



Physicians for Human Rights Opinion on the Law of the Kyrgyz Republic on Forensic Examination

October 9, 2013

Physicians for Human Rights (PHR) was asked by the Open Society Justice Initiative (OSJI) to review the law of the Kyrgyz Republic on Forensic Examination (hereinafter “Forensic Law”) and to assess its consistency with international standards contained in the United Nations’ Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment or Istanbul Protocol (available at: www.ohchr.org/Documents/Publications/trainin-g8Rev1en.pdf).

PHR has more than 25 years of experience in the medical documentation of torture and ill treatment and led the development of the first international guidelines for medico-legal documentation of torture and ill treatment that are contained in the Istanbul Protocol. PHR has investigated and documented medical evidence of torture and ill treatment in dozens of countries including Kyrgyzstan, Tajikistan and Kazakhstan. In addition, PHR has extensive experience in the implementation of Istanbul Protocol standards for effective medical and legal investigation and documentation of torture and ill treatment.

During the past 3 years, PHR’s efforts to implement Istanbul Protocol standards in Kyrgyzstan have consisted of three primary activities: 1) an assessment of torture and ill treatment practices, 2) capacity building training for medical and legal experts on the effective investigation and documentation of torture and ill treatment, and 3) policy reform activities. PHR’s forensic medical experts have conducted approximately 12 forensic medical evaluations of alleged torture and ill treatment using Istanbul Protocol standards. PHR has conducted 3 Istanbul Protocol trainings for medical and legal experts on the effective medical documentation of torture and ill treatment and provided individual mentoring of several independent, non-governmental medical experts. Currently, these non-governmental medical experts are the most qualified clinicians in Kyrgyzstan to evaluate physical and psychological evidence of torture and ill treatment in accordance with international Istanbul Protocol standards.

PHR has developed detailed policy recommendations in an Istanbul Protocol National Plan of Action for Kyrgyzstan which was presented and discussed at a roundtable entitled “The Implementation of the Istanbul Protocol in the Kyrgyz Republic: Challenges and Lessons Learnt” in Bishkek on February 22, 2012. The roundtable was co-sponsored by the Organization for Security and Cooperation in Europe (OSCE) Center in Bishkek, the Office of the High Commissioner for Human Rights (OHCHR) Regional

Office for Central Asia (ROCA), and the European Union (see: <http://www.osce.org/bishkek/88305>). Approximately 200 governmental and non-governmental representatives attended the meeting. The roundtable focused specifically on the implementation of the Istanbul Protocol in Kyrgyzstan. Critical outcomes included: 1) Recognition of the need to officially implement a plan of action for the effective investigation and documentation of torture and ill treatment; 2) Recognition of the need to conduct Istanbul Protocol training for all official forensic medical experts in Kyrgyzstan, and 3) Recognition of the need for independent, non-governmental forensic medical examinations of alleged torture and ill treatment in accordance with Istanbul Protocol standards.

At the Roundtable, Drs. Iacopino and Moreno expressed the view that medical evaluations of torture and ill treatment by both governmental and non-governmental forensic experts should be based on adequate qualifications, alone, not on a particular professional license or certificate. This would enable non-governmental health professionals to serve as medical experts in legal proceedings, from which they have historically been excluded, and require all medical experts to receive training on Istanbul Protocol standards of medical documentation of torture and ill treatment.

Analysis

In reviewing the Forensic Law, we are deeply concerned that many of the provisions of the Forensic Law are inconsistent with the goal of ensuring independent, non-governmental forensic evaluations and are inconsistent with Istanbul Protocol standards as well. In our opinion the Forensic Law: 1) effectively excludes those who are currently most qualified to conduct forensic medical evaluations of alleged torture and ill treatment; 2) undermines the independence of non-governmental forensic experts; and 3) fails to ensure protection against torture and ill treatment.

1. Exclusion of Qualified Independent, Non-governmental Forensic Experts:

While Article 1, paragraph 7 of the Forensic Law recognizes that the competence of forensic experts depends on “availability of examination, knowledge, professional skills and experience of the expert necessary to perform certain types of forensic examinations,” current provisions in the Forensic Law would exclude those who are currently most qualified to conduct forensic medical evaluations of alleged torture and ill treatment, namely individual, non-governmental forensic experts and highly qualified international forensic medical experts.

- a. Article 14 requires that a private forensic expert be an employee of a forensic agency and one who performs forensic examinations as part of their job description.
- b. Article 13 requires that private forensic agencies employ “at least five experts in different types of forensics, for whom the agency is the main workplace, and whose qualifications are confirmed by a Competence Certificate issued according to an established procedure.”
- c. Furthermore, Article 13 states that, “Private forensic agencies may perform all types of forensic inquiries, except for examinations performed exclusively by state forensic agencies,” but does not indicate which examinations would be performed exclusively by state forensic agencies.
- d. These provisions would arbitrarily exclude qualified, individual, non-governmental forensic experts on the basis of not being affiliated with a private forensic agency, or an insufficient number of forensic experts working for a private forensic agency. In addition, it is not clear whether forensic evaluations of torture and ill treatment would be performed “exclusively by state forensic agencies.”

- e. These provisions are unnecessary, arbitrary, and irrelevant with respect to the competence of forensic experts as defined in Article 1, paragraph 7 of the Forensic Law.
- f. Article 39 would also exclude examinations by highly qualified international forensic experts unless the body/individual authorizing the forensic examination requested “involvement of foreign forensic experts according to procedure established by law, at their own initiative or following a request of the forensic agency director.” Given the current lack of capacity for the effective forensic medical investigation and documentation of torture and ill treatment in Kyrgyzstan, this provision would unnecessarily deny victims of torture the discovery of critical corroborating forensic evidence of their allegations.

2. Undermines the independence of non-governmental forensic experts:

The Forensic Law undermines the independence of non-governmental forensic experts through provisions that establish state control over certification and sanctioning of independent, non-governmental forensic experts.

- a. Article 17 states that “The competence of forensic experts from private forensic agencies shall be certified by Expert Qualification Boards of state forensic agencies once in five years.”
- b. The Expert Qualification Boards will not only be responsible for certifying private forensic experts (Articles 15 and 16). They apparently will have the a role in depriving non-governmental forensic experts of their Competence Certificates and facilitating disciplinary, administrative and/or criminal sanctions against non-governmental forensic experts (Article 22).
- c. These provisions would effectively enable undefined state actors of the “Expert Qualification Boards” to determine whether non-governmental expert are qualified to evaluate forensic medical evidence of torture and ill treatment. State regulation of non-governmental forensic experts would also preclude the possibility of judicial determination of qualifications of both state or non-state forensic experts in court, as there is no provision for the interrogation of forensic experts in relation to his/her qualifications in the Forensic Law (Article 14).
- d. State forensic experts in Kyrgyzstan operate under the authority of various state ministries and agencies and do not operate independently of state interests. In fact, the Law of the Kyrgyz Republic on Forensic Examination was drafted by the State Centre for Forensic Expertise under the authority Ministry of Justice. The lack of independence of state forensic experts should be addressed, but while this remains to be the case, establishing state control mechanisms of non-governmental forensic experts contradicts the objective and purpose of establishing a law to enable independent forensic examinations in Kyrgyzstan.

3. Fails to ensure protection against torture and ill treatment:

The Forensic Law presumes conditions that undermine protection against torture and ill treatment.

- a. Article 24 provides that forensic medical examinations are made on the basis of a Forensic Examination Authorization/Order. Paragraph 1 suggests that an “interested party” may apply to state officials to authorize a forensic examination, but even if this includes the detainee or his/her legal counsel, it does not acknowledge a detainee’s independent right to a prompt evaluation by a qualified, non-governmental forensic medical expert in accordance with Istanbul Protocol Standards.

- b. Article 24 also indicates that the body/individual authorizing the forensic examination will have control over the questions asked of the forensic examiner and control over access to relevant evidence, despite provisions to petition the authorizing body/individual for reconsideration.
 - c. Article 28 stipulates that, “Forensic examination may be attended by participants in the legal process who are entitled to attend the examination according to the procedural laws of the Kyrgyz Republic and who have a written permission of the body/individual authorizing the forensic examination.” According to the Istanbul Protocol, the presence of third parties during forensic examinations is virtually never justified. We know from our extensive experience that the presence of police, investigators, and prosecutors during forensic evaluations prevents detainees from making any allegations of abuse for fear of reprisals and/or harsh sentencing.
 - d. These provisions fail to ensure protection against torture and ill treatment through state control of a detainee’s access to non-governmental forensic experts and relevant evidence; it would also permit coercive influences to suppress allegations of torture and ill treatment.
4. Note: We have reviewed and agree with the recommendations of the 9 April 2013 OSCE/ODIHR Opinion on the of the Draft Law of the Kyrgyz Republic on Forensic Examination (see Opinion-Nr.: CRIM -YR/227/2013 [MWrz], www.legislationline.org).

Recommendations

1. Given fundamental inconsistencies between the goals of the Forensic Law and its provisions, we urge an immediate suspension of its application in Kyrgyzstan until such time that it can be revised to ensure independent, non-governmental forensic evaluations, to protect individuals from torture and ill treatment, and to be consistent with international standards.
2. The Forensic Law must include a general provision recognizing that medical evaluations of torture and ill treatment by both governmental and non-governmental medical experts should be based on adequate qualifications, alone, not on a particular professional license or certificate.
3. Specific requirements for a private forensic expert to be affiliated with a private forensic agency and for private forensic agencies to include a minimum of 5 forensic experts are not relevant and should be deleted.
4. Any provision in the Forensic Law that stipulates that forensic examinations are to be performed exclusively by state forensic agencies must be disclosed in the Law and include a justification based in legal necessity and/or forensic science.
5. Given the current lack of capacity for the effective forensic medical investigation and documentation of torture and ill treatment in Kyrgyzstan among state and non-state forensic experts, the Forensic Law should allow qualified international experts to conduct forensic evaluations based on the international expert’s qualifications as determined by judges in light of the alleged victim’s rights and needs and current national forensic capacities.
6. All provisions in the Forensic Law that refer to state control over the certification and/or sanctioning of non-governmental forensic experts must be deleted as they effectively undermine the principle of independence of non-state actors.
7. The Forensic Law should also include provisions for all forensic experts to have unrestricted access to relevant evidence, including crime scenes, material evidence, witnesses, and relevant legal documents, including interrogation logs and medical records, and they must follow chain of custody procedures for material medical evidence.

8. The Forensic Law should be revised to exclude all third parties such as police, investigators, and prosecutors from forensic evaluations as this practice is known to conceal torture practices and maintain impunity for torture.
9. The Forensic Law must recognize that detainees have an independent right to have a prompt evaluation by a qualified, non-governmental forensic medical expert in accordance with Istanbul Protocol Standards.
10. The Forensic Law should note that the practices of all Kyrgyz forensic experts, state and non-state, should be consistent with well establish international standards.
11. The Forensic Law should be revised to address the recommendations of the 9 April 2013 OSCE/ODIHR Opinion on the Draft Law of the Kyrgyz Republic on Forensic Examination.
12. The process of revising the Law of the Kyrgyz Republic on Forensic Examination should include relevant stakeholders including individual, non-governmental forensic experts and international forensic experts. The process should be collaborative, participatory and transparent.