

KYRGYZSTAN

**Torture and other cruel, inhuman,
degrading treatment or punishment: the
widespread and impunity**

*Submission of the National Center of the Kyrgyz
Republic for the Prevention of Torture and Other Cruel,
Inhuman, Degrading Treatment or Punishment
to the UN Universal Periodic Review*

June, 2014

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INTRODUCTION

This submission was prepared by the National Center of the Kyrgyz Republic on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter - the National Centre). National Center established by the Law of the Kyrgyz Republic from July 12 of 2012, No. 104 as an independent public body performing the functions of the national preventive mechanism in accordance with international obligations of the state party. In this submission, prepared as part of the UN Universal Periodic Review of Kyrgyzstan scheduled for January-February 2015, the National Center expresses deep concern on limitations in legislation of the country on the prohibition of torture and other ill-treatment. National Centre also expresses concern on widespread of torture and other ill-treatment and impunity for use of torture and other ill-treatment.

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LIMITATIONS OF RIGHTS TO PROTECTION FROM TORTURE IN NATIONAL LEGISLATION

In 2012, Kyrgyz authorities revised the article 305-1 of the Criminal Code on "torture" and increased punishment. The crime is identified as grave crime (part 1 and 2 of the article) and gravest crime (part 3 of article). National Center welcomes this amendment, as the law now does not allow pre-existing practice of exempting from criminal liability of the person, who committed torture, in the case of the reconciliation with the victim. National Center supports the initiative of the Kyrgyz authorities to revise the Criminal Code and Criminal Procedure Code. Expert working groups on development of new versions of the Criminal Code and the Criminal Procedure Code established by Decree of the President of Kyrgyzstan from August 8, 2012, No. 147 are planning to conduct public discussion of the Codes in the second half of June, 2014. National Center admits changes in the Criminal Code and the Criminal Procedure Code. However, a number of issues related to limiting guarantees of protection from torture are not reflected in the new editions of the Criminal Code and the Criminal Procedure Code.

According to the Criminal Procedure Code of Kyrgyzstan, providing protection against torture of "suspected" but there is no clear provision of protection against torture, and no separate part, which lists the rights of "detainee". This allows law enforcement authorities to abuse their powers. The UN Special Rapporteur on Torture noted that there are no procedural status, rights and guarantees of person from the moment of arrest to the formal initiation of criminal proceedings¹.

There is no registration of time of detention outside of law enforcement buildings. It can take from a few hours to several days until the detainee will not be brought to the official place of detention. This period of time gives opportunity to torture detainee before registration, for example, detainees are held in offices and basements of the departments of law enforcement and put into the police car and driven for several hours. When person is brought to the police station or before he is officially recognized as suspect, torture and coercion already used against the person. This is indicated by the UN special Rapporteur on Torture². In 2012, 274 cases, when suspects were delivered to the temporary detention centers after their actual arrest, were found³.

IMPUNITY OF USE OF TORTURE

Analysis of the situation of fight against torture in Kyrgyzstan shows that the main reason for impunity of use of torture is incomplete conformity of definition of "torture" in the national criminal legislation with the international definition. This eliminates the possibility of criminal

¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. Mission to Kyrgyzstan. Paragraph 80 (d).

² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. Mission to Kyrgyzstan. Paragraph 44.

³ Report on the implementation of the project "Combating torture in Kyrgyzstan through national mechanisms for the protection of human rights", "Prevention of torture in detention centers under the Ministry of Internal Affairs of the Kyrgyz Republic."

responsibility of those who is not among public officials. They are staff of orphanages, psychiatric facilities, nursing homes, and etc.

The presence of so-called "okolopytochnye" articles 111, 304, 305, and 325 of the Criminal Code creates certain opportunities for officials to escape punishment under article 305-1 of the Criminal Code, which certainly prevents bringing officials to justice for torture use.

Also, underlying causes of impunity of torture use are absence of independent public authority for investigation of complaints and allegations concerning torture and prejudicial treatment of statements of torture by the judiciary.

Prosecuting authorities, representing the public prosecution at the trial, are not interested in making judges take into account statements on obtaining confessions through torture. In the case of consideration of statement of torture by judges, there is possibility of direction of criminal case for further investigation in order to fill gaps of the investigation and acquittal. Thus, there is a conflict of interest of the public prosecutors, , on the one hand acting as a public prosecutor, on the other hand acting as an authority which is required responding to a statement of torture under national law.

It should be acknowledged that citizens, who have been subjected to torture, often send complaint to the authority after a certain period of time and obtaining the consequences of use of physical violence, unfortunately, is quite difficult. Often, prosecutors refuse to institute criminal proceedings on allegations of torture after incomprehensive investigation.

As a rule, the refusal to institute criminal proceedings is motivated by absence of evidences of torture which is given by the forensic medical examination. Therefore, it is necessary to introduce into the practice of collecting evidence use of findings of psychological and psychiatric examination. Conclusion of psychological and psychiatric examination may be used as grounds Independence of for criminal prosecution in case of failing to detect injures.

Independent forensic experts, unfortunately, is only on paper and has a formal character. There is no provision for conducting medical examination in private institutions.

Example: At press conference on May 2, 2014, lawyer of mother of Aibek Mambetaliev, who died in coal mine Karakeche (according to the one of versions, officers of Jungal Department of Interior Affairs are suspected), indicated that the first medical examiner stated that death was result of cardiac failure. But the results of the second forensic examination showed that he died of rupture of internal organs.

The presence of such practices confirms the urgent need to introduce alternative forensic examinations.

As of termination of the criminal cases, which were already under investigation, it is appropriate to note that before changes in the Criminal Code of the Kyrgyz Republic to toughen punishment for torture (imprisonment from 4 to 8 years with deprivation of the right to occupy certain positions or engage in certain activities for period of 1 to 3 years), prosecutors referred to the fact that crime under Art. 305-1 of the Criminal Code of the Kyrgyz Republic is classified as less grave.

"It is necessary to note that there is difficulty of proving facts of physical pressure by law enforcement authorities as in case of the use of torture, there are no witnesses except law

enforcement officers. Also, often victims of torture refuse their initial testimony or they submit countering statement"⁴.

However, even after making the above mentioned changes in the Criminal Code of the Kyrgyz Republic, the positive dynamics in increasing indictments against public officials on use of torture is not observed.

As noted above, one of the causes of impunity of officials for torture use is the fact that judges do not take allegations of torture into consideration during the trial and often such statements are considered by public prosecutor as an attempt to avoid criminal liability. In the criminal proceedings, the main element of the evidence base for conviction is confessionary statement of suspect that blatantly contradicts to the national and international legislation.

In addition, very often, the judicial authorities ignore the defendants' allegation on proceedings against them in the absence of a lawyer during the first hours of detention.

According to the Code of Criminal Procedure, the investigating body shall notify relatives or close persons of detainee in 12 hours. This gives opportunity for use of torture, in addition, rights of the detainee can be ignored (to contact a lawyer, require a medical examination), which allows to eliminate all evidence proving use of torture and other ill-treatment. Torture is often used in first few hours after arrest of person. UN Special Rapporteur on Torture also concluded that in Kyrgyzstan, there is a serious lack of protection in the first few hours after the arrest⁵.

This fact also plays a huge role in the current situation with impunity of torture use.

Non observance of duration of placement in temporary detention centers (48 hours) provided in the Constitution, the Code of Criminal Procedure and late filling of the arrest documents also reduce possibility of punishment of the public officials.

The law "On the procedure and conditions of detention of persons detained on suspicion and charges of committing crimes" indicates that the places of detention of suspects are under the control of investigative bodies: temporary detention centers under the Ministry of Internal Affairs, pre trial detention centers under the SSEP and pre-trial center under the National Security Agency (hereinafter - TDC and PDC). The investigator has unlimited and unimpeded access to the detainees, detainees are subjected to torture in presence of investigator or directly by investigator. The purpose of torture use is obtaining a confession. This is confirmed by the fact that 90.4% of torture, committed in 2013, had purpose of coercing a confession of the crime and in 2012, 89.5% of tortures⁶.

Transfer of TDC and PDC under the authority of the penitentiary system (hereinafter - SSEP) helps to reduce the use of torture. The results of monitoring, conducted by non-governmental organizations, show that one in four (27.8%) of persons subjected to torture in the detention

⁴ Official portal of the Coordinating Council of Prosecutors General of state parties of the CIS. Available: <http://www.ksgp-cis.ru>

⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. Mission to Kyrgyzstan. Paragraph 43.

⁶ Report on human rights monitoring in 2013 p.40-41. (OSCE, USAID, Freedom House, "Soros Foundation-Kyrgyzstan").

center were afraid to submit complaint while being there. However, in pre-trial detention center every second person (61.3%) told about facts of torture use in temporary detention center⁷. Prevention of torture is facilitated by the fact that the procedure of transferring detainees from the temporary detention center under the Ministry of Interior Affairs to the pre-trial detention center under SSEP includes examination of body of the transferred detainee by the officer of the SSEP. If there are evidences of physical violence PDC staff refuses to accept transferred person and sent back to the temporary detention center. In fact, SSEP officers are obliged to declare about evidences to the prosecutor⁸. The UN Special Rapporteur on Torture recommends Kyrgyzstan take measures to transfer TDC from the Ministry of Interior Affairs jurisdiction to jurisdiction of SSEP⁹.

FUNCTIONAL AND FINANCIAL INDEPENDENCE OF NATIONAL PREVENTIVE MECHANISM

National Center was established by the Law of the Kyrgyz Republic from July 12, 2012 in order to pursuit obligations of the Kyrgyz Republic under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. National Center was registered on October 25, 2013. Staff of the National Center was recruited by open competition and start working on March 17, 2014. Despite the short period of its existence, the National Center introduced report on the establishment of the prevention of torture and other ill-treatment in places of detention and restriction of freedom for 2013 into Parliament. During introducing the report at the plenary session, question on necessity of the existence of the National Center and dubbing functions of the Ombudsman, was raised. Some members of Parliament have initiative on abolition of the National Center and its transfer to the Institution of the Ombudsman. This initiative raises concern of the National Center and civil society and seems inconsistent step as National Center was established by Parliament in 2012.

In accordance with article 18 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the States Parties shall guarantee the functional and financial independence of the national preventive mechanisms as well as the independence of their personnel. These provisions were developed in the Law of the Kyrgyz Republic "On National Center of the Kyrgyz Republic on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". However, currently funding of the National Center is available only for so-called "protected budget items" (wages, payroll taxes, and etc.). National Center has no capability to fully operate because of insufficient funding. Simply, office has no furniture, sufficient office equipment, and communication system. There is no opportunity for preventive visits because of lack of funding. In such circumstances, there is a risk of insufficient preventive visits and consequently poor presentation of the report to Parliament in the coming years.

^{7 7} Report on human rights monitoring in 2013 p.42. (OSCE, USAID, Freedom House, "Soros Foundation-Kyrgyzstan").

⁸ Report on human rights monitoring in 2013 p.49. (OSCE, USAID, Freedom House, "Soros Foundation-Kyrgyzstan").

⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. Mission to Kyrgyzstan. Paragraph 83(b).

RECOMMENDATIONS

On limitations in national legislation:

- Bring the article "torture" of the Criminal Code in line with article 1 of the Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Exclude rules that provide opportunities for non institution of criminal proceedings under Art. 305-1 of the Criminal Code "torture" from so called "okolopytochnye" articles of the Criminal Code (torment, excessive use of power, abuse of power,);
- Bring amendment to the Criminal Procedure Code, aimed at making a confession other than those declared in the presence of a judge or a lawyer of a person deprived of liberty have no probative value in court, except in cases when it is used as evidence against those accused to obtain a confession by unlawful means;
- Include the definition of "detained" in accordance with Article 9 of the International Covenant on Civil and Political Rights, stating that it is a measure of procedural coercion, which is any form of restriction of freedom of movement, person has the status as long as he/she does not receive full control of his/her freedom of movement or is not adjudicated;
- Bring amendment to the Code of Criminal Procedure and the Law of the Kyrgyz Republic "On operational investigative activity" in terms of compulsory and immediate notification of relatives of the detainee with the full name of the body and officials producing detention or giving detainee such opportunity at the moment of detention;
- Criminalize law enforcement officials who have responsibilities for failure to immediately notify the detainee's family at the moment of detention;
- Amend the Criminal Procedure Code, Laws of the Kyrgyz Republic "On the procedure and conditions of detention of persons suspected or accused of committing crimes" and "On operational investigative activity" under which an independent medical examination and medical inspection should be provided at the request of the detainee (suspected, arrested, accused), person's relatives and the defense in accordance with principles 24 and 25 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- Criminalize law enforcement officials for non-providing timely access to an independent medical examination.

On prevention of torture and other ill-treatment; impunity of torture use

- Make a statement under article 22 of the UN Convention against Torture recognizing the competence of the UN Committee against Torture to consider individual communications.
- In one year, create a new independent body for instant investigation of complaint on torture and other cruel, inhuman or degrading treatment or punishment (the investigation period of is 2 months), which possessed sufficient resources to meet the requirements of independence and (legal, functional and financial) enshrined in the UN Convention against Torture, would have adequate staffing structure and would have enjoyed immunity and privileges;
- Transfer TDC under Ministry of Interior Affairs and TDC and PDC under National Security Committee to the jurisdiction of the SSEP on order to implement effective action to prevent torture and systematic implementation of the recommendations of the UN Special Rapporteur on torture in Kyrgyzstan;

On ensuring functional independence of the NPM

- Provide functional and financial independence of the national preventive mechanism, providing all the necessary resources, in accordance with Article 18 of Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Provide timely implementation of the recommendations of the national preventive mechanism to the public authorities.