizen rights and freedoms. As a result, legislators prioritised the protection of human health and dignity, as well as the right to privacy.

However, the definition of torture was transferred from the old Criminal Code to the new one despite being appropriately criticised for its partial incompatibility with the UN Convention against Torture.²⁵ Finally, the definition of torture was formally altered in March 2023²⁶ to align with the definition of the UN Convention against Torture. The article “Torture” has had its legislative framework totally altered.

24 Uliana Koruts, Roman Maksymovych and Olha Shtykun, ‘Legal Grounds for Restrictions of Human Rights in the European Court of Human Rights Case-Law’ (2021) 4(4) Access to Justice in Eastern Europe 137, doi:10.33327/AJEE-18-4.4-n000089.

25 Daniyar Kanafin, *Procedural guarantees of protection from torture in criminal proceedings of the Republic of Kazakhstan: Expert judgement* (OSCE Programme Office in Astana 2017) 6; Nikolai N Turetsky, ‘Application of Comprehensive Measures in the Fight against Torture in the Republic of Kazakhstan’ (2022) 3 Law and State 117, doi:10.51634/2307-5201_2022_3_109.

26 Law of the Republic of Kazakhstan no 212-VII of 17 March 2023 ‘On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Human Rights in Criminal Proceedings, Execution of Punishment, and Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ <<https://adilet.zan.kz/rus/docs/Z2300000212>> accessed 20 March 2024.

The article was renamed “Cruel, inhumane or degrading treatment, torture” to reflect a significant development: for the first time in Kazakhstan's criminal legislation, acts of cruel, inhumane or degrading treatment were criminalised alongside torture. This revised article is divided into various sections. The first section establishes accountability for torture, whereas the second part provides liability for cruel, inhumane, or degrading treatment. The third and fourth sections are aggravated offences that apply to both ill-treatment and torture.

Due to recent changes in the criminal law, the subject of torture has significantly expanded. Previously, major emphasis was placed on the subject of torture as a specific subject, such as an official employee of the criminal-executive system, equipped with particular powers to ensure the application of criminal sanctions and other measures of criminal-legal influence. It could be the concept of a person functioning in an official capacity is now introduced alongside officials, particularly those who carry out criminal prosecution.

The note to Article 146 of the Criminal Code clarifies this broad definition. It encompasses individuals who, while not formally classified as officials or representatives of authority under the Criminal Code, possess dispositive powers over persons in their care or custody. This includes those kept, treated, trained, or brought up on a permanent, temporary, or periodic basis in an organisation with which the person has an employment relationship, such as an employee of an educational, treatment, medical, or social institution.

Indeed, there are problem students at special educational institutions for juvenile offenders who, by failing to follow the set standards of behaviour, may experience the use of violence.²⁷ Cases of torture have also been documented in Kazakhstani boarding schools for orphans and children who have been abandoned by their parents, resulting in speech impairment and psychoneurological anomalies. As a result of the legislator's expanded understanding of who qualifies as a perpetrator of torture, such acts are not excluded from these settings. Under the amended language of the criminal code rule, perpetrators of torture may include both private and public authorities, including anyone acting in an official capacity.

However, this idea of a person acting in an official capacity is, in our opinion, presented in an overly narrow manner. According to the International Covenant on Civil and Political Rights, a perpetrator of torture may include any individual acting either within or beyond his or her official role or in a private capacity.²⁸ As a result, anyone can be subjected to torture. The understanding of a person acting in an official capacity, according to the note

27 Yaacov Reuven, ‘Organizational Climate in Juvenile Correctional Institutions in Israel: A Study on Violence by Educational Instructors towards Inmates during Discipline Encounters’ (2018) 13(1) *International Journal of Criminal Justice Sciences* 77, doi:10.5281/zenodo.1403393.

28 CCPR General Comment no 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (adopted 10 March 1992) para 2 <<https://www.refworld.org/legal/general/hrc/1992/en/11086>> accessed 20 March 2024.

to Article 146 of the Criminal Code, is limited to the spheres of health care, education, and medical and social spheres, which narrows not only the circle of subjects of torture but also the circle of potential victims of torture.

Torture is defined by the requirement that it causes significant physical and (or) mental pain. As a result, the Convention's definition of torture separates it from other forms of ill-treatment by the severity of bodily and (or) mental anguish. In this regard, the new definition of torture in the Criminal Code differs from the traditional one in that it does not associate torture with the infliction of severe physical and (or) mental pain. This makes prosecuting somebody for torture difficult because the real behaviours indicative of torture in Kazakh criminal law are difficult to separate from ill-treatment. Using this, law enforcement agencies can legally classify torture as ill-treatment with a less severe punishment than torture.

Currently, we and other Kazakhstani scientists are confronted with the challenge of investigating the extent of pain experienced during torture, as this phenomenon remains entirely uncharted territory.

3.3. Problems of distinguishing torture from cruel, inhumane or degrading treatment and other forms of violence

Torture should be defined as both action and possibly inactivity (tacit agreement) under the new definition in Section 2 of Article 146 of the Criminal Code. According to the Supreme Court of the Republic of Kazakhstan's normative resolution, inaction should include silent approval, such as nodding, gesturing, or otherwise signalling consent, and failure to intervene when aware of others' illegal actions. It should also encompass unlawful allowance of individuals to access those who are then subjected to torture, resulting in physical and (or) mental suffering.²⁹

Torture, by its nature, is always an intentional and purposeful act.³⁰ It is critical to pay close attention to the definition of torture's purposes. It may be committed for the following reasons:

- to coerce the tortured person or another person to testify or perform other acts;
- to punish the tortured person for an act committed by the person or another person;

29 Normative resolution of the Supreme Court of the Republic of Kazakhstan no 7 of 28 December 2009 'On Application of Norms of Criminal and Criminal Procedural Legislation on Issues of Observance of 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_> accessed 20 March 2024.

30 Jayantha C Herath and Michael S Pollanen, 'Clinical Examination and Reporting of a Victim of Torture' (2017) 7(3) Academic Forensic Pathology 330, doi:10.23907/2017.030.

- to intimidate the tortured person or, through that person, another person;
- any other reason based on discrimination of any kind (e.g., gender, age - older people, minors; based on different religious beliefs, nationality, non-traditional sexual orientation).

The presence of intent and purpose distinguishes torture from cruel, inhumane, or humiliating treatment, which has been criminalised as an independent *corpus delicti* under Part 1 of Article 146 of the Republic of Kazakhstan's Criminal Code. While the partition of Article 146 of Kazakhstan's Criminal Code into two *corpus delicti* appears progressive, it is clear that the objective signs of both crimes are identical. Cruel, inhumane, or humiliating treatment is defined as the intentional inflicting of bodily and (or) mental suffering in the absence of symptoms of torture.³¹ Torture is similarly recognised as the intentional infliction of physical and (or) mental anguish but is committed for specific purposes including – but limited to – those outlined above.

The distinction between ill-treatment devoid of qualifying qualities and torture devoid of qualifying characteristics is thus based on the presence of purpose. For an act to qualify as torture, the purpose must be established in a mandatory manner. In contrast, purpose is not a necessary element for qualifying the *corpus delicti* of ill-treatment without qualifying features. This distinction becomes challenging in cases where cruel, inhumane, or degrading treatment is motivated by factors such as religious hatred or revenge – both of which could also align with discriminatory motives that qualify as torture. Consequently, the question of how to differentiate between the two offences remains unanswered.

Given the disparity in sentencing, it is likely that many cases will be classified as ill-treatment, which carries a lower sentence than torture. The UN Committee against Torture has previously expressed concern about this issue, noting that law enforcement officials accused of torture are frequently prosecuted under other articles with less severe penalties than torture. The Committee has emphasised that torture should be recognised as a more serious crime.³²

Torture, as defined by the Convention, is distinguished from other forms of ill-treatment by the severity of physical and (or) mental anguish. At first glance, this distinction may appear insignificant and meaningless in distinguishing torture from related offences. However, such qualification is given in the convention definition deliberately to highlight the essence of torture and its separation from other forms of ill-treatment.

31 Law of the Republic of Kazakhstan no no 226-V of 3 July 2014 'Criminal Code of the Republic of Kazakhstan' art 146 <<https://adilet.zan.kz/eng/docs/K140000226>> accessed 20 March 2024.

32 Concluding observations of the Committee against Torture of 12 December 2014 'Concluding observations on the third periodic report of Kazakhstan (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)' <<https://adilet.zan.kz/eng/docs/O140000002>> accessed 20 March 2024.

In contrast to the UN Convention against Torture, the absence of the condition of “severe suffering” in the description of torture in the Criminal Code indicates a broader understanding of suffering. Under Part 2 of Article 146 of the Republic of Kazakhstan's Criminal Code, even a minor degree of inflicted suffering is already encompassed. This broader scope appears to be a positive step.

Nevertheless, the difficulty arises when attempting to distinguish between ill-treatment and torture, especially in cases where both involve violence motivated by discrimination, punishment for an act committed by the victim or another person, or intimidation directed at the victim. Some argue that “given that cruel and inhumane treatment is itself also contrary to international law, attempting to set clear borders between the two is probably a futile and potentially misleading task”.³³ This raises a critical question: how can ill-treatment from torture be effectively distinguished from torture when their motives and actions overlap significantly?

The challenge becomes even more pronounced when distinguishing torture from ill-treatment that causes only minimal health injuries. In most cases, the defining element is whether law enforcement agents or individuals acting with their cooperation inflicted harm with the intent of extracting relevant evidence.

Under Kazakhstan's Criminal Code, torture is classified as a form of cruel treatment and violence against a person carries varying degrees of penalties. For lesser forms of torture, punishments include a fine of up to 1000 minimum calculation index (MCI), correctional labour in the same amount, community service for up to 600 hours, restriction of freedom for up to 2 years, or imprisonment for the same period. In Kazakhstan, one MCI is worth 3,692 tenge (about \$7.76 USD). For the fundamental *corpus delicti* of torture, more severe penalties apply. These include a fine of up to 5,000 MCI, correctional labour in the same amount, restriction of freedom for up to six years, or imprisonment for the same period. Additionally, offenders face mandatory deprivation of the right to hold certain positions or engage in certain activities for up to three years.

When comparing the punishment for ill-treatment (the basic *corpus delicti* causing minor harm to health) and torture, the differences in severity become evident. For ill-treatment, the penalties include a fine of up to 2,000 MCI, correctional labour in the same amount, involvement in community service for up to 600 hours, restriction of freedom for up to 2 years, or imprisonment for the same period, with or without deprivation of the right to hold certain positions or engage in certain activities for up to two years.

As we can see, the primary *corpus delicti* of ill-treatment differs from the main *corpus delicti* of torture by the imposition of more mild punishments. Differences are evident in the amount of the fine, correctional labour, and the necessary supplementary punishment for ill-treatment compared to torture. However, other fundamental forms of punishment, such

33 Welsh and Rayner (n 23) 9.

as imprisonment or restriction of freedom, remain the same for both offences. This reflects the legislator's acknowledgement of the overlapping nature of the fundamental ingredients of torture and ill-treatment.

This overlap creates difficulties in determining which criminal law provisions should apply when establishing facts of violence against a person. We will not examine why there are differing amounts of fines or correctional work in the Criminal Code for cases involving minor harm to health, whether classified as torture or cruel treatment, despite the fact that torture is inherently a form of cruel treatment. Ultimately, this topic of systematic punishments and their proportionality under the Republic of Kazakhstan's Criminal Code remains unresolved.³⁴

International experts have noted that the punishments under Part 1 of Art. 141-1 "Torture" of the Criminal Code 1997 – ranging from "a fine of 200 to 500 of minimum calculation index or in the amount of wages or other income of the convicted person for a period of two to five months, or deprivation of the right to hold certain positions for up to three years, or restriction of freedom for up to five years, or imprisonment for the same period of time" – do not correspond to the gravity of such a crime as torture. This is inconsistent with Article 4 of the UN Convention against Torture, which categorises torture as a serious crime.³⁵

Experts have suggested extending the scope of Part 1 of Article 146-1 "Torture" to include other forms of violence against a person, including ill-treatment, thereby criminalising such acts as distinct from torture and prescribing less severe punishment for them. Although nearly 9 years have passed since this advice was given, it remains relevant regarding the current construction of Article 146 of the Criminal Code. The inclusion of infliction of slight harm to health in "Torture" does not conform to the UN Convention against Torture's interpretation of torture, which equates torture with ill-treatment. In this regard, we agree that "if an excessively broad definition is used, the severity of the trauma suffered by survivors of torture can be minimised".³⁶

Part 2 of Article 146 of the Criminal Code covers the imposition of small injury to health as a result of torture, Part 3 addresses medium severity harm to health, and Part 4 addresses significant harm to health. Similarly, in terms of ill-treatment, Part 1 of Article 146 covers mild health harm, Part 3 with medium severity, and Part 4 with substantial health harm.

34 Ramazan Sarpekov and Sattar Rakhmetov, 'Problems of Building the System of Punishment in the Criminal Code of the Republic of Kazakhstan' (2022) 1(68) Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan 48, doi:10.52026/2788-5291_2022_68_1_43.

35 Tatiana Chernobil, 'Independent Report of the Republic of Kazakhstan to the UN Committee against Torture' (*Center for Legal Policy Research*, September 2013) <https://online.zakon.kz/Document/?doc_id=39720417> accessed 20 March 2024.

36 Richard M Duffy and Brendan D Kelly, 'Psychiatric Assessment and Treatment of Survivors of Torture' (2015) 21(2) *BJPsych Advances* 106, doi:10.1192/apt.bp.113.012005.

It turns out that ill-treatment has been designated as a separate *corpus delicti*, but in terms of the degree of infliction of moderate to serious bodily harm, aggravating factors, and penalty, this *corpus delicti* is identical to torture.

In addition, the introduction of cruel treatment into a separate *corpus delicti* has created overlaps with other offences, such as the intentional infliction of serious harm to health with particular cruelty (Paragraph 4, Part 2, Article 106 of the Criminal Code) and the intentional infliction of moderate harm to health with particular cruelty (Paragraph 3, Part 2, Article 107 of the Criminal Code). This has led to potential conflicts in interpretation, and it is possible that the Supreme Court of the Republic of Kazakhstan may give certain clarifications on this matter in the future.

At present, the penalty for the offence outlined in Paragraph 4 of Part 2 of Article 106 of the Criminal Code ranges from 6 to 10 years of imprisonment, while the punishment under Part 4 of Article 146 of the Criminal Code is from seven to twelve years. In the instance of death by negligence as a result of causing substantial harm to health, the criminal risks eight to twelve years in jail. Meanwhile, torture or ill-treatment that causes substantial harm to the victim's health or death due to negligence is punishable by jail for seven to twelve years.

As we can see, the lower limit of the sanction for torture and ill-treatment is milder, starting from 7 years of imprisonment, whereas the lower limit of the sanction for infliction of serious harm to health resulting in the victim's death by negligence begins at eight years. As we may see, the desire to end impunity, noble as that aim might be, must not be at the expense of respect for "the principle of legal certainty".³⁷ Moreover, the Criminal Code and the Criminal Procedure Code that implements it already have enough ambiguities and problematic provisions.³⁸

It must be stated that international legal principles cannot provide a comprehensive and precise solution to the relationship between torture and ill-treatment. Torture can encompass acts such as the failure to provide food, water, or medical treatment. For example, the lack of medical attention and unwillingness to hospitalise a critically ill complainant were classified as the intentional infliction of extreme pain and suffering by an official to extract a confession.³⁹

Researchers engaged in torture research also draw attention to the expanding understanding of acts that may have been recognised as torture. Clare McGlynn raises the

37 Tatyana Eatwell and Steven Powles QC, 'Quasi-Governors' and Questions Relating to Impunity and Legal Certainty' (2021) 19(2) *Journal of International Criminal Justice* 399, doi:10.1093/jicj/mqab020.

38 Elena Mitskaya, 'Fighting Corruption in Kazakhstan by Force of Criminal Law' (2023) 15(2) *Cosmopolitan Civil Societies* 1, doi:10.5130/ccs.v15.i2.8346; Elena Mitskaya, 'Theoretical Thoughts on Legal Regulation of Mediation in Criminal Process in Kazakhstan' (2020) 15(1) *International Journal of Criminal Justice Sciences* 91, doi:10.5281/zenodo.3822110.

39 *Ashim Rakishev and Dmitry Rakishev v Kazakhstan* no 661/2015 (CAT, 31 July 2017) para 8.2 <<https://atlas-of-torture.org/en/entity/h8cz5xhyq1x8mh3ohk273nmi>> accessed 20 March 2024.

issue of considering rape as “a form of torture is recognised in a wider range of situations and circumstances than is currently the case”.⁴⁰ The distinction between torture and ill-treatment remains challenging,⁴¹ and, as experts point out, just as ill-treatment can include features of torture, so can torture.⁴² International human rights bodies consider the following factors when determining whether torture or ill-treatment has occurred:

- 1) the nature of the act or acts in question;
- 2) the severity of the physical and/or mental harm caused as a result of these actions;
- 3) the purpose of the subject;
- 4) the official status and/or individual responsibility of the subject;
- 5) whether the harm resulted from a lawful sanction;⁴³
- 6) the setting in which the act or acts were carried out.⁴⁴

To establish severity, the victim's susceptibility – such as disability or old age – must be considered as a component of judging the degree of pain and suffering.⁴⁵ It is obvious that, unlike physical pain and suffering, defining the degree of intensity, the strength of moral anguish in both ill-treatment and torture is inherently difficult. Non-physical or psychological abuse is frequently difficult to establish in practice.⁴⁶ Torture, on the other hand, is an extreme form of cruelty,⁴⁷ whereas ill-treatment is not considered torture if the harm inflicted is mild.⁴⁸

The UN Convention against Torture does not specify what constitutes extreme pain or physical/moral suffering to distinguish torture from ill-treatment. In this regard, the European Court's practice has been developed, which is instructive for Kazakhstan as a model for combating both torture and ill-treatment.

40 Clare McGlynn, ‘Rape, Torture and the European Convention on Human Rights’ (2009) 58(03) *International and Comparative Law Quarterly* 565.

41 David Weissbrodt and Cheryl Heilman, ‘Defining Torture and Cruel, Inhuman, and Degrading Treatment’ (2011) 29 *Law and Inequality* 380.

42 *ibid* 373.

43 *ibid* 376-7.

44 European Court of Human Rights, *Guide on Article 3 of the European Convention of Human Rights: Prohibition of torture* (CoE ECtHR 2024).

45 Juan E Mendez, ‘How International Law Can Eradicate Torture: A Response to Cynics’ (2016) 22(2) *Southwestern Journal of International Law* 254.

46 A Dardiri Hasyim, Mufrod Teguh Mulyo and Darsinah, ‘Harmonization of Cairo's Declaration of Human Rights in the Criminal Act of Sexual Violence Law’ (2021) 16(2) *International Journal of Criminal Justice Sciences* 402, doi:10.5281/zenodo.4756084.

47 John D Bessler, ‘The Gross Injustices of Capital Punishment: A Torturous Practice and Justice Thurgood Marshall's Astute Appraisal of the Death Penalty's Cruelty, Discriminatory Use, and Unconstitutionality’ (2023) 29(2) *Washington and Lee Journal of Civil Rights and Social Justice* 67; Nigel S Rodley, ‘The Definition(s) of Torture in International Law’ (2002) 55 *Current Legal Problems* 468.

48 Mendez (n 45) 255.

For instance, in Ireland, compared to the United Kingdom (1978, paras. 167,168), the Court recognised certain actions as inhumane treatment because they inflicted a sense of inferiority, oppression, and degrading treatment on the victim. The assessment generally depends on the case's circumstances, including the acts' duration and their impact on the victim's condition. However, the Court did not classify ill-treatment as torture since it lacked the depth of misery and cruelty that characterises torture.⁴⁹

Torture has been distinguished from ill-treatment by the severity of the treatment and the intent behind it. Torture, as a severe form of ill-treatment, is typically carried out to obtain information, force a confession, or punish an individual, while ill-treatment is defined as a person's unreasonable behaviour in a certain context, characterised by excessive humiliation of a person's dignity and intentionality in causing the individual physical/mental agony.⁵⁰

Given this distinction, it might be necessary to amend the definition of ill-treatment and torture in the Criminal Code. Torture should be reserved for extreme infliction of bodily injury characterised by significant pain and suffering and resulting in death as a result of negligence. Consequently, inflicting moderately severe impairment on one's health should fall under the category of ill-treatment.

Cases involving severe injury to one's health by cruel treatment should be evaluated under Paragraph 4, Part 2, Article 106 of the Criminal Code, addressing the purposeful infliction of severe harm to one's health with specific cruelty. Meanwhile, torture involving less severe harm to health should continue to be addressed as just as it is now. In the future, torture could be established as a separate component of Article 146 of the Criminal Code.

At the same time, further consideration is needed to refine the qualified composition of torture and ill-treatment. When assessing the punishment for torture, the provisions of the UN Convention against Torture and the gravity of the crime must be considered.

4 CONCLUSIONS

Kazakhstan declares its commitment to the rule of law and human rights. Torture, along with other forms of cruel, inhumane or degrading treatment or punishment, is recognised as a gross violation of fundamental human rights and must not go unpunished. To ensure accountability, such acts must be properly criminalised. Failure to do so adequately hinders the possibility of holding individuals accountable. Although recent amendments to the

49 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 20 March 2018) <<https://hudoc.echr.coe.int/fre?i=001-181585>> accessed 20 March 2024.

50 *The Greek Case, 1969: Denmark v Greece, Norway v Greece, Sweden v Greece, Netherlands v Greece* App nos 3321/67, 3322/67, 3323/67 and 3344/67 [1972] 12 Yearbook of the European Convention on Human Rights <https://70.coe.int/pdf/denmark_norway_sweden_netherlands_v_greece_i.pdf> accessed 20 March 2024.

criminal law have partially implemented the recommendations of the UN Committee against Torture by recognising a person acting in an official capacity as a subject of torture, this has not yet aligned the definition of torture consistent with international norms.

The understanding of persons acting in an official capacity, given in the note to Article 146 of the Criminal Code, is limited to the sphere of healthcare, education, and medical-social spheres. This approach contradicts international norms and narrows not only the range of subjects of torture but also the range of potential victims of torture. Furthermore, the new definition of torture in Article 146, which characterises it as a less severe act (i.e. when causing minor harm to health), does not correspond to the understanding of torture in the UN Convention against Torture, which, in our opinion, requires correction.

Cruel, inhumane or degrading treatment is singled out as a separate crime due to its increased public danger. This shows the state's commitment to combating any form of violence against a person. However, in terms of object, objective side, subject, and subjective side (except to force the tortured or another person to testify), ill-treatment has no differences from torture. The qualifying characteristics and punishment for qualified *corpus delicti* in the Criminal Code are the same. In international legal terms, torture is an aggravated form of cruelty or an extreme form of expression. As such, it is difficult to distinguish between torture and the basic elements of ill-treatment and torture.

In light of this, we believe it is necessary to make a legislative distinction between ill-treatment, torture and cruel treatment. Clarifications of the Supreme Court are needed not only to address the overlap between norms related to ill-treatment and the deliberate infliction of serious harm to health with particular cruelty (Paragraph 4, Part 2, Article 106 of the Criminal Code) and the deliberate infliction of moderate harm to health with particular cruelty (Paragraph 3, Part 2, Article 107) but also to clarify the broader differentiation between ill-treatment and torture from other crimes.

There is, therefore, an urgent need to revise the legal qualification of torture and other forms of ill-treatment in the criminal legislation of Kazakhstan to effectively counteract the violation of fundamental human rights.

REFERENCES

1. Agibaev N, *Analysis of the Legislation of the Republic of Kazakhstan for Compliance with International Standards of Effective Investigation of Torture* (Public Association "Kadir-Kasiet" 2022) <https://online.zakon.kz/Document/?doc_id=32876848> accessed 20 March 2024.
2. Bessler JD, 'The Gross Injustices of Capital Punishment: A Torturous Practice and Justice Thurgood Marshall's Astute Appraisal of the Death Penalty's Cruelty, Discriminatory Use, and Unconstitutionality' (2023) 29(2) *Washington and Lee Journal of Civil Rights and Social Justice* 65.

3. Chernobil T, 'Independent Report of the Republic of Kazakhstan to the UN Committee against Torture' (*Center for Legal Policy Research*, September 2013) <https://online.zakon.kz/Document/?doc_id=39720417> accessed 20 March 2024.
4. Danisor DC and Danisor MCr, 'Totalitarianisms and the Establishment of Objective Legal Order' (2020) 10(1) *Juridical Tribune* 36.
5. Dardiri Hasyim A, Teguh Mulyo M and Darsinah, 'Harmonization of Cairo's Declaration of Human Rights in the Criminal Act of Sexual Violence Law' (2021) 16(2) *International Journal of Criminal Justice Sciences* 402, doi:10.5281/zenodo.4756084.
6. Deol SS and Ganai RA, 'Custodial Violence in Kashmir by the Indian Security Forces: A Spontaneous Consequence or a Deliberate Counter-Insurgency Policy?' (2018) 13(2) *International Journal of Criminal Justice Sciences* 370, doi:10.5281/zenodo.2657636.
7. Duffy RM and Kelly BD, 'Psychiatric Assessment and Treatment of Survivors of Torture' (2015) 21(2) *BJPsych Advances* 106, doi:10.1192/apt.bp.113.012005.
8. Eatwell T and Powles QC S, 'Quasi-Governors' and Questions Relating to Impunity and Legal Certainty' (2021) 19(2) *Journal of International Criminal Justice* 393, doi:10.1093/jicj/mqab020.
9. Evans MD, 'The Criminalisation of Torture as a Part of the Human Right Framework' (2014) 2 *Crimen* 136.
10. Evans R, 'The Ethics of Torture' (2007) 7(1) *Human Rights & Human Welfare* 53.
11. Gilyazetdinova I and Sydykov A, *Criminal Liability for Torture: Textbook* (Supreme Court of the Kyrgyz Republic 2021) 31.
12. Herath JC and Pollanen MS, 'Clinical Examination and Reporting of a Victim of Torture' (2017) 7(3) *Academic Forensic Pathology* 330, doi:10.23907/2017.030.
13. Kanafin D, *Procedural guarantees of protection from torture in criminal proceedings of the Republic of Kazakhstan: Expert judgement* (OSCE Programme Office in Astana 2017).
14. Koruts U, Maksymovych R and Shtykun O, 'Legal Grounds for Restrictions of Human Rights in the European Court of Human Rights Case-Law' (2021) 4(4) *Access to Justice in Eastern Europe* 131, doi:10.33327/AJEE-18-4.4-n000089.
15. McGlynn C, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(03) *International and Comparative Law Quarterly* 565.
16. Mendez JE, 'How International Law Can Eradicate Torture: A Response to Cynics' (2016) 22(2) *Southwestern Journal of International Law* 247.
17. Mitskaya E, 'Fighting Corruption in Kazakhstan by Force of Criminal Law' (2023) 15(2) *Cosmopolitan Civil Societies* 1, doi:10.5130/ccs.v15.i2.8346.
18. Mitskaya E, 'Theoretical Thoughts on Legal Regulation of Mediation in Criminal Process in Kazakhstan' (2020) 15(1) *International Journal of Criminal Justice Sciences* 91, doi:10.5281/zenodo.3822110.

19. Nye JS, *Understanding International Conflicts: An Introduction to Theory and History* (Longman Classics in Political Science, 5th edn, Pearson 2005) 21.
20. Reuven Ya, 'Organizational Climate in Juvenile Correctional Institutions in Israel: A Study on Violence by Educational Instructors towards Inmates during Discipline Encounters' (2018) 13(1) *International Journal of Criminal Justice Sciences* 77, doi:10.5281/zenodo.1403393.
21. Rodley NS, 'The Definition(s) of Torture in International Law' (2002) 55 *Current Legal Problems* 467.
22. Sarpekov RK (ed), *Implementation of Norms of International Treaties in the Field of Human Rights (Civil and Political Rights) in the Legislation of the Republic of Kazakhstan: Analytical Report on the Topic of Fundamental and Applied Scientific Research 2018* (Institute of Legislation of the Republic of Kazakhstan 2018).
23. Sarpekov R and Rakhmetov S, 'Problems of Building the System of Punishment in the Criminal Code of the Republic of Kazakhstan' (2022) 1(68) *Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan* 43, doi:10.52026/2788-5291_2022_68_1_43.
24. Skakov AB, 'Implementation of the Norms of the Standard Minimum Rules for the Treatment of Prisoners in the Novelties of the Criminal Executive Code of Kazakhstan' in *Information and Analytical Materials on Modernisation of Criminal, Criminal Procedure and Criminal Executive Legislation of the Republic of Kazakhstan*, pt 3 (Mazhilis of the Parliament of the Republic of Kazakhstan 2016) 185.
25. Turetsky NN, 'Application of Comprehensive Measures in the Fight against Torture in the Republic of Kazakhstan' (2022) 3 *Law and State* 109, doi:10.51634/2307-5201_2022_3_109.
26. Weissbrodt D and Heilman C, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law and Inequality* 343.
27. Welsh J and Rayner M, 'The "Acceptable Enemy": Torture in Non-Political Cases' (1997) 7(1) *Torture* 9.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРО ЗМІНИ В КРИМІНАЛЬНОМУ ЗАКОНОДАВСТВІ КАЗАХСТАНУ
ЩОДО ВИЗНАЧЕННЯ КАТУВАННЯ ТА ІНШИХ ЖОРСТКИХ, НЕЛЮДСЬКИХ
І ТАКИХ, ЩО ПРИНИЖУЮТЬ ГІДНІСТЬ, ВИДІВ ПОВОДЖЕННЯ І ПОКАРАННЯ

Олена Мицькая*, Курмангали Сарикіулов та Канат Утаров

АНОТАЦІЯ

Вступ. Проблема насильства залишається зараз актуальною в Казахстані. Незважаючи на правовий захист від насильства і захист прав особистості, на сьогоднішній день є не вирішеним питання катування з боку держави або від її імені. Насильство підриває основи Казахстану як правової держави. Зусилля держави, спрямовані на вирішення цієї ситуації, видаються неефективними, що сприяє створенню середовища, в якому заохочуються майбутні порушення прав, свобод і законних інтересів громадян, які охороняються Конституцією Республіки Казахстан. Спостерігається тенденція толерантного ставлення до насильства з боку держави. Неприпустимим є застосування катування

співробітниками правоохоронних органів та пенітенціарної системи як стандартної практики. Особливе місце в боротьбі з тортурами займають системні заходи, зокрема кримінально-правові. Мета цього дослідження полягає у тому, щоб проаналізувати, як катування та інші види жорстокого, нелюдського поводження криміналізуються згідно з кримінальним законодавством Казахстану, визначити проблеми, пов'язані із застосуванням цих законів, запропонувати рекомендації щодо їх вирішення та зробити внесок у дискусію навколо цих питань.

Методи. Метод нормативно-правового дослідження було використано під час аналізу кримінального законодавства Казахстану щодо кваліфікації катування. Концептуальний аналіз було застосовано під час вивчення нового понятійного апарату в розкритті розуміння жорстокого поводження та катування. Порівняльно-правовий метод дозволив зіставити історію розвитку кримінального законодавства Казахстану щодо криміналізації катування і жорстокого поводження, а також критичний аналіз чинних норм кримінального права у порівнянні з міжнародно-правовими актами. За допомогою якісного методу було проаналізовано ситуацію з катуваннями за офіційними даними Комітету правової статистики та спеціального обліку Генеральної прокуратури Республіки Казахстан, за зверненнями зі скаргами на катування громадян Казахстану до Уповноваженого з прав людини в Республіці Казахстан.

Результати та висновки. На основі аналізу положень чинного казахстанського кримінального та міжнародного законодавства та відповідної наукової літератури автори приходять до науково обґрунтованого висновку про необхідність звернення уваги держави з метою більш активного зосередження на боротьбі з катуваннями та жорстоким, нелюдським поводженням. Автори роблять пропозиції щодо подальшого розвитку кримінально-правових заходів протидії катуванню та жорстокому, нелюдському поводженню. Однією з таких рекомендацій є скасування вузького визначення посадової особи щодо катування у сфері охорони здоров'я, освіти, медицини та соціальної сфери. Крім того, автори виступають за коригування статті 146 Кримінального кодексу для більш чіткого розмежування між жорстоким поводженням і катуванням.

Ключові слова: Кримінальний кодекс; катування; жорстоке, нелюдське або таке, що принижує гідність, поводження; кваліфікація злочинів.