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“Program to enhance the capacity of NGOs and institutions to advocate for implementation of human rights decisions and standards to prevent torture”
Best Practices - Preliminary Recommendations for Kyrgyzstan
Investigation of Torture and Cruel, Inhuman or Degrading Treatment

Investigatory Mechanism:

Currently Kyrgyz Law foresees the prosecutor as having the right to institute all criminal proceedings and investigate all criminal cases, with the additional right to delegate the investigation to an investigator.¹ As the Office of the Prosecutor is tasked with all investigations and all prosecutions, it is faced with an inherent conflict of interest in cases where allegations of abuse arise in the context of an ongoing investigation, or as part of a legal proceeding, specifically where those allegations relate to an attempt to procure evidence.²

Recommendation #1:

In order to ensure the practice of meaningful, independent investigations in cases where there have been allegations of torture or other forms of abuse of detained persons, by state officials, Kyrgyzstan must establish a system where such investigations are not performed exclusively by the offices accused of, or having a stake in the outcome, of the abuse.

Recommendation #2:

Kyrgyz legislation regarding the independent mechanism should detail its personal jurisdiction and subject matter jurisdiction, its reporting and accountability structure, mechanism for submission of complaints, and any relevant statutes of limitation for complaints.

Recommendation #3:

Any model which is utilized in Kyrgyzstan must be fully funded and resourced. Without the necessary staff and support, independence will be impossible to achieve. Without proper resourcing, investigators will be forced to take short cuts and rely on other institutions which will undermine their effectiveness.

¹ Kyrgyz Criminal Procedural Code Chapter 5. Participants of Proceedings and Persons Participating in Court Proceedings, Representing Interests of the State. Article 33 Prosecutor. (2008)

²One example of a state with a similar dual responsibility and corresponding problems with conflict is Russia - Russian NGO Shadow Report on the Observance of CAT by the Russian Federation for the period from 2001 to 2005, Moscow, May 2006, online: <http://www2.ohchr.org/english/bodies/cat/docs/ngos/joint-russian-report-new.pdf>, para. 12.41. There was a 2007 Amendment to the law which was supposed to help address this - Federal Act No. 87-FZ of 5 July 2007 amending the Code of Criminal Procedure and the Federal Act on the Prosecutor's Office – however, the practice has demonstrated that this separation was not clear and definitive enough and the Prosecutor's Office was not committed to investigating allegations of torture. Further separation was attempted in 2011, by making investigative committees independent from the Office of the Prosecutor and in 2012, by creating special departments within the committee explicitly for investigation of crimes allegedly committed by police and other law enforcement officials. There is not a lengthy history yet to gauge its effectiveness. NGO's appear optimistic, however, there are concerns over resourcing. Alternative report of Amnesty International to CAT review of 5th periodical of the Russian Federation, October 2012, p. 5.; The text of the respective Decree is available on the Investigative Committee's website: <http://www.sledcom.ru/upload/iblock/a4c/a4cdc6b6dc00679897197909e1682a3d.pdf>.

Best Practice:

Kyrgyzstan should develop a model based on the systems where investigations of abuse can be performed by entities which are completely separate from the State's police and prosecutorial systems.

- Kyrgyzstan should create an Independent Commission of Investigations specifically to investigate allegations of Torture or Cruel, Inhuman or Degrading treatment by state officials.³
- The Commission must have a separate source of funding and oversight from the Office of the Prosecutor and the Investigations and Operative Officers.⁴
- The Commission should also have the ability to act as a Complimentary Prosecutor if it chooses (described in Investigatory Procedures) or at its option, to turn the results of the investigations over a prosecutor to initiate proceedings based on the results.
- The Commission should be established via a normative legal act.⁵

Good Practice

Some Systems have created a multi-layer approach,⁶ where investigations of, and oversight for state activities related to detention are not completely removed from the traditional channels (Office of the Prosecutor and general investigations) however, they have complimentary bodies who have the option to intervene and investigate.

- Kyrgyzstan could keep the existing system in place and also fund an external department which would have the option to investigate claims.⁷
- The department should be able to independently choose the cases that it investigates, free from external pressure or interference.

³In England, the Police Complaints Commission the Independent Police Complaints Commission is an independent, non-departmental public body (NDPBs). This designation refers to a governmental agency that is not part of a government department or directly accountable to Ministers and their employees. Christina Murtaugh and Michael Poe, "Establishing an Independent Police Oversight Body," INPROL Consolidated Response (10-007), August 2010, pg 6 citing to United Kingdom, How to be a Civil Servant. Independent Departments, solely for the purpose of investigating police abuse also exist in multiple European Union Countries. Examples of this practice can be seen in Belgium, "Comité P" ("Standing Police Monitoring Committee") deals with complaints against the police <http://www.comitep.be/>; Cyprus Independent Authority for the Investigation of Allegations and Complaints against the Police; Law 9 (1) 2006; France, Yes - Commission nationale de déontologie de la sécurité: la saisine de la CNDS n'est pas directe (la réclamation doit être transmise à un député ou à un sénateur de son choix. Le Premier ministre, le Médiateur de la République, le Président de la Haute Autorité de lutte contre les discriminations et pour l'égalité (HALDE), le Contrôleur général des lieux de privation de liberté et le Défenseur des enfants peuvent, de leur 15 propre chef, saisir la Commission.) <http://www.cnds.fr/>; Ireland "Garda Síochána Ombudsman Commission" deals with complaints against the police (or Garda) in Ireland. <http://www.gardaombudsman.ie>" and Northern Ireland.; Prof. Dr. Monica den Boer and Prof. Dr. Roel Fernhout, Radboud, POLICING THE POLICE: Police Oversight Mechanisms in Europe: Towards a Comparative Overview of Ombudsmen and Their Competencies, Background Report for the Asia-Europe Foundation (2008).

⁴Several EU countries have Ombudsman with the authority to investigate police Abuse. In these situations, the Ombudsman is an independent body from the police and prosecutorial structures. See Eg Finland where both the Parliamentary Ombudsman and the Chancellor of Justice can deal with administrative complaints against the police; Hungary where both the Ombudsman's Office and a specialized Police Complaints Body; the Netherlands and Sweden; Prof. Dr. Monica den Boer and Prof. Dr. Roel Fernhout, Radboud, POLICING THE POLICE: Police Oversight Mechanisms in Europe: Towards a Comparative Overview of Ombudsmen and Their Competencies, Background Report for the Asia-Europe Foundation (2008) Annex 2.

⁵In its study of best practices for the establishment of an Independent Police Oversight Commissions, The International Network to Promote the Rule of Law (INPROL) looked at the legal mechanisms which would best facilitate this. While establishment via the Constitution was viewed as the most permanent and least likely to be disrupted, INPROL recommended the use of National law, either through the Law on Police or through separate legislation as most feasible while still relatively stable, where a Constitution was in existence. Christina Murtaugh and Michael Poe, "Establishing an Independent Police Oversight Body," INPROL Consolidated Response (10-007), August 2010, pg 1-2.

⁶This is closer to what actually occurs in Guatemala, Jamaica and Peru. There appear to be more than one entity with the authority to initiate investigations. In Peru – this parallel process happens though the Office of the Ombudsman. During meetings with Peruvian Officials in Lima, TSPC research Matthew Kennis learned that this office enjoys very high approval ratings due to its reputation for conducting thorough investigations to corroborate complaints, its occasional suggestion that the Public Prosecutor investigate cases itself instead of sending to the police, or its pushing other ministries to take action. However, it is reluctant to take on a broader role, specifically that of the NPM, as the government is not currently offering additional resourcing for it to do so.

⁷This would be an expansion on Guatemala's CICIG and Jamaica's INDECOM – which do not actually exist solely for the investigation of torture, but other state –level abuses. These units are independent models that work in concert with other agencies. Due to resourcing, they do not investigate every allegation; The INPROL Report also discusses such an option in the context of a Police Complaints mechanism which is complimentary to internal processes. Christina Murtaugh and Michael Poe, "Establishing an Independent Police Oversight Body," INPROL Consolidated Response (10-007), August 2010, pg 5.

- The department should not exist within the same reporting and oversight structure as the Prosecutor.

Good Practice

Some states have created a special department within the Office of the Prosecutor tasked only with investigating these types of special cases. In some instances, they work inside a multi-layered approach, like the one described above, to cooperate on investigations with independent mechanisms.

- Kyrgyzstan could create a special department within the Office of the Prosecutor, which investigates and prosecutes only these types of allegations and cases.⁸
- Staff hired for such a department must meet specific hiring criteria that match the new goals and culture to be established in this office. They must also be trained in human rights standards, international standards and norms specific to torture.⁹
- There should not be cross over between cases handled in this department and the rest of the Office of the Prosecutor.
- Efforts must be taken to monitor any potential for internal pressure as the results of these investigations would likely impact other on-going cases within the Office of the Prosecutor.

Investigatory Procedures:

Any mechanism which is established within Kyrgyzstan in order to ensure independent investigations must also be mindful of the practices that the mechanism should engage in. In order to be effective, investigations must be thorough and based on international standards. There are multiple assurances which the State must consider in order to achieve this.

Recommendation #1:

Kyrgyzstan should create a set of written guidelines, which specify the minimum standards for acceptable investigations.

Recommendation #2:

Kyrgyzstan must ensure an effective and confidential process for the timely submission of detainee complaints.

Recommendation #3:

In order to ensure that the results of investigations are brought to the attention of a judicial authority when warranted, the independent investigatory body should have the right to act as a complimentary prosecutor.

Best Practice - Guidelines for Investigation

- Kyrgyzstan should develop a set of written, clear and detailed guidelines for investigation of allegations of torture, inhuman and degrading treatment.

⁸ Guatemala created a Special Anti-Impunity Prosecutor's Office as part of the original CICIG Agreement and the Bilateral Cooperation Agreement signed between the Public Prosecutor's Office (MP) and CICIG Guatemala on February 27, 2008 <http://cicig.org/uploads/documents/convenios/mp-cicig.pdf>; This office has staff from the Independent Mechanism and Prosecutors.

⁹Consider Russia – they transformed Militia to police, but found just a large transfer of staff without any change when they did this. While the new independent investigatory mechanism, mentioned above has been created, the concerns remain that this will also not be sufficiently resourced

- These guidelines should be developed by a panel of national and international experts and based on international standards and on the recommendations of international and national expertise.¹⁰
- Once developed, the guidelines must be implementable, and thus the body tasked with investigation should be provided with all necessary resources to meet its obligations.

Best-Practice - Complaints / Reporting

Current Kyrgyz law does specify that a suspect has the right to file complaints about actions of preliminary investigator, actions and decisions of the investigator, prosecutor.¹¹ These complaints can be filed by a complainant, defense council, legal guardian or designated representative. A decision by a judge as to the lawfulness of the actions must be made within 5 days.¹² However, there are few details about how this right can be not only ensured, but made meaningful. It is further unclear how this right is operationalized as it relates to complaints against arresting authorities while a suspect is in custody.

- Kyrgyzstan should create and distribute confidential forms for reporting abuse.¹³
- These forms should be given to each detainee upon registration in any type of detention center.
- There should be confidential and easily accessible repositories for these forms around all detentions facilities.
- The head of each facility and his or her deputy alone should have access to these repositories.
- They should be responsible for checking the boxes and reporting to the authority in charge of investigation of Torture and Abuse a daily number of complaints.
- Any complaints should be transmitted – confidentially – the day they are submitted.
- The head of the facility should also be required to inform the relevant staff within the National Preventive Mechanism (NPM) upon the existence of complaints.
- The NPM shall have the authority to follow up on any complaints or require justification for why action was not taken on complaints.

Good Practice

(This practice is not mutually exclusive of the Best Practice and could be simultaneously implemented)

- Kyrgyzstan should institute a system of mandatory reporting among police regarding any observed injury or abuse in detention.¹⁴

¹⁰ Georgia did this for the Office of the Prosecutor General. These guidelines Internal Guidelines regarding Preliminary Investigation into allegations of torture, inhuman and degrading treatment. The guidelines adopted recommendations of international experts and organizations as well as declared the fight against human rights violations as one of the main priorities of the Office of Prosecutor General of Georgia. However, they are not available publicly, so civil society has doubts about their effectiveness, UNSRT 2007 226; Jamaica's INDECOM created an action plan which suggests that by the end of a period of years they should be meeting certain timelines for investigation, completion, reporting etc (keeping complainant apprised)

¹¹ Kyrgyz Criminal Procedural Code Chapter 6. Participants of Criminal Proceedings Defending their rights and interests or the rights and interests of people they represent. Article 40(12) Rights and Responsibilities of the Suspect (2008); Kyrgyz Criminal Procedural Code Chapter 6. Participants of Criminal Proceedings defending their rights and interests or the rights and interests of people they represent. Article 56(10) Rights and Responsibilities of a Civil Defendant (2008);

¹² Kyrgyz Criminal Procedural Code, Part V. Motions and Petitions, Section 15 Appeal from Actions and Decisions of State Bodies and Officials Administering Proceedings on a Criminal Case, Article 131 Complaints Against Actions or Decisions of an Investigator or Procurator

¹³ This best practice is modeled on the Georgian Practice initiated by the Ministry of Corrections and Legal Assistance. In 2011 more than 40,000 complaint envelopes were distributed.

¹⁴ In Jamaica, the INDECOM Act requires security forces to report regarding the conduct of a member of the security forces or any specified official which (a) resulted in the death of or injury to any person or was intended or likely to result in such death or injury; (b) involved sexual assault; (c) involved assault or battery by the member or official; (d) resulted in damage to property or the taking of money or of other property; (e) although not falling within any of the preceding paragraphs, is in the opinion of the Commission of a grave or exceptional nature. These reports are required at all levels of hierarchy to encourage breaking the culture of silence; A/HRC/16/52/Add.3, Human Rights Council, Sixteenth session findings and recommendations of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Jamaica, 12 to 21 February 2010; Claim No: 2011 HCV 06344, 2012-05-25, Case Number: 2011HCV06344; Bulgarian legislation also contains a number of

- Police should have access to a confidential hot line in order to report such abuse.

Best Practice - Relationship to Prosecuting Authority

After thorough and independent investigations have occurred, they will only be useful if evidence of abuse is in fact brought before a judicial authority. As described above, currently, detainees may file claims, but there is no clear mechanism for anyone other than a Prosecutor to supplement evidence of claims of abuse before a tribunal after an investigation. As many of these claims are likely to be raised in the context of abuse in order to illegally obtain evidence for a different proceeding, there is an inherent conflict of interest in this system (as described above).

- If Kyrgyzstan creates an independent mechanism for investigations, that body should also be able to request judicial permission to act as a Complimentary Prosecutor on cases where there have been allegations of Torture and Cruel, Inhuman or Degrading Treatment.
- Kyrgyzstan should develop procedural rules to facilitate this participation, but at a minimum the CP must be allowed to present evidence of the alleged abuse before the tribunal.¹⁵



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provisions concerning action to be taken in respect of cases of ill-treatment. Pursuant to Section 205 (2) of the Criminal Code of Procedure (CPC), public officials are under a legal obligation to immediately inform the prosecutor's office of any facts related to a criminal offence which may have come to their knowledge. The Code of Ethics of police staff and Instruction No. Iz-1711 of 15 September 2009 contain specific obligations for the police to report to their superiors acts of violence or inhuman or degrading treatment. Further, the Ministry of Justice has issued specific instructions concerning the obligatory reporting of injuries observed on persons admitted to prisons and investigation detention facilities.

¹⁵ The CICIG has such an ability. Currently, the Commission participates in 21 cases as a complementary prosecutor—most of which are cases under the responsibility of the Special Anti-impunity Prosecutor's Bureau (FECI) of the MP—and offers technical support in other investigations at the behest of the Public Prosecutor's Office (MP), Article 3.1 (b) of the CICIG Agreement.