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IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL OR DEGRADING TREATMENT OR PUNISHMENT IN THE REPUBLIC OF KAZAKHSTAN

Askhat AMEN

West Kazakhstan university after M.Utemisov, Uralsk, Republic of Kazakhstan
e-mail: ass_amen81@mail.ru
<https://orcid.org/0000-0002-4275-3516>

Gulnar ESEEVA

West Kazakhstan university after M.Utemisov, Uralsk, Republic of Kazakhstan
e-mail: usatova_56@mail.ru
<https://orcid.org/0000-0002-5445-6025>

Kazakhstan ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1998. This article highlights the constitutional prerequisites for the effective implementation of this treaty in the Republic of Kazakhstan, and also examines the implementation of the Convention in the country. The process of transformation of the norms of the Convention when transposed into national legislation is highlighted through the analysis of differences in the legislation of the country and the norms of the treaty. The article analyzes the legislative, administrative, judicial and other measures taken in the country to prevent acts of torture and other types of ill-treatment of people. The study details institutional measures aimed at improving criminal policy and preventing torture in the country.

Keywords: protection, human rights, torture, Convention, law, jurisdiction, ratification, suffering.

IMPLEMENTAREA CONVENȚIEI ONU ÎMPOTRIVA TORTURII ȘI ALTOR TRATAMENTE CRUNTE SAU DEGRADANTE ÎN REPUBLICA KAZAHSTAN

Kazahstanul a ratificat Convenția ONU împotriva torturii și a altor tratamente sau pedepse crude, inumane sau degradante în 1998. Prezentul articol subliniază premisele constituționale pentru punerea în aplicare a acestui tratat în Republica Kazahstan și, de asemenea, examinează procesul de implementare a Convenției. Se evidențiază procesul de transpunere a normelor Convenției în conformitate cu legislația națională, prin analiza diferențelor dintre legislația țării și normele tratatului. Articolul analizează măsurile legislative, administrative, judiciare și de altă natură luate în țară pentru prevenirea actelor de tortură și a altor tipuri de maltratare a persoanelor. Studiul detaliază măsurile instituționale care vizează îmbunătățirea politicii penale și prevenirea torturii în țară.

Cuvinte-cheie: protecție, drepturile omului, tortură, Convenție, lege, jurisdicție, ratificare, suferință.

APPLICATION DE LA CONVENTION DES NATIONS UNIES CONTRE LA TORTURE ET AUTRES TRAITEMENTS CRUELS OU DÉGRADANTS EN RÉPUBLIQUE DU KAZAKHSTAN

Kazakhstan a ratifié la Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants en 1998. Cet article décrit les conditions constitutionnelles préalables à la mise en œuvre de ce traité en République du Kazakhstan et examine également le processus de mise en œuvre de la convention. Il met en évidence le processus de transposition des règles de la convention conformément au droit national, en analysant les différences entre la législation du pays et les règles du traité. L'article analyse les mesures législatives, administratives, judiciaires et autres prises dans le pays pour prévenir les actes de torture et autres types de mauvais traitements. L'étude détaille les mesures institutionnelles visant à améliorer la politique pénale et à prévenir la torture dans le pays.

Mots-clés: protection, droits de l'homme, torture, Convention, loi, juridiction, ratification, souffrance.

ВНЕДРЕНИЕ КОНВЕНЦИИ ООН ПРОТИВ ПЫТОК И ДРУГИХ ЖЕСТОКИХ ИЛИ УНИЖАЮЩИХ ДОСТОИНСТВО ВИДОВ ОБРАЩЕНИЯ В РЕСПУБЛИКЕ КАЗАХСТАН

Казakhstan ратифицировал Конвенцию ООН против пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания в 1998 г. В рамках данной статьи освещаются конституционные предпосылки эффективной имплементации данного договора в Республике Казахстан, а

также рассматривается ход выполнения норм Конвенции в стране. Освещается процесс трансформации норм Конвенции при перенесении в национальное законодательство, через анализ различий в законодательстве страны и нормативов договора. В статье анализируются законодательные, административные, судебные и другие меры, принимаемые в стране для предупреждения актов пыток и других видов жестокого обращения. В исследовании подробно излагаются меры институционального характера, направленные на совершенствование уголовной политики и предотвращение пыток в стране.

Ключевые слова: защита, права человека, пытка, Конвенция, закон, юрисдикция, ратификация, страдание.

Introduction

Since the first day of independence, Kazakhstan has recognized the universally recognized principles of human rights protection, proclaimed in the UN Charter and the Universal Declaration of Human Rights. The Republic of Kazakhstan is a party to more than sixty multilateral universal international treaties in the field of human rights, seven of which are UN human rights conventions, the so-called “international instruments for the protection of human rights”. These human rights conventions include the 1984 UN Convention against Torture and Other Cruel or Degrading Treatment or Punishment (hereinafter referred to as the Convention Against Torture). The prohibition and prevention of torture are the subject of many international treaties. The universal set of such treaties includes the norms of the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights (hereinafter - the ICCPR), the 1984 Convention against Torture and Other Cruel or Degrading Treatment or Punishment and the Additional Protocol to this Convention of 2002. The regional block includes the norms of the 1969 Inter-American Convention on Human Rights, the 1981 African Charter on Human and Peoples’ Rights, the 1995 CIS Convention on Human Rights and Fundamental Freedoms, the European Convention for the Protection of Human Rights and Fundamental freedoms 1950 and the European Convention for the Prevention of Torture 1987

Most of these international treaties establish only a general legal regime for the prohibition of torture. For example, Article 5 of the 1948 Universal Declaration of Human Rights states: “No one should be subjected to torture or cruel, inhuman or degrading treatment or punishment” [1]. Article 7 of the International Covenant on Civil and Political Rights defines: “No one may be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no person should be subjected to medical or scientific experiments without his free consent” [2]. Article 10 of the IC-

CPR states: “All persons deprived of their liberty have the right to humane treatment and respect for the inherent dignity of the human person”.

International legal standards for the prohibition of torture and their criminalization are enshrined in the UN Convention against Torture. In particular, the Convention defines the crime of torture, proclaims the principle of the absolute prohibition of restricting the human right to protection from torture, and also developed a control mechanism for the implementation of the Convention’s norms by the States parties. The preventive component of the fight against torture is enshrined in the Additional Protocol to the 2002 Convention against Torture.

Main ideas of the research

The Republic of Kazakhstan ratified the UN Convention against Torture and Other Cruel or Degrading Treatment or Punishment on June 29, 1998. As a party to the Convention, our state has undertaken the following obligations: in accordance with the constitutional principles of the legal system, to develop and implement a coordinated policy against torture and other forms of abuse and punishment, as well as be guided by it when implementing legislative and institutional reforms.

By the time the Republic of Kazakhstan ratified the UN Convention against Torture in the Basic Law of our country, the constitutional prerequisites for the effective implementation of this treaty were formed:

- Art. 1 of the Constitution: “The Republic of Kazakhstan asserts itself as a democratic, secular, legal and social state, the highest values of which are a person, his life, rights and freedoms”;

- Clause 2, Art. 12 of the Constitution: “Human rights and freedoms belong to everyone from birth, are recognized as absolute and inalienable, determine the content and application of laws and other normative legal acts”;

- Art. 17 of the Constitution: “Human dignity is inviolable. No one should be subjected to tor-

ture, violence, other cruel or degrading treatment or punishment”;

- Clause 3, Art. 39 of the Constitution: “In no cases are the rights and freedoms provided for by Articles 10, 11, 13-15, paragraph 1 of Article 16, Article 17, Article 19, Article 22, paragraph 2 of Article 26 of the Constitution subject to restriction”;

- pp. 9 p. 3 art. 77 of the Constitution: “Evidence obtained by illegal means has no legal force. No one can be convicted only on the basis of his own confession” and others [3].

These constitutional norms are reflected in the sectoral legislation of the Republic of Kazakhstan.

In order to implement the Convention against Torture in the Republic of Kazakhstan, legislative reforms were carried out: the Law of the Republic of Kazakhstan “On the Procedure and Conditions of Detention of Suspects and Accused of a Crime” was adopted on March 30, 1999; December 21, 2002 amendments and additions were made to the Criminal, Criminal Procedure and Criminal Execution Codes of the Republic of Kazakhstan; in 2005 the International Covenant on Civil and Political Rights was ratified; in 2008, the Optional Protocol to the UN Convention against Torture was ratified; On July 10, 2007, the Supreme Court of the Republic of Kazakhstan adopted a normative resolution “On the application of the norms of international treaties in judicial practice”; in 2009, the first Optional Protocol to the International Covenant on Civil and Political Rights was ratified; On December 28, 2009, the Supreme Court of the Republic of Kazakhstan adopted a normative resolution “On the application of the norms of criminal and criminal procedure legislation on the observance of personal freedom and inviolability of human dignity, counteraction to torture, violence, and other cruel or degrading treatment or punishment”.

One of the legal mechanisms for the implementation of the UN Convention against Torture in Kazakhstan is the criminalization of liability for torture in 2002, when the Criminal Code of the Republic of Kazakhstan was supplemented by Art. 347-1, which criminalizes torture.

According to article 347-1 of the Criminal Code of the Republic of Kazakhstan, torture is recognized as “deliberate infliction of physical and mental suffering committed by an investigator, a person conducting an inquiry, or another official in order to obtain information or confessions from

the tortured person or a third person, or to punish him for the action he committed, or of which he is suspected of committing, as well as to intimidate or coerce him or a third person, or for any reason based on discrimination of any nature” [5].

Our analysis of the disposition of Art. 347-1 of the Criminal Code of the Republic of Kazakhstan for its compliance with the concept of torture given in the UN Convention against Torture, led to the conclusion that there are differences in their wording.

The UN Convention against Torture and Other Cruel or Degrading Treatment or Punishment defines “torture” as “any act by which severe pain or suffering, physical or mental, is intentionally inflicted on a person in order to obtain information from him or from a third party, or confession, punish him for an act that he or a third party has committed or of which he is suspected of committing, as well as intimidate or coerce him or a third party, or for any reason based on discrimination of any nature, when such pain or suffering is caused by a public official or by another person acting in an official capacity, or at their instigation, or with their knowledge or tacit consent” (Art. 1) [6].

Thus, from the point of view of international regulation, signs of torture are actions that:

- причинять сильную боль или страдания, физические или психические;
- applied to a person intentionally;
- are carried out for the purpose of obtaining information or confession, as a punishment for actions committed by the person himself or a third party, as well as for the actions they are suspected of committing, for the purpose of coercion or intimidation, as well as for any other reasons based on discrimination of any character;
- are produced by a government official or other person acting in an official capacity, or at their instigation, or with their knowledge or tacit consent.

In our opinion, not all of the above-mentioned signs of torture are reflected in the criminal legislation of the Republic of Kazakhstan. The following differences can be identified in the definition of torture given in Art. 347-1 of the Criminal Code of the Republic of Kazakhstan and in the UN Convention against Torture:

- firstly, under torture, according to Art. 347-1 of the Criminal Code of the Republic of Kazakhstan, it is understood only “willful infliction of physical and mental suffering”, and in the Convention tor-

ture is defined as any act that “intentionally inflicts severe pain or suffering, physical or mental”;

- secondly, the subjects of the crime under Art. 347-1 of the Criminal Code of the Republic of Kazakhstan are “an investigator, a person conducting an inquiry, or another official”, while the Convention defines “a public official or other person acting in an official capacity” as subjects of a crime;

- thirdly, according to Art. 347-1 of the Criminal Code of the Republic of Kazakhstan, one of the purposes of torture is to punish the tortured person “for an act that he has committed or is suspected of committing” [5]. And in the Convention, this goal is set forth in a different version and contains an indication of a third person, namely that the purpose of torture is to punish the tortured person “for an act that he or a third person has committed or of which he is suspected of committing”.

On inconsistencies in the definition of “torture” given in Art. 347-1 of the Criminal Code of the Republic of Kazakhstan, the concept given in article 1 of the UN Convention against Torture, is stated in official and alternative reports on the human rights situation in the Republic of Kazakhstan, as well as in the recommendations of the UN Committee against Torture following the consideration of the Second Report of the Republic of Kazakhstan. In particular, it is noted that further implementation of the Convention will require amendments and additions to Art. 347-1 of the Criminal Code of the Republic of Kazakhstan, which should reflect the following provisions:

- criminal prosecution under Art. 347-1 of the Criminal Code of the Republic of Kazakhstan should be subject to all government officials or other persons acting in an official capacity;

- to distinguish between acts of torture that are committed by an official at his instigation, with his knowledge or with tacit consent, or in deliberate inaction;

- punishments for acts of torture must be commensurate with the gravity of the crime [7; 83].

In the UN Convention against Torture and in the criminal legislation of the Republic of Kazakhstan, when defining torture, the following definitions are used: “severe pain”, “physical suffering”, “moral suffering” and “mental suffering”. However, at the moment there are no official definitions of these definitions both in the Convention itself and in the Criminal Code of the Republic of Kazakhstan, and in the regulatory resolution of the Supreme Court of the Republic of Kazakhstan

“On the application of the norms of criminal and criminal procedural legislation on the observance of personal freedom and the inviolability of human dignity, torture, violence, other cruel or degrading treatment and punishment” [8].

The Ozhegov Dictionary defines the etymology of the following concepts:

- pain is a feeling of suffering; - strong means significant;

- suffering is physical or mental pain, anguish;

- physical - related to the activity of muscles, muscles in living substances;

- the psyche is a totality of emotional experiences as a reflection of objective reality in the consciousness;

- moral - referring to the inner spiritual life of a person [9; 68, 937].

Based on the etymology of the above concepts, it seems that used by the legislator of the Republic of Kazakhstan in the disposition of Art. 347-1 of the Criminal Code of the Republic of Kazakhstan, the concept of “physical or mental suffering” is more successful than the concept contained in the Convention - “suffering, physical or mental”, since moral suffering refers to the inner spiritual organization of the individual and is not associated with emotional experiences. In this case, in our opinion, it is precisely the reception of an international norm into criminal law that is permissible.

The International Association for the Study of Pain (IASP) has defined pain as an unpleasant sensory and emotional experience associated with true or potential tissue damage or described in terms of such damage. That is, pain is usually more than a pure sensation associated with existing or possible organic damage, since it is usually accompanied by an emotional experience [10].

In this regard, we believe that “severe pain”, “physical suffering” and “psychological suffering” are distinguished according to the degree of suffering experienced by a person. Namely, “physical suffering” is associated only with bodily sensations of pain, “psychological suffering” - only with mental sensations, and “severe pain” includes both bodily (physical) and mental (psychological) suffering. Consequently, as a legislative mechanism for the implementation of the UN Convention against Torture (in terms of its incorporation), the first part of Art. 347-1 of the Criminal Code of the Republic of Kazakhstan, after the words “intentional infliction”, add the words “severe pain”.

The distinction between the concepts of “severe pain”, “physical suffering” and “mental suffering” should be given at the legislative level, in particular, in the footnote to Art. 347-1 of the Criminal Code of the Republic of Kazakhstan or in the normative resolution of the Supreme Court of the Republic of Kazakhstan “On the application of the norms of criminal and criminal procedure legislation on the observance of personal freedom and inviolability of human dignity, counteraction to torture, violence, and other cruel or degrading treatment or punishment.”

The UN Convention against Torture prohibits not only “torture”, but also “cruel, inhuman or degrading treatment or punishment” (commonly referred to as “ill-treatment”) [6]. In the case of torture, there is an internationally recognized precise definition. At the same time, “cruel treatment”, given its nature, is much more difficult to define, and therefore “cruel, inhuman or degrading treatment or punishment” is not defined in international law in such precise terms as “torture”.

According to article 16 of the UN Convention against Torture, “ill-treatment” is defined as one that includes: “other acts ... that do not fall within the definition of torture contained in Art. 1, when such acts are committed by an official or other person acting in an official capacity, or at their instigation, or with their knowledge or tacit consent” [6]. However, while such acts are not considered torture, or do not cause severe pain or suffering, or are not intentionally committed, they are prohibited and States are obliged to take measures to protect individuals from ill-treatment.

An attempt was made to interpret this term in the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, according to which the term “cruel, inhuman or degrading treatment or punishment” should be interpreted as follows to provide the broadest possible protection against abuse of a physical or psychological nature, including keeping a detained or imprisoned person in conditions that deprive him, temporarily or permanently, of any of his natural senses, such as sight, hearing, spatial or temporary orientation “.

While both torture and ill-treatment are explicitly prohibited, the distinction between the two has certain legal implications. For example, under the Convention against Torture, the state is obliged to apply the law in cases of torture and either prosecute or extradite persons suspected of committing

such acts. At the same time, the Convention does not oblige states to take the same steps against those whose actions are “inhuman or degrading”. In general, we can say that there is a certain gradation on the basis of seriousness, at the beginning of which there is torture, and at the end - degrading treatment and punishment. At the same time, all these actions are illegal and violate international legal and political obligations, on the basis of which only “torture” is criminalized in the criminal legislation of the Republic of Kazakhstan, and responsibility for “inhuman or degrading treatment or punishment” is not provided for, which, in our opinion, is a space. We believe that it is advisable to criminalize “inhuman and degrading treatment and punishment” and to make appropriate changes and additions to the Criminal Code of the Republic of Kazakhstan.

Differences between Art. 347-1 of the Criminal Code of the Republic of Kazakhstan and the UN Convention against Torture with regard to the subject of the crime, in our opinion, seem to be permissible based on the reception of international norms in criminal legislation. The subjects of the crime under Art. 347-1 of the Criminal Code of the Republic of Kazakhstan, as noted above, are the investigator, the person conducting the inquiry, or another official. The Convention defines the subjects of the crime as a public official or other person acting in an official capacity. In accordance with the normative resolution of the Supreme Court of the Republic of Kazakhstan “On the application of the norms of criminal and criminal procedure legislation on the observance of personal freedom and inviolability of human dignity, countering torture, violence, other cruel or degrading treatment or punishment” dated December 28, 2009 . to other officials specified in Art. 347-1 of the Criminal Code, not only officials of the criminal prosecution bodies, but also officials of other bodies and organizations listed in paragraph 3 of the note to Art. 307 of the Criminal Code [8].

Law enforcement practice and correct qualification of torture are associated with its difference from other crimes. Crimes containing certain elements of torture include: “Intentional infliction of grievous bodily harm” (Article 103); “Intentional infliction of medium-gravity harm to health” (Article 104); “Deliberate infliction of slight harm to health” (Article 105); “Torture” (Article 107), part two of which contains the qualifying feature “with the use of torture”. The UN Convention against Torture has included discrimination of any nature

among the motives for committing the crime. This motive is present in Art. 347-1 of the Criminal Code of the Republic of Kazakhstan. At the same time, a similar qualifying feature is enshrined in clause e) part 2 of Art. 107 of the Criminal Code of the Republic of Kazakhstan. Of particular note is Art. 347 of the Criminal Code of the Republic of Kazakhstan “Coercion to testify”, in which coercion of a suspect, accused, victim, witness to testify or an expert to give an opinion by using threats, blackmail or other illegal actions by the investigator or the person conducting the inquiry is considered a criminal offense.

Often, illegal actions of officials related to the use of torture are qualified under Art. 308 of the Criminal Code of the Republic of Kazakhstan “Excessive power or official powers”. The act provides as a mandatory sign the onset of significant violations of the rights and legitimate interests of citizens, and in paragraphs a) and b) of part 4 of this article qualifying signs are indicated: the use of violence or the threat of its use, the use of weapons or special means. The above is the reason for the low law enforcement practice in the field of combating torture. An analysis of the investigative practice shows that Art. 347-1 of the Criminal Code of the Republic of Kazakhstan practically does not work. According to statistics in 2009 under Art. 347-1 of the Criminal Code of the Republic of Kazakhstan “Torture” two criminal cases were initiated against the employees of the internal affairs bodies. For the specified period under Art. 347-1 of the Criminal Code of the Republic of Kazakhstan one police officer was convicted of torture.

In 2008, the Republic of Kazakhstan ratified the Additional Protocol to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 2002, which made it possible to strengthen the preventive direction of combating torture and create an effective system to combat it. This should be a prerequisite for the development of an official position of the state to determine the legal status of decisions of the Committee against Torture. In the process of further implementation of the UN Convention against Torture, the status of these decisions as acts of official international interpretation of the norms of the Convention should be taken into account, both in relation to the Republic of Kazakhstan and in relation to other states. In this regard, it is advisable to carry out the implementation of the decisions of the Committee against Torture by issuing a special

regulatory legal act, as well as a special regulatory Resolution of the Supreme Court of the Republic of Kazakhstan.

Conclusions

Recognition of the jurisdiction of the Committee against Torture allows a person, if domestic protection mechanisms have been exhausted, to file an individual complaint with the Committee. However, in Kazakhstan there are no constitutional and legislative guarantees of the human right to apply to international human rights bodies and organizations. So, for example, in the Constitution of the Russian Federation, such a guarantee is enshrined in Art. 46, according to which “everyone has the right, in accordance with international treaties of the Russian Federation, to apply to international bodies for the protection of human rights and freedoms, if all available domestic remedies have been exhausted”. We propose to establish constitutional guarantees of the human right to appeal to international bodies for the protection of human rights and supplement Art. 13 of the Constitution of the Republic of Kazakhstan by the relevant norm.

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