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Best Practices - Preliminary Recommendations for Kyrgyzstan Safeguards for Prevention Torture and Cruel, Inhuman or Degrading Treatment

Safeguard #1 – Definition of Detention / Custody to Trigger Procedural Safeguards

Currently, in Kyrgyzstan, “Detention,” is defined as “coercive procedural action, which essentially consists in imprisoning a suspected person for a short period (up to forty-eight hours) pending a judicial warrant,¹” and “Arrest,” is defined as a coercive procedural action, which essentially consists in incarcerating an accused under a court decision.² Regarding custody, the CPC states that “the detained on the suspicion of committing a crime shall be placed in the temporary detention center. The procedure for and the conditions custody for the detained shall be provided by the legislation of the Kyrgyz Republic.”³ However, nowhere does it state that the term custody is in fact defined. Further, Kyrgyz Law describes its procedural guarantees as beginning from the moment of actual arrival at the detention facility.⁴

Recommendation:

Kyrgyzstan should amend the definition for detention, or create a definition for custody, so that it is found to occur at the moment of factual detention/custody and all procedural safeguards should be triggered from that point.

Best Practice

Kyrgyzstan should define detention as the moment of factual detention and the suspect or detained person should be immediately made aware of all applicable procedural rights.

- Detention or custody must be defined in the criminal procedural code (and other relevant laws where applicable) as the factual moment when a person is detained by police.⁵
- This definition should make it clear that factual detention equates to the moment when a person’s freedom of movement is in fact limited, or from the moment that a reasonable person would not feel free to leave of his or her own accord.⁶
- In order to ensure the distinction between factual detention and remand to a detention facility, when a detainee is registered at the first station or detention facility, the registration form must denote both the time of factual detention and the time of registration at the facility.⁷

¹ Kyrgyz Criminal Procedural Code, Section 1 General Provisions, Chapter 1 Major Provisions, Article 5 Major Definitions Used in the Code, Major Terms, Detention (2008).

² Kyrgyz Criminal Procedural Code, Section 1 General Provisions, Chapter 1 Major Provisions, Article 5 Major Definitions Used in the Code, Major Terms, Detention (2008).

³ Kyrgyz Criminal Procedural Code, Section IV Procedural Sanctions, Chapter 11 Detention of the Suspect, Article 98 Conditions for Custody of the Detained on the Suspicion of Committing a Crime (2008).

⁴ Kyrgyz Criminal Procedural Code, Section 1 General Provisions, Chapter 6 Participants of Criminal Proceedings Defending Their Rights and Interests or the Rights and Interests of Persons They Represent, Article 40 Rights and Responsibilities of the Suspect (1)(4) (2008).

⁵ This is the in Bulgaria and the procedural rights are required to be read at that moment of detention and in writing at the moment of charging. Bulgarian Criminal Procedural Code Section 219 and 55 (1).

⁶ Modeled on the Supreme Court’s decision in *Miranda v. Arizona* 384 U.S. 436, 444 (1966)

Safeguard #2 – Definition and Notice of Rights

As described above, a detained person's procedural rights should be explicitly defined and communicated to him or her from the moment of factual detention. If there is no procedural protection between the moment of apprehension (factual detention) through the moment of arrival at a detention facility, these rights could be rendered meaningless. Further if there is no mechanism to ensure the effectuation of these rights, they are even less likely to be protected.

Recommendation #1

Kyrgyzstan should create a written list of the procedural rights which are guaranteed to all detained persons, and which could be easily distributed.

Recommendation #2

Procedural rights must attach from the moment of factual detention, and this must be communicated to the detained person. Rights should be communicated orally upon the moment of factual detention and then should be given to the detained person in writing upon the arrival at the first official facility (police station or detention facility).⁸

Best Practice –

Kyrgyzstan should create a written list of all relevant procedural rights which apply to a detained person and communicate these rights to the person both orally and in writing.

- Rights must be read to the suspect at the moment of factual detention and prior to any interrogation.
- Rights should make it clear that no interrogation may take place, anywhere at any time, without an attorney, if the detained person wishes to have one present.⁹
- Detained persons should sign and date (with time) a copy of the procedural rights upon arrival to the detention facility.¹⁰
- At a minimum, the detainee's rights must include the right to remain silent and the right to have his or her attorney present prior to any form of questioning.
- Any violation of these rights, including the failure to advise the suspect of these rights, from the moment of factual detention, should result in exclusion of any evidence obtained from the proceedings against the accused (unless they were later obtained from an independent source).¹¹

Safeguard #3 – Medical Examinations

In Kyrgyzstan, detainees currently have a right to a medical examination any time they are brought to a temporary detention ward or any time a relative complains regarding physical assault from

⁷ In Bulgaria, when a detained person is brought to a police station they must be registered on a form that lists both the time for factual detention and the time of actual registration at police station. Interview by TSPC consultant/researcher Bakhtiyor Avezdjanov, with a duty officer from the Regional Police Station 7, Sofia Bulgaria, April 2013.

⁸ Bulgaria Criminal Procedural Code, Section 219 and 55 (1)

⁹ Current Kyrgyz law does allow for an attorney during interrogation, but it does not make it clear that interrogation can include any conversation with the police from the moment of apprehension.

¹⁰ While the Georgian definition of "detention" is not as specific regarding factual detention as would be ideal, they do require that a copy of rights are made available to detainees immediately upon arrest, and are visible throughout Georgian temporary detention centers; The Report on Implementation of 2011-2013 Action Plan for the Fight Against Ill-treatment in Georgia p 17

¹¹ Modeled on the "Exclusionary Rule," established in American Case law through *Weeks v. US*, 232 U.S. 383 (1914) and affirmed in a line of cases since including eg *Mapp v. Ohio* 367 U.S. 643 (1961), which broadened the rule to near universal application.

officers of preliminary investigation and investigation.¹² However, there is no provision detailing who these medical personnel should be or what their training must be.

Recommendation #1

Kyrgyzstan should ensure that each temporary detention facility has at least two independent (from facility and prosecutorial structures) medical professionals on staff, or available at all times.

Recommendation #2

Detained persons should have a compulsory medical examination, which must be documented in writing and adhere to certain minimum standards, upon every entrance to the detention facility.

Detained persons must also have the right to request examination at any time. Once requested, examinations should take place within 24 hours.

Recommendation #3

Medical personal should keep a detailed record of findings from medical examinations. This record book should be available for inspection by the relevant investigative authority at any time necessary (bearing in mind any confidentiality concerns).¹³

Best Practice -

Kyrgyzstan should ensure that all detained persons see independent medical personnel for a full examination upon their initial entrance to a detention facility, after any exit and re-entry and whenever requested subsequently. These examinations should be thorough and should be recorded in writing.

- Medical Personnel must be available at all times to complete examination of newly arrived detainees.¹⁴
- Medical Personnel should be independent from the oversight and budget of the detention facility where they are working, in order to ensure that examinations do not suffer from internal pressure.¹⁵
- At a minimum, medical staff performing the examination of newly arrived detainees should draw up a certificate which specifies in detail the characteristics, position and size of each injury, the statements made by the detainee, and the medical conclusion.¹⁶
- Medical staff should be required to report any injuries found on detainees, or any medical concerns which raise suspicion of potential abuse. These reports should be made to the head of the Detention Facility, the National Preventive Mechanism, and the mechanism in charge of investigations of abuse.¹⁷

¹² Kyrgyz Criminal Procedural Code, Section 1 General Provisions, Chapter 6 Participants of Criminal Proceedings Defending Their Rights and Interests or the Rights and Interests of Persons They Represent, Article 40 Rights and Responsibilities of the Suspect (5) (2008).

¹³ This is modeled, not on Bulgaria's medical record keeping, but on their registration of detainees as described by an interview with police officers from the Regional Police Station 7 to a TSPC researcher Bakhtiyor Avezdjanov.

¹⁴ Georgia amended its law in 2005 in order to mandate medical examinations of prisoners in each case of taking and returning of the person from the penitentiary establishment, except for his or her taking or returning from the Court hearing, UNSRT 2007 p.209; In Bulgaria, detainees are not required to have a medical examination upon arrival, however it is their right to choose to do so. Bulgaria Instruction No. Iz-1711; CPT/Inf 2012, citing the CPC and the Law on the MIA.

¹⁵ Georgia has recently instituted structural reforms of their forensic structure in response to international criticism. While it is still a state structure, it is no longer under the Ministry of Justice. Due to international and domestic criticism of the forensics structure in Georgia, on October 31, 2008, the Parliament of Georgia adopted the Law on Legal Entity of Public Law "Levan Samkharauli National Bureau of Forensic Expertise (NBFEE)." Specifically, the fact that the NBFEE was a part of the Ministry of Justice was structurally inconsistent with the international requirements for independence and impartiality of forensic services. The law entered into force on January 1, 2009, and created the new NBFEE as an independent legal entity of public law rather than an institutional part of the Ministry of Justice.

¹⁶ Bulgaria Order № L-6399 of 26 July 2010 issued by the Minister of Justice (concerning the internal order in investigation detention facilities).

¹⁷ In Bulgaria, reports must be made to prosecutor and the General Directorate for the Execution of Punishments; in Regulation № 2 of 22 March 2010 "On the terms and conditions for medical care in places of deprivation of liberty."

- A log should be kept of all examination and any reports of injury or medical concerns. This log book should be available for inspection by the relevant investigatory official or prosecutors should the need arise.¹⁸
- All medical personnel stationed at or responsible for examinations at detention facilities should be trained in the relevant methods and forensic techniques regarding examinations specific to the identification of signs of torture, abuse and other forms of ill treatment.

Good Practice

- Detainees may request to see independent medical personal at their own expense.¹⁹
- This request should be honored at all time, and should not require judicial permission.



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¹⁸ In Georgia if injuries are found detainees are required to give basic information about their source, which is noted in so called “Krebsi” (Daily Notes) of the Penitentiary Supervising the Penitentiary Department and Human Rights Protection Unit of the Prosecution Service Department which is automatically transferred (via fax) to the Unit of Georgia, UNSRT 2007 217; Regarding Bulgaria, this is modeled, not on its medical record keeping, but on their registration of detainees as described by an interview with police officers from the Regional Police Station 7 to a TSPC researcher Bakhtiyor Avezdjanov.

¹⁹ In Georgia, although reforms have been instituted to take the Forensic Structure out from under the Ministry of Justice, detainees may still request medical examination of an independent examiner of their choice. According to Article 364 of the new CPC on alternative expertise, “each party has a right to acquire, on its own initiative and at its own expenses, an expert conclusion to determine the circumstances, which, according to his/her opinion, might assist him/her to defend his/her interests. The respective institution is obliged to carry out the expertise requested and paid for by the party. If the party so requests, the results of the expert conclusion must be attached to the criminal case and shall be examined along with other evidence. Georgian Criminal Procedural Code 364.