

# National mechanisms for the prevention of torture in Central Asia

Kazakhstan, Kyrgyzstan and Tajikistan



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## **National mechanisms for the prevention of torture in Central Asia: Kazakhstan, Kyrgyzstan and Tajikistan**

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# Kazakhstan (as of 2012)

## Introduction

Kazakhstan became independent from the former USSR on 16 December 1991. Kazakhstan is the ninth largest country in the world and its territory is larger than Western Europe. It borders Russia, Turkmenistan, Uzbekistan, Kyrgyzstan and China. The population of Kazakhstan is over 16 million, of which over half are ethnic Kazakhs and a significant proportion Russians. The state language is Kazakh (Article 7 of the Constitution),<sup>1</sup> although Russian is used equally by public institutions and local government. The main religions are Sunni Islam and Orthodox Christianity.

The Constitution was adopted in 1995, with amendments in 1998, 2007 and 2011.<sup>2</sup> This provides, in Article 12, that human rights and freedoms shall be recognised and guaranteed. Under article 4(3) of the Constitution, the international treaties ratified by Kazakhstan shall have precedence over national legislation, unless a statute is required to give effect to a treaty.<sup>3</sup>

Kazakhstan is a unitary state, with the President as the head of state, elected for five years. The Parliament consists of two chambers: the Senate and the Majilis. There is a Supreme Court at the summit of a system of regional and local courts, including administrative courts. The courts may put questions for preliminary ruling on the constitutionality of statutes to the seven-member Constitutional Council.<sup>4</sup> The independence of judges is protected by the Constitution, although all judges are appointed

by the President except for members of the Supreme Court, who are appointed by the Senate.

Kazakhstan is a member of the United Nations (UN), Commonwealth of Independent States (CIS) and the Organisation for Security and Cooperation in Europe (OSCE), for which it held the chair in 2010. By participating in OSCE, Kazakhstan hosted the organisation's summit in 2010 in Astana. Kazakhstan has ratified a number of international treaties in the field of human rights relating to torture,<sup>5</sup> and has also undertaken numerous political commitments in the field of human rights.<sup>6</sup>

This report first sets out the system of detention facilities in Kazakhstan and briefly describe the statistics concerning the prison population. Then, based on interviews with members of Public Monitoring Commissions, it outlines the major challenges in the field of human rights protection and assess the effectiveness of the monitoring mechanisms, as well as the projects aimed at the creation of the National Preventive Mechanism (NPM) for the prevention of torture. Finally, it examines the legislation of Kazakhstan on the prohibition of torture and concludes by making recommendations aimed at strengthening respect for the prohibition of torture.

## Overview of detention facilities in Kazakhstan

There are a number of state detention facilities which fall under different ministries:

1 Kazakhstan Languages Act, no. 151, 11 July 1997.

2 Embassy of Kazakhstan, 'Constitution', 2010, available at: <http://www.kazakhembus.com/index.php?page=constitution>.

3 See also the judgment of the Constitutional Council of Kazakhstan of 11 October 2011 no. 18/2 in the case concerning the interpretation of article 4(3) of the Constitution, available in Russian at <http://www.constcouncil.kz/rus/resheniya/?cid=11&rid=134>

4 However, only one judgment on the courts' questions for preliminary ruling has been given since 2008 (<http://www.constcouncil.kz/rus/resheniya/?cid=9&rid=731>).

5 Kazakhstan is a party of the following treaties: International Convention on the Elimination of All Forms of Racial Discrimination, accession on 26 August 1998; International Covenant on Economic, Social and Cultural Rights, ratification on 2 December 2003; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, ratification on 23 September 2010; International Covenant on Civil and Political Rights; Accession, Ratification on 24 January 2006; First Optional Protocol to the International Covenant on Civil and Political Rights; Ratification on 30 June 2009; Convention on the Elimination of All Forms of Discrimination against Women, accession on 29 August 1998; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, ratification on 24 August 2001; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, accession on 26 August 1998. Kazakhstan has accepted the procedures under Articles 21 and 22 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratification on 22 October 2008. After ratification Kazakhstan made a declaration postponing the implementation of provisions of OPCAT regarding the establishment of NPM for three years; the SPT has accepted this. There are no reservations made to these treaties.

6 UN Human Rights Council, Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, The Right To Development- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak – Mission to Kazakhstan (A/HRC/13/39/Add.3), 16 December 2009, pp. 5-6, available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13specialsession/A.HRC.13.39.Add.3\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13specialsession/A.HRC.13.39.Add.3_en.pdf).

### Ministry of Health:

- Child care institutions/Secure children's homes/ Child prisons (27)
- Specialised hospitals
- Medical and social rehabilitation centres
- Medical 'sobering-up stations', transferred from the Ministry of the Interior by Presidential Decree in 2010

### Ministry of Education and Science:

- Boarding schools (107)
- Juvenile rehabilitation centres

### Ministry of Justice (until September 2011):

- The penitentiary system, including pre-trial, post-trial and administrative detention facilities
- Social and psychological rehabilitation centres for drug users

### Ministry of the Interior

- Retains authority for temporary detention wards and regained authority over the penitentiary system, as well as administrative detention facilities, in September 2011.<sup>7</sup>

### Ministry of Labour and Social Protection/ Welfare:

- Institutions for elderly and disabled prisoners
- Centres for homeless prisoners

### Committee for National Security:

- Pre-trial detention facilities (in Astana, Almaty and other major cities)
- Special vehicles for escorting suspects, defendants and convicts

### Ministry of Defence:

- The premises of the military transport police
- Special vehicles for escorting suspects, defendants and convicts
- Disciplinary military cells (*Hauptwache*) – for disciplinary arrests and custody of suspects

Following recommendations by the UN Committee against Torture (CAT), responsibility for prisons was transferred from the Ministry of the Interior to the Ministry of Justice in 2001. The transfer of responsibility from the Ministry of the Interior to other ministries in 2010 was, it would appear, a continuation of this process.<sup>8</sup> Despite this, in 2011 the President of Kazakhstan ordered that authority over the penitentiary system be transferred back from the Ministry of Justice to the Ministry of the Interior.<sup>9</sup> The Government of Kazakhstan was instructed to prepare, and introduce in Parliament, bills concerning the transfer. This was decided in August 2011 and concluded by the end of September 2011. However, the original intention to dissolve the Committee on the Penal System was not implemented and it was maintained as a separate body within the Ministry of the Interior. By way of an official explanation for the transfer of the penitentiary system, it was claimed that there was a 'pressing need to stabilise the criminal situation in correctional labour facilities, and also to neutralise the negative influence that authorities in the penal sphere and leaders of criminal organisations have on the conduct of repressive parts of special military units'.<sup>10</sup>

<sup>7</sup> Ibid.

<sup>8</sup> National expert report

<sup>9</sup> Decree of the President of the Republic of Kazakhstan of 26 July 2011 no. 129 "On Penitentiary System of the Republic of Kazakhstan". See also the statement by Ambassador Kairat Abdrakhmanov at the 878th OSCE Permanent Council meeting, Vienna, 1 September 2011.

<sup>10</sup> Letter from the Ministry of the Interior to the Office of PRI in Central Asia, 7th Sept 2011



## Overview of population in detention facilities

| Facilities and quantity   | Number of people detained  |
|---|--|
| Child care institutions – <b>27</b>   | 1,963 children (January 2008)  |
| Boarding schools – <b>107</b>   | No data available  |
| Special educational organisations and high security educational organisations – <b>10</b>       | 280  |
| Children’s homes/Organizations for orphans and children left without parental care – <b>166</b> | 11,612 children  |
| Centres for the isolation, adaptation and rehabilitation of minors – <b>18</b>                  | 6,287 children   |
| Specialised hospital facilities   | Most recent publicly available data dates back to 1990 and is certainly outdated <sup>11</sup>   |
| Special premises for administrative detainees/Administrative detention facilities               | No date available  |
| Social and psychological rehabilitation centres for drug users – <b>22</b>                      | 4,865  |
| Medical ‘sobering-up stations’ – <b>32</b>  | No recent data available because of transfer from the Ministry of the Interior to the Ministry Health  |
| Penitentiary institutions – <b>75</b>   | 44,803 (1st February 2012), including:<br>3,475 women (of whom 21 were pregnant and 393 had children under the age of 18);<br>40 minors held with their mothers;<br>1,600 convicts under 21 years old (of whom 167 are under 18 years old);<br>420 convicts over 60 years old;<br>2,082 foreign prisoners  |
| Pre-trial detention facilities (SIZOs) – <b>19</b>  | 6,790 (1st February 2012), including:<br>526 women (of whom 11 were pregnant and 82 had children under the age of 18);<br>428 detainees under 21 years old (of whom 86 are under 18 years old);<br>30 convicts over 60 years old;<br>257 foreign prisoners   |
| Institutions for elderly people, medical and social rehabilitation centres                      | There is no general information on the total number of persons in nursing homes. In the Kyzylorda province there are 180 people, in the Mangystau province – 132, in Astana – 323 and in the Karagandy province – 2,501. According to the Statistics Agency of Kazakhstan, in Kazakhstan in 2007 there were 69 residential homes for elderly and disabled adults |
| Centres for the homeless  | There is no general information on the total number of persons in centres for the homeless. In the Kyzylorda province there are 76 people. In the Northern Kazakhstan province – 150, in Astana – 144, in Almaty – 965, and in the Karaganda province – 397  |
| Detention facilities of the Committee for National Security (CNS)                               | 1,348 persons over the last five years   |

There appears, from the statistics, to be a large number of children in various institutions, including boarding schools, children's homes, facilities for rehabilitation and adaptation of minors, etc. The number amounts to over 20,000 at any one time. This compares to a population of just over 53,000 in prison (not including children). However, there are ever fewer minors in prison. In 2008, there were four correctional colonies with 476 detainees. Today, there is only one correctional colony in Kazakhstan, in which 122 minors are detained.

There are 19 medium security correctional colonies, 19 high security, five maximum security and special treatment, 17 colony-settlements, and one prison. It must be noted that many Soviet Gulags were located in the then Kazakh Socialist Soviet Republic. Some of the Gulag facilities are still functioning today in the penitentiary system of Kazakhstan.

Furthermore, there is evidence that there are unofficial places of detention which are not covered by national legislation. In some cases described in the media, the unofficial places of deprivation of liberty are widely used'.<sup>12</sup> It must also be noted that 'in 2009, reports emerged which appeared to confirm persistent allegations that the CNS was using unofficial places of detention such as rented apartments and houses – so-called safe houses – to keep individuals in *de facto* unacknowledged and incommunicado detention. NGOs and lawyers told Amnesty International that in some cases the individuals detained were told by the officers apprehending them that they were being placed on a witness protection scheme and that for their own safety all details of the safe houses had to be kept strictly secret. In fact, reports suggest that their status was changed from witness to suspect while they were kept in secret detention, with no access to a lawyer of their own choice, independent medical care or family'.<sup>13</sup>

## Human rights concerns

Despite near universal ratification of human rights treaties and a stated commitment to implement its obligations through the adoption of a National Action Plan on Human Rights,<sup>14</sup> torture and the rights of those deprived of their liberties, including the right to liberty and security of the person, are amongst the most pressing human rights concerns within the country at the moment according to NGOs.<sup>15</sup> In addition, with respect to particular categories of vulnerable persons, NGOs identify children, sexual minorities/LGBT prisoners, women, young people, those with HIV/AIDS or TB, those with mental health problems or disabilities, drug users and asylum seekers.

Legislatively, the rights of defendants, including minors, are protected, but the experience of human rights organisations shows that these principles are far from being implemented in practice. Lawyers are often not able to gather evidence due to a lack of adequate training.<sup>16</sup> Victims of torture often do not receive compensation or rehabilitation<sup>17</sup> and judges still accept evidence obtained by illegal means<sup>18</sup> despite this being prohibited by legislation. During the first three days of detention, the defendants are represented by lawyers appointed by the investigators and these lawyers initially accept the legality of investigative actions involving torture, which later allows courts to dismiss the defendants' claims that confessions were obtained under torture. It appears that the same lawyers are appointed by police investigators, despite the fact that the bar should approve the schedules for on-duty lawyers, as lawyers known to the police are appointed regardless of who is on duty.

The procedure for investigating torture cases is still undergoing improvement. In order to avoid departmental tribalism in investigating torture, amendments and additions were introduced in Article 192 of the Penal Code, according to which police

<sup>12</sup> National expert report

<sup>13</sup> *Kazakhstan: No effective safeguards against torture*, Amnesty International.

<sup>14</sup> National Action Plan on Human Rights approved by the resolution of the President of the Republic of Kazakhstan No. 32-36.125 of 5 May 2009.

<sup>15</sup> Latest alternative report NGOs in Kazakhstan on the implementation by Kazakhstan the International Covenant on Civil and Political Rights.

<sup>16</sup> UN Committee Against Torture, Consideration Of Reports Submitted By States Parties Under Article 19 Of The Convention—Concluding Observations Of The Committee Against Torture: Kazakhstan (CAT/C/KAZ/CO/2), 12 December 2008, para 27.

<sup>17</sup> *Ibid.*, para 28.

<sup>18</sup> *Ibid.*, para 29.

investigate allegations of torture by those working for bodies of the Interior and visa versa. As well as this, experts propose reforming the system of 'alternative jurisdiction', transferring the role of investigation either to the procurator or forming a new independent investigative body. According to the reports of human rights activists, forensic examinations are either not conducted (psychological examinations are never conducted) or conducted too late to uncover traces of torture. Forensic experts are not trained to detect traces of torture.

There are ongoing allegations of torture and ill treatment, especially in temporary detention wards (IVSs) and pre-trial detention facilities (SIZOs).<sup>19</sup> There are insufficient guarantees for those held to have access to lawyers, doctors or their families.<sup>20</sup> With regard to access to lawyers, the premises (special meeting rooms in detention facilities) are limited and shared by lawyers and investigators, the latter having priority access to detainees (making lawyers wait hours outside, including in freezing weather). Trials may be held in pre-trial detention facilities: formally they are considered open, but no person who is not party to the proceedings has access to inside the detention facility.

There are also concerns about the 'neglect of mental health patients and the low level of protection of mental health patients from abuse, including forced internment'.<sup>21</sup> Concerns have been raised about ill treatment in boarding schools, juvenile detention centres, with limited opportunities for victims to report such violations.<sup>22</sup> Although corporal punishment is unlawful in schools and alternative care, it is not unlawful in foster care, military schools, and the workplace.<sup>23</sup>

Corruption is rife in the criminal justice system and there is evidence of confessions being obtained by force and other unlawful means.<sup>24</sup> It also results in a lack of proper detention facilities. The detention facilities in Almaty are intended to hold 1,800 inmates, for example. Currently, 800 inmates are detained in facilities intended for only 450. Construction projects for the development of new facilities have been funded, but their implementation suspended.

The prison population is considered to be high. A lot of resources are allocated to buying medical equipment. In 2011, 1,092m tenge was spent on resources and 1,167,370,000 tenge has been set aside for the same in 2012. This work is taking place on the eve of the transfer of the responsibility for medical services being transferred from the Ministry of the Interior to the Ministry of Health. However, as official sources regularly report, the problem of a lack of medical personnel remains unresolved, with approximately 50% of positions left vacant.

Prison terms are considered to be lengthy and the prison population is significantly above the European average.<sup>25</sup> A 'prisoner hierarchy' still exists (penitentiary administration *de facto* delegates official powers of disciplinary sanctions to those placed higher), resulting in violence.<sup>26</sup> Many detainees are held in places of detention far from their homes and families because of the centralised distribution of detainees, regardless of the legislative requirements that prisoners serve sentences close to their families.<sup>27</sup> Women who are detained, often with their children, are threatened.<sup>28</sup> No separation exists between women with children and those without.

In accordance with a joint order from the Ministries of Justice, Health and the Interior 'On ensuring the

19 Ibid.

20 Ibid.

21 UN Committee On Economic and Social Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant Concluding observations of the Committee on Economic, Social and Cultural Rights–Kazakhstan (E/C.12/KAZ/CO/1), 7 June 2010, pp.3, 6, 8, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/428/62/PDF/G1042862.pdf?OpenElement>.

22 UN Committee On The Rights Of The Child, Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention Concluding Observations Of The Committee On The Rights Of The Child: Kazakhstan (CRC/C/KAZ/CO/3), 19 June 2007, pp. 7-8, 10-11, 17-18, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/424/33/PDF/G0742433.pdf?OpenElement>.

23 Ibid., para 36.

24 Ibid., p. 19.

25 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, op. cit., pp. 8-10.

26 Ibid.

27 Ibid.

28 Ibid., p.11.



participation of specialists in the field of medicine in the penal sector in carrying out medical examinations of bodily injuries found on those detained in temporary detention wards, SIZOs and facilities in the penal system', medical examinations of those under investigative arrest and those places in SIZOs and correctional facilities in case of bodily injury. However, according to interviews with PMCs, doctors in facilities report to the ministries exercising authority over detention facilities; civilian doctors, particularly specialised doctors, do not work in detention facilities. Injuries are not properly recorded or recorded in such a way as to conceal torture. Access to medical care is a particular concern in the prisons located hundreds of miles from the nearest cities, which makes it impossible for ambulance to arrive on time.

There is a strong civil society movement, especially with respect to the struggle against torture, although one national expert(s) considers that there is less focus on rehabilitation.<sup>29</sup>

There have been attempts over recent years to improve the situation in the penitentiary system, including transferring authority from the Ministry of the Interior to the Ministry of Justice for many places of detention.<sup>30</sup> However, this has been set aside by transferring the authority over the penitentiary system back to the Ministry of the Interior in 2011.<sup>31</sup>

## National monitoring mechanisms

Although there are internal monitoring procedures aimed at investigating complaints, the results of these are not transparent (declarations to the press may be made in cases of public importance, but this is not a regular practice).<sup>32</sup>

The following external mechanisms exist:

## The General Prosecutor, including a Department for the Supervision of the Rights of Persons Detained in Custody or Serving a Criminal Sentence

As set out in Article 83 of the Constitution, the Prosecutor's Office supervises the uniform application of laws, decrees and other acts. Although the Constitution states that it is to act independently (Article 83(2)), it is accountable to the President of the Republic. The Prosecutor General is appointed for five years and has the power to 'take steps to identify and rectify any violations of law, appeal the laws and other legal acts contradicting the Constitution and laws of the Republic, represents the interests of the state in court, as well as in the cases, the procedure and limits established by law, to ensure legality in court (Law on the Prosecutor of the Republic of Kazakhstan, Article 1). The office is funded from the state budget.

The Prosecutor General can control, monitor and investigate all cases as set out in Article 83 of the Constitution. The Penal Code of Kazakhstan notes that complaints can be submitted to the General Prosecutor and it sets out a timeframe within which the Prosecutor must respond (Law on Procedures for Handling of Individuals and Entities, Article 8).

A department on the protection of the rights of prisoners has been created in the General Prosecutor's Office.

The Prosecutor is said to conduct inspections of detention facilities daily.<sup>33</sup> However, a number of concerns have been raised about the way in which the Prosecutor General fulfils his mandate. On the one hand, the Prosecutor's Office endorses the indictments prepared by the police after preliminary criminal investigation; on the other, it is meant to monitor the extent to which criminal justice bodies and law enforcement officials comply with the law and to protect the rights of citizens and residents. This leads to the paradox that, if allegations of torture or ill-treatment are raised at a later stage in a criminal

29 National expert report, p.58.

30 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak op. cit., pp. 8-10.

31 UN Committee Against Torture, List of Issues prior to the submission to the third periodic report of Kazakhstan (CAT/C/KAZ/3), 17 February 2011, para 10.

32 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, op. cit., para 64.

33 Ibid.

court case, and they have to be processed by the Prosecutor's Office, the latter, by demanding an investigation, basically admits that it has not fulfilled its monitoring role. Therefore, as underlined by the Special Rapporteur, while the prosecutors appear to have some formal control over the police (illegally detained persons were indeed released following the prosecutors' interventions), in many contexts, they appear to tend to ignore grave violations.<sup>34</sup>

### National Commissioner for Human Rights

The post of Commissioner was created by Presidential Decree of 19 September 2002 no. 947 to which the Statute of the Commissioner for Human Rights was added. The Decree remains the legal basis for the Commissioner's activities.

The Commissioner is appointed by the President of the Republic upon non-binding advice from the Parliament (para. 8 of the Statute). The term of office of the Commissioner is five years and is renewable once (paras. 10-11 of the Statute). The Commissioner can appoint their own staff (at present this is a staff of 12) – the National Centre for Human Rights which assists the Commissioner in carrying out his or her function.<sup>35</sup> Funded by the state budget, the Commissioner has a broad mandate which includes, among other things, the ability to investigate allegations of torture (a special working group has been created within the Commissioner's office)<sup>36</sup> and in so doing to visit places of deprivation of liberty (article 21(1)(4) of the Penal Code and para. 15(5) of the Statute), however the applicable legislation does not specify whether the visits should be unannounced or whether the Commissioner may meet the detainees in private. However, according to clause 5 of para. 15 of the Statute, the Commissioner has the right to enter the headquarters of government organs on the presentation of ID, and also to visit places of detention and meet and talk with those detained there, which is

interpreted by the Ombudsman Office as the right to enter pre-trial detention facilities unhindered.

The Statute severely restricts the Commissioner's mandate; he is prevented from examination of actions of the General Prosecutor of Kazakhstan and of the cases concluded by a judgment of a court in Kazakhstan (para. 18) (e.g. a criminal case where the defendant is convicted on the basis of evidence obtained under torture falls outside of the Commissioner's mandate because it was concluded by a final court judgment). However, in practice, the Commissioner indeed examines cases concerning judicial and the General Prosecutor's decisions.<sup>37</sup> Where the Commissioner finds a violation of constitutional rights, he or she may forward his recommendations to the public official concerned who should inform the Commissioner of the measures undertaken to remedy the violation within 30 days (paras. 25-26 of the Statute). The Commissioner also publishes annual reports which mention visits to a range of places of detention including psychiatric hospitals as well as penitentiary facilities.

The Commissioner is not considered to be sufficiently independent, has limited resources (both human and financial) and does not have regional offices in this vast state.<sup>38</sup> His mandate is also not defined by law, but by Presidential decree, and he cannot investigate allegations against the actions of the General Prosecutor and all cases decided by the courts.<sup>39</sup> The impact of his findings are considered inadequate.<sup>40</sup> The office does not function in compliance with the Paris Principles.<sup>41</sup> In particular, there have been no criminal investigations into allegations of torture opened upon the Commissioner's motion. Even though the Commissioner has the right to unannounced access to detention facilities, in practice, the schedule of his visits is made known to the penitentiary administration beforehand and nothing is done by the Commissioner to prevent

<sup>34</sup> Ibid., para. 55.

<sup>35</sup> Approved by Presidential Decree no. 992 of 10 December 2002 on the Establishment of the National Centre on Human Rights.

<sup>36</sup> The Commissioner's 2010 Report, p. 87.

<sup>37</sup> Ibid., p. 14.

<sup>38</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, op. cit., para 65.

<sup>39</sup> Concluding Observations of the Committee Against Torture, op. cit., para. 23.

<sup>40</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, op. cit., para 65.

<sup>41</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights, op. cit., pp.3, 6, 8, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/428/62/PDF/G1042862.pdf?OpenElement>.

such leaks. The Commissioner has not been accredited by the ICC. According to information from the Ombudsman Office, ‘in certain cases, those managing the penal system are warned of visits no earlier than 24 hours before the visit’.

In July of this year, the Commission underwent accreditation in the International Coordinating Committee of Human Rights Institutions under the UN High Commissioner for Human Rights, achieving ‘B-list’ status.

### Public Monitoring Commissions (PMCs)

Established by legislative amendments of 29 December 2004,<sup>42</sup> and falling under the Ministry of Justice, their mandate is set out in Article 19-1 of the Penal Code. Generally, the PMCs are designed to assist detainees in enjoying their rights and freedoms, especially with respect to conditions of detention and medical assistance. Article 19-2(1) of the Code provides that a delegation of at least two members has ‘unimpeded access to prisons and detention facilities’ although this is ‘in the manner prescribed by the authorised body of the correctional system’. PMCs therefore need to seek prior authorisation before entry,<sup>43</sup> and indeed there were statements that they had been denied access.<sup>44</sup> In practice, initially the PMCs were required to provide a yearly plan of the visits to the penitentiary administration, later this was reduced to notifications one day prior to the visit (and this in order to ensure that no operative activities are conducted on that particular day in a particular detention facility). This varies from one region to another – in the Northern Kazakhstan and Kostanay regions, access was occasionally denied. Pre-trial detention facilities of the Committee of National Security fall outside the mandate of the PMCs. In the Almaty region the visits were made, but no regular monitoring was possible.

The PMC members may meet detainees and receive complaints from them. Article 19-2(2) of the Code specifies that this is done with the detainees’ consent, which allows the penitentiary administration to deny access to certain detainees, citing their

alleged lack of consent or other reasons – but in the Pavlodar and Almaty regions, such cases were not recorded. The reasons cited may include that a particular detainee is ‘a criminal authority’, absent for investigation or guarded by the Financial Police rather than usual Ministry of Justice or Ministry of Interior (after 2011) staff. According to para. 73 of the Rules on the Internal Structure of Correctional Facilities, only the treatment addressed to bodies carrying out monitoring and supervision of correctional facilities. Complaints to PMCs do not fall under this category. In one case in the Kostanay region, the penal administration managed to take under its own jurisdiction all the complaints from the members of the PMC who received them.

Rules concerning the composition of the PMCs were adopted by the Governmental Decree of 16 September 2005 no. 924. One PMC was created in every region of Kazakhstan (but there is no coordinating body on a national level – though this is envisaged, at least informally). Members of NGOs are chosen on a voluntary basis (para. 6 of the Rules), there are 3 to 9 members on every commission (para. 8 of the Rules) and no criteria for selection is established in case there are more than nine applications (such issues arose in Almaty, and some applicants were placed on a waiting list, according only to the date of applications); there is nothing preventing two PMC members being nominated by the same NGO (there are commissions with more than one member of the same NGO present, but in some regions, like Pavlodar, only two NGOs are interested in participation in the PMC and tighter rules on representation would make the commission inoperable). In practice, the PMCs consist of human rights activists, lawyers, doctors and journalists. The first PMCs were created by those NGOs which had cooperated with PRI and the Kazakhstan International Bureau on Human Rights and International Law, which had a positive effect on their composition and working methods. They operate in all 15 of Kazakhstan’s provinces as well as in the cities of Almaty and Astana. There is, however, no regular budget and they often funded by international donors (travel is an important issue given the distances the PMC members have to cover in Kazakhstan in order

<sup>42</sup> Kazakhstan Legislation on Institutions of Administration of Justice Amendment Act.

<sup>43</sup> Article 4, Regulations on the Visiting of Institutions that Carry out Punishment as well as Investigatory Isolation Installations by Private Persons of 7th January 2003, No.6.

<sup>44</sup> See Almaty Helsinki Committee Press Release on the Monitoring of Human Rights No.05/2006, May 2006, [www.humanrights.kz/press\\_review\\_12.php](http://www.humanrights.kz/press_review_12.php).

to move from one facility to another). There is limited coordination between the various commissions across the state<sup>45</sup> and although there is generally diversity in the professional specialisms of the members, some have found it difficult to recruit members.<sup>46</sup>

Although on the face of it, therefore, the PMCs do not appear to be independent, the national expert states that they 'remain one of the independent and effective bodies which monitor the places of deprivation of liberty. They are completely subordinated to the detaining body and they always work on the safety of detainees and their rights. However, they do not have unimpeded access to all places of detention.'<sup>47</sup> In particular, they have to notify the penitentiary administration of their plans for visits of the detention facilities and even in urgent cases notifications should be made one day in advance of the visit. Sometimes despite prior notifications the PMC members may be denied access to a detention facility or be forced to wait outside while the formalities for entry are being sorted out.

The PMCs' monitoring is primarily focused on the conditions of detention (including disciplinary cells) rather than on uncovering cases of torture, but they manage to meet detainees in private even though this is not provided for in the relevant legislation. PMC members consult the detainees on their rights (not necessarily linked to torture – this may involve pensions, family law, fair trial etc.) and distribute information to prisoners on human rights and prevention of torture. The PMCs monitor conditions of detention (including in disciplinary cells), medical treatment, access to information (information stands, libraries) etc.

As regards allegations of torture, most complaints are made on the phone – the PMCs privately visit the complainant in the detention facility and insist on forensic examinations (which are conducted in such cases), but days later the penitentiary administration usually replies with the news that

the complaint has been withdrawn. In one case in Almaty the investigation into the allegations of torture in a detention facility was pursued and resulted in a successful prosecution (and it is the only such case in Kazakhstan). When the PMCs refer a particular matter to the prosecutors, the latter instruct the penitentiary authorities to investigate complaints brought against them and take the penitentiary administration's side. In cases where the

The PMCs can make recommendations to the relevant authorities regarding the rights of persons detained, both orally and in writing. Where the penitentiary administration is able to fulfill the recommendation itself (e.g. by providing information to the detainees on their rights by subscriptions; minor reparations like painting walls and even equipping a proper dentists' surgery), it does so, but problems arise where a recommendation requires public funding. However, some important changes were made to the legislation following the PMCs' recommendations: e.g. positions of lawyers and psychologists were created, window blindfolds were removed from windows of the detention facilities, toilets in the cells were separated and drinking water is now provided all the time.

According to the Commissioner's 2010 report, monitoring commissions were created within the Ministry of the Interior with the mandate covering temporary detention wards (IVS) administered by the ministry, and this was done without any legal basis.<sup>48</sup> Legislative amendments of 2011 now provide a legal basis, which is the same as for the PMCs; the only difference being that there may be up to 11 members on the commission. These commissions are yet to begin operating.

Members of PMCs worked on a bill 'On public monitoring' in to lobby the ministry to include, *inter alia*, the right to conduct surprise visits and to meet detainees in private. Further points advocated by NGOs include making public officials concerned obliged to react in writing to the PMC's conclusions

45 APT, OPCAT Database, Kazakhstan, available at [http://www.apt.ch/index.php?option=com\\_content&view=category&id=242&Itemid=237%E2%8C%A9=en](http://www.apt.ch/index.php?option=com_content&view=category&id=242&Itemid=237%E2%8C%A9=en).

46 Amnesty International, Kazakhstan Summary of Concerns on Torture and Ill Treatment. Briefing before the UN Committee Against Torture, November 2008, AI Index: EUR 57/001/2008, p. 8.

47 The UN Committee Against Torture 'remain[ed] concerned that their access to IVSs is neither automatic nor guaranteed and that their access to medical institutions has yet to be considered. Furthermore, it has been reported that the commissions have not been granted the right to make unannounced visits to detention facilities, that they are not always given unimpeded and private access to detainees and prisoners, and that some inmates have been subjected to ill-treatment after having reported to the commissions' members'. (Concluding Observations of the Committee Against Torture, op. cit., para 22).

48 Commissioner's 2010 Report, p. 87.

within 10 days and the provision of government financial support for the annual publication of the consolidated PMC reports.

## NPM under OPCAT

Kazakhstan ratified the Optional Protocol to the Convention Against Torture on 22nd October 2008. However, in February 2010 it then made a declaration under Article 24 of OPCAT to postpone designation of its NPM. Earlier proposals included that the Public Monitoring Commissions carry out the role of the NPM under OPCAT, or that the Commissioner for Human Rights together with the Public Monitoring Commissions carry out the NPM mandate.

A draft law provided that the National Human Rights Centre, which is part of this Commissioner for Human Rights, would take the lead and contract out NPM work to NGOs who applied through a public tendering process. The Association for the Prevention of Torture (APT) and the Special Rapporteur raised several concerns with this proposal, including the challenges that this may raise regarding the relationship between the NGOs and the Human Rights Centre, and the idea of tendering was most severely condemned. This bill has been dropped. However, a return original draft is being discussed.

The most recent bill introduced by the Prime Minister of Kazakhstan and intended to come into force on 1 January 2013,<sup>49</sup> but not yet adopted by the Parliament, intends to entrust the NPM functions to the Commissioner for Human Rights, Public Monitoring Commissions and to public associations in general. The current draft law is not seen to be adequate in terms of the amount of detail it provides on the operation of the NPM and does not deal with all the OPCAT requirements.<sup>50</sup> Thus, none of the mentioned bodies currently possesses the mandate necessary to carry out the NPM functions and no legislative amendments are proposed to remedy this; there is potential to lift only a few of the currently existing restrictions on visits to detention facilities.

Further, designating an unspecified number of entities as the NPM would clearly undermine the

effectiveness of the latter: coordination of the work at any level and on any issue would hardly be possible and turn prevention of torture into fiction. APT also raised the concern that the Commissioner has limited human, financial and material resources to undertake regular monitoring of places of detention. Finally, the Commissioner does not have any regional offices, which may have a significant impact in implementation of the OPCAT, in particular in a country the size of Kazakhstan.<sup>51</sup> Given that this draft law stipulates that the Commissioner for Human Rights be part of the NPM (as the Commissioner himself wants<sup>52</sup>), the concerns raised above with respect to its lack of legal mandate and independence are particularly pertinent here.

On the other hand, the bill is supported by NGOs and PMCs, in particular, because tendering appears to have been replaced by goal-orientated funding of the PMC members' NPM activities. The provisions relating to financing the NPM, however, is not set out very clearly in the bill and the latest statement from the government proposes that the bill introduces tendering. The new bill also does not allow for expert participation in the monitoring visits, which was provided for in the previous version. Furthermore, the bill does not prevent punishment of prisoners for assisting members of the NPM on the grounds of national security the designation of PMCs (or even all public associations) as NPM ensures that human rights NGOs may act independently from the Commissioner for Human Rights.

## The legal framework relating to torture

Article 17 of the Constitution provides that a person's dignity shall be inviolable and that no one must be subject to torture, violence or other treatment and punishment that is cruel or degrading.

Torture is a criminal offence in national law as set out in the Criminal Code of Kazakhstan, Article 141-1 (formerly 347-1, the offence was moved from the 'crimes against justice' to 'crimes against persons').

<sup>49</sup> Hearings in the Majilis – the lower chamber of the Parliament – yet to take place (<http://www.parlam.kz/ru/mazhilis/document/id11/info13>).

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Commissioner's 2010 Report, p. 88.



In the article, the following definition of torture is provided:

*Intentional infliction of physical and (or) mental suffering by an investigator, the person exercising the inquiry, or any other official, or with their instigation, or with the acquiescence of the other person, or with their consent, to receive from the victim or third person information or a confession or to punish him for an act that they have committed or are suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind.*

The offence is ‘punishable by a fine of two hundred to five hundred tenge paid in monthly specified rates or in the amount of wages or other income for the period from two to five months, or deprivation of the right to hold certain positions for up to three years, or restraint of liberty for up to five years, or imprisonment for the same period’. Aggravating circumstances result in a maximum imprisonment of 7 years, and if death or serious bodily injury has been inflicted, then the term of imprisonment could be 5-10 years.

Despite revisions, the definition of torture is considered to be too narrow, as it does not cover acts of those ‘acting in an official capacity’, only ‘public officials’ and refers only to the more vague concept of ‘physical and mental suffering caused as a result of legitimate acts on the part of officials’, rather than ‘lawful sanctions’.<sup>53</sup> There is also no differentiation between torture and other prohibited types of ill-treatment, only torture having been criminalised. Inhuman or degrading treatment is prosecuted under Article 308 – abuse of official power – which is a serious crime, but does not allow for differentiation between different actions constituting the same crime according to this article.

The sentences for commission of torture are also not considered to be sufficiently strong<sup>54</sup> and very few people have been convicted of torture: 2 in 2005, 7 in 2006, 7 in 2007, 2 in 2008, 1 in 2009 and 6 in 2010.<sup>55</sup> This is despite a considerable number of complaints of torture and ill-treatment according to data from human rights organisations,<sup>56</sup> and even the Prosecutor’s Office.<sup>57</sup> Amnesty or impunity has been granted in practice to those convicted of torture (unless committed under aggravating circumstances – given that it is a usual practice to reduce the prison population by granting amnesty to those convicted of minor crimes, torture without aggravating circumstances is not a grave crime excluding the possibility of an amnesty).

Article 77(9) of the Constitution and 116(1)(1) of the Code of Criminal Procedure prohibit the use of evidence in court which is obtained through torture. A Supreme Court ruling with reference to the latter article required the courts to refer the cases where the defendant alleged that evidence was obtained under torture to the prosecutors who were to report to the trial court (but the original criminal proceedings should not be suspended). Usually the prosecutor provides the court with a decision not to open a criminal case. Any motions to the prosecutor of allegations of torture within the framework of inquiry are forwarded to the trial court dealing with the case against the person who claims to be the victim, without further inquiry.

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment notes in his 2009 report that although safeguards are provided in law, they are not respected in practice.<sup>58</sup> It would also appear that statements alleged to have been obtained through torture or other ill treatment are used in practice and are not held to be inadmissible by the courts. Furthermore, the burden of providing proof is on the alleged victim to show that torture was inflicted.<sup>59</sup>

53 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, op. cit.

54 Concluding Observations of The Committee Against Torture, op. cit., para 17.

55 Statistics provided by the Committee on legal statistics and special accounts of the General Prosecutor of Kazakhstan.

56 In 2010, according to preliminary data of Kazakh human rights organizations, there have been 263 requests from citizens with complaints of torture and ill-treatment (for information: 2009 – 286 complaints, in 2008 – 212, in 2007 – 178, in 2006 – 137, in 2005 – 64 and in 2004 – 104).

57 Statistics provided by the Committee on legal statistics and special accounts of the General Prosecutor of Kazakhstan.

58 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, op. cit., pp.18-19.

59 Article 124 of the Penal Code.

Kazakhstan has adopted a number of recent laws which improve the rights of detainees. These include legislation which enables different categories of prisoners to be detained in the same institution but under different regimes, which will enable prisoners to be held closer to their homes;<sup>60</sup> criminal liability for torture; medical examination of detainees in SIZOs and temporary pre-trial detention wards (IVSs);<sup>61</sup> and an order enabling allegations of torture to be verified by civil society organisations.<sup>62</sup> Furthermore, in a 2008 judgment, the Constitutional Council struck down a provision of the Penal Code which provided for the prosecution of detainees for self-harming.<sup>63</sup> The Constitutional Council held that the conditions of detention in prisons are not always compatible with the applicable legislation and that the detainees had a right to freedom of expression which included, as a last resort, self-harming. This is used as a last resort by the prisoners. However, the 2011 amendments to article 360(3) of the Criminal Code made it possible to prosecute prisoners for 'organisation of mass disobedience to lawful orders of the penitentiary administration', in particular, in the form of 'self-harming'. Thus the effect of the 2008 Constitutional Council judgment was reduced to nothing.

## Conclusions and recommendations

Although there is progress towards the designation of an NPM under OPCAT, various concerns remain as to the extent to which the Commissioner and his Centre are able to comply with the treaty provisions. A number of amendments would need to be made to ensure that it is effective as a preventive monitoring body.

Despite the apparent lack of liberal decision-making mechanisms and a one-party-dominated parliament, civil society can be a major lobbyist for change. The authorities of Kazakhstan are attentive to the international reputation of their state, so that this

argument may be used in convincing the authorities to adopt rules and create mechanisms aimed at combating torture.

Considering the above, the following recommendations can be made:

### *Generally:*

- The definition of torture should be amended to comply with Article 1 of UNCAT;
- The transfer of the penitentiary system back to the Ministry of the Interior should be revoked;
- Greater guarantees should be provided for detainees to have access to a lawyer, a doctor and members of their families; arrests should be properly registered;
- Defence lawyers should be permitted to gather evidence;
- There should be appropriate training for lawyers and judges, in particular regarding evidence obtained by torture and proper justification of decisions concerning placement into custody;
- 'Additional investigation' should be abolished; if there is no evidence of guilt the defendants should be acquitted;
- Allegations of torture should be promptly and effectively investigated; victims of violations should receive adequate compensation;
- Separation between different types of detainees should be effected in practice;
- Mental health patients' rights should be respected;

60 Further Improvements to the Penal Correctional System Amendment Act, signed on 10 December 2009.

61 Orders of the Minister of Justice (No. 30 of 1 February 2010), the Minister of Health (No. 56 of 29 January 2010), the Minister of Internal Affairs (No. 41 of 1 February 2010) and the Chairperson of the National Security Committee (No. 15 of 30 January 2010).

62 Order of the Minister of Justice (No. 31 of 2 February 2010), the General Prosecutor (No. 10 of 3 February 2010), the Minister of Internal Affairs (No. 46 of 2 February 2010), the Chairperson of the National Security Committee (No. 16 of 2 February 2010) and the Chairperson of the Agency to Combat Economic Crime and Corruption (No. 13 of 2 February 2010). See UN Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention – Additional follow-up information provided by Kazakhstan on the implementation of the concluding observations of the Committee against Torture (CAT/C/KAZ/CO/2), (CAT/C/KAZ/CO/2/Add.2), 11 April 2011.

63 <http://www.constcouncil.kz/rus/resheniya/?cid=9&rid=391>.

- An independent and effective complaints mechanism should be established to enable individuals in boarding schools to submit claims on ill treatment;
- The prohibition of corporal punishment should be respected in practice;
- Decisions and recommendations of UN and OSCE bodies should be implemented;
- Courts should be encouraged to refer cases concerning constitutionality of legislation to the Constitutional Council and consider presenting individual complaints to the Constitutional Council.

#### *With respect to the Commissioner for Human Rights:*

- The independence of the National Commissioner on Human Rights should be ensured by way of elections by the parliament;
- The mandate of the National Commissioner on Human Rights should be defined by law and should be amended to enable him/her to investigate allegations of violations of rights by the Prosecutor;
- Judicial decisions should not prevent the Commissioner from examining complaints;
- The legislation on the National Commissioner for Human Rights should be brought into compliance with the Paris Principles;
- The Commissioner should be encouraged to examine cases of torture and to visit detention facilities;
- The office of the Commissioner should open regional offices in every region (or in as many regions as possible).

#### *With respect to the PMCs:*

- The legal framework for the activities of PMCs should be set out in an act of parliament rather than in an executive resolution;
- The mandate of the PMCs should be extended to cover all detention facilities and closed institutions, or other mechanisms should be created to monitor the facilities currently outside the PMC mandate;
- PMCs should be allowed to make unannounced visits and meet detainees in private and at any time (including public holidays and emergency situations);
- PMCs should automatically report all cases both of death or suicide in detention facilities;
- Authorities should be put under a legal obligation to react in writing and within the prescribed time-limit (e.g. one month) to the violations of the detainees' rights established by the PMCs;
- Adequate funding should be provided by the state to enable the PMCs to function effectively;
- PMCs should be consulted (e.g. by way of parliamentary hearings) on the draft legislation within the field of their mandate; such bills should be made public before their adoption.

#### *With respect to the NPM:*

- The draft legislation establishing the NPM should be amended to ensure it complies fully with OPCAT provisions (in particular, in terms of the independence of the NPM);
- The bill should be drafted to clearly exclude tendering procedures;
- The bill should allow for the participation of experts in visits to detention facilities;
- The bill should absolutely prohibit punishment for cooperation with the NPM;
- After the mentioned amendments have been made, the NPM legislation should be adopted without delay.

## Kyrgyzstan (as of 2012)

### Introduction

The Kyrgyz Republic has a population of 5.4 million, in a total area of about 198,500 square kilometres.<sup>64</sup> The majority of the population are ethnic Kyrgyz, with Slavs and Uzbeks as the largest minorities.<sup>65</sup> The official languages are Kyrgyz and Russian and the main religions are Sunni Islam and Orthodox Christianity.<sup>66</sup> The country borders Uzbekistan, Kazakhstan, Tajikistan and China.

In 2010 there was a violent change of government when President Bakiev was overthrown. A provisional government was set up and now has to deal with the challenges left by the previous regime including corruption, crime and economic failure. There is concern that the new government is not up to the challenge<sup>67</sup> and there has been violence and clashes between ethnic groups across the country.<sup>68</sup>

In June 2010 a referendum resulted in the adoption of a new constitution forming a mixed parliamentary and presidential system.<sup>69</sup> The President is the head of state with significant powers and the parliament, the Jogorku Kenesh is elected by proportional representation.<sup>70</sup> There are still concerns that too much power remains in the hands of the president.<sup>71</sup> The government has faced considerable difficulties in controlling areas of the country with deep ethnic divisions.<sup>72</sup> However, parliamentary elections in late 2010 were considered to be free and fair.<sup>73</sup>

The Provisional Government dissolved the Constitutional Court back in April 2010. The new

Constitution provides that a Constitutional Chamber of the Supreme Court be entrusted with the judicial review of the constitutionality of statutes. A statute governing the proceedings before that Chamber was adopted back in May 2011, but because of political disagreements the authorities have failed to appoint the judges so far and the Chamber is yet to become operational.

This report will set out the applicable legal rules and the main problems in the field of human rights, generally and with particular focus on the prevention of torture, as well as the system of places of detention and restriction of liberty in place in Kyrgyzstan. It will then examine the efficiency of the existing monitoring mechanisms, including the proposals for the establishment of the NPM.

### Legal framework for the prohibition and prevention of torture and other ill-treatment

#### International treaties

A list of human rights is contained in the Constitution and Article 6 provides that international human rights treaties to which the Kyrgyz republic is party are part of the legal system of the country and have direct action and take priority over other international treaties; however their relationship with the provisions of domestic law has not been clearly spelled out.<sup>74</sup>

64 Embassy of the Kyrgyz Republic, Available at: [http://www.kgembassy.org/index.php?option=com\\_content&view=article&id=111&Itemid=224](http://www.kgembassy.org/index.php?option=com_content&view=article&id=111&Itemid=224).

65 Minority Rights Group International, Kyrgyzstan Overview, 2010, Available at: <http://www.minorityrights.org/2346/kyrgyzstan/kyrgyzstan-overview.html>.

66 Ibid.

67 International Crisis Group, Kyrgyzstan—A Hollow Regime Collapses, 27 April 2010, Available at: [http://www.crisisgroup.org/~media/files/asia/central-asia/kyrgyzstan/193\\_the\\_pogroms\\_in\\_kyrgyzstan.ashx](http://www.crisisgroup.org/~/media/files/asia/central-asia/kyrgyzstan/193_the_pogroms_in_kyrgyzstan.ashx).

68 Amnesty International, Annual Report 2011—Kyrgyzstan, 12 May 2011, Available at: <http://www.amnesty.org/en/region/tajikistan/report-2011>.

69 World Bank, Country Brief 2010, September 2010, Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/KYRGYZEXTN/0,,contentMDK:20629311~menuPK:305768~pagePK:141137~piPK:141127~theSitePK:305761,00.html>.

70 Kyrgyzstan Inquiry Commission, Report of the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan in June 2010, May 2011, pp. 64-65, available at: [http://www.k-ic.org/images/stories/kic\\_report\\_english\\_final.pdf](http://www.k-ic.org/images/stories/kic_report_english_final.pdf).

71 FIDH, Kyrgyzstan: A weak state, political instability: civil society caught up in the turmoil, 4 October 2010, pp. 18-19, Available at: <http://www.fidh.org/Kyrgyzstan-A-weak-state-political-instability>.

72 Radio Free Europe/Radio Liberty, Breaking Kyrgyzstan's Cycle Of Violence, 17 June 2010, Available at: [http://www.rferl.org/content/Commentary\\_Breaking\\_Kyrgyzstan\\_Cycle\\_Of\\_Violence/2074823.html](http://www.rferl.org/content/Commentary_Breaking_Kyrgyzstan_Cycle_Of_Violence/2074823.html).

73 OSCE, Kyrgyz Republic—Parliamentary Elections, 11 October 2010, Available at: [http://www.osce.org/documents/odihr/2010/10/47026\\_en.pdf](http://www.osce.org/documents/odihr/2010/10/47026_en.pdf).

74 Kyrgyzstan Inquiry Commission, *op. cit.*, pp. 64-65.

The Kyrgyz Republic has ratified a number of international human rights treaties, including International Convention on the Elimination of All Forms of Racial Discrimination (Accession 5 September 1997); International Covenant on Economic, Social and Cultural Rights (Accession 7 October 1994); International Covenant on Civil and Political Rights, (Accession 7 October 1994); Optional Protocol to the International Covenant on Civil and Political Rights (Accession 7 October 1994); Convention on the Elimination of All Forms of Discrimination against Women (Accession 10 February 1997); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Accession 22 July 2002); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Accession 5 September 1997); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Accession 29 December 2008); Convention on the Rights of the Child (Accession 7 October 1994); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Accession 6 December 2010). Kyrgyzstan made no reservations or declarations with regard to the above treaties. It has been found to be in violation of its international treaty obligations on a number of occasions, including relating to failure to conduct proper investigations.<sup>75</sup>

Kyrgyzstan is also a member of the Shanghai Cooperation Organisation<sup>76</sup> and the Collective Security Treaty Organization (CSTO).<sup>77</sup>

### Prohibition of torture in domestic law

The constitution of Kyrgyzstan provides a number of provisions underscoring the protection of human rights, including prohibitions of death penalty, torture and other cruel, inhuman or degrading treatment

or punishment, slavery, human trafficking etc. The Constitution provides protection for detainees, requiring them to be brought before a judge within 48 hours, and the opportunity to have a lawyer from the moment they are arrested. They should be immediately informed of the reasons for their arrest. This is also provided for in Article 40 of the Code of Criminal Procedure Kyrgyzstan. Under the Emergency Law, initial detention can only be extended beyond 48 hours in clearly defined circumstances.<sup>78</sup>

Article 305-1 of the Criminal Code outlaws torture<sup>79</sup> and it is defined as:

*Deliberate infliction of physical or mental suffering to any person for the purpose of obtaining information or confession for the person, punishing him for committed act or for the act in commission of which the person is suspected, as well as for the purpose of intimidating and compelling the person to commit certain actions, if these acts are committed by an official or any other person with the knowledge or consent of an official, shall be punishable by deprivation of liberty for a term of three to five years with disqualification to hold specified offices for a term of one to three years or without such disqualification.*<sup>80</sup>

Torture is also an aggravating circumstance of the crime of torment (article 111 of the Criminal Code), that is infliction of physical or moral suffering by way of beatings or other violent actions, if that does not lead to grave or serious bodily harm (prohibited by articles 104 and 105 of the Criminal Code). The punishment provided for torment aggravated by torture goes up to five years in prison.

The definition of torture, however, is not considered to be in compliance with UNCAT Article 1 and despite what protection there is, there is evidence that these 'these rights have been systematically ignored.

75 UN Human Rights Committee, Communications No. 1275/2004 (CCPR/C/94/D/1275/2004), 20 November 2008, pp.10-11.

76 <http://www.sectsc.org/EN/>.

77 UN Human Rights Council, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1–Kyrgyzstan (A/HRC/WG.6/8/KGZ/1), 22 February 2010, p. 15, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/111/53/PDF/G1011153.pdf?OpenElement>.

78 HRW, Where is the Justice? Interethnic Violence in Southern Kyrgyzstan and its Aftermath, August 2010, Available at: [http://www.humansecuritygateway.com/documents/HRW\\_Kyrgyzstan\\_WhereIsTheJustice\\_InterethnicViolenceInSouthernKyrgyzstanAndItsAftermath.pdf](http://www.humansecuritygateway.com/documents/HRW_Kyrgyzstan_WhereIsTheJustice_InterethnicViolenceInSouthernKyrgyzstanAndItsAftermath.pdf).

79 ICG, Kyrgyzstan: The Challenge of Judicial Reform Crisis Group Asia Report N°150, 10 April 2008, p.16, Available at: [http://www.crisisgroup.org/~/media/Files/asia/central-asia/kyrgyzstan/150\\_kyrgyzstan\\_\\_the\\_challenge\\_of\\_judicial\\_reform.ashx](http://www.crisisgroup.org/~/media/Files/asia/central-asia/kyrgyzstan/150_kyrgyzstan__the_challenge_of_judicial_reform.ashx).

80 as amended by Law of the Kyrgyz Republic of November 15, 2003, no. 223, Source: Criminal Code Of The Kyrgyz Republic, 1997, Available at: <http://www.oecd.org/dataoecd/36/52/46816567.pdf>.



Interrogations have occurred in the absence of legal representation. The majority of detainees were allowed access to a lawyer only after a confession had been obtained and, even then, were not allowed to consult the lawyer in private. Many detainees have not been allowed to choose their own lawyer, even when one had been retained on their behalf by their family. State appointed lawyers have consented to matters being sent for trial, making it more difficult for private lawyers to gain access to the prosecution evidence'.<sup>81</sup>

Although the government asserts that allegations of torture have been prosecuted,<sup>82</sup> NGO reports claim otherwise, in part because the prosecutor no longer visits temporary detention facilities.<sup>83</sup> Be that as it may, but the most recent report of the UN Special Rapporteur related the official statistics on prosecutions, according to which only seven cases of torture reached the courts in 2010-2011 (with no convictions recorded so far) and further three officials were sentenced to disciplinary sanctions.<sup>84</sup>

Health services do not always issue medical certificates for those who have been subject to torture and there are considerable difficulties in gaining compensation for violations.<sup>85</sup> Furthermore, despite the constitutional protection, in practice there

is evidence of lawyers being prevented access to their clients.<sup>86</sup>

The death penalty was replaced by life imprisonment in 2007.<sup>87</sup>

## Overview of the human rights situation

A major problem is considered to be the lack of the rule of law<sup>88</sup> and there are ongoing concerns about serious human rights violations in the country, including torture and ill treatment in detention centres.<sup>89</sup> Anti-corruption efforts in Kyrgyzstan have faltered despite efforts to reduce bribery.<sup>90</sup> There is widespread criminality and drug trafficking is a serious problem.<sup>91</sup> Concerns have been raised about the treatment of minority groups including Uzbeks, and ethnic tensions.<sup>92</sup> Reports of human rights violations continue after the unrest in June 2010.<sup>93</sup>

There are numerous cases of torture and ill treatment that have been documented by many and the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan noted 'The frequency and gravity of allegations raised serious concern'.<sup>94</sup>

81 Kyrgyzstan Inquiry Commission, *op. cit.*, paras 293-295.

82 'According to the statistical data of the Procurator-General, three cases were prosecuted under article 305-1 (torture) of the Criminal Code between 2007 and 2009', UN Human Rights Council, National report *op. cit.*, pp.7-8, para 36.

83 ICG, Kyrgyzstan: The Challenge of Judicial Reform, Crisis Group Asia Report N° 150, 10 April 2008, pp. 15-16, Available at: [http://www.crisisgroup.org/~media/Files/asia/central-asia/kyrgyzstan/150\\_kyrgyzstan\\_\\_the\\_challenge\\_of\\_judicial\\_reform.ashx](http://www.crisisgroup.org/~media/Files/asia/central-asia/kyrgyzstan/150_kyrgyzstan__the_challenge_of_judicial_reform.ashx).

84 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Kyrgyzstan, 21 February 2012, UN Doc. no. A/HRC/19/61/Add.2, para. 54.

85 Kyrgyzstan Inquiry Commission, *op. cit.*, para 296.

86 Institute for Public Policy, Torture: The Situation in Kyrgyzstan, 11 August 2008, Available at: [http://www.ipp.kg/en/analysis/690/Institute for Public Policy.pdf](http://www.ipp.kg/en/analysis/690/Institute%20for%20Public%20Policy.pdf).

87 Act No. 91 of 25 June 2007, UN Human Rights Council, National report, *op. cit.*, para 67.

88 Institute for Public Policy, Torture: The Situation in Kyrgyzstan, 11 August 2008, *op. cit.*

89 Kyrgyzstan Inquiry Commission, *op. cit.*, pp. ii-iii.

90 IWPR, Anti-Corruption Efforts Falter in Kyrgyzstan, 11 November 2010, Available at: <http://iwpr.net/report-news/anti-corruption-efforts-falter-kyrgyzstan>; see also Freedom House, Freedom in the World—Kyrgyzstan (2010), 12 January 2010, Available at: <http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7856>.

91 VOA, Kyrgyzstan Unrest Reveals Influence of Drug Money, Organized Crime, 29 June 2010, Available at: <http://www.voanews.com/english/news/asia/Kyrgyz-Unrest-Highlights-Influence-of-Organized-Crime-97389924.html>.

92 ICTJ, Kyrgyzstan in Transition, August 2010, Available at: <http://www.ictj.org/static/Publications>.

93 Refugees International, Island of Democracy Becoming an Island of Anarchy, 15 July 2010, available at: <http://www.refugeesinternational.org/press-room/oped/island-democracy-becoming-island-anarchy>; Kyrgyzstan Inquiry Commission, *op. cit.*, pp. ii-iii; HRW, Kyrgyzstan: New Evidence Emerges on Brutality of Attacks, 25 June 2010.

94 UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan (A/HRC/17/41), 1 April 2011, para 48. Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-41.pdf>.

There are a number of human rights groups operating in the state, some of whom have a specific interest in torture.<sup>95</sup>

Many consider that there is a great need for police reform to deal with lack of professionalism and capacity.<sup>96</sup> There is a lack of public support for the police.<sup>97</sup>

## Particular issues of concern relating to torture and other ill treatment

There are ongoing concerns of abuse in police custody and detention, particularly post arrest and during investigation and during pre-trial detention facilities (SIZO):<sup>98</sup>

“According to data collected by members of the Coalition on Prevention of Torture, some 90% of torture cases discovered by human rights activists between March 2007 to April 2008 in Kyrgyzstan, occurred in the temporary detention wards of the Ministry of Internal Affairs.

Of 59 cases of torture, 53 were took place in temporary detention wards, one occurred at the Committee for National Security, one at an army facility, one at a juvenile detention centre, and three at other state facilities.

- 71% of complaints (42 cases) of torture were made by victims to human rights activists during monitoring of restricted facilities
- 20.3% of complaints came from relatives
- 3.4% of complaints came from partner organizations and attorneys. According to the Coalition’s data, the torture victims included three women and 11 juveniles. Most of the victims of torture were either between the ages of 26 and 40 (23 cases) or between the ages of 18 and 25 (17 cases).<sup>99</sup>

There are cases reported of torture and other ill treatment by law enforcement officials,<sup>100</sup> particularly following the events in June 2010.<sup>101</sup> Amnesty International states in its 2011 annual report that trial standards fell short of international norms<sup>102</sup> and medical examination is often refused.<sup>103</sup>

Although the number of criminal cases opened into the cases of torture (not necessarily under article 305-1 of the Criminal Code, but also under other provisions) is growing (34 in 2010, 53 in 2011), investigations into allegations of torture are deemed to be inadequate<sup>104</sup> and evidence ‘a pattern in the Kyrgyz Republic of torture by the police during early periods of unregistered detention and a failure by the authorities to independently and effectively investigate cases of torture and deaths in custody’.<sup>105</sup> Furthermore, prosecutors do not

95 E.g. Ventus human rights group (head—Kamil Ruziev); Kylum Shamy—*Torch of the Century* (head—Aziza Abdirasulova) See URL: <http://www.hivos.nl/english/community/partner/10008658>; Spravedlivost /Justice (note: Valentina Gritsenko, Director, Spravedlivost (Jalalabad)); Coalition for Democracy and Civil Society—(head—Dinara Oshurakhunova); Council for the Defence of the Rights of Youth (head—Timur Shaikhutdinov); Tokmok Human Rights Resource Centre (head—Maxim Kuleshov); Law and Order (head—Izzatilla Rakhmatillaev); Kyrgyz Committee for Human Rights (KCHR) URL: <http://www.kchr.org/about-en.php>; The Coalition Against Torture—an umbrella group of non-government organisations from Kazakhstan, Tajikistan and Kyrgyzstan.

96 OSCE, Concept Paper Kyrgyz Republic: Police Reform Strategy, April 2005, Available at: <http://www.osce.org/bishkek/14201>. Central Asia Online, Kyrgyzstan police reform begins, 13 January 2011, Available at: [http://centralasiaonline.com/cocoon/caii/xhtml/en\\_GB/features/caii/features/main/2011/01/13/feature-01](http://centralasiaonline.com/cocoon/caii/xhtml/en_GB/features/caii/features/main/2011/01/13/feature-01).

97 IWPR, Kyrgyz Police Short on Public Support, 21 January 2011, Available at: <http://iwpr.net/report-news/kyrgyz-police-short-public-support>.

98 UN Human Rights Council, Fourteenth session, 28 May 2010: Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo—Mission to Kyrgyzstan (A/HRC/14/22/Add.2), 28 May 2010, para 39.

99 Institute for Public Policy, Torture: The Situation in Kyrgyzstan, 11 August 200, *op. cit.*

100 HRW, Kyrgyzstan: Torture, Detentions Escalate Tensions, 14 July 2010, Available at: <http://www.hrw.org/en/news/2010/07/13/kyrgyzstan-torture-detentions-escalate-tensions>.

101 Kyrgyzstan Inquiry Commission, *op. cit.*, pp. 56-57.

102 Amnesty International, Amnesty International Report 2011, 12 May 2011, pp.202-203, Available at: <http://www.amnesty.org/en/annual-report/2011>.

103 Human Rights Watch, World Report 2011, 2011, p.452, Available at: <http://www.hrw.org/en/world-report-2011>.

104 Ibid.

105 Soros Foundation, Communication to the United Nations Human Rights Committee In the case of Turdubek AKMATOV against the Kyrgyz Republic, 7 April 2011, pp.24-26; Amnesty International, Amnesty International Report 2011, 12 May 2011, p.203, Available at: <http://www.amnesty.org/en/annual-report/2011>; Amnesty International, Kyrgyzstan – Submission to the UN Universal Periodic Review Eighth session of the UPR Working Group of the Human Rights Council, May 2010, p.3.

initiate criminal proceedings in this respect.<sup>106</sup> The Special Rapporteur on independence of Judges and Lawyers has noted “the various limitations on the independence of the judiciary ... mean that judges regularly conduct proceedings in favour of the prosecution,”<sup>107</sup> and “note[d] with concern that the provisions of the prosecutor’s office are set out in the chapter of the Constitution relating to the executive power”.<sup>108</sup>

Confessions have been extracted under torture<sup>109</sup> and the judiciary have failed to uphold rights by ignoring allegations of torture.<sup>110</sup> The investigators are infrequently badly equipped and trained, so that they regard the recourse to torture as one of the means to collect missing evidence (impossible to collect because of the lack of equipment) and to meet the required figures for completed investigations upon which their remuneration depends.

At the same time, forensic examinations of the victims of torture are either delayed or conducted unprofessionally, both done in order to conceal cases of torture. Only state-provided forensic medical examination is available, independent forensic experts may be appointed by the court to conduct examinations, but these appointments are done with significant delay, so that traces of torture may have already disappeared by the date of the judicial decision to conduct an examination. State forensic medical examinations are limited to physical harm and do not examine psychological harm caused by torture.

There is harassment of defence lawyers.<sup>111</sup> Furthermore, recent amendments to Article 17 of the Custody Act severely restricted the access of lawyers to the defendants. Adopted without much public

debate and after much lobbying by the Penitentiary Service, they provide for a lawyer’s obligation to seek permission from the investigator or a judge to access his client in detention. Currently, a bill repealing these amendments is under consideration in the Jogorku Kenesh.

The penitentiary system suffers from a number of inadequacies including poor conditions and lack of appropriately trained staff.<sup>112</sup> Deaths in custody occur, including in the pre-trial detention facility of the National Security Service. In early 2011 riots occurred in a number of detention facilities and prisons in protest against conditions of detention and treatment of the detainees by the penitentiary service.<sup>113</sup> There is evidence of prisoner hierarchy, with the lowest category of prisoners suffering humiliating treatment as a result.<sup>114</sup>

There are particular concerns for prisoners sentenced to life.<sup>115</sup> The most pressing issues relating to life imprisonment are: a need to replace life imprisonment with 25 years of deprivation of liberty as a fixed punishment; a need to review legal norms that discriminate against life prisoners vis-à-vis other types of prisoners, including in their right to be considered for parole; and the need to build additional facilities for life prisoners. The Government has elaborated a national programme (“Umut II”) for 2012-2016 to replace the previous programme that expired in 2010, which will set out a conceptual framework for developing the penitentiary system’.

Particular problems were raised because of the inter-ethnic violent clashes (killings, hostage taking and torture) that took place in South Kyrgyzstan, particularly in Osh and Jalalabad in June 2010. The clashes were followed by trials against those Uzbeks

106 The Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kyrgyzstan, 18-22 September and 1 October 2005, U.N. Doc. E/CN.4/2006/52/Add.3, at para. 29.

107 Ibid, at para. 51.

108 Ibid., at page 2; see also para. 76. The 2010 Constitution no longer places the provisions on the *prokuratura* in the chapter on judiciary.

109 Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan, *op. cit.*, pp. 8-10.

110 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, *op. cit.*, para 41.

111 Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan, *op. cit.*, para 38.

112 Ibid., p.9.

113 <http://www.bbc.co.uk/news/world-asia-16722757>.

114 ICG, Kyrgyzstan’s Prison System Nightmare – Asia Report N° 118 – 16 August 2006, p.13, Available at: [http://www.crisisgroup.org/~media/Files/asia/central-asia/kyrgyzstan/118\\_kyrgyzstans\\_prison\\_system\\_nightmare.ashx](http://www.crisisgroup.org/~media/Files/asia/central-asia/kyrgyzstan/118_kyrgyzstans_prison_system_nightmare.ashx).

115 Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan *op. cit.*, p. 9.

designated as instigators of violence against the Kyrgyz (despite the vast majority of victims being Uzbeks). There are serious allegations and evidence that Uzbek defendants were tortured in detention, then stoned by 'OBON'<sup>116</sup> at the courtroom and, finally, given disproportionately harsh sentences.<sup>117</sup>

With respect to particularly vulnerable groups, although treatment in some women's prisons may often be better than in others, there are concerns with respect to the facilities provided to minors who are detained.<sup>118</sup> There are also claims that there is poor treatment in the facilities for those with tuberculosis and HIV.<sup>119</sup>

Further concerns were raised by ICG regarding those with mental health difficulties, with few mental health professionals and lack of basic care.<sup>120</sup> Mental health patients are often particularly vulnerable to exploitation.<sup>121</sup> Other vulnerable groups include, in particular, those with drug addictions who fail to obtain humane treatment in health care facilities,<sup>122</sup> Uzbek minorities,<sup>123</sup> and sexual minorities.

The most recent report of the UN Special Rapporteur on Torture lists the following problems: recourse to torture and other forms of ill-treatment, deaths in custody, lack of effective safeguards and prevention, that is unrecorded detention and denial of access to lawyer, evidence obtained under torture, lack of *ex officio* investigations, lack of independent medical examinations and shifting the burden of proof of torture on the victims, impunity and lack of effective investigations of allegations of torture, poor conditions of detention.<sup>124</sup>

## Overview of places of deprivation of liberty

State Penitentiary Service is an executive agency reporting directly to the Government of the Kyrgyz Republic rather than to a particular ministry. It administers six pre-trial detention centres; 10 correctional facilities (including three of strict regime, 4 intensive regime, and 2 for persons suffering from tuberculosis).<sup>125</sup> There is also one educational colony and 15 colonies-settlements.

One pre-trial detention facility is administered by the National Security Service (GSNB); this facility falls outside of monitoring mandate of all mechanisms. Conditions of detention and ways of treatment of the detainees of the GSNB-administered facility is not known to the public. Military servicemen accused of the commission of crimes or sentenced to disciplinary arrests are detained in disciplinary quarters (*Hauptwache*) and serve their sentences in the disciplinary military regiments if convicted. NGO Committee of Soldiers' Mothers have access to both types of facilities, but they are considered to be too dependent on the Ministry of Defence to press on investigation of allegations of torture which undermines the effectiveness of their monitoring.

Temporary detention wards for criminal defendants arrested pending judicial decision on their pre-trial detention and special accommodation centres for those sentenced to administrative arrest (up to 15 days for minor offences) are administered by the Ministry of Interior (Article 631 of the Code on Administrative Responsibility of the Kyrgyz Republic). Special accommodation centres for those arrested at the border are administered by the State Border Service.

116 Literally: 'women's special task force', from Russian *otryad bab osobogo naznacheniya*, copying a Russian abbreviation for special police task force, OMON (*otryad militsii osobogo naznacheniya*).

117 See, e.g., Human Rights Watch, "A Death Follows Police Torture" (<http://www.hrw.org/news/2011/08/11/kyrgyzstan-death-follows-police-torture>), "Violence in Courtroom" (<http://www.hrw.org/news/2011/09/21/kyrgyzstan-violence-courtroom>); KIC Report, op. cit., para. 277 et seq.

118 Ibid.

119 Ibid.

120 Ibid.

121 Soros Foundation, Government Accountability for Torture and Ill-Treatment in Health Settings, May 2011, p.3, Available at: [http://www.soros.org/initiatives/health/focus/law/articles\\_publications/publications/accountability-torture-health-20110511](http://www.soros.org/initiatives/health/focus/law/articles_publications/publications/accountability-torture-health-20110511).

122 Ibid.

123 Amnesty International, Annual Report 2011 – Kyrgyzstan, 12 May 2011, p.203, Available at: <http://www.amnesty.org/en/region/tajikistan/report-2011>.

124 Report of the UN Special Rapporteur on Torture Juan E. Mendez, op. cit., *passim*.

125 Description of places of deprivation of liberty is enshrined in the Criminal Execution Code of the Kyrgyz Republic.

Boarding schools for disabled children, orphanages, centres for rehabilitation of minors and elderly persons' homes are under the authority of the Ministry of Social Development, while psychiatric hospitals and units in hospitals for drug abusers are administered by the Ministry of Health.

Currently, there are around 9,500 persons imprisoned, which is a significant drop from more than 11,000 in 2008.<sup>126</sup> However, over the same period the number of life prisoners has increased from 164 to 257<sup>127</sup> which is a worrying trend, especially in view of the ethnic inequality in sentencing following the Osh events of June 2010.<sup>128</sup>

## Oversight mechanisms in place at the national level

### Internal bodies

The Ministry of Interior has a number of mechanisms for dealing with accusations that its employees engage in acts of torture, including requiring their staff to conduct preventive activities. Internal investigation of allegations is said by the government to occur and be reported to the Minister.<sup>129</sup> A special group within the Ministry looks at temporary holding facilities in particular.<sup>130</sup> However, the response of the authorities to allegations of torture has been said to be "grossly inadequate".<sup>131</sup>

### External bodies

An IWPR article of October 2009 underscores the difficulties national NGOs have experienced in monitoring detention facility standards: "Ernst Japarov, coordinator of the Voice of Freedom foundation in Kyrgyzstan, says NGOs are commonly turned down when they ask to visit prisons, as there

is no legal mechanism requiring the authorities to let them have access."<sup>132</sup>

### Prosecutor's Office

Under the Constitution and the 2009 *Prokuratura* Act the prosecutors in Kyrgyzstan are subordinated to hierarchically superior prosecutors and the Prosecutor-General, who is, in turn, accountable to the President of the Kyrgyz Republic and the Jogorku Kenesh, but to a different degree: the Prosecutor-General is appointed by the Jogorku Kenesh upon the President's proposal, but may be dismissed by the President unilaterally (article 11(1) of the 2009 Act). Consequently, once appointed, the Prosecutor-General would, in practice, be accountable to the President rather than the Parliament, while all lower prosecutors are subordinate to the Prosecutor-General (article 4(1) of the 2009 Act). Parliamentary participation in the dismissal of the Prosecutor-General has been introduced in the legislation in February 2012, but its effects are yet to be seen. In any event, the Prosecutor-General remains accountable to the President, as provided for in article 13(1) of the 2009 Act. The Prosecutor-General is appointed for a seven-year term and may be reappointed once; other prosecutors are appointed for five years and can not spend more than two consecutive terms at the same post (articles 19(1) and 19(2) of the 2009 Act).

Under the 2009 Act the prosecutors have a mandate of overseeing the places of detention (pre-trial detention facilities, correctional colonies and prisons), but it is limited to the review of the conditions of detention and of the legality of detention (article 31(1)-(2) of the 2009 Act). A prosecutor may visit places of detention and meet the detainees, as well as access the documents concerning the legality of their detention (article 38(1) of the 2009 Act). They may also issue binding orders to the penitentiary

126 Information obtained by the PRI office for Central Asia.

127 Ibid.

128 See the KIC report, cited above.

129 IWPR, Kyrgyzstan: Hopes for Stronger Anti-Torture Regulation, 2 October 2009, Available at: <http://iwpr.net/report-news/kyrgyzstan-hopes-stronger-anti-torture-regulation>.

130 Institute for Public Policy, Torture: The Situation in Kyrgyzstan, 11 August 2008, *op. cit.*

131 IWPR, Kyrgyzstan: Victims of Police Abuse Struggle for Justice, *op. cit.*

132 IWPR, Kyrgyzstan: Hopes for Stronger Anti-Torture Regulation, 2 October 2009, Available at: <http://iwpr.net/report-news/kyrgyzstan-hopes-stronger-anti-torture-regulation>.



administration aimed at improving conditions of detention (article 38(1)(4) of the 2009 Act).

The prosecution can investigate allegations of torture and ‘abuse of power’ under Article 305 of the same Code. However, there are allegations that the Prosecutor does not carry out adequate investigations and rarely visits the temporary detention facilities. When faced with questions concerning the reaction of the Office of the Prosecutor-General to the credible allegations of torture administered against community activist Mr. Azimzhan Askarov accused of inciting to violence in Bazar-Korgon in June 2010 (and later sentenced to life imprisonment), the then Deputy Prosecutor-General replied, “This is merely an opinion”.<sup>133</sup> This is due in part to the prosecutors’ dependence of the executive and in part to the conflicting mandate of the Prosecutor, as investigator on the one hand, and prosecutor on the other (and a supervisor as well): ‘Investigators and prosecutors have an effective private agreement: the prosecutor, who has issued the arrest warrant, wants to confirm the accusation and turns a blind eye to the complaints of torture by those under investigation.<sup>134</sup> However, in 2011 the Office of the Prosecutor-General instructed the lower prosecutors to strengthen the supervision over allegations of torture which brought about more than 40 opened investigations (they are yet to be followed by prosecutions).

### **Ombudsman**

The Office of the Ombudsman was established in 2002 in the framework of the implementation of the national human rights programme for 2002–2010<sup>135</sup> through the Law on Ombudsman (Akyikatchy) of the Kyrgyz Republic (the 2002 Act).

Under Article 4 of the 2002 Act the Ombudsman is appointed by the absolute majority vote of the members of the Jogorku Kenesh and the candidates may be proposed by the President of the Kyrgyz Republic, parliamentary factions, political parties and NGOs. S/he should be between 30 and 65 years old. The term of office of the Ombudsman is five years and s/he may be reappointed once.

The Ombudsman has a broad mandate, covering all rights as defined by national legislation as well as international treaties to which the state is party (Article 1 of the 2002 Act). The Ombudsman has a very broad range of powers: s/he may visit any detention facility and any place of restriction of liberty and any public or private body, meet the detainees in private (article 8(10) of the 2002 Act), question any public official, access any governmental records, apply to the Supreme Court and its the Constitutional Division, etc. The Ombudsman can receive and investigate non-anonymous complaints from any person, physical or legal, if there is a final judicial or administrative decision; applications from the detainees should not be subject to censorship (article 10 of the 2002 Act). If the Ombudsman establishes a violation of human rights, the impugned agency or public official is under an obligation to provide a reply within 30 days of the Ombudsman’s decision (article 10(17) of the 2002 Act). No further criteria of admissibility of complaints or remedies in cases of human rights violations are provided.

The Ombudsman published annual and special reports which are discussed at the plenary sessions of the Jogorku Kenesh where s/he is encouraged by law to name the agencies and public officials implicated in violations of human rights (article 11 of the 2002 Act).

However, the OHCHR has questioned the compliance of the ombudsman office with the Paris Principles, particularly in terms of its independence and effectiveness.

*‘In February 2011, the Chair of the Parliamentary Committee on Human Rights, Equal Opportunities and Public Associations initiated draft amendments to the Law on the Ombudsman of the Kyrgyz Republic in follow-up to previous meetings of the Committee. The proposed amendments fall short of the international principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) and, if adopted as drafted, will not seriously address the issue of the lack of independence and effectiveness of this institution.’<sup>136</sup>*

<sup>133</sup> FIDH report, cited above, p. 32.

<sup>134</sup> ICG, Kyrgyzstan: The Challenge of Judicial Reform, *op. cit.*, pp. 15-16.

<sup>135</sup> National report, Kyrgyzstan (A/HRC/WG.6/8/KGZ/1), *op. cit.*, p.5.

<sup>136</sup> Report of the United Nations High Commissioner for Human Rights on technical assistance and cooperation on human rights for Kyrgyzstan, *op. cit.*, pp. 8-9.

In practice the Ombudsman office regularly visits pre-trial detention facilities, temporary detention wards, psychiatric hospitals and institutions for children; these visits are reported by the Ombudsman in his reports to the Jogorku Kenesh. Most of the visits are conducted by the employees of the Ombudsman's office rather than by him personally. In 2007, on the initiative of Kyrgyzstan's human rights activists, a working group against torture was established under the Office of the Ombudsman of the Kyrgyz Republic. This group has investigated 22 charges of torture to date.<sup>137</sup>

### *Ad hoc arrangements*

In the absence of the functioning NPM or other general framework for monitoring of the places of detention, multiple *ad hoc* arrangements exist between authorities and NGOs allowing the latter to conduct visits to places of detention. Generally, an NGO specialising in one of the aspects of the rights of detainees (children's rights, rights of HIV-infected persons, rights of those convicted to life imprisonment etc.) applies to the relevant executive agency indicating the purpose of the visits, the identities of those NGO employees who would carry out the visits etc. The usual practice is that such applications are granted to a number of NGOs for a period of one year and regularly renewed, the visits are unannounced and the NGO employees conducting visits may meet detainees in private. However, concerns arise as to whether such permits may be granted in exchange of the NGOs not raising the issues of the detainees' rights publicly.

Another *ad hoc* arrangement currently under generalisation is the Ombudsman's outsourcing of some of his monitoring activities to the NGOs. In July 2011 the Memorandum was concluded between the Office of the Ombudsman and Public Foundation Kylym Shamy. Under the agreements, Kylym Shamy together with NGO Golos Svobody coordinated NGO activities of monitoring of temporary detention wards of the Ministry of Interior. The Ombudsman issued powers of authority to participating NGO members granting them his visiting and monitoring rights. However, the latter may infrequently face

denial of access to detention facilities, because the penitentiary administration does not consider the Ombudsman's power of attorney issued to human rights activists as a valid permission to enter into the detention facility (in that case the visitors relied on the Ministry of Interior order granting access to the members of the Public Council of the Ministry; see below in detail). Detention facilities should have been notified one day prior to the visit, but in most cases the visiting NGOs could meet detainees in private and make video records of the interviews.

Nevertheless, it is upon the Ombudsman's delegation that the first comprehensive monitoring of the temporary detention wards of the Ministry of Interior became possible.<sup>138</sup> 34 cases of serious allegations of torture were recorded during the first six months of the operation of the Memorandum, of which only one case is under active investigation by the Prosecutor's office and further cases where the prosecutors decided not to proceed with investigation are under appeal before the courts (victims were provided with assistance of *pro bono* lawyers).

In February 2012 opening for signature of the new draft Memorandum extending the scope and the participation of the July 2011 Memorandum was discussed. This would engage more public authorities in charge of places of deprivation or restriction of liberty and more NGOs (including regional organisations) in monitoring the conditions of detention and unveiling the cases of torture. It would provide for unannounced visits and the right of the NGOs involved in monitoring to meet detainees in private. The Memorandum was signed on 15 June 2012.

### *NPM*

Kyrgyzstan ratified OPCAT in December 2008. Only in 6 June 2011 a Draft Law 'On the National Centre of the Kyrgyz Republic on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'<sup>139</sup> was eventually introduced to the Jogorku Kenesh by a group of MPs belonging to different factions. It provided for a creation of the National Torture Prevention Centre ("the NTPC") to

<sup>137</sup> Institute for Public Policy, Torture: The Situation in Kyrgyzstan, 11 August 2008, *op. cit.*

<sup>138</sup> Torture prevention in temporary detention facilities under the Ministry of Internal Affairs of the Kyrgyz Republic. Monitoring. Reaction. Rehabilitation. Available at: [http://golossvobody.kloop.kg/files/2011/12/Torture-prevention-in-IVS\\_eng.pdf](http://golossvobody.kloop.kg/files/2011/12/Torture-prevention-in-IVS_eng.pdf).

<sup>139</sup> <http://www.kenesh.kg/lawprojects/lps.aspx?view=projectinfo&id=124332>.

be designated as NPM. The process appeared to have been transparent and involved a range of civil society actors and it received considerable support from these various stakeholders.<sup>140</sup> In particular, discussions open to the Ombudsman and NGOs were held in the Jogorku Kenesh on 14 September 2011.<sup>141</sup> However, the bill was not adopted at the plenary session of the Jogorku Kenesh held on 27 October 2011; it was remitted to the Committee on Human Rights and Equal Opportunities for reconsideration for the reason that, in the MPs' opinion, "a comprehensive approach to the reform of the law-enforcement bodies was required and the creation of the NTPC would not solve the problem of torture".<sup>142</sup> Although this latter formula appeared to have postponed the consideration of the NPM bill *sine die*, in early 2012 the discussions were renewed and the bill received the support from two Committees of the Jogorku Kenesh. It was eventually adopted and promulgated by the President on 13 July 2012.

According to the bill, the NTPC would be designated as NPM. As a separate entity it would have two-tier organisation, consisting of the Coordination Council and the Centre staff under the authority of the Director. The Coordination Council, elected for 4 years, would consist of 11 members, including the Ombudsman, a majority MP, an opposition MP and 8 NGO representatives (article 9(2) of the bill). Those latter would be chosen by drawing lots (article 10(3) of the bill). No member of the Coordination Council, except the Ombudsman, would be permitted to sit on it for more than two consecutive terms (article 9(3) of the bill).

Under article 11 of the bill the Coordination Council would be in charge of appointment of the NTPC Director and recruitment of staff, definition of the NTPC strategies and working methods, scrutinises legislative proposals in the field of prevention of torture. The NTPC Director would oversee the activities of the staff and report to the Coordination Council (article 14(4) of the bill). In particular, they would appoint groups of staff members in charge

of the visits of particular places of detention (article 25(2) of the bill). According to article 8 of the bill, the NTPC staff should be selected among lawyers, teachers, doctors, psychologists, psychiatrists, social workers experiences in work with minorities or other vulnerable groups, or in overseeing or monitoring the places of detention. Law-enforcement officials, judges and persons with criminal record may not be recruited as the NTPC staff (article 8(2) of the bill), and there should be not more than 70% of staff members of one sex (article 5(9)).

The bill contains a non-exhaustive list of places of detention and places of restriction of liberty that the NTPC staff would be mandated to monitor (article 2).<sup>143</sup> The former include pre-trial detention facilities, correctional and educational colonies and prisons, special admission centres of the police, military disciplinary quarters etc., while military and law-enforcement regiments, rehabilitation centres for minors, psychiatric institutions, orphanages, accommodation centres for the elderly and the handicapped are among the latter. The NTPC staff is to be provided with information on the location, number and authorities in charge of the places of detention and restriction of liberty (article 22 of the bill).

The bill distinguishes between three types of visits (article 23 of the bill): preventive, "intermediate" and special. Preventive visits are scheduled at regular time intervals and is aimed at a comprehensive examination of a given facility. Intermediate visits are conducted to obtain follow-up on the implementation of recommendations or to ascertain that those who cooperate with NPM are not subject to pressure. Finally, special visits would be conducted to investigate particular situations and cases. The visits would be conducted by the groups of NTPC staff or Coordination Council appointed by the Director. There should be at least two members on each group, at least one of whom should be a staff or Council member. The groups may also comprise external experts in a particular field (article 25(4) of the bill). The visits are in principle unannounced, but the

140 APT, Promoting Kyrgyzstan's NPM Draft Law, 4 October 2010, Available at: [http://www.apr.ch/index.php?option=com\\_k2&view=item&id=1010:promoting-kyrgyzstans-npm-draft-law&Itemid=230&lang=fr](http://www.apr.ch/index.php?option=com_k2&view=item&id=1010:promoting-kyrgyzstans-npm-draft-law&Itemid=230&lang=fr).

141 <http://www.kenesh.kg>.

142 <http://www.kenesh.kg/RU/Pages/ViewNews.aspx?id=8&NewsID=4427>.

143 IWPR, Torture Prevention Bill to be Postponed in Kyrgyzstan, 31 January 2010, Available at: <http://iwpr.net/report-news/torture-prevention-bill-be-postponed-kyrgyzstan>.

visiting group must present its IDs and a decision of the NTPC Director authorising the visit (article 25(6) of the bill). The visiting group may choose the detainees it wishes to meet and do so in private, take photos, make video recording, have access to all information concerning the detainees except their medical records, which would only be provided to the NTPC upon the detainee's explicit consent (article 26(1)). Every visit is to be followed by a public written report.

The NTPC would present its annual and special reports to the Jogorku Kenesh, though no provision is made about discussion of the reports at the plenary or committee meetings. Article 16 of the bill provides that the state bodies concerned must report to the NTPC on the measures taken following the latter's recommendations within one month from receiving them.

The content of the draft law has been generally well received, though concerns have been raised about whether this jeopardises its independence with political presence.<sup>144</sup> The bill's authors are of the opinion that this would give more political and administrative influence to the NTPC actions and would allow smoother reception of the NTPC conclusions by the political class and the bureaucracy. The procedure for selecting the participating NGOs (among those who declare protection of human rights among their statutory aims) by drawing lots is highly unusual and untrustworthy. However, it has been agreed to by all interested stakeholders as the only means to ensure transparency of the procedure and to remove all possible allegations of subjectivity and abuse by any body designated to select the NGOs (even if against a set of clear pre-established criteria).

The obligation of the visiting group to be in possession of a prior authorisation of the NTPC Director means that in some cases it will have to be given many hours, if not days, in advance and the visiting group will have to take special precautions to avoid the leaks of information. The NTPC access

to medical documentation may be hindered by the penitentiary administration's reliance on the alleged absence of the detainee's consent – and there is nothing in the bill which may prevent such situation (e.g., it is unclear who seeks the consent and how it is expressed). The bill should also spell stronger obligations of the executive, in particular, in respect of the obligation to conduct investigations into credible allegations of torture.

There are further concerns about the lack of complete unfettered access and funding. As APT note:

*"It is hoped that... enough political support will be engendered to ensure that the draft law receives political backing in parliament and that the government allocates adequate resources to the future NPM."<sup>145</sup>*

The bill was subject to human rights, anti-corruption, gender and even environment protection assessment.<sup>146</sup> Kyrgyz authorities were called upon by the head of the OSCE representation in Bishkek to adopt and implement the NPM legislation in 2012.<sup>147</sup> The legislation has been adopted.

### ***Public supervision councils and initiatives under discussion***

Under the Decree of the Transitional President of the Kyrgyz Republic of 29 September 2010 no. 212, every executive agency was obliged to create public supervision councils (PSC) consisting of public figures, journalists, human rights activists etc. to review and advise on the agencies' policy-making. Even though their primary role is not to conduct monitoring of or investigate violations of human rights, the public councils of the Ministry of Interior and the State Penitentiary Service included visits of the places of detention under the authority of the respective bodies in their plans of action for 2012.<sup>148</sup>

Some visits of detention facilities by the PSC members already took place in 2011. The members

<sup>144</sup> See APT database on OPCAT, [http://www.apr.ch/index.php?option=com\\_content&view=category&id=241&Itemid=237&lang=en](http://www.apr.ch/index.php?option=com_content&view=category&id=241&Itemid=237&lang=en).

<sup>145</sup> APT, Promoting Kyrgyzstan's NPM Draft Law, *op. cit.*

<sup>146</sup> Links to the assessments are available at: <http://www.kenesh.kg/lawprojects/lps.aspx?view=projectinfo&id=124332>

<sup>147</sup> <http://www.vb.kg/?topic=172344>

<sup>148</sup> See Order of the Director of the State Penitentiary Service of 6 June 2011 no. 261 and annex 3 thereto, and Action Plan of the Public Supervision Council of the Ministry of Interior, adopted on 6 June 2011, available at [http://www.mvd.kg/index.php?option=com\\_content&view=category&layout=blog&id=113&Itemid=635&lang=ru](http://www.mvd.kg/index.php?option=com_content&view=category&layout=blog&id=113&Itemid=635&lang=ru)



of the PSC of the State Penitentiary Service were able to monitor prisons, correctional colonies and pre-trial detention facilities. The PSC Chairperson and her deputies were able to conduct unannounced visits while other members (mostly coming from human rights NGOs) had to notify the penitentiary administration via the Chairperson. The meetings with detainees were conducted in private to the extent possible (security concerns by both the administration and the PSC members may have prompted the presence of penitentiary officers during the interviews). The PSC activities led, in particular, to the creation of separate cells for pregnant detainees and for those who has just given birth to their children.

As regards the PSC of the Ministry of Interior, it successfully lobbied a decree of the Minister authorising the PSC members to visit temporary detention wards of the Ministry without prior notification and meet detainees in private. There were no objections from the administration of the temporary detention wards by the PSC members which could enter those facilities where the NGOs conducting the monitoring under the 2011 Memorandum concluded with the Ombudsman were refused access. The two mechanisms were thus complementary one to the other given that some human rights activists participated in both.

On 30 December 2011 the Public Supervision Councils Bill<sup>149</sup> which had been introduced to the Parliament by a number of MPs was open for discussion. It maintains policy advice as the primary aim of the PSC, but contains a caveat in article 13 allowing the PSCs to investigate violations of human rights committed by the relevant executive agency and monitor the activities of public officials to assess their efficiency. Article 9 of the bill also introduces a general procedure for appointment of all PSC members by a Commission on PSC Members Selection whose members would be appointed by the President of the Kyrgyz Republic out of civil servants following a procedure proposed in the bill. The decisions of PSC would not be binding, but the relevant agency would be under an obligation to reply to the PSC within 10 working days. In sum, even though the selection of the PSC members would

be operated by career bureaucrats not necessarily interested in increasing public oversight over the executive and the PSC's primary role would be to provide policy advice, the possibility to conduct monitoring and investigate complaints may prove useful to the PSCs of the executive agencies administering places of detention. Paradoxically, the PSCs may be in some way even more effective in pressing for their recommendations be implemented than the NPM: under the relevant bills as they stand now the impugned body or official has to reply to the NPM within one month, but within 10 days to the PSC.

Furthermore, Ministry of Interior proposed a bill<sup>150</sup> (which has not yet been introduced to the Parliament) envisaging the establishment of the Commissioner for Human Rights in the Ministry of Interior and Public Commissions for Human Rights in the Ministry of Interior. According to the bill, the Commissioner would be elected by the Jogorku Kenesh and empowered to visit detention facilities under the authority of the Ministry of Interior and to investigate complaints of violations of human rights by the police. Public Commissions would function at the local level, their members would be selected according to a procedure determined by the Commissioner, but the final nominations should be subject to approval of local councils. The Commissions would have monitoring and investigative powers within their relevant districts. The Ministry of Interior would be under obligation to inform the Commissioner of any measures taken following his or her conclusion that a violation of human right have taken place. The Commissioner and the Public Commissions would prepare annual reports that would be debated at the Jogorku Kenesh.

149 <http://www.kenesh.kg>

150 [http://www.mvd.kg/index.php?option=com\\_content&task=view&id=2622&lang=ru](http://www.mvd.kg/index.php?option=com_content&task=view&id=2622&lang=ru)



## Conclusions and recommendations

The recent developments for the establishment of the NPM are encouraging. This is particularly the case when allegations of torture are rife and investigations are lacking. The extent to which even a well functioning NPM may be able to prevent torture occurring, however, is to be considered and more fundamental changes are going to be required to the legislation and other policy in order for prevention to properly be achieved. An effective well functioning NPM, however, will go a long way to helping this to be achieved.

A number of recommendations are therefore made:

### *Generally:*

- The definition on torture should be amended to bring it in line with Article 1 of UNCAT;
- Recommendations of the KIC should be implemented;
- Binding decisions and recommendations of the UN and OSCE bodies should be implemented;
- The legislation should clearly prohibit the use of evidence obtained under torture in court and the judiciary must ensure that such obligation is complied with in practice;
- The authorities should take all necessary measures to eradicate corruption in the State;
- There should be training of judges in torture prevention;
- Staff in penitentiary systems should be trained in torture prevention and human rights;
- Particular attention should be paid to those with mental health difficulties to ensure they receive adequate standard of care;
- The authorities should ensure that the constitutional and legal rights of detainees are respected in practice;

- Appoint judges of the Constitutional Chamber of the Supreme Court based on their professional rather than political background;
- Ensure that at least one independent monitoring mechanism has access to the GSNB detention facility and all military detention facilities.

### *In respect of the Prosecutor's office:*

- Prosecutors should be encouraged to effectively investigate allegations of torture;
- The prosecutor's office should be reformed in the way to exclude conflicts of interest preventing effective investigations of torture.

### *In respect of the Ombudsman:*

- The independence of the Ombudsman office should be ensured to bring it in line with the Paris Principles;
- The Ombudsman should not only be encouraged to outsource his monitoring powers to human rights NGOs, but to carry them out himself;

### *In respect of the NPM:*

- Speedily bring the new legislation on the NPM into operation.

### *In respect of the PSC and other initiatives:*

- Amend the bill to provide for a less bureaucracy-dominated selection procedures, consider special regulations for the PSC at the executive agencies administering places of detention, and adopt the bill;
- In any event, allow the PSC members unrestricted access to the relevant detention facilities, in line with the recommendations of the UN Special Rapporteur on Torture;
- The bill on the public control of the respect for human rights by the Ministry of Interior should be introduced to the Jogorku Kenesh and adopted.

## Tajikistan (as of 2012)

### Introduction

Tajikistan borders Uzbekistan and Kyrgyzstan, China and Afghanistan. It consists of Mount-Badakhshan Autonomous Region, two provinces (Sughd and Khatlon), Dushanbe, and 60 cities and districts. Following the country's independence which had resulted from the break-up of the Soviet Union, Tajikistan suffered a violent civil war in 1992-1997 that left around 50,000 dead and 800,000 displaced.<sup>151</sup>

Tajikistan's population is around 6.8 million.<sup>152</sup> The national language is Tajik, with Russian being recognised as the language of inter-ethnic communication and is widely spoken. The main religion is Islam (Sunni, Ismal'ii). Minority groups include Uzbeks 15.3%, Russians 1.1%, and Kyrgyz 1.1% (National Census, 2000).<sup>153</sup> Nearly half the population of Tajikistan live below the poverty line, although this number has been in decline.<sup>154</sup>

The head of state is the President and the highest legislative body is the Majlisi Oli. The Constitutional Court was set up in 1995 and as well as ruling on constitutional matters can rule on complaints of violations of constitutional rights that are submitted, albeit rarely, by citizens.<sup>155</sup> There are a number of other courts including the Supreme Court, Supreme Economic Court, Military Court and regional, district and local courts.

Parliamentary elections in recent years have not been seen to be free and fair.<sup>156</sup> There has been evidence of violence between government and insurgents in parts of the state.<sup>157</sup>

The International Crisis Group (ICG) notes the lack of infrastructure in Tajikistan renders many areas of the country inaccessible, "Its regions are increasingly disconnected from the central government, isolated by geography, poor roads and a failure to build any coherent government structures."<sup>158</sup> The border between Tajikistan and Afghanistan is poorly policed.<sup>159</sup>

Rights are protected in the Constitution (articles 14 et seq. of the Constitution). A Special Department of the constitutional guarantees of citizens' rights was established in 1997 in the Executive Office of the President of the Republic of Tajikistan. There also exists a Commission under the Government of the Republic of Tajikistan on the Rights of the Child and the Commission of the Government of the Republic of Tajikistan for the implementation of international commitments on human rights.

Tajikistan is party to a number of international human rights treaties<sup>160</sup> and has been found in violation of its treaty obligations by UN human rights committees, including cases relating to torture and ill treatment.<sup>161</sup> According to Article 10(3) of the Constitution,

151 Human Rights Watch Background Paper on Tajikistan, <http://www.hrw.org/legacy/backgrounder/eca/tajikbkg1005.htm>

152 United Nations Statistics Division, 2011. Available at: <http://data.un.org/CountryProfile.aspx?crName=TAJIKISTAN>.

153 Minority Rights International, Tajikistan Overview, December 2008, Available at: <http://www.minorityrights.org/?lid=2379>.

154 World Bank, September 2010, Available at: [http://siteresources.worldbank.org/INTTAJKISTAN/Resources/TJ\\_Poverty\\_Note\\_SummarySept2010Eng.pdf](http://siteresources.worldbank.org/INTTAJKISTAN/Resources/TJ_Poverty_Note_SummarySept2010Eng.pdf)

155 UN Commission on Human Rights, Civil And Political Rights—Including The Questions Of Independence Of The Judiciary, Administration Of Justice, Impunity: Report Of The Special Rapporteur On The Independence Of Judges And Lawyers, Leandro Despouy (E/CN.4/2006/52/Add.4), 30 December 2005, pp.6-7, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/100/54/PDF/G0610054.pdf?OpenElement>, para 9.

156 Human Rights Watch, World Report 2011, January 2011, p.474, Available at: <http://www.hrw.org/en/world-report-2011>.

157 Ibid.

158 International Crisis Group, Tajikistan: On The Road To Failure—Asia Report N°162, 12 February 2009, p. 1, Available at: [http://www.crisisgroup.org/~media/Files/asia/central-asia/tajikistan/162\\_tajikistan\\_\\_\\_on\\_the\\_road\\_to\\_failure.ashx](http://www.crisisgroup.org/~media/Files/asia/central-asia/tajikistan/162_tajikistan___on_the_road_to_failure.ashx).

159 Ibid.

160 International Convention on the Elimination of All Forms of Racial Discrimination, Accession 11 Jan 1995; International Covenant on Economic, Social and Cultural Rights, Accession 4 Jan 1999; International Covenant on Civil and Political Rights, Accession 4 Jan 1999; Optional Protocol to the International Covenant on Civil and Political Rights, Accession 4 Jan 1999; Convention on the Elimination of All Forms of Discrimination against Women, Accession 26 Oct 1993; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Signed 7 Sept 2000; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Accession 11 Jan 1995; Convention on the Rights of the Child, Accession 26 Oct 1993. No reservations or declarations have been made by Tajikistan with regard to the above treaties.

161 UN Human Rights Committee, Communications Nos. 1108/2002 and 1121/2002 (CCPR/C/89/D/1108&1121/2002), 3 May 2007; UN Human Rights Committee, Communication 1348/2005 (CCPR/C/89/D/1348/2005), 3 May 2007; UN Human Rights Committee, Communications Nos. 1209, 1231/2003 and 1241/2004 (CCPR/C/92/D/1209,1231/2003&), 24 April 2008; UN Human Rights Committee, Follow-up Progress Report of the Human Rights Committee on Individual Communications (CCPR/C/100/3), 5 January 2011; UN Human Rights Committee, Follow-up Progress Report of the Human Rights Committee on Individual Communications (CCPR/C/98/3), 21 May 2010. S.T Romanov Study "The implementation practice of the Views of the UN Committee on Human Rights in the Republic of Tajikistan." The study was implemented with the support of the Regional Office of the UN High Commissioner for Human Rights.

international treaties ratified by Tajikistan are a constituent part of the legal system of Tajikistan and in the case when laws of the Republic do not match recognized international legal acts, the norms of international legal instruments prevail.

## Overview of human rights situation and issues of particular concern

The Tajik Constitution provides certain safeguards for those subject to deprivation of liberty, including judicial protection of human rights, right to fair trial by a competent and impartial court and access to lawyer from the moment of detention (article 19), presumption of innocence and principle of legality of crimes and punishments, including prohibition of retroactive application of criminal law (article 20).<sup>162</sup>

The Code of Criminal Procedure of the Republic of Tajikistan, adopted on 3 December 2009 by Law No. 564, came into force on 1 April 2010. Tajikistan keeps in article 111(1) a provision dating back to Soviet legislation, according to which a person accused of a crime punishable by more than 2 years (and in 'exceptional' – but undefined – cases even if the maximum punishment is less than 2 years) in prison may be placed in pre-trial detention only because of the gravity of charges.

Preliminary detention pending investigation can last a maximum of 18 months, but there is no time-limit for the detention pending trial.<sup>163</sup> Unlawful detention is addressed under Article 358 of the Code of Criminal Procedure of the Republic of Tajikistan, and it is punishable by up to three years imprisonment.<sup>164</sup>

From 2004 there is an absolute moratorium on death penalty<sup>165</sup> and it is now *de facto* an abolitionist state.<sup>166</sup>

A range of concerns have been raised by national and international observers. These include: lack of independence of judges, violations of the right to be free from torture, the lack of independence of the Ombudsman and lack of transparency in the process of drafting legislation.<sup>167</sup> There are allegations of ill treatment of children with disabilities in residential homes.<sup>168</sup>

There have been concerns raised about the lack of mandatory training for law enforcement officials and doctors on torture prohibition,<sup>169</sup> and in particular on the rights of the child.<sup>170</sup>

Torture is considered to be widespread, particularly in order to extract confessions,<sup>171</sup> and these are still permitted as evidence in court.<sup>172</sup> There are a high number of deaths in custody<sup>173</sup> and prison conditions are considered to be poor.<sup>174</sup> Access to doctors, lawyers and family is limited. Detentions are also not properly registered and there are inadequate records

162 Constitution of Tajikistan (1994), Available at: <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan003670.htm>,

163 RFERL, New Criminal Code In Force In Tajikistan, 2 April 2010, Available at: [http://www.rferl.org/content/New\\_Criminal\\_Code\\_In\\_Force\\_In\\_Tajikistan\\_/2000700.html](http://www.rferl.org/content/New_Criminal_Code_In_Force_In_Tajikistan_/2000700.html).

164 Code of Criminal Procedure of the Republic of Tajikistan (adopted 3 December 2009 by Law No. 564, effective 1 April 2010) Available at: <http://www.legislationline.org/documents/section/criminal-codes/country/49>. Note: Unofficial translation in English, provided by ODIHR (OSCE).

165 Law "On repealing the execution of the death penalty", 15 July 2004, No. 45.

166 ODIHR (OSCE), 2011. Available at: <http://legislationline.org/topics/country/49/topic/11>.

167 [http://www.humanrts.tj/public/userfiles/downloads/Publications/UJR\\_Tajikistan\\_2011\\_NGO%20report\\_1\\_RUS.pdf](http://www.humanrts.tj/public/userfiles/downloads/Publications/UJR_Tajikistan_2011_NGO%20report_1_RUS.pdf).

168 UN Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention (CRC/C/TJK/CO/2), 5 February 2010, p.7.

169 UN Committee Against Torture, Consideration Of Reports Submitted By States Parties Under Article 19 Of The Convention -Conclusions and recommendations of the Committee against Torture (CA T/C/TJK/CO/1), 7 December 2006, pp. 2-7, Available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CAT/C/TJK/CO/1&Lang=E>.

170 UN Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention (CRC/C/TJK/CO/2), 5 February 2010, p.7.

171 Conclusions and recommendations of the Committee against Torture, op. cit.

172 Ibid., para 39.

173 Ibid.

174 Ibid

kept.<sup>175</sup> Torture victims do not receive adequate medical care and psychological rehabilitation. There are continued reports that torture and other ill treatment is used by law enforcement officials to extract confessions.<sup>176</sup>

Investigations into torture and ill treatment are considered to be inadequate.<sup>177</sup> Proper preventive mechanisms are also considered to be lacking,<sup>178</sup> as are independent complaints mechanisms,<sup>179</sup> and few (2-3 officials per year) are convicted of torture or other ill treatment.<sup>180</sup> There are no professional associations engaged in torture prevention and only a few NGOs.<sup>181</sup>

Those in detention facilities do not have immediate access to a lawyer, doctor and family members from the moment of apprehension. The payment of compensation to victims of torture is not provided by law.

Furthermore, there are on-going concerns that lawyers are not permitted to visit pre-trial detention facilities and temporary detention facilities.<sup>182</sup> As one lawyer noted, 'The Code of Criminal Procedure does not provide for an obligation of an investigation agency or an investigator to make a thorough examination of a detained person and to describe his/her condition upon detention when a detention report is made. Such gap allows law-enforcement officers to avoid liability when their practice torture in detention facilities because they may claim that the detained person was injured before his/her detention'.<sup>183</sup>

Article 17(1) of the 2011 Procedures and Conditions of Detention Act is meant to remedy this by guaranteeing the detainees, *inter alia*, an unrestricted right to meet with his or her lawyer. These legislative provisions, however, have to be observed in practice. Although the Criminal Procedure Code does provide for the right of a detainee's family to be told of their detention, no time limit is given for this.<sup>184</sup>

For these and other related reasons the European Court of Human Rights has consistently held, for example, in *Khodzhayev v. Russia* (no. 52466/08, 12.05.2010) and *Gaforov v. Russia* (no. 25404/09, 21.10.2010) that an extradition to Tajikistan would amount to a violation of the prohibition of torture by the sending State Party to the European Convention on Human Rights. This effectively bars extraditions to Tajikistan by the Council of Europe member States.

The Tajik authorities have asserted that allegations of torture are taken seriously and investigated,<sup>185</sup> and note a new Criminal Procedure Code, which came into force in April 2010, which provides for guarantees following arrest.<sup>186</sup>

Nevertheless, the allegations of torture made before, during or after the trial, are not investigated effectively due to the lack of clear, independent, transparent and efficient procedures of review and verification of allegations of torture. Typically, such an investigation is not conducted in the absence of a declaration by the alleged victim.

175 Ibid.

176 Amnesty International, Amnesty International Report 2010, p.350, Available at: [http://thereport.amnesty.org/sites/default/files/AIR2010\\_EN.pdf](http://thereport.amnesty.org/sites/default/files/AIR2010_EN.pdf).

177 See Communication 1276/2004, 23 April 2009, UN Human Rights Committee; Communication 1195/2003, 22 April 2009, UN Human Rights Committee.

178 UN Committee Against Torture, Conclusions and recommendations, op. cit.

179 Ibid.

180 UN Committee Against Torture, Conclusions and recommendations, op. cit.

181 These include: Bureau for Human Rights and the Rule of Law; Society and Law; League of Women Lawyers; Public Foundation 'Nota Bene'; Human Rights Center; and the Independent Center for Human Rights Protection.

182 European Union EEAS, 2009 Tajikistan Seminar Final Report, 4 October 2010, Available at: [http://eeas.europa.eu/human\\_rights/dialogues/civil\\_society/docs/2009\\_tajikistan\\_seminar\\_final\\_report\\_annexes\\_en.pdf](http://eeas.europa.eu/human_rights/dialogues/civil_society/docs/2009_tajikistan_seminar_final_report_annexes_en.pdf).

183 Ibid.

184 Ibid.

185 OSCE, Statement By The Delegation Of The Republic Of Tajikistan At The 2010 OSCE Review Conference (RC.DEL/57/10), 5 October 2010, Available at: <http://www.osce.org/home/71990>.

186 "...[a]n advocate shall be admitted to participation in the criminal case from the moment of issuing a resolution on institution of criminal proceedings against the person as well as from the moment of the actual arrest of the suspect", Code of Criminal Procedure of the Republic of Tajikistan adopted on 3 December 2009 by Law No. 564 and becoming effective on 1 April 2010, Article 49(2). OECD, The Istanbul Anti-Corruption Action Plan Second Round of Monitoring-Tajikistan, 29 March 2010, p.15, Available at: <http://www.oecd.org/dataoecd/32/21/45051512.pdf>.

## Places of deprivation of liberty

Ministry of Interior administers special accommodation centres for those sentenced to administrative arrest for minor offences and temporary detention wards where suspects are placed after the arrest and before their detention is authorised by a judge or, 'if necessary' (article 111(2) of the Code of Criminal Procedure) by a prosecutor or investigator.

According to the article 8 of the Law on the System of Penal Enforcement on July 15, 2004 # 51, there are range of places where individuals can be deprived of their liberty. These include: 11 correctional facilities (for those who have been sentenced to a term of imprisonment (article 70 of the Penal Code adopted on August 6 2001 # 32)), 5 pre-trial detention centres, correctional centres, medical organisations, and enterprises within the penal system for prisoners' labour.

Among the correctional facilities for convicts (Article 71 of the Penal Code) are: correctional colonies (for adults), educational colonies (for minors and prisoners under 20 years old), prisons, medical-correctional facilities (for compulsory treatment of those suffering from alcoholism, drug users and other psychological illness, HIV infected, TB-infected and persons who have yet to finalise their treatment for sexually transmitted diseases).

Under Article 28 of the Law On Psychiatric Care of 2 December 2002 no. 90, an individual who suffers from a mental disorder which impedes his/her ability to make informed decisions and who presents an imminent danger to him/herself and to others, may be admitted to a psychiatric hospital by the decision of the psychiatrist without the consent of the patient and his legal representative. Administrative detention facilities also exist and such detention should only be used in 'exceptional circumstances' (Article 753 of the 2008 Code on Administrative Offences).

All correctional facilities fall under the Department of Correctional Affairs of the Ministry of Justice. There are special pre-trial detention centres under the Ministry of Defence (for military officers accused of crimes) and the Ministry of Security (for those charged with crimes against the State).

## Legal position on torture

Article 5 of the Constitution provides that life, honour, dignity, and other natural human rights are inviolable and that the rights and liberties of the person and citizen are recognized, observed, and protected by the state. Article 18 *in fine* of the Constitution declares that the inviolability of individual is guaranteed by the government and that no one may be subjected to torture or cruel and inhuman treatment. The criminal-law definition of torture has recently been amended, so that both the situation before and after the amendments will be considered below.

### Situation prior to 2012

The definition of torture is provided in the 1998 Criminal Code of Tajikistan. According to the footnote to article 117 (inserted by the Criminal Code Amendment Act of 17 May 2004 no. 35) torture is infliction of physical or moral suffering, in particular, with the aim of obtaining testimonies or of forcing to commit an action against the victim's will or of punishing the victim.

Torture is an aggravating circumstance of the crime of torment (article 117(1) of the Criminal Code), which is infliction of physical or moral suffering by way of beatings or of other violent actions that does not lead to grave or serious bodily harm. It is also an aggravating circumstance of the crime of forcing defendants, witnesses, victims or experts to give testimonies, which only applies to those in charge of criminal investigations or administration of justice (article 354 of the Criminal Code), like investigators, prosecutors and judges, but not to other law-enforcement officers who are more often implicated in torture. Finally, torture is mentioned as an *actus reus* of the crime of deliberate violations of international humanitarian law (article 403 of the Code). Article 316 of the Criminal Code criminalises abuse of power by public officials, in particular with the use of violence among the aggravating circumstances, which allows for the prosecution of criminal acts constituting torture without mentioning torture at all.

It is noteworthy that torture is not included in the list of aggravating circumstances of the crime of abuse of power, applicable to any public official, making it impossible to prosecute torture as a specific crime of a public official different from that of a private



individual. Furthermore, discriminatory intent and recourse to torture in order to force a third person to act or refrain from acting are not included in the definition given in Article 117 of the Criminal Code. Furthermore, the very notions of inhuman and degrading treatment are unknown to criminal law of Tajikistan.

This definition has been criticised for failing to comply with UNCAT Article 1. As the UN Committee against Torture noted in 2006:

*The definition of torture provided in domestic law... is not fully in conformity with the definition in article 1 of the Convention, particularly regarding purposes of torture and its applicability to all public officials and others acting in an official capacity.*

The State party should adopt domestic legislation in line with article 1 of the Convention to address all the purposes therein, and it should ensure that acts of torture by State agents, including the acts of attempting to torture or complicity in it, ordering or participating in torture, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed.

Despite this being mentioned in 2006, this remained a concern over a number of years.<sup>187</sup> According to a number of NGOs in Tajikistan,<sup>188</sup> the absence of and an adequate punishment for the commission of torture is a major shortcoming. This also contributes to inadequate training as well as to lack of opportunities for proving torture; it strengthens the sense of impunity for torturers and, accordingly, adversely impacts the fairness of criminal proceedings. Evidence obtained under torture is still accepted by judges as evidence and complaints of the defendants' about the use torture, has not received a proper response.

### Situation after the 2012 amendments

The 2012 Criminal Code Amendment Act abolished the existing regulations concerning the criminal-

law definition of torture. Instead it introduced a new article 143-1 which now contains a specific crime of torture. According to the 2012 Act torture is defined as follows:

“Intentional infliction of bodily and/or mental harm committed by a person in charge of inquiry or criminal investigation or by any other public official him or herself or with their incitement, knowledge or acquiescence by a third person, in order to obtain information or confessions from the victim or from a third person or to punish him or her for the act which he or she has committed or is suspected to have committed, as well as to intimidate the victim or a third person, or to force him or her, or for another reason based on discrimination of any kind”.

Further, article 143-1(2) and (3) sets out a number of aggravating circumstances. The definition generally follows Article 1 UNCAT, comprising its main elements. The penalties remain, however, a problem. Without aggravating circumstances torture remains a crime of ‘middle gravity’, that is one punishable by a fine or by a term of imprisonment up to five years. This classification also allows to sentence the defendants to conditional punishments, as provided for in article 71 of the Criminal Code. Initially the sponsors of the bill suggested a penalty of up to six years of imprisonment, which would have made torture a ‘grave’ crime.<sup>189</sup> This has been eventually dropped, so that only torture committed in aggravating circumstances is a serious crime, classified as ‘grave’ or even ‘especially grave’ when it results in death.

## Monitoring mechanisms

Although there are some mechanisms which can visit places of detention, there is ‘no systematic review of all places of detention, by national or international monitors, and that regular and unannounced access to such places is not permitted’.<sup>190</sup> Visits by civil society organisations or international non-governmental agencies to places of detention are

<sup>187</sup> IWPR, ‘Tajikistan Needs Tougher Torture Definition’, 10 August 2010, Available at: <http://iwpr.net/report-news/tajikistan-needs-tougher-torture-definition>.

<sup>188</sup> Universal Periodic Review of Human Rights, prepared by the NGOs of the Republic of Tajikistan. Report number 1 (Civil and political rights); paras 28-31.

<sup>189</sup> <http://ru.kloop.tj/2012/01/13/v-ugolovnyiy-kodeks-tadzhikistana-budet-vneseno-ponyatie-pyitki/>.

<sup>190</sup> UN Committee Against Torture, Conclusions and recommendations, op. cit.

also not permitted in Tajikistan (an exception was a correctional colony for juveniles visited by the children's rights associations; but after a recent amnesty only a handful of juvenile convicts are held there).

### General Prosecutor's Office

Appointed for five years by the President and with the consent of the Upper Chamber of the Majilisi Oli, the Prosecutor General reports to the Parliament and the President of Tajikistan. His or her mandate is set out in the constitution. The role of the Prosecutor and the subordinate prosecutors is to supervise the observance and uniform enforcement of laws during the execution of punishment.<sup>191</sup> According to article 45 of the Constitutional Law of the Republic of Tajikistan "On the Prosecutor's Office of Tajikistan" (25 July 2005, No. 107), the prosecutor has broad powers which include the ability to:

- Visit places of the detention, including homeless placement centres, detention centers and institutions or bodies which execute sentences, and other places, executing measures of compulsion, appointed by the court;
- Interview detained, arrested, prisoners and persons subject to compulsory measures;
- Examine documents and materials on the basis of which these persons are detained, arrested, convicted, or subjected to compulsory measures;
- Require strict observance and uniform enforcement of laws and international legal acts recognized by Tajikistan, on human rights and the humane treatment of prisoners;
- Require that the authorities of the place of deprivation of liberty create conditions that respect the rights of detainees, prisoners and persons subject to compulsory measures;

- Check compliance with legislation, directives and orders of the administration;
- Demand explanations from officials, to make objections and representations, institute criminal proceedings or disciplinary and administrative proceedings;
- Revoke the disciplinary sanctions which have been imposed illegally against detainees;
- Release immediately persons illegally detained in prisons or institutions performing the measure of compulsion, or in violation of the law subjected to detention, forced imprisonment or placed in a psychiatric institution.

The oversight of the respect for the rights of detainees is within the mandate of the prosecutors, as provided for in Article 51 of the 2011 Procedures and Conditions of Detention Act. This latter provision specifies that the penitentiary administration is legally bound by the orders of the supervising prosecutors.

Although these powers are fairly extensive, there are a range of concerns with the office of the General Prosecutor as an independent oversight mechanism. Firstly, the investigations into allegations of torture are considered to be inadequate and few in number.<sup>192</sup> Secondly, some have questioned the impartiality of the Prosecutor's office due to 'close personal and structural links' between it and the police. Thirdly, as is the concern with all prosecutor's offices carrying out similar functions, the conflict of interest in both prosecuting an individual but at the same time investigating allegations of torture that they raise.

As a result, there are claims that a significant proportion of complaints on torture and other forms of abuse were not investigated or considered by state agencies or ended up in court,<sup>193</sup> and that the General Prosecutor is therefore simply providing a form of 'official verification' rather than an adequate investigation.

<sup>191</sup> Chapter 6 of the Constitutional Law of the Republic of Tajikistan "On the Prosecutor's Office of Tajikistan" (11 March 1996, 290) and Article 26 of the Code of Execution of Criminal Sentences (6.08.2001).

<sup>192</sup> As one official reports: "'Usually General Prosecutor starts one case about torture in a year, but not more', <http://centralasiaonline.com/cocoon/caii/xhtml/ru/features/caii/features/main/2010/07/30/feature-02>.

<sup>193</sup> <http://www.humanrts.tj/ru/index/index/pageld/34/>.

## Commissioner for Human Rights (Ombudsman)

According to the Ombudsman Act of 20 March 2008 no. 372, the Ombudsman is appointed by the President with consent of the Lower Chamber of Parliament (article 4) of Tajik-speaking lawyers over 35 years of age possessing high moral qualities (article 5) for a five-year term (article 7). The ombudsman has personal immunity and inviolability of the home and office (article 8) and his independence is provided for in Article 3 of the 2008 Act. The ombudsman has his own budget which is provided for from the national budget (article 34). According to Article 29 of the 2008 Act all state bodies must respond to recommendations of the Commissioner. The Ombudsman has the power to appoint his or his own staff (para. 4) and as at January 2011, this amounted to 36.<sup>194</sup>

He has a broad mandate which includes consideration of complaints from citizens, analysis of legislation, monitoring and studying and making recommendations on human rights, as well as carrying out training. He may also apply to the Constitutional Court to seek declarations of unconstitutionality of the legislation. Individual applications to the Ombudsman are not subjected to complicated admissibility criteria: it suffices to submit a written application within a year from the alleged violation (article 14 of the 2008 Act). The Ombudsman may access any premises of public authorities, including places of detention and military regiments (article 12(1)(a)), request assistance from public authorities in investigating the complaints (article 17), and the authorities should provide the requested documents or information within 15 days from the Ombudsman's request (article 27(2)). Under Article 20 of the 2008 Act if the Ombudsman establishes a violation of human rights, he may apply

to the state body responsible for the violation asking it to open disciplinary proceedings or a criminal case against the official concerned or ask the President of the Supreme Court to consider quashing the judicial decision which violated rights. Under Article 29 the officials concerned should notify the Ombudsman of the measures taken in response to his conclusions within a month of receipt thereof.

Although the Ombudsman has the right to visit state bodies and organizations (both public and private), civil society organizations, military services, penitentiary institutions other army services and organizations on the territory of Tajikistan, during the course of an investigation (Article 12), it would appear that he has undertaken few monitoring visits, if at all.<sup>195</sup> His task is challenging, however, as access to information and to places of detention is severely restricted.<sup>196</sup> The Ombudsman did not have the power to visit detainees in private, but this appears to have been amended with a change to the legislation in October 2011.<sup>197</sup> Be that as it may, the only activity report of the Ombudsman available in Russian and covering the years 2009 and 2010 does not contain any mention of torture, detention facilities or rights of detainees.<sup>198</sup> His Strategy paper for the years 2011-2015<sup>199</sup> briefly mentions detainees' rights and suggests that the Ombudsman might be interested in developing the methodology of prison monitoring, in particular within the framework of the OPCAT. At the press-conference of 30 March 2011 the Ombudsman even spoke of two visits planned to correctional institutions in Khatlon and Sogdi regions.<sup>200</sup>

Accordingly, even though the individual appointed to the office appears to be respected, there are a number of concerns raised with how the Ombudsman is carrying out his functions, including a failure to keep proper records,<sup>201</sup> and the overall passivity and lack of independence.<sup>202</sup>

194 Report on the Activities of the Ombudsman for 4 months in 2009 and 2010. <http://ombudsman.tj/tj/>

195 In 2009-2010 this was only one visit: to a psychiatric hospital, August 24-25, 2010, Report on the Activities of the Ombudsman for 4 months in 2009 and 2010. <http://ombudsman.tj/tj/>. Page 19.

196 Institute for War and Peace Reporting, Shroud of Secrecy Surrounds Tajik Prisons, 22 June 2009, Available at: <http://www.unhcr.org/refworld/docid/4a4491e51c.html>.

197 Freedom House, Nations in Transit 2010 – Tajikistan, January 2010, pp.513-514, Available at: <http://www.freedomhouse.org/template.cfm?page=17>.

198 <http://ombudsman.tj/bitrix/file%20PDF/Doklad-ru.pdf>

199 <http://ombudsman.tj/bitrix/file%20PDF/Strategia-ru.pdf>

200 <http://nm.tj/society/44-zarif-alizoda-skuchat-ne-prihoditsya.html>

201 Central Asian Newswire, Tajik ombudsman to address prison conditions, 20 December 2010, Available at: <http://centralasianewswire.com/viewstory.aspx?id=2695>.

202 Freedom House, Nations in Transit 2010, op. cit.

In early 2012 a coalition of NGOs elaborated a strategy for prevention of torture. The coalition suggested the Ombudsman may cooperate with NGOs in order to enhance his monitoring of detention facilities. It has been suggested, in particular, that the Ombudsman delegates his powers of access to places of deprivation of liberty to the NGOs forming the coalition so that the latter have the possibility to access and interview the detainees.

## Conclusions and recommendations

Tajikistan has neither signed nor ratified OPCAT. The current mechanisms available to monitor places of detention and undertake a preventive mandate are limited and lack independence and proper oversight. It has been recommended that the state establish a national human rights commission in compliance with the Paris Principles.<sup>203</sup>

The following recommendations are made:

### *Generally:*

- The definition of torture should be amended to ensure that it complies with UNCAT, in particular, torture should be made a serious crime.
- The state should ratify the Optional Protocol to the UN Convention Against Torture.
- Decisions and recommendations of international bodies should be implemented.
- There should be mandatory training for law enforcement officials and judges on human rights, torture prevention and the rights of the child.
- Evidence obtained by torture should be inadmissible in court.

- Deaths in custody should be properly investigated.
- Open-ended provisions of the Code of Criminal Procedure ('exceptionally', 'if necessary') should be revised to eliminate executive discretion in placing persons in custody.
- Proper records should be kept of the numbers in detention.
- A time frame should be provided in which a detainee's family is informed of their detention.
- Independent and effective investigations into allegations of torture should be ensured.

### *In respect of the monitoring mechanisms:*

- The Prosecutor's Office should be reformed in order to eliminate possible conflicts of interest.
- The independence of the Ombudsman should be ensured.
- The Ombudsman should in practice be able to make unannounced visits to detention facilities and meet detainees in private.
- The Ombudsman should ensure that proper records are kept of his or her visits.
- Detainees should be ensured of their rights to access their lawyer, a doctor and their family.
- International and national bodies (that should be created) should be able to visit places of detention on a regular basis.

<sup>203</sup> UN Committee Against Torture, Conclusions and recommendations, op. cit.

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