

Note on the Information provided by the Permanent Mission of the Republic of Kazakhstan to the United Nations and other International organizations at Geneva on items 7, 9, 18 and 29 of the concluding observations of the Committee against Torture, adopted Dec. 12, 2008 (CAT/C/KAZ/CO/2)

Submitted by the Coalition of Kazakhstan NGOs against Torture (the Committee on the Rule of Law and Human Rights Reform Monitoring, the Kazakhstan International Bureau for Human Rights and the Rule of Law, Legal Policy Research Center, MediaNet, the *Sauygu* Public Foundation (“Coalition”))

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Introduction

This brief note aims to address issues raised by the Permanent Mission of the Republic of Kazakhstan to the United Nations and other International organizations at Geneva (hereinafter PM of the RK) in its response to the Concluding Observations of the Committee against Torture. The present note does not aim to cover all questions raised in the information issued by the PM of the RK.

In re: Paragraph 7 of the concluding observations

In para. 7 of the Concluding observations the CAT stated that “it is concerned about consistent allegations concerning the frequent use of torture and ill-treatment” and required the state to “apply a zero-tolerance approach to the persistent problem of torture and cruel, inhuman or degrading treatment or punishment.” In particular, the CAT recommended to the government “publicly and unambiguously condemn practices of torture in all its forms, directing this especially to police and prison staff, accompanied by a clear warning that any person committing such acts or otherwise complicit or participating in torture or other ill-treatment be held responsible before the law for such acts and subject to penalties proportional with the gravity of their crime.” In response to this recommendation the PM of the RK indicated that one of the factors why allegations of torture were not treated as crime of torture was the “lack of unified judicial and supervisory practice.” In order to solve this problem the Supreme Court adopted a regulatory resolution in December 2009¹ (more than a year after the report of the CAT) which “clearly delineated” the legal basis of criminal liability for torture and abuse of office. This statement does not, however, address the problem of frequent use of torture by the investigative authorities. Criminal liability for torture was introduced in December 2002 and although, as stated in the Report of the CAT, the definition of torture adopted in Article 347-1 of the Criminal Code of Kazakhstan “does not contain all the elements of article 1 of the Convention [Against Torture]”² the Criminal Code provided criminal liability for certain acts of torture and the absence of criminal cases and convictions on torture charges cannot be explained by lack of judicial regulations. This can be explained by reluctance of investigative and prosecutorial authorities to lay torture charges against torturers. It is not clear how regulatory resolution of the Supreme Court can change the culture of protecting law enforcement officers involved in torture by their colleagues who have to investigate those crimes.

In relation to another recommendation of the CAT, namely to “[e]stablish and promote an effective mechanism for receiving complaints of sexual violence”, the PM of the RK referred

¹ Regulatory Resolution of the Supreme Court of the RK No. 7 of 28 December 2009.

² U.N. Committee Against Torture. CAT/C/KAZ/CO/2. 21 November 2008. para. 6.

to the manual of the Office of the Public Prosecutor. It appears that this Manual (Guidelines) established some mechanisms for receiving such complaints.³ It is questionable, however, whether these mechanisms are effective. For example, according to s. 17 of the Guidelines, the detained person during the interrogation is asked about possible application of torture against him or her. This provision neither protects a person against torture nor provides an effective mechanism for receiving information regarding torture because the person, who asks this question, is the investigator who can be involved in torture him or herself. The investigator has no interest in recording acts of torture and it is almost impossible to imagine that the investigator will do so if he or she participated in acts of torture.

The CAT also recommended to “[c]hange the performance evaluation system of investigators so as to eliminate any incentive for obtaining confessions.” The PM of the RK stated that the Government “is currently considering a change in staff performance appraisal in order to eliminate the incentive to extract confessions.” In order to do so the Government will introduce bills on status of investigators in 2011. Without being able to see the actual wording of the bill it is difficult to comment whether it is an affective tool to eliminate such an incentive. It is not very clear why the government did not introduce this bill before and should wait until 2011.

In re: Paragraph 9 of the Concluding Observations

In response to criticism voiced by the CAT in para. 9 of the Concluding Observations the PM of the RK referred to Article 68 of the Criminal Procedure Code, which gives the detained person a right to inform his relatives “immediately” about the fact of his detention and his location. It is questionable, however, if this rule is an effective protective measure against torture during the period between apprehension and the formal registration of detainees at the police station.

Firstly, the Code does not require the police officer who apprehends the suspect to grant the suspect access to the phone immediately after the suspect is apprehended. Secondly, it is not clear if the term “immediately” refers to the situation before the suspect is delivered to the police station or after. It appears that it refers to the situation after the suspect is delivered to the police station because the Code states that the suspect can inform his relatives about the location of his detention. This means that the person apprehended by the police will not be able to inform his relatives before he is delivered to the police station and booked. Thirdly, it seems that the provision regarding the right of the suspect to inform his relatives immediately is in conflict with the provisions of Article 138, which requires the police to inform relatives within 12 hours and in some exceptional cases the notification period can be delayed up to 72 hours. It can be concluded that the police has authority to delay notification in usual cases up to 12 hours and in exceptional cases up to 72 hours, which would be enough to extract confession from the suspect under torture. The CAT pointed out in para. 9 that “torture and ill-treatment of suspects commonly takes place during the period between apprehension and the formal registration of detainees at the police station.” Instead of declaring the right of the detained person to make a phone call, the police have to be obliged to give the detained person an actual opportunity to make a phone call and notify his/her relatives and his/her lawyer during or immediately after the person is apprehended.

Although the Code gives the suspect a right to consult with a lawyer before the first questioning, it does not always prevent acts of torture and coerced confessions. Firstly, the

³ See Order of the Prosecutor General of 1 February 2010 adopting the guidelines.

person can be tortured and interrogated off record before his meeting with a lawyer. Secondly, the suspect can be forced to waive his right to a lawyer unless the participation of the lawyer is mandatory, for example suspect is a minor or does not speak the language of the criminal proceedings. Thirdly, Kazakhstani authorities can use so-called “pocket” advocates appointed by the investigator who cannot be considered as independent lawyers acting in the best interests of the suspect. Confessions obtained in such circumstances can be considered as admissible. It should be noted, however, that the recent Regulatory Resolution of the Supreme Court of the RK No. 7 of 28 December 2009 in s. 14 states that “if the defendant during court hearings claims that he gave his statement under physical or psychological violence of the law enforcement agencies, he was not informed of his right to invite counsel and not to give self-incriminatory statements, and his interrogation was conducted without participation of counsel, the challenged statement should be considered as inadmissible evidence.” This is a very positive legal rule that should be adopted in the Criminal Procedure Code. Moreover, the wording of the Code could be more explicit and binding similar to the provision of Article 75(2) of the Russian Criminal Procedure Code that automatically recognizes as inadmissible “any statement of a suspect or accused that was given in the course of the pre-trial stages of a criminal case in the absence of defense counsel, including situations where there was a waiver of defense counsel, and not confirmed by that suspect or accused in court.” It is important to explicitly indicate that any disputed confession obtained after waiving the right to the defence counsel must be automatically excluded from evidence. Otherwise the police could torture the suspect demanding him first to waive his right to a lawyer, and then to sign the self-incriminatory statement.

In re: Paragraph 18 of the Recommendation

As noted above in this note, the fact that torturers continue to be charged not with crime of torture but with other less severe offences can be explained not by the lack of judicial guidelines, but reluctance of the investigative and prosecuting authorities to charge and prosecute torturers on the charge of torture.

In re: Paragraph 29 of the Recommendation

Although as mentioned above s. 14 of the Regulatory Resolution of the Supreme Court of the RK No. 7 of 28 December 2009 introduced a new legal rule, Kazakhstan should adopt a more explicit legal norm in the Criminal Procedure Code.

Important issues that can be addressed to the PM of the RK

- (1) Whether Kazakhstan intends to introduce the legal rule according to which any statement of a suspect or accused that was given in the course of the pre-trial stages of a criminal case in the absence of defense counsel, including situations where there was a waiver of defense counsel, and not confirmed by that suspect or accused in court, is recognized inadmissible as evidence?
- (2) Whether Kazakhstan intends to revise definition of torture adopted in Article 347-1 of the Criminal Code of Kazakhstan and bring it in compliance with article 1 of the Convention against Torture?
- (3) Whether Kazakhstan considered establishing an independent investigative agency comprised of civilian investigators to investigate acts of torture committed by law enforcement officers?
- (4) Whether Kazakhstan plans to introduce harsher sentences for act of torture, for example, especially for acts resulted in death of the victim?