

# **Effective documentation of torture and other inhuman treatment conditions by medical institutions in Tajikistan according to the principles of Istanbul Protocol**

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**NGO «Human Rights Center»**

**Report on the results of the joint work of the Working Group under the Ministry of Health and Social Protection and the NGO "Human Rights Center"**

**Tajikistan National Centre of  
Forensic Medicine**

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The report was prepared by the coordinator of the programm «Implementation of Istanbul Protocol in Tajikistan» Navruzova Parvina and Mr. Furkat Inomonovich, the NCFM Deputy Director

**List of acronyms and abbreviations**

TDF	Temporary Detention Facility
PHR	Physicians for Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICCPR	International Covenant on Civil and Political Rights
FPE	Forensic Psychiatric Examination
MoH	Ministry of Health and Social Protection
NGO	Non governmental organization
UN	United Nations
ICD -10	International Classification of Diseases Tenth Revision
RT	Republic of Tajikistan
PTD	Pre-trial Detention Center
IP	Istanbul Protocol
FME	Forensic Medical Examination
PTSD	posttraumatic stress disorder
CC	Criminal Code
RT	Republic of Tajikistan
CPC	Criminal Procedural Code
NCFM	National Center of Forensic Medicine

## ***I. Introduction***

Republic of Tajikistan (RT) is a member of two international treaties, the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>2</sup>, which imposes an obligation on the government to take effective legislative, administrative, judicial or other measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment and to fight them.

Despite the fact that international standards of human rights and international humanitarian law consistently prohibit usage of torture under any circumstances, still torture and ill-treatment are being practiced in more than half of the world countries<sup>3</sup>.

*The guidelines on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)* is intended to serve as international guidelines for the assessment of the status of persons who claim that they were subjected to torture and ill-treatment; at investigating cases of alleged torture and presentation of the results of such assessment and investigation to the court or any other authority conducting investigation.

National legislation, as it is known, contains a prohibition of torture and other cruel or degrading treatment or punishment. Such a ban is constitutional guarantee (Article 18 of the RT Constitution), which is also stated in the Criminal Procedure Code (CPC) of RT.

In the same year the Supreme Court of the Republic of Tajikistan adopted a Resolution of the Plenum №1 «On the application of the criminal law and criminal procedural law standards to combat torture."

Thus, in Tajikistan reforms of the legislation to strengthen the fight against torture is still underway. In accordance with the Istanbul Protocol starting from 2012 to the present reforms in the work of forensic experts and primary care physicians in documenting torture have been carried out.

The Republic of Tajikistan is taking active steps to prevent and combat torture and impunity in Tajikistan.

In October, 2012 international experts "Physicians for Human Rights" developed *«an action plan to implement the standards of the Istanbul Protocol on effective medical investigation and documentation of torture and ill-treatment in Tajikistan.»*

This plan was developed based on the findings of the research «"Efficient documenting of torture and other inhuman treatment conditions by medical institutions in

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<sup>1</sup> Ratified in the RT in 1999

<sup>2</sup> Ratified in the RT in 1995

<sup>3</sup> Amnesty International. Amnesty International Report 1999 (London, AIP, 1999).

<sup>4</sup> M. Başoğlu, "Prevention of torture and care of survivors: an integrated approach", The Journal of the American Medical Association (JAMA), vol. 270 (1993), pp. 606-611.

Tajikistan"»<sup>4</sup> and the results of the three-day training conducted for law enforcement and medical personnel.

The plan was developed by international experts from "Physicians for Human Rights" in conjunction with forensic experts of NCFM lawyer and the lawyer of NGO "Human Rights Center" Navruzova Parvina.

An invitation was sent to the Special Rapporteur on Torture, who visited the Republic of Tajikistan in May 2012.

The Government of the country has provided a progress report on the implementation of the Convention against Torture, which was heard in November 2012.

The Committee against Torture at its forty-ninth session (29 October - 23 November 2012) adopted concluding observations and recommendations to the Second Periodic Report of Tajikistan.

Special Rapporteur on torture and other cruel treatment Mr Juan E. Mendez, on January 28, 2013 at the 22nd Session on the Human Rights Council made recommendations on the results of his visit to Tajikistan.

On August 15, 2013 the Action Plan on implementing the recommendations of the Committee against Torture and the Special Rapporteur on Torture approved by the Government of the Republic of Tajikistan were adopted.

In the framework of the government's plan it is envisaged to make amendments to the legislation, in particular establishment of the shortest time frame for the appointment and conduct of medical examination \ forensic medical examination (on allegations of torture).

As well as development of the Draft Law "On t independent forensic examination", etc

Ministry of Health and Social Protection of the Republic of Tajikistan (the MoH) is implementing a number of activities according to the governmental plan to create the required legal and medical ground to improve the approaches, the conduct of medical examination of victims of violence, etc.

## ***II. Report on the activities of the Working Group under the Ministry of Health and Social Protection of the Republic of Tajikistan***

On December 02, 2012 with the view to improve the internal regulations and guidelines, forms for forensic \ psychiatric examination and medical examination in accordance with the principles of the Istanbul Protocol by the Order of the Minister of Health and Social Protection a Working Group was established.

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<sup>4</sup> Monitoring results "Effective documentation of torture and other inhuman conditions of handling in medical institutions in Tajikistan," conducted jointly with the Commissioner for Human Rights and the NGO "Human Rights Center" in June 2012.

The Working Group was comprised of the representatives of the Ministry of Health, the General Prosecutor's Office and NCFM and of the representative of civil society, notably:

- First Deputy of MoH of the Republic of Tajikistan Olimov Nasim Khojaevich; (before Rahmonov S B)
- NCFM Director Odinaev Yahyo Ortukovich;
- NCFM Deputy Ganiev Furqat Inomjonovich;
- Head of department of "examination of victims, defendants and other living persons" of the NCFM Sangov Khurshed Mahmadscharipovich;
- Lawyer of the NGO "Human Rights Centre" Navruzova Parvina.

As a national expert advice was provided by the General Prosecutor's Office representative Khalifazoda Marizoi Niyozov - Head of Department for Supervision over the implementation of laws in the police and the Drug Control within the General Prosecutor's Office of Tajikistan and Jamila Muhtidinova - clinical psychologist.

Since 2012 and presently this activity is being supported by the Department of International Organizations" Open Society Institute" - Assistance Fond in Tajikistan in partnership with the international organization "Physicians for Human Rights" (*one of the authors of the Istanbul Protocol*).

The purpose of the Working Group was to develop medical forms, and certain provisions of the analysis of internal guidelines and regulations of the Centre of Forensic Medicine, in particular:

- Development of a special form (for medical examination) according to the Istanbul Protocol principles for a medical examination by doctors (*who are involved in conducting medical examinations of detainees from the moment of actual detention*);
- Adjustment of the existing forms (forensic medical examination opinion) for conducting forensic examination according to the specialized forms on "assessment of physical evidence of torture or ill-treatment" developed by the International Organization "Physicians for Human Rights" (PHR) following the Istanbul Protocol.
- Development of specialized forms for psychological examination according to the standard forms on the "Assessment of physical evidence of torture or ill-treatment" developed by the International Organization PHR;
- Making amendments and additions into the internal regulations "On some procedural grounds for conducting forensic medical examinations in RT";
- Analysis and preparation of recommendations for presenting to the Working Group within the Department of the constitutional guarantees under the President of RT for subsequent amendments\ changes in Chapter 24 "Examination", in Chapter 21, "Inspection, Survey, investigative experiment", into articles 186-187 of the CPC RT and the RT Law "On state forensics" etc.

In general, all the tasks set forth before the Working Group have been successfully implemented.



Following the development of the above documents expert assistance has also been provided by lawyers of organizations members of the Coalition of NGOs against torture in Tajikistan.

It is important to note that the legal documents governing performance of a forensic medical examination were approved in 2008 and did not include a methodology of examination in cases of torture, however at torture like at other types of bodily injury, in the context of physical injury, there are no any specific differences in the approaches of its study and examination.

In addition, in the rules currently being used for assessment of injury severity there were specific types of injury, such as beatings, torture and anguish whose mechanism of origin is of the same type as the methods used in the torture.

However, according to the Istanbul Protocol provisions, evaluation of only physical injuries may not be sufficient for effective diagnosis of violence during the torture.

Also, with inclusion of a new article into the Criminal Code (143/1) – Torture, a necessity of introducing changes and additions to the regulations governing performance of forensic medical institutions emerged which should be adapted to the international standards as specified in the Governmental Action Plan.

Currently draft version of legal documents of forensic medical service is developed which covers the principles of conducting medical examination (its complex nature) in cases of torture mentioned in the Istanbul Protocol.

In the 1-th of November 2014 by the Ministry of Health had approved new normative legal documents into the Forensic Medical Service of the Republic of Tajikistan regulating the performance of forensic medical examination.

The Working Group has also been developed the ***Act for a medical examination of all detainees*** by primary care physicians.

The advantage of this form is that it contains the following guarantees for a person being examined, notably:

*"The rights to receive a copy of the act, the rights to voluntarily examination, defining injuries on the principles of forensic medical examination; also in cases of allegations of torture (doctor's recommendation to conduct a complex examination with involvement of a psychiatrist), storing a copy of the act in medical institution up to 10 years and so on".*

This approach will enable the lawyers to obtain a copy of the act by themselves from the medical facility, etc.

The ***act of medical examination form and a form of forensic medical opinion*** were adapted, in particular included the following requirement was included:

*"In cases when the person being examined makes a statement of torture and other ill-treatment by the body appointed forensic examination, or by other law enforcement body (in this case, with the guidance of the Istanbul Protocol the complex examination can be*

*carried out), a copy of the opinion shall be sent to another supervisory authority, and an appropriate notice shall be made on it".*

Also it is planned to introduce the principles of conducting medical examination in cases of torture in accordance with the provisions of Istanbul Protocol in the activities of the judicial - psychiatric examination and the curricula of medical universities.

In 2011, 2013, 2014 international experts "Physicians for Human Rights," in conjunction with the NGO "Human Rights Centre" and NCFM conducted several training sessions for doctors and law enforcement officials. The trainings were conducted with the support of the "Open Society" - Assistance Foundation in Tajikistan jointly with the OSCE Office in Tajikistan and with the assistance of the Ministry of Health and Social Protection. In total 70 forensic experts, 20 doctors, 20 lawyers were trained.

Primary care physicians (orthopaedists, paediatricians) as well as gynaecologists, proctologists, psychiatrists and forensic experts attended the trainings. Also judges, prosecutors, lawyers and representatives of the NGO Coalition against Torture in Tajikistan participated in the trainings. Within four days, the participants divided into two groups (doctors and lawyers) studied the basic facts of torture investigations, as well as international standards for forensic examination of alleged victims of torture and documenting cases of torture.

On June 20-21 Empathy and expert from Physicians for Human Rights Rusudan Beriashvili arranged meetings and visits to the DNA lab of Tbilisi, to the Forensic Medicine Centre and rehabilitation centre for torture victims "Empathy."

During the visit, the delegation of Tajikistan and Kyrgyzstan acquainted with the staff of the Centre, visited the Centre itself. As it turned out that in Tbilisi there is only one DNA laboratory which is actively involved in carrying out various activities in the framework of criminal and civil proceedings, as well as operates various laboratories, etc.

It should be noted that in recent years the Ministry of Health of the Republic of Tajikistan pays particular attention to the development of forensic - medical service.

In 2013 for this purpose a new building within the National Medical Centre was allocated to house National Centre for Forensic Medical Examination and budget funds were allocated for its repairs and equipping. Also a special order of the Minister of Health and Social Protection was issued which obliges the National Medical Centre to provide all diagnostic conditions of persons who applied for the production of forensic medical examination.

Currently the MoH and NCFM achieved considerable results with regards to implementation of international standards in the work of the medical examination, which has been reported by both international organizations and also by the **UN Special Rapporteur on Torture Mr. Juan E. Mendes** during his visit to Tajikistan<sup>5</sup>.

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<sup>5</sup> Last visit of the UN Special Rapporteur against Torture by Mr. Juan Mendez in the National Center of Forensics of RT in February 2014

However, it should be noted that conducting of forensic medical examination, except for availability of normative legal ground is closely associated with the human resources and material - technical support from whose quality largely determines the **quality and level of evidence of expert opinions.**

Modern forensic science and medical forensics has many opportunities to solve problems in forensic and investigation authorities, in particular in the use of torture, which provide the **evidence base with a probability of 99, 9999%.**

There are still many problems in this field that need to be resolved in the shortest possible time, without addressing that, regardless of the availability of legal ground it is not possible to achieve the fundamental results.

According to the recommendations of the UN Committee against Torture, the investigation of cases of torture and other ill-treatment requires a specific approach, which determines the effectiveness of the investigation. Such specificity is characterized by the following circumstances: torture is both physical and psychological violence; torture imputed against a public official, or committed with their instigation or with their acquiescence to obtain a confession, evidence or other information required to carry out his functional duties. So, if you want to prove the evidence of physical and mental violence it is necessary to carry out medical examinations, but for evidence of torture in general, it is necessary to conduct a thorough investigation.

Thus, conducting of forensic medical examination in cases of torture and other ill-treatment should also be accompanied by not only the establishment of physical violence, but also contain an assessment of the mental component. This requires making certain amendments, additions and adaptations in the rules of the examination, as a forensic medical expert has no right to go beyond the limits of their knowledge while the psychical component is not an object of his special knowledge. In this case, the need for complex examination i.e. medical forensic and forensic - psychiatric examinations arises.

According to the CPC the procedure of forensic examination appointment is defined by the inquiry officer, investigator or judge. Where appropriate, they appoint a complex examination, **however** the legislation does not specify in which cases it should be appointed. Furthermore, according to the CPC RT forensic medical examination is carried out on the basis of written orders, resolution of investigative bodies and the court decision, in fact of public officials, while the exercise itself is charged against such officials. This is also a subject of debate among human rights defenders, as in this case, there is legally provided possibility for deliberate drag out of the procedures for the appointment and the production of medical examination.

The above stated fact urged us to carry out an in-depth analysis of legislation governing the production of forensic medical examination in Tajikistan and other related regulations that come into contact with the production of forensics in cases of application of torture or other ill-treatment in order to take measures aimed at adapting them for the effective investigation of torture by providing recommendations for making changes and amendments to the existing regulations.

In view of the above stated, in the course of the analysis with respect to bringing the national legislation of the RT in compliance with international standards the Istanbul Protocol is used as a benchmark for comparison of approaches and efficient production of forensic medical examination of victims of torture.

The analysis was focused to identify the main problems and obstacles in implementation of the Istanbul Protocol in conducting forensic and psychiatric examination, a medical examination after the actual arrest and during a criminal investigation, etc.

More detailed information is provided below.

### ***III. Physical evidence of torture (the procedure for appointing and conducting forensic medical examination)***

In accordance with the international law, governmental bodies should investigate reported cases of torture immediately and impartially.

The fundamental principles of any investigation of torture case are its competence, impartiality, independence, thoroughness and quickness. These elements in one or another form can be adapted to any legal system and investigation of all allegations of torture should be guided by these principles<sup>6</sup>.

Tajik legislation defines the activities of the state forensics examinations which are based on the principles of independence, respect for human and civil rights, independence of the forensic expert, independence of the state forensic institutions, competence, impartiality, comprehensiveness and completeness of the examination, scientific validity of the means and methods of examination, professional ethics<sup>7</sup>.

The task of the state forensics is to establish the circumstances, subject to proof following the courts decisions, the preliminary inquiries and investigations, as well as on the basis of applications of natural and legal persons through the organization and production of the state forensics<sup>8</sup>.

State forensic examination is conducted by a forensic expert in the manner prescribed by this Law, as well as by internal regulations approved by the Ministry of Health and Social Protection of RT.

Medical experts involved in the investigation of cases of torture or ill-treatment should always be guided by the highest ethical standards and, in particular, get conscious consent prior to any examination is undertaken<sup>9</sup>.

Below are a few questions that have been analysed with regard to their compliance with international standards, in particular:

#### **➤ Medical examination of detainees, suspects, accused etc.**

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<sup>6</sup> Paragraph 73 of the Istanbul Protocol

<sup>7</sup> Article 5 of the RT Law "On the state forensic examination"

<sup>8</sup> Article 3 of the RT Law "On the state forensic examination"

<sup>9</sup> Paragraph 83 of the Istanbul Protocol

- **Corpse inspection, exhumation**
- **Examination**
- **Access to the reports (opinions) on the results of the medical examination and forensic medical examination to persons examined, their representatives and lawyers**
- **Responsibility of doctors for knowingly giving false information**
- **Possibility of establishing non-governmental institute of forensic examinations**

Activities of the state forensic institutions, types of forensic examinations and examinations procedure in terms of special knowledge are determined by the RT Law "On state forensics."

**State forensics examination:**

The activities of the arranging and conduct of the state forensic examinations on the court decision, rulings of judges, the bodies of inquiry, preliminary investigation and applications of physical and legal persons by the specialized institutions established by the Government of the Republic of Tajikistan aimed to guarantee the rights and lawful interests of individuals in the process of criminal, civil, economic or the administrative proceedings, establishment by means of special knowledge in the field of science, technology, art or craft of the circumstances subject to proof.

*RT Law "On state forensics", Article 4*

The law establishes two types of institutions of the state forensic examination of the Ministry of Health:

- 1) forensic medical examination;
2. Forensic Psychiatric Examination.<sup>10</sup> *(in more detail is described in Part 4 Psychological evidence of torture)*

According to the provisions of paragraph 24 of the Standard Minimum Rules for the Treatment of Prisoners and paragraph 126 of the Istanbul Protocol each prisoner should be subjected to a medical examination at his admission and thereafter as necessary.

These guarantees are also reflected in the legislation of the Republic of Tajikistan.

The legislator provides for conducting several types of medical examination:

1. Medical examination of detained persons - Part 17 of the Instructions on detention;
2. Medical examinations - Part 3 of the Article 24 of the Law "On the procedure and detention conditions of suspects, accused and defendants"
3. Inspection of corpse, exhumation (Article 184 CPC RT);
4. Examination (Chapter 24 CPC RT);

During the analysis internal rules and regulations of the Pre-trial Detention Facilities (hereinafter referred to as PTD) were not available therefore it is not clear what are the purpose and procedure of the medical examination of the accused and the

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<sup>10</sup> Article 9 of the RT Law "On the state forensic examination".

defendants and whether the established procedures enable to identify and document cases of torture and other cruel, inhuman or degrading treatment or punishment.

## 1) Survey

Legislation of the Republic of Tajikistan, depending on the location of the detainee (the suspect, accused or defendant) and the specific objectives envisages several formats of medical examination.

In the CPC RT there is no a separate specialized standard envisaging the process and procedure for conducting medical examination of detainees.

Survey as an investigative action should not be confused with an inspection (осмотр) or with the "forensic medical examination".

The Criminal Procedure Code provides only for an investigative action "Survey" - one of the purposes of which is also to identify any bodily injuries. Such survey is carried out by the investigator when the surveyed person is a male person or by a doctor when the surveyed person is female person, whereby survey is carried out on the naked body.

**Survey** — is an investigative action meant to establish the presence or absence of any special distinctive signs, traces of the crime or injury on the human body, to identify the state of intoxication or other properties and attributes relevant to the case. If it is not required to carry out an examination it is possible just to carry out a survey of the suspect, accused, victim or witness. A survey is conducted by an investigator at the stage of preliminary investigation and is regulated by Article 186 of CPC RT.

Such interpretation makes an impression of incomprehensibility. Of course, it is clear to the professionals that in the first case it is a fixation examination to identify presence of any evidence on the body, clothing, various signs (for example, distinguishing marks) the survey and recording of which can be done by the investigator, and in the second case a medical examination is meant. However, the interpretation as it is, does not reflect the full sense of it thus making a room for the deployment of disputes.

The actual ground for conducting a survey are the evidences and other data contained in case (including investigation and search details) indicating to the possibility of detection traces of crime, injury or other distinguishing marks on the body of the accused (suspect, victim or witness) contributing to its identification etc.

Survey is conducted only in cases where the detection of these signs and traces do not require the production of forensic examination.

In addition to the Criminal Procedure Code, the process of the medical survey is provided for in the Regulations "On the detention", from the moment of actual detention in respect of detainees only. Also the procedure and grounds for conducting medical survey is regulated by the Law of RT "On the detention of suspects, accused and defendants."

Below production of a medical survey is described in more details.

### ***Medical survey of detainees before registering the procedural status of "suspect"***

A law enforcement officer, actually arresting a person must immediately explain the procedural rights of the detainee (the right to a legal counsel, the right not to testify against himself or his next to kin, etc)<sup>11</sup>.

Immediately after a delivery of the detained person to the criminal prosecution facility, an act for clarification of the rights of detainee is drawn up. The upper part of the act is attached to the detention report, and the lower part is given to the detainee and not subject to withdrawal, etc.

After drawing up an act of arrest of the detainee appropriate entry is made into the log-book of detention : (date and time of the detainee delivery, the detainee's name, etc.)

After making appropriate entry into the log-book of detention the detained person shall be subject to medical survey.

Medical survey is carried out by a doctor in the premises of the prosecuting authority, in a separate room before drawing up of the detention report and obtaining the status of a suspect.

Medical survey is:

- inspection of the detainee on health status (including to determine if the detainee suffers any disease);
- external examination of the detainee body (for identifying any bodily injuries, to determine their nature and when they were inflicted\emerged);
- Stating the condition of the detainee reporting external examination results and medical records (blood pressure, temperature, etc.)

The results of the survey are recorded in an act, which shall be attached to the report on detention making **its integral part**.

After the survey, a protocol of detention is drawn up and the detainee, who received the procedural status of the suspect, delivered to the TDF.

*The instruction "On detention" fully regulates the process of actual detention, recording the fact of the detainee delivery to the prosecuting facilities and makes provision for the obligatory medical survey prior to making a detention report, etc.*

*However, the Instruction does not provide for giving copies of the results of the medical survey to the detainee. Whereas the Istanbul Protocol requires that the results of medical survey were also given to the person being surveyed and it is one of the guarantees of the detained person.*

***Also the legislator envisages a procedure for medical survey of the suspects, accused and defendants at deterioration in their health status, if they get any bodily***

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<sup>11</sup> Instruction "On the detentionf" 2013

*injuries. Medical survey is carried out by the medical staff to places of detention without delay<sup>12</sup>.*

The results of the medical survey are recorded in the prescribed manner and communicated to the victim, the suspect and accused persons. At the request of the suspect, accused or defendant or their lawyer, a copy of the medical survey is provided to them.

On the decision of the head of the detention facility or the official or body in charge of the criminal case, or at the request of the suspect, accused or defendant or his counsel medical survey is conducted by the staff of other medical institutions. Rejecting such a request may be appealed with the supervising prosecutor.

Medical survey in cases where there are bodily injuries, taking into consideration the subject of analysis, i.e. the use of violence by an officer of the same institution, cannot be unbiased as medical survey is carried out by the medical staff of the same institution. In this context the principle of the expert independence is violated as specified in the Istanbul Protocol.

The legislation does not specify deadlines for appeals in cases of allegations or complaints by detainees or their lawyer. Detainee's right on being informed on the results of the survey, access to obtain copies of survey act is not specified by the legislation, etc.

According to the requirements of the Istanbul Protocol, the person being surveyed is required to obtain a copy of the medical survey and should be informed of their rights to receive a copy of the act.

Part 3 of this article states that on the decision of the head of detention facility a medical survey can be carried out in other health care institutions.

In cases of torture, possible use of physical and psychological violence on the part detentions facility and how this part of the article will be preventing from carrying out the medical examination in other medical facility at the option of the defence is also unclear.

*In law enforcement practice, there are cases when a medical survey after the actual arrest and before placement into the TDF is not always obligatorily carried out.*

*As a respond to the written request of lawyers to provide the results of medical survey they answer that the medical survey has been conducted and TDF staff were disciplined for it <sup>13</sup>.*

From the above stated it becomes clear that a medical examination is not regulated by the procedural legislation but by the Instruction "On detention" in respect solely of detainees, the Law on the detention of suspects, accused, defendants, etc.

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<sup>12</sup> Part 3, Article 24 of the RT Law "On the procedure and conditions of detention of suspects, accused and the defendants'

<sup>13</sup> A written response from the Office of Internal Affairs in the Khatlon region as of 10.06.2014 concerning the death of Homidov Nizomidin.



In certain cases a medical survey is carried out in accordance with provisions of the Law, with some restrictions on the rights of the person being surveyed and not always in law enforcement the norms of law are respected.

Istanbul Protocol and other international legal instruments consider a medical examination (inspection) to determine the bodily injury not as an independent procedure, but as a part of the activities of the forensic medical examination.

Thus, there are considerable differences between the Criminal Procedure Code and other legislative acts of the Republic of Tajikistan and the Istanbul Protocol with regards to the conducting a medical survey, the objects of a medical examination, number of persons participating in a medical examination, as well as the processing of their results and their access etc

## **2) Inspection of a corpse, exhumation**

External examination of a corpse is done by an investigator in the place of its discovery in the presence of witnesses and a medical specialist in forensic medicine, and if such specialist is not available by other doctor. Unidentified bodies are subject to mandatory fingerprinting and photographing. In cases when it is necessary to remove the corpse from the place of burial (exhumation) for inspection the investigator makes a resolution. Such resolution on the removal of a corpse is mandatory for the administration of the burial site and relatives of the deceased. Removing the corpse and its inspection is done in the presence of witnesses and a medical specialist in forensic medicine, and if such specialist is not available by other doctor.<sup>14</sup>

Remove from this paragraph the word **"unidentified"** and leave it with the following wording: **"the corpses are subject to mandatory fingerprinting and photographing."**

This fact will give not only a full detail of the appearance for the purpose of identification, but also record any bodily injuries on the corpses. Photographing must be conducted in accordance with the requirements of judicial evidentiary photography which envisages only photographs of unidentified bodies.

In legal practice in most cases photographing is carried out. In practice, this is already being done almost in every case, the legislative implementation would be timely. In addition it is necessary and timely to think about making amendments into gene dactylography of unidentified corpses.

*The following describes the main problems in the legislation that hinder the full conduct of a forensic examination according to the principles of the Istanbul Protocol (e.g. conscious consent, terms of examination conduct, confidentiality and availability of the reports' conclusions of the results of examinations" etc.).*

## **3) Examination**

The appointment procedure and passing the examination is set by Chapter 24 of the CPC. An examination is appointed by an investigator at his discretion and on the basis of his resolution.

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<sup>14</sup> Article 184 CPC RT.

*The judicial procedure on criminal cases in the Republic of Tajikistan is determined by CPC RT, based on the Constitution of the Republic of Tajikistan.*

The legal procedure established by the criminal procedural legislation **is obligatory** for courts, prosecution bodies, preliminary inquiries and investigations, as well as **participants of the criminal proceedings**<sup>15</sup>.

Forensic medical experts carrying out examinations on the basis of the resolution or decision of the court are the parties to the criminal proceedings <sup>16</sup>.

In case if examination is carried out on the request of individuals or legal entities (the lawyer's request) in accordance with **Article 21 of the Law "On State forensic examination"** the resulting medical conclusion is considered to be obtained not in the procedural way, as these grounds are not provided in the CPC standards.

#### **Article 21 Grounds for performing state forensic examinations**

The grounds for conducting state forensic examination are of the court ruling, the judge's order, order of the person conducting investigation, the investigator or the prosecutor, as well as the application of physical and legal persons; from the date of fling such orders, resolutions or statements the state forensic examinations are considered to be assigned.

Chapter 4, Law of RT "On state forensic examination"

Recognizing and take into account the findings of the state forensic examination produced on the grounds specified in the Law "On State forensic examination," becomes an disputable point in the criminal proceedings.

There is a risk that subsequently findings of the forensic examination cannot be taken into account by the body of investigation and court.

International standards, in particular the Istanbul Protocol standards make provision for conducting forensic medical examination based on the request of the victim or his representative.

### **3.1. Complex examination**

Complex examination is appointed in cases when for the examination knowledge of the different branches of science is required. It is carried out by experts of different specialties within their competence<sup>17</sup>.

**The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the use of torture in particular (intentional causing of physical or mental suffering)**

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<sup>15</sup> Article 1 CPC RT

<sup>16</sup> Article 58 CPC RT

<sup>17</sup> Article 214 "Complex forensic examination" CPC RT

Notably, paragraph 6 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Appendix 1 to the Istanbul Protocol) states that the medical examination includes a requirement for both physical and psychological \ psychiatric examination indicating physical and psychological symptoms in a report on the results of the examination.

Paragraph 104 of the Istanbul Protocol establishes that it is always necessary to carry out a psychological examination and psychological assessment of the alleged victim of torture.

Paragraph 164 of the Istanbul Protocol describes the survey methodology of the person subject to examination by an expert and it is aimed to determine not only the physical, but also psychological evidence of torture.

In Tajikistan there is no legal instrument specifically regulating the examination of cases of torture.

Appointing an examination to determine the nature and extent of bodily injury according to Article 209 of the CPC is mandatory. Conducting psychological (psychiatric) examination of the victims, according to the above article of the CPC is mandatory when there is a doubt in their ability to perceive the circumstances relevant to the case and give provide evidence on such circumstances.

Thus, the psychiatric examination as a tool to identifying the symptoms and evidence of torture, and even more as an integral part of the expert studies for the potential use of torture is not provided for.

In case of necessity, an investigator is entitled (but not obliged) to appoint a complex forensic medical and psychological / psychiatric examination in order to identify the symptoms and psychological evidence of torture (*specified in more detail in Chapter 4 Psychological evidence of torture*).

### 3.2. Additional re-examination

*When the medical examination opinion is somewhat unclear or incomplete as well as at the appearing of new issues with respect to the previously investigated case an additional examination may be appointed which can be assigned to the same or another expert..*

*In the case of invalidity of the expert opinion or doubt in its accuracy further examination can be appointed assigned to another expert or experts <sup>18</sup>.*

In practice, there are lots of occasions **when disagreement of one of the parties** is considered as the basis for conducting re-examination. This provision is not justified as **disagreement between the opposing parties will always appear**, for which expert opinion is not in favour. Therefore, amendment of the Article will cause that unreasonable re-examinations validated will not be re-appointed<sup>19</sup>.

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<sup>18</sup> Article 220. Additional and repeated examination

<sup>19</sup> Analysis of this part is made on the basis of long-term experience of Deputy Director of NCFM RT Furkat Ganiev

An expert produces an opinion, where the severity of the injury is assessed as a grave, in this case, a criminal case under article 110 is initiated, which is punishable by imprisonment.

There are various circumstances arise, including of a corruption nature and the need to determine the severity level towards alleviation, i.e. to specify the injury either as medium or light injury. As a result, such conditions are created that the defendant expresses disagreement with the expert's opinion and wishes to carry out re-examination.

Disagreement of either party should be reasonable and not prejudiced, because there is another party - the victims. The standard states that doubts in the accuracy is a thing that makes the possibility of re-appointment of examinations endless, as in the case changing the opinion as a result of re-examination, the doubt on the other side arises, that is, of the opposing party (e.g. the victim or the casualty) then a lawsuit starts, as in the case of changing the result of examination opinion the injured party will have doubts about the correctness of this examination.

This situation gives rise for endless reassignments of examinations and a field for the development of corruption.

### **3.3. Content of the expert opinion**

Article 217 of the CPC defines the "Content of expert opinion"

1. After conducting an examination, taking into account the examination findings, an expert or experts on their behalf draw up an opinion report, which shall specify: **(add at least)**

- *When and where the examination is carried out; Whom the examination was carried out by (first name, middle name, education, profession, work experience, academic degree and academic rank, position); - The ground for conducting an examination made, etc.*

The legislator clearly defines the list of items to be included in the content of expert opinion. However, in law enforcement practice over the years, a need to supplement the content of the expert opinion emerges.

For example - when it is necessary include not only the date, but also the time of the examination of a person being examined in the form of an act and an opinion and such possible details in the forms of other fields.

Therefore, it is important for the CPC to specify the minimum list of the items to be included into the content of expert opinion, which are important for the investigation and any additional specific field information cannot be useless for the case in general. This amendment is very important, since the state forensics of RT currently makes amendments in the form on the examination in accordance with the recommendations of the **Istanbul Protocol**, which contains much more information compared to the one provided in the CPC. Adding to all the information into the CPC is also not appropriate because other industries may not have this information or specifics and in the CPC everything should be universal, so "**at least**" is the shortest and at the same time the most appropriate addition..

### **3.4. Presence of other persons during the forensic medical examination**

According to Article 26 of the Law "On state forensics" those persons who are granted a right by the procedural legislation of the Republic of Tajikistan can be present during the production of the state forensic examinations.

Persons present in the production of state forensic have no right to interfere in the course of the examination, but may give explanations and ask questions from forensic experts, relating to the subject of the state forensics.

The presence of others is not allowed during drawing up expert opinions, as well as at the stage of the meeting of legal experts and drawing up conclusions, and if the state forensic examination is carried out by a panel of forensic experts.

Inspection for the purpose of the examination is to be conducted in private, under the control of the medical expert and without presence of security agents and other government officials. Police and other law enforcement officers should not be in the room where the examination is carried out, except for cases whereby in the opinion of the physician performing examination, there is evidence that the detainee poses a serious threat to the safety of medical personnel.

In this case, at the request of the physician security guards of the medical institution, and not the police or other law enforcement officers must be present during the examination. In this case, the security guards should still be out of earshot (i.e. only within visual contact with the patient).

The presence for any reason of the police, military or other law enforcement personnel in the premises where the examination is held should be noted in the official medical report of the doctor. The presence of these persons during the examination may serve as a ground to deem invalid medical report containing the adverse findings. Access to a lawyer should be provided during the medical examination.

***Paragraph 83 and 124-126 of the Istanbul Protocol***

Based on the above, the legislator provides full right to the investigator to be present during the examination, as well as allowing presence of other persons (relatives, lawyers) during the examination, which is a violation of international standards.

### **3.5. The timeframe for conducting medical survey and forensic examination**

For detecting and recording the traces of beatings and injuries timeliness of appointing and conducting of medical survey and forensic examination is of great importance.

Paragraph 104 of the Istanbul Protocol establishes that a medical examination (survey) should be carried out regardless of how long has passed since the use of torture, but if it is alleged that torture had taken place within the last six weeks, then this survey should be organized in a matter of urgency before the clear signs of torture disappear.

CPC RT and RT Law "On state forensics" recognize the forensic examination to determine the nature and severity of injuries as obligatory. However, national legislation does not specify the timing of it.

Therefore, paragraph 9 of the Action Plan on implementing the recommendations of the Committee against Torture and the Special Rapporteur on Torture adopted by the Government of the Republic of Tajikistan on August 15, 2013 makes provision for the adoption of a legislative act establishing the shortest period of time for appointment and conducting of medical survey and forensic examination according to the complaints on use of torture.

Often notably in law enforcement practice problems occur not in a timely appointment of forensic examination by investigators, but in the conducting of examination itself, as medical forensic examinations are carried out a few days later when the traces of bodily injuries disappear, etc.

### **3.5. Obtaining the consent of the individuals being examined**

Paragraph 64 of the Istanbul Protocol includes the requirements of the Lisbon Declaration on obligation of doctors to receive freewill and informed consent of mentally normal patients for survey or any kind of examination or other procedures.

Medical examination conducted to gather evidence in the course of any investigation requires the consent of the individual being examined and such consent must be conscious in the sense that the such individual understands how the medical data obtained during the examination will be used, how they will be stored and who will have access to them. If these and other points concerning the consent of the individual being examined are not be solved in advance then the consent to the examination and registration of its results shall be invalid.

Paragraph 83 of the Istanbul Protocol also identifies the need to obtain informed consent of the person being examined before any examination or survey is undertaken.

According to paragraph 165 the person being interviewed by an (doctor) has the right to refuse the examination. In this case, the physician should document the reason for the refusal of the examination. Furthermore, if the person is a detainee, the report should be signed by his or her lawyer and another health care professional.

In the Republic of Tajikistan in accordance with the provisions of Paragraph 2, Article 210 of the CPC examination of victims and witnesses is carried out only with their freewill consent that is given by them in writing. If these persons have not reached 16 years of age or unfit to plead, the written consent to the examination is given by their legal representatives.

RT Law "On the State Forensic Examination" establishes that the forensic examination of an individual can be done on a voluntary or compulsory way (Article 32).

If the state forensic examination is performed on a voluntary basis, a written consent of the person who is subject to the state forensics is to be provided to the institution of the state forensic examination.

If a person in respect of whom state forensic examination is assigned is under the age of 16 years old or is declared incapable by a court, a written consent to carry out state forensic examination shall be given by the legal representative of that person.

Thus, the national legislation with regard to voluntariness of the examination of the victims agrees with the Istanbul Protocol and other international instruments.

However, obtaining the consent of the victim is vested not on an expert, but on the investigating authorities, which should provide a written consent of the victim to the forensic institution.

This discrepancy gives rise to the problem to experts in determining whether the obtained consent was informed one as it is stipulated in paragraph 64 of the Istanbul Protocol.

This has significant impact as in the case of uninformed consent for conducting examination and registration of such examination findings shall be considered invalid.

This has significant impact as in the case of uninformed consent for conducting examination and registration of such examination findings shall be considered invalid.

#### **4) Accessibility of reports (opinions) on the results of the medical survey and examination findings to persons being examined, to their representatives and lawyers.**

International legal instruments securing confidentiality of forensic medical examination reports (opinions), however, provide for mandatory access to them for individuals subject to examination, his (her representative and lawyer).

Thus, according to paragraph 84 of the Istanbul Protocol forensic medical examination report should be confidential and communicated to the subject or his or her nominated representative.

Paragraph 126 of the Protocol establishes that if a detainee or a lawyer acting on behalf of such detainee request for a medical report, such report should be provided.

Also item "C", Paragraph 6 of Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Appendix 1 to the Istanbul Protocol) states that a report on the results of the examination is not passed to any other person, except pursuant to consent of the subject or by a court ruling authorized to provide such passing.

RT Law "On state forensics" prohibits a forensic expert to inform anyone about the results of the state forensic examination, except for the person or body appointed such examination (Article 18 Part 2).

Article 15 Part 1 Item 6 of the Law requires the head of the state forensic institution upon completion of the examination to send the opinion of a forensic expert, the objects of examination and the case file to the entity or person who appointed the state forensic examination or applied for conducting the forensic examination.

Familiarization (presentation to) of the suspect, accused or the victim with the findings of the examination in accordance with Article 219 of the CPC is carried out by the investigator prior the end of the preliminary investigation. At the same time, these persons have the right to give their explanations and to express their objections to the conclusions of the examination. In the case of the satisfaction or waiver of such petition the investigator shall make a relevant decision which is notified to the person raised such petition under his or her signature.

A protocol is made on the familiarization with the conclusions of the expert and the protocol of his interrogation where the statements made or objections are reflected.

On the basis of international practice it is often the suspects, accused, convicted undergo to torture and other ill-treatment at the stage of prosecution or while serving their sentence <sup>20</sup>.

The legislation provides a number of procedural rights to a suspected or accused person during criminal proceedings, in particular the right to receive a copy of the detention report or resolution on application of a preventive measure etc.; to know what he is accused of, and receive a copy of the resolution on bringing him to justice as the accused, on the application of a preventive measure, as well as get a copy of the indictment, etc.

However, the CPC does not provide for the right to receive copies of the results (conclusions \ act) of medical survey and the forensic medical examination and psychiatric examination opinions.

As it has been noted earlier, similarly at conducting a medical survey in accordance with Article 186-187 of CPC the Law makes a provision for producing a protocol of survey without making a separate medical conclusion and presentation of its copies to the stakeholders.

It is important to note that there is a problem in getting a copy of the conclusions of forensic medical examination by the accused, the defendants and their lawyers.

Often, there are obstacles to lawyers in obtaining copies of the forensic medical examination opinions on the allegations of torture, when the investigation refuses to provide such copies. The refusal is motivated by the fact that a lawyer has the right to familiarisation; however CPC RT does not oblige investigators to issue copies findings to lawyers<sup>21</sup>

Thus, there are significant differences between the national legislation and international instruments with respect to the accessibility of reports (opinions) about examination findings to the subjects, their representatives and lawyers.

In general, the legislation of the Republic of Tajikistan allows for a full investigation of cases of torture, however, some disputable points may be excluded or modified with the view of proposed recommendations.

## **5) The liability of doctors for giving deliberately misleading information**

An important condition for ensuring the impartiality and objectivity of doctors and experts in conducting a medical survey and forensic examination is to establish criminal liability for knowingly giving false information and conclusions.

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<sup>20</sup> Amnesty International Report 2012 (Tajikistan ).

<sup>21</sup> Written response of the General Prosecutor's Office of the RT on a criminal case of Karamkhudoeva from 14.11.2012№ 18\85\п-12



Articles 351-352 of the CC RT establish criminal liability for producing knowingly false conclusion or refusal to give an opinion by experts and specialists.

If criminal liability with respect to deliberately producing misleading opinion or refusal to provide opinion does not invoke any dispute, the responsibility of doctors under this article of the Criminal Code is highly disputable for the following reasons:

- doctors conducting medical examination of detained individuals or those placed into the places of detention, as well as the doctors who are engaged into the process of forensic medical examination as experts of their profile are not warned about the responsibility under Articles 351-352 of the Criminal Code, which excludes their criminal liability;
- doctors conducting medical survey (examination) having neither the status of the expert nor the status and the specialist (who also warned of the responsibility) fall out of the range of subjects the crimes provided for in Articles 351-352 of the Criminal Code;
- To qualify the actions of doctors who provided false information under other articles of the Criminal Code making provision for liability for forgery and counterfeiting, namely article 323 (forgery) and 340 (forgery, manufacture or sale of forged documents) is not advisable as giving false conclusions on its nature directed against the interests of justice.

## **6) Non-state forensics**

According to the requirements of Article 208 of CPC RT (Procedure for appointment of examination) -

*Examination is performed by specialists of expert agencies, other public or non-governmental institutions, enterprises, organizations or other leading persons designated by the investigator.*

Even though the CPC RT refers to the possibility of conducting examination by non-governmental and other expert institutions in there is no such law in the RT regulating activities of such institutions. Consequently, there are no independent expert institutions in the RT.

Concerning the standards of investigating torture, all the persons who allege torture should have the right to a medical examination, including in private medical institutions.

To improve the quality and evidence base of expert opinions, it is necessary to systematically organize trainings on effective documentation of torture among a wide range of medical (primary care physicians, forensic doctors, psychiatrists, etc.) and legal (lawyers, investigators, judges, members of the inquiry and etc.) staff, as well as to improve facilities of forensic medical examination centres.

The Working Group at the Ministry of Health and Social Protection of RT has not conducted any activities with this regard.

It is planned that in 2015 works will commence to analyse and design for the development of the Draft Law "On Non-State forensics."

## **V. *Psychological \ psychiatric evidence of torture***

According to common belief, torture is an extraordinary event in the life of an individual, which is capable of causing a variety of physical and psychological suffering. It is important to recognize that not everyone who was a victim of torture develops psychiatric illness possible to diagnose. However, many victims suffer severe emotional disturbance and psychological symptoms.

The main psychiatric disorders associated with torture are post-traumatic stress disorder (hereinafter referred to as PTSD) and deep depression <sup>22</sup>.

PTSD is a consequence of trauma and is determined by a psychiatrist or clinical psychologist in the course of medical study.

At the same time in the national legislation there are no certain standards governing the list of doctors who are entitles to conduct medical survey to determine PTSD.

In the course of the analysis medical examination by doctors-psychologists was not evaluated. More emphasis has been made to the analysis of the procedure and the production of forensic psychiatric examinations, etc.

The grounds and procedures for the production of the forensic psychiatric examination (further FPE) is regulated by the RT Law "On state forensics", CPC RT, as well as by the internal regulation on forensic psychiatric examination, etc.

Regulations on the forensic psychiatric examination in the RT determines in accordance with the CPC provisions the conditions and procedure for the production of forensic psychiatric examinations in Tajikistan.<sup>23</sup>.

During the analysis of the legislation in terms of assessment of the psychological evidences of torture and its compliance with the principles of the Istanbul Protocol focus was made at the following range of issues, in particular:

- *Conducting forensic psychiatric examination at the request of individuals (self-sustained collection of evidence);*
- *Consent of subject to the passage of the FPE;*
- *Obligatoriness of conducting a complex forensic examination (forensic and psychiatric);*
- *Psychological / psychiatric examination (collection of medical and psychiatric disease history, the order of its preparation, confidentiality, etc.)*

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<sup>22</sup> Paragraph 236 of Istanbul Protocol

<sup>23</sup> Approved by Order of the Ministry of Health and Social Protection as of 09.02.2001 № 54

### ***1) Conducting a forensic psychiatric examination at the solisitation of individuals (private collection of evidence)***

The ground for the production of the state forensic examination is a court ruling, the judge's decision, the person conducting the inquiry, the investigator or the prosecutor, as well as the application of physical and legal persons at that the date of filing such request is considered to be the date of assigning the state forensic examination<sup>24</sup>.

Internal regulations of FPE makes provision that at conducting FPE experts are guided by the basics of criminal and civil laws and proceedings of the RT as well as the provisions of the regulations and orders issued by the Ministry of Health of the Republic of Tajikistan.

In accordance with Part 3 of this Regulation the legal ground for the production of FPE is the resolution or determination on its conducting under the provisions of CPC.

According to Article 6 of the CPC "Resolution" is an act passed by investigator, prosecutor in the process of inquiry and preliminary investigation or the judge of the first instance solely, etc

It is important to note that the RT Law on State forensics regulates the general procedure for the appointment and conducting of all state forensic examinations, but a detailed conducting of each examination in is carried out in the framework of internal instructions \ regulations of each agency of the state forensics.

RT Law "On state forensics" provides guarantees to an individual himself by his own to collect evidence for further appeal, etc.

So far in law enforcement practice there were no requests of individuals for determining the psychiatric state for the purpose of definition of PTSD.

Lawyers often do not know to what extent they can advise the alleged victim of torture undergo a psychiatric research to determine PTSD obtained as a result of the possible use of torture and other ill-treatment, etc.

Only in one case lawyers of the organisation members of the NGO Coalition against Torture had filed a request for a citizen of Afghanistan to the Psychiatric Clinical dispensary of Dushanbe to determine PTSD.

As a result, she was surveyed by a group of psychiatrists and was diagnosed with PTSD. The report was drafted in accordance with the principles of the Istanbul Protocol, with expert support of the experts of the international organization "Physicians for Human Rights."

Regulations on the FPE does not clearly define the procedure whereby an individual on his own requests to determine his psychiatric state on the alleged fact of use of torture before a criminal case is initiated.

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<sup>24</sup> Article 21 of the Law "On the state forensic examination"

Inconsistency of the Regulation on the FPE and the Law "On state forensics" is in the fact that the Regulation was adopted by the Order of the Minister of Health and Social Protection RT under the number 54 from 09.02.2001.

Recent amendments concerning the **"conduct of examination at the request of the individual"** were made into the Law "On the State Forensics" on 16.04.2012..

Despite the lack of direct procedures in the Regulations of the FPE, in law enforcement practice doctors can conduct a survey and identify the trauma, etc.

### ***The consent of the subject to the passage of FPE***

**Paragraph 64 of the Istanbul Protocol** provides that the medical examination conducted to collect evidence in the course of any investigation requires the consent of the individual being examined, which is to be conscious in the sense that the patient must understand how medical information obtained during the examination will be used, how they will be stored and who will have access to them

State forensic examination of an individual can be done on a voluntary or compulsory basis..

If the state forensic examination is performed on a voluntary basis, a written consent of the person who is subject to the state forensics is to be presented to the institution of the state forensic examination<sup>25</sup>.

According to provisions of Part 2, Article 210 of the CPC RT examination of victims and witnesses is carried out only with their free consent that is given by them in writing.

The CPC does not provide compulsory forwarding a suspect, accused, defendant and sentenced to the passage of the forensic medical or psychiatric examination, but only defined participatory process, for which the examination can be carried out only with their consent.

According to the internal Regulation of FPE - the suspect, accused, defendant, a person who undergoes proceedings on application to him or her compulsory measures of a medical nature, are subject to forensic psychiatric examination, regardless of their own consent or the consent of the other parties<sup>26</sup>.

In this case, it is determined or considered that the subject is insane, thus the person may not exactly realize and accordingly its consent is not required.

A range of persons who may be sent to the state forensic examination forcibly is determined by the procedural legislation of the Republic of Tajikistan.

If the procedural legislation of the Republic of Tajikistan does not contain direct reference to the possibility of forced state forensic examination, state forensic institution is not entitled to carry out a state forensic examination of the that person by force.

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<sup>25</sup> Article 32 of the RT Law "On the state forensic examination"

<sup>26</sup> Paragraph 28 of the FPE Regulations

At the same time, forced medical measures provided for by Part 1, Article 97 of the CPC RT are applicable cases against persons who have committed socially dangerous acts in a state of insanity or acquired psychiatric disorders after committing the crime that make it impossible to appoint or execution of punishment.

Compulsory medical measures shall be appointed only when the morbid psychiatric disorders of individuals cause danger to themselves or others, or in case of causing other possible serious harm.<sup>27</sup>.

Forced forwarding of citizen to FPE shall be permitted only in the cases stipulated by the CPC and civil procedure law. (Item 28, Order № 54 dated 09.02.2001 of the MoH RT). It is prohibited the use of force, threats, fraud, limitation of rights and the use of other illegal means to receive information from the persons under FPE.

At the same time, CPC RT and FPE Regulations do not regulate the procedure for psychiatric examination to determine PTSD.

Therefore it is not so clear to what extent a consent of the subject is taken by a psychiatrist at the time of examination to determine possible PTSD.

At conducting FPE person subjected to examination is informed in an comprehensible form by the by a psychiatrist about examination methods are to be used in respect with him or her, including alternative ones, possible pain or side effects, which is confirmed by the signature of the subject<sup>28</sup>.

## **2) *Obligingness to conduct a complex forensic examination (forensic and psychiatric)***

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* defines torture and prohibits the use of physical and moral suffering.

The law provides for a mandatory appointment and conducting of examination to identify possible facts of the use of physical violence, however, does not make provision for determining moral suffering as a form of torture.

Since psychological symptoms are so prevalent among survivors of torture, it is strongly recommended to include a psychological evaluation in any assessment of the effects of torture<sup>29</sup>.

The psychiatric state of the suspect, the accused is established only in those cases where there is doubt about their sanity or ability to defend their rights and legitimate interests in the criminal proceedings<sup>30</sup>.

At producing FPE psychiatrists determine the psychiatric state of the accused or the suspect, their ability to realize the nature and social danger of their actions (inactions)

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<sup>27</sup> Article 438 CC RT

<sup>28</sup> Item 4, Part 4 of the Regulations on the forensic psychiatric examination in RT dated 09.02.2001 № 54

<sup>29</sup> Paragraph 261 of Istanbul Protocol

<sup>30</sup> Article 209 CPC RT

by performing socially dangerous acts, and by the time of the proceedings, as well as an opinion on the need to apply in respect of those persons medical measures, etc.

Legislation does not clearly define the term moral suffering resulting from physical and psychological violence in cases involving torture, etc.

At the same time, psychiatrists, notwithstanding the absence of direct legislative basis for determining psychiatric suffering resulting from the use of torture, can determine the psychiatric state and its causal relationship.

During the forensic psychiatric examination to determine the psychiatric state of the subject person International Classification of Diseases (ICD-10) is used.

**ICD-10 - is the International Statistical Classification of Diseases and Related Health Problems** (English. International Statistical Classification of Diseases and Related Health Problems) is a document used as a leading statistical and classification basis in health care. This paper is periodically (every ten years) is reviewed under the supervision of WHO.

ICD is a normative instrument providing uniformity of the methodological approaches and international comparability of materials.

Currently, the International Classification of Diseases of Tenth Revision is available (**ICD-10**, *ICD-10*).

Psychiatric state also includes the definition of post-traumatic stress disorder (hereinafter PTSD).

Posttraumatic stress disorder is referred to the class F40-F48 - Neurotic, stress-related and somatoform disorders, ICD-10.

Post-traumatic stress disorder (PTSD, "Vietnam syndrome", "Afghan syndrome," and so on) is severe psychiatric condition that occurs as a result of single or repeated traumatic situations, such as military operations, severe physical injury, sexual abuse, or the threat of death.

During PTSD a group of characteristic symptoms, such as psychopathological anxiety, avoidant behaviour, loss of memory of the traumatic events and the high level of disturbance persists for more than a month after the trauma<sup>31</sup>

In this case, since PTSD is not a sign of insanity of an individual but it is a severe psychiatric condition that has resulted from the use of physical and psychological trauma.

Therefore identification of PTSD is obligatory for the appointment and conduct of the investigation, in the case of obtaining the consent of a suspect, accused, defendant or convict.

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<sup>31</sup> *American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders. — Fifth. — Arlington, VA: American Psychiatric Publishing, 2013. — P. 271–280. — ISBN 978-0-89042-555-8. (DSM-V)*

In addition to post-traumatic stress disorder other diagnoses should also be considered, such as major depressive disorder and persistent change in personality (see relevant section). The list of other possible diagnoses, which is not exhaustive includes:

- i) General anxiety syndrome which is characterized by excessive anxiety and excitement about a number of different events and activities, motor disorder and increased autonomous activity;
- ii) panic syndrome, which is expressed in the form of repeated and unexpected strong attacks of fear or anxiety, including such symptoms as sweating, choking, trembling, heart palpitations, dizziness, nausea, chills or hot flashes;
- iii) Acute stress syndrome, having essentially the same symptoms as PTSD, but in respect of which the diagnosis is put in a month after exposure to traumatic events;
- iv) psychosomatic disorders characterized by physical symptoms that cannot be attributed to any disease;
- v) Maniacal depressive syndrome characterized by maniacal or hypo-maniacal attacks associated with elevated, expansive or irritable mood, delusions of grandeur, reduced need for sleep, flight of ideas, psychomotor agitation and associated psychotic occurrences;
- vi) Disorder due to the general condition of the patient, often in the form brain damage, causing fluctuations or failure consciousness level, orientation, attention, concentration, memory and coordination;
- vii) phobias, such as fear of open communication or space.

FPE is performed in compliance with the principles of the rule of law, independence of the expert, objectivity and completeness of expert research, protection of the rights and freedoms of the individual (paragraphs. 4, 10-13 of this Regulation)

In order to make diagnosis of persistent change in personality according to ICD-10 after the survived suffering such change in personality should remain for at least two years after the stress connected to this suffering.

ICD-10 states that the stress should be so strong that "to explain its profound impact it was not necessary to take into account the vulnerability of a particular person."

***Chapter VI, Section B of the Istanbul Protocol***

***3) ) Psychological / psychiatric examination (collection of medical and psychiatric anamnesis (history), the order of its preparation, confidentiality, etc.)***

- *Interview process*
- *Medical and psychiatric history before and after detention*
- *Conclusion of psychiatrist (clinical opinion)*
- *Types of forensic psychiatric examination*

Psychological evaluation can provide important evidence of violence over torture victims for several reasons: torture often causes devastating psychological symptoms, torture methods are often designed so as not to cause physical injury, while physical torture methods may leave traces that are either not clear or not enough specific<sup>32</sup>.

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<sup>32</sup> Paragraph 260 of Istanbul Protocol

Psychiatric examination provides useful evidence for forensic examination, review of applications for political asylum, establishing of the conditions under which false confessions could be obtained, understanding regional practices of torture, identify the needs of victims in medical treatment; examination results are also used as evidence in the course of investigations into human rights violations.

The overall objective of the psychological evaluation is to assess the extent to which the allegation of a person on torture corresponds to the data obtained during the psychological examination. To this end the examination should provide a detailed statement of anamnesis of the person, evaluation of his psychiatric state, assessment of social activity and clinical findings<sup>33</sup>.

➤ ***Interview process***

The Regulations on the forensic psychiatric examination in RT dated 09.02.2001 № 54 specifies the entire process of conducting forensic psychiatric examination by physicians-psychiatrists.

Before proceeding to the interview, the physician should introduce the interview process in a manner that explains in detail the procedures to be followed (questions asked about psychosocial history, including history of torture and current psychological state) and that prepares the individual for the difficult emotional reactions that the questions may provoke. The individual needs to be given an opportunity to request breaks, interrupt the interview at any time and be able to leave if the stress becomes intolerable, with the option of a later appointment. Physician's need to be sensitive and empathic in their questioning, while remaining objective in their clinical assessment. At the same time, the interviewer should be aware of potential personal reactions to the survivor and the descriptions of torture that might influence the interviewer's perceptions and judgements.

It is important to take into account the reasons for the psychological evaluation, since they determine the degree of confidentiality to be provided by the expert. If any state agency in judicial proceedings requests assessment of the reliability of allegation of one or other person about torture, such person must be informed that it means cancellation of medical confidentiality in respect of all the information provided in the message.

However, if the request on the psychological examination comes from a person subjected to torture, an expert must comply with medical confidentiality.

**Paragraph 263, 265 of the Istanbul Protocol**

In legal practice psychiatrist in the course of history-taking, at the beginning of the survey explains the purpose of the FPE, research methodology (x-ray, possible examination by other professionals, computer tomography (magnetic resonance imaging), clinical examinations, etc.), in process of FPE with subsequent recording in the medical card of the subject.

At the same time during the passage of a psychiatric examination, there is the risk that obtaining repeated trauma by the subject.

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<sup>33</sup> See chap. III, Section C, Chapter IV, Section E of the Istanbul Protocol



In cases where there is a risk of repeated trauma the psychiatrist conducts FPE using implicit and explicit questions, while taking a break for some time, thereby controlling the psychological state of the subject.

FPE is conducted for up to 30 days, the subject's stay duration in the expert hospital may be extended on the grounds of complexity of the expert case or in cases of failure to provide sufficient material by an official<sup>34</sup>.

It is important to note that the procedure of the survey (the interview process), the collection of medical and psychiatric history, etc. are not envisaged by this provision of FPE.

In the process of conducting FPE psychiatrists collect history based on previously acquired knowledge in the medical school and the established practice in their institutions.

In a case whereby a young professional is employed who has no particular experience of FPE, his or her subsequent activities shall be carried out under the supervision of another psychiatrist with a certain experience.

Young professionals are also pass training every 5 years at the Department of Psychiatry and Addiction named after M G Gulomov and the Tajik Institute of Post-Graduate Medical Training (TIPGMT).

#### ➤ ☐ **Medical and psychiatric history before and after detention**

***Paragraph 276 of the Istanbul Protocol*** provides that it is necessary to pay all efforts to document the full history of torture, persecution and other relevant traumatic experiences. This part of the evaluation is often exhausting for the person being evaluated. Therefore, it may be necessary to proceed in several sessions. The interview should start with a general summary of events before eliciting the details of the torture experiences.

The interviewer needs to know the legal issues at hand because that will determine the nature and amount of information necessary to achieve documentation of the facts.

During the interview due to time constraints and other problems often it can be difficult to get this information. Nevertheless, it is important to collect sufficient data about psychiatric health and psychosocial functioning of the person being surveyed in order to get an idea on to what extent torture contributed to the development of existing psychological disorders.

It is important to note that in the legal practice psychiatrists at conducting FPE collect history according to the principles of the Istanbul Protocol, in particular:

- Personal Data;
- psychosocial history before arrest (marital status, education, work);
- past history of disease (severe and chronic diseases, injuries, surgeries, medications taken at the moment);
- habits (tobacco, alcohol, drugs, etc.);

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<sup>34</sup> Paragraph 52 of the Regulations on the production of forensic psychiatric examination as of 09.02.2001

- check medical history, hospital records, reference letter from residence place authority, eyewitness testimony, the testimony of the person being surveyed given during the preliminary investigation, etc.
- has medical care been provided during and after the detention;

In the course of history-taking from the words of the person being interviewed the circumstances precedent to the physical violence, a coherent narration etc.

During the survey in cases where the person being surveyed reports on a physical abuse, the psychiatrist examines the places where there are signs of physical injury, and records the location of injury, its size, presumably establishes a mechanism of injury and other details into the medical history.

In cases where there is a need of medical care, the person being surveyed is sent to another specialist, and an appropriate entry shall be in his or her medical history.

Full details of health state before the injury, the state of health at the moment, painful sensations in the body, somatic complaints, use of drugs and their side effects, if he or she has hereditary psychiatric illness, appropriate sexual history, information about surgery and other medical data are included into the medical history.

It is important to note that in order to provide confidentiality it is prohibited to take photographs. However, in cases where there are obvious signs of physical trauma, these places are photographed and attached to the medical history of the subject. (This provision is not provided in legislation, physicians base on the examination confidentiality principle).

In law enforcement practice in cases of torture and other ill-treatment a forensic psychiatric examination (to determine PTSD) was not carried out.

### **Diagnostic indications**

A) A disorder cannot be diagnosed if there is no evidence that it occurred within 6 months after a very traumatic event.

B) in case if between the occurrence of disorder and stress more than 6 months has passed determining diagnosis is possible if the typical but not alternative symptoms / such as anxiety and obsessive-compulsive depressive disorder are manifested.

C) to detect the injury there must be repeated intrusive memories or what happened in the day playing ideas and dreams.

D) conspicuous symptoms of emotional blunting, numbness, feelings and escape from stimuli reminiscent of the trauma are often present, but not enough to diagnosis.

E) autonomous violations of mood disorders and behavioral abnormalities confirm the diagnosis but are not of primary importance.

F) protracted chronic disorders caused by stress, should be classified in the F62.0

G) included: traumatic neurosis.

Acute, chronic, late-onset.

Acute - if the presence of symptoms less than 3 months.

Chronic - if symptoms persist for longer than 3 months.

Belated development: if at least 6 months have passed between the manifestations of symptoms and stressful event.

In this connection psychiatrists in their activities did not use these diagnostics criteria, as it was called by another name and more often neurologists put these diagnoses as neurological diseases. Over the last 3-4 years, psychiatrists have begun diagnosing this category of patients who address themselves or in the framework of a criminal case not related to the use of torture and other ill-treatment, etc

### ➤ **□ Conclusion of psychiatrist (clinical opinion)**

According to paragraph 62 of the FPE Regulations – Examination is considered to be carried out when expert opinion is made in writing on the results of the examination (the act of forensic psychiatric examination) with the answers to these questions, or indicating the inability to answer them. Furthermore, the document drawn up by the experts should be in hard copy, signed and ready for shipment (delivery) to the official (authority) appointed the forensic examination.

Expert opinion (act of forensic psychiatric examination) consists of four parts: foreword (introduction); history; description of the physical, neurological and psychiatric status and the final part (motivated opinion) - *Item 63, Regulation on FPE RT*.

If before having commenced the survey the experts come to the conclusion that all the questions set go beyond special psychiatric knowledge or submitted materials are not suitable or sufficient to give an opinion, or the modern science cannot answer the questions set then such experts produce a written report on the impossibility of giving an expert opinion<sup>35</sup>.

Forensic Psychiatric Examination Act is signed by all experts, who carried out the examination and shall be certified by the official stamp of the forensics institution.

Expert opinion (forensic psychiatric examination act) is made in not less than three copies, one of which is sent to an official (authority) appointed forensic examination and the other two shall be kept in forensic institution (at conducting of outpatient forensic psychiatric examination) one copy is kept in the medical record of the person being examined<sup>36</sup>.

<sup>35</sup> Paragraph 65 of the Regulation on the forensic psychiatric examination as of 09.02.2001

<sup>36</sup> Paragraph 68 of the Regulation on the forensic psychiatric examination as of 09.02.2001

**However, according to the Istanbul Protocol** - "The report is confidential and is communicated to the subject or his or her nominated representative. An opinion of the subject or his or her representative about the examination process is asked and recorded in the report. The report shall also be provided in writing, as appropriate, to the body responsible for investigating allegations of torture or ill-treatment. The state must ensure that it is delivered securely to these persons. The report shall not be given to any other person, except with the consent of the subject or by order of a court empowering to enforce such a transfer. "<sup>37</sup>.

In formulating a clinical conclusion for the purposes of reporting psychological evidence of torture, the following important questions should be asked:

- (i) Are the psychological findings consistent with the alleged report of torture?
- (ii) Are the psychological findings expected or typical reactions to extreme stress within the cultural and social context of the individual?
- (iii) Given the fluctuating course of trauma-related mental disorders over time, what is the time frame in relation to the torture events? Where is the individual in the course of recovery?
- (iv) What are the coexisting stressors impinging on the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role)? What impact do these issues have on the individual?
- (v) Which physical conditions contribute to the clinical picture? Pay special attention to head injury sustained during torture or detention;
- (vi) Does the clinical picture suggest a false allegation of torture?

**Paragraph 287 of the Istanbul Protocol**

The process of the interview, further collection of medical and psychiatric history, also drawing up clinical considerations except for **diagnosing level fully** are consistent with the principles of the Istanbul Protocol.

Regulations on the FPE stipulate that expert opinion consists of four parts in including the final part (motivated conclusions).

However, with respect to the consistency the expert should state in the final part the data of psychological examination and their consistency.

*In legal practice during the preparation of the final part of the report the psychiatrist indicates the level of compliance of the subject's data in the following text: "the data of the condition are classified on the basis of objective details of medical history, physical injury" or "physical data and psychiatric condition have probably resulted in PTSD."*

According to paragraph 288 of the Istanbul Protocol - Clinicians should comment on the consistency of psychological findings and the extent to which these findings correlate with the alleged abuse.

If the severity of symptoms in victims of torture corresponds to psychiatric diagnosis according to the classification of DSR-IV or ICD-10, it is necessary to specify a diagnosis.

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<sup>37</sup> ANNEX I Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Istanbul Protocol

*It is necessary to emphasize once again that, although the diagnosis associated with the trauma of psychiatric illness confirms the validity of allegations of torture, in compliance to psychiatric diagnosis criteria does not mean that a person was not subjected to torture.*

Severity level of symptoms in victims of torture may not reflect the diagnostic criteria DSR-IV or ICD-10.

In these cases, as in all others, it is necessary to consider the symptoms of torture victims in conjunction with what they tell verbally concerning his or her alleged circumstances of the torture.

The report should describe and assess the extent of correspondence between the picture presented by the victim of torture and symptoms of which he or she report.

### ➤ ***Types of forensic psychiatric examination***

FPE are conducted by forensic psychiatric expert panels approved by Order of the Ministry of Health and Social Protection of RT.

Inpatient and outpatient as well as distance (including post-mortem) FPE are conducted by a panel of experts consisting of at least 3 psychiatrists – experts - chairman of the panel of experts, its members (including the deputy chairman of the panel of experts) appointed by order of the MoH. When carrying out a particular examination one of the panel members is a physician speaker.

The same rules apply to conducting of outpatient FPE directly at the detention centre. FPE in the investigator's office and the court (in the courtroom) can be carried out both by one expert and a panel of experts.

The fact that all the experts conducting the examination are warned on the responsibility under provisions of Articles 351,352 of the Criminal Code RT for producing deliberate misleading conclusion is stated in the text of expert opinion (FPE Act).

**Outpatient FPE** is conducted in the manner prescribed by the Criminal Procedural and the Code of Civil Procedure on the court ruling, judge's decision of the judge, and in the stage of preliminary investigation by the decision of the person conducting the inquiry, the investigator or prosecutor.

Outpatient FPE is carried out by the national and regional outpatient FPE panels of experts. The timeframe of producing the act outpatient FPE shall not exceed 20 days from the commencement of expert examinations till the end of the examination (p. 62 of this Regulation).

**Stationary FPE** is conducted following the decision of an investigator, prosecutor, investigative bodies, court ruling, and by decision made solely by a single judge in the case of private prosecution or judicial order to prepare a civil case on the basis of the direction of (recommendations) of outpatient FPE panels of experts.

Stationary FPE is conducted in a forensic psychiatric unit of the National Clinical Psychiatric Hospital. The tenure of the subject's stay in the expert hospital as a general rule should not exceed 30 days. The period of continuous stay of the subject in the

expert hospital may not exceed 3 months. FPE Act should be drawn up and signed by experts not later than 10 days after the adoption of expert decision.

**Absentee (post-mortem) examination** is carried out by doctors psychiatrists having the right for conducting FPE (p. 7 hereof), on the instruction of the head of the expert institution. All the absentee (post-mortem) examinations are conducted in the general turn to the production of outpatient examinations.

The examination is conducted in absentia if the full-time expert examination of the person is not possible. Post-mortem examination is carried out in cases where in the criminal or civil case it is required to give expert advice on the state of psychiatric health (psychiatric state) of a deceased person.

**Re-examination** is appointed if the validity or accuracy of the previous expert opinion (expert opinions) are seem doubtful or unsubstantiated. Conducting of re-examination by the order of the MoH is entrusted to a different composition of panel of experts.

Repeated outpatient or inpatient FPE is assigned only to the court's ruling, bodies of preliminary investigation and inquiry are not allowed to re-appoint outpatient or inpatient FPE.

## **CONCLUSIONS AND RECOMMENDATIONS**

### ***To the Chapter Physical evidence of torture::***

#### **1) Medical survey**

RT legislation provides for various formats for conducting medical survey, notably when a detainee is delivered to a criminal prosecution facility (Instruction of detention), at deterioration of health condition, or presence of physical injuries (RT Law "On the Procedure and Conditions of detention of suspects, accused and defendants").

Istanbul Protocol and other international instruments consider a medical survey (inspection) for determining injuries not as an independent procedure, but as integral part of the activities in the framework of the medical examination. *Therefore, the following recommendations are made:*

- **To make amendments to the CPC RT (Article 186), to the Law "On the Procedure and Conditions of detention of suspects and accused persons" (Articles 16 and 24, Part 3), and "On the state forensics" to establish a uniform procedure for medical survey and examination complying with the requirements of paragraphs 83 and 124-126 of the Istanbul Protocol;**
- **Conducting medical survey exceptionally by a physician, not by an investigator; that is to amend Article 186 of the CPC, and Article 24 of the Law of RT "On the procedure and conditions of detention of suspects and accused persons" as specified above.**
- **To regulate the procedure for conducting a medical survey and procedure for documenting the results of the medical survey;**
- **Envisage the rights of person being examined (for access to obtain copies of the medical survey findings, the right to appeal, etc.);**
- **Study of internal instructions \ regulations of TDF, PTD regarding medical documentation;**
- **Exclude from Part 3, Article 24 of the Law of RT "On the procedure and conditions of detention of suspects, accused and defendants" the right to the**

## **Head of detention facility on making decision for conducting medical examination in other medical institutions.**

### ***2) Inspection of the corpse, exhumation***

Article 184 of the CPC RT provides – “External examination of a corpse is done by an investigator in the place of its discovery in the presence of witnesses and a medical specialist in forensic medicine, and if such specialist is not available by other doctor. Unidentified bodies are subject to mandatory fingerprinting and photographing. In cases when it is necessary to remove the corpse from the place of burial (exhumation) for inspection the investigator makes a resolution.”

This fact will give not only a full detail of the appearance for the purpose of identification, but also record any bodily injuries on the corpses. Photographing must be conducted in accordance with the requirements of judicial evidentiary photography which envisages only photographs of unidentified bodies. In legal practice in most cases photographing is carried out. In practice, this is already being done almost in every case, the legislative implementation would be timely. In addition it is necessary and timely to think about making amendments into gene dactylography of unidentified corpses. Therefore we make the following recommendations:

- Delete from Article 184 CPC RT the word **"unidentified"** and leave it with the following wording: **"the corpses are subject to mandatory fingerprinting and photographing."**

### ***3) Conducting examination at the request of individuals prior to the initiation of criminal proceedings***

The proceedings on criminal cases in the Republic of Tajikistan are determined by CPC RT based on the Constitution of the Republic of Tajikistan.

An examination carried out on the request of individuals or legal entities (the lawyer's request) in accordance with **Article 21 of the Law "On State forensic examination"** the resulting medical conclusion is considered to be obtained not in the procedural way, as these grounds are not provided in the CPC standards.

There is a risk that subsequently findings of the forensic examination cannot be taken into account by the body of investigation and court.

**Istanbul Protocol** standards make provision for conducting forensic medical examination based on the request of the victim or his representative which is recognized by the RT.

- **Inclusion into the Article 186 of CPC an addition of the following content: "conducting medical survey at the request of individuals and entities prior to instituting criminal proceedings"**

### ***4) Obligingness to conduct a complex forensic examination in cases of torture and other ill-treatment***

National legislation, in particular the CPC does not provide for a mandatory appointment and production of forensic examination in cases of causing psychiatric (moral) suffering (posttraumatic stress disorder - PTSD) being one of the forms of torture under Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Psychological (psychiatric) examination of victims is mandatory when there is a doubt in their ability to perceive the circumstances relevant to the case and give evidence on them. However, emotional distress, psychiatric disorders associated with the use of torture in criminal

proceedings under the Criminal Procedure Code is not determined. In this regard, the following recommendations are offered:

- **In order to ensure a complex forensic medical and psychiatric examination of alleged victims to amend Article 209 of CPC "Mandatory appointment and conducting forensic examination" with an additional paragraph of the following content: *"psychiatric suffering, psychiatric disorders associated with the use of torture (post-traumatic stress disorder PTSD) "*.**

#### ***5) Additional re-examination***

Article 220 of the CPC provides for the appointment and conducting of additional re-examination if expert report is somewhat unclear or incomplete or in cases when expert opinion seems to be unsubstantiated etc. In practice, there are lots of occasions when disagreement of one of the parties is considered as the basis for the production of re-examination. This provision is not justified as between the opposing parties always appear moments of disagreement of the parties, for which expert opinion is not in favour. Therefore, amendment to this Article will cause that they will not appoint unjustified repeated examinations. In this regard, the following recommendations are proposed:

- Article 220 of the CPC RT should be supplemented by the following content: **"Groundlessness and doubts must be motivated and are stated in the decision on the appointment of a re-examination and should not refer to unreasonable or unexplained disagreement of the parties."**

#### ***6) Excluding the presence of law enforcement officers during medical studies of detainees***

The law allows the investigator to be present during the forensic examination. Article 39 of the RT Law "On state forensics" – At conducting of the state forensic examination of an individual those persons to whom such right is granted by the procedural legislation of the Republic of Tajikistan can be present. The presence of other persons in the process must be authorized by a body or person appointed such state forensic examination and the persons subject to the state forensic examination or their legal representatives.

At that, according to paragraphs 83 and 124-126 of the Istanbul Protocol examination for the purpose of the examination is to be conducted in private, under the control of the medical expert and without presence of security agents and other government officials. Access to a lawyer should be provided during the medical examination.

*In this regard, the following recommendation is proposed:*

- **Make amendments into the CPC RT and into the practice of forensic examination in order to exclude the presence of the investigator and other law enforcement officers during the forensic examination of notably torture victims. Also, it makes sense to implement such provisions in the standards of producing forensic medical examinations at alleged statements on torture.**

#### ***7) The timeframe for conducting medical survey and forensic examination***

For detecting and recording the traces of beatings and injuries timeliness of appointing and conducting of medical survey and forensic examination is of great importance. CPC RT and RT Law "On state forensics" recognize the forensic examination to determine



the nature and severity of injuries as obligatory. However, national legislation does not specify the timing of it.

Paragraph 104 of the Istanbul Protocol establishes that a medical examination (survey) should be carried out regardless of how long has passed since the use of torture, but if it is alleged that torture had taken place within the last six weeks, then this survey should be organized in a matter of urgency before the clear signs of torture disappear. *In this regard, the following recommendation is made:*

- **As a part of measures to ensure the timely implementation of forensic medical examination of alleged victims of torture to amend Part 2, Article 209 of the CPC RT as follows:**

*«Medical examination (survey) in order to identify signs of torture should be carried out regardless of how long has passed since the use of torture, but if it is alleged that torture had taken place within the last six weeks, then this survey should be organized in a matter of urgency before the clear signs of torture disappear»;*

- **Amend Article 19 of the RT Law "On state forensics" as follows:**

*"In the case of alleged cases of torture and ill-treatment, including sexual abuse, the medical expert shall conduct the examination within 24 hours after receipt of the request, with a view to timely identifying bodily injury" etc.*

#### ***8) The informed consent of the person examined for medical survey and forensic medical examination.***

Tajik legislation provides that no need to get the consent of the detained and accused for conducting forensic medical examination. In the Republic of Tajikistan in accordance with the provisions of Paragraph 2, Article 210 of the CPC examination of victims and witnesses is carried out only with their freewill consent that is given by them in writing. However, the consent of the detained and accused is not taken, etc.

Paragraph 64 of Istanbul Protocol envisages that medical examination for evidential purposes in an inquiry requires consent that is informed in the sense that the patient understands factors such as how the health data gained from the examination will be used, how they will be stored and who will have access to them.

*In connection with it the following recommendations are made:*

- **Amend Article 32 of the RT Law "On state forensics" with regards to receiving the consent of the person subject to examination to bringng in compliance with Articles 64, 83 and 165 of the Istambul Protocol providing an expert a right for taking informed consent of the subject for conducting examination.**

#### ***9) Availability of medical survey findings and medical examination opinions to the subjects, their representatives and lawyers***

International legal instruments, securing the confidentiality of forensic medical examinations opinions, however, provide for mandatory access to the subject, his \ her representative and lawyer.

According to paragraph 84 of the Istanbul Protocol forensic medical examination report of the expert on the results of the examination shall be confidential and be brought to the attention of the subject or his designee (her) representative. RT Law

"On state forensics" prohibits a forensic expert to disclose to anyone the results of the state forensic examination, except for the person or body who has appointed it (Article 18, Paragraph 2). *In this regard, the following recommendation is proposed:*

- **The provision of Article 18, paragraph 2 of the Law "On State forensics" and Article 15, Part 1, Paragraph 6 bring in compliance with paragraphs 84 and 126 of the Istanbul Protocol, thus providing heads of forensic expert agencies to provide a copy of the report (opinion) of the examination to the subject himself or herself, to his or her representative or lawyer, the prosecuting authorities.**

#### **10)        *The content of the expert opinion***

**Статья 217 УПК РТ определяет «Содержание заключения эксперта».** The legislator clearly defines the list of items to be included in the content of expert opinion. However, in law enforcement practice over the years, a need to supplement the content of the expert opinion emerges. For example - when it is necessary include not only the date, but also the time of the examination of a person being examined in the form of an act and an opinion and such possible details in the forms of other fields.. the following recommendation is proposed:

- **The Article here should be supplemented by a phrase - "at least" as the specificity and form of expert opinions are approved by the line ministries and agencies and may contain more information than specified in this article.**

#### **11)        *The liability of doctors for giving deliberately misleading information***

An important condition for ensuring the impartiality and objectivity of doctors and experts in conducting a medical survey and forensic examination is to establish criminal liability for knowingly giving false information and conclusions. Articles 351-352 of the CC RT establish criminal liability for producing knowingly false conclusion or refusal to give an opinion by experts and specialists. However, the Criminal Code does not provide for criminal liability against doctors who conduct medical examination as part of criminal proceedings. Therefore, the following recommendation is proposed:

- **In order to establish criminal liability of doctors for giving deliberately false information or document to add to article 351 of the Criminal Code of the Republic of Tajikistan note that the doctors engaged in carrying out a medical examination (survey) or consultations during the collection of evidence of injuries are considered to be the specialists.**

#### **12)        *Non-state forensic examination***

Although the CPC RT mentions the possibility of examination by non-state and other expert institutions of the Republic of Tajikistan, but there is no law regulating their activities. Consequently, in the RT there are no independent expert institutions. With regards to the standards on investigating torture, all persons who allege torture, should have the right to a medical examination, including in private medical institutions. In this regard, we propose the following recommendation:

- **To regulate such issues as the creation of alternative - non-state expert institutions with the ability to conduct a medical examination through the development and implementation of the Law governing the range of**

activities, rights and obligations of non-state expert institutions and equating the status of its specialists to government experts.

- In order to improve the human, material and technical support of forensic medical examination centres of the Republic of Tajikistan to allocate separate budget funds to improve the quality of evidence and the forensic medical examinations.
- Regularly conduct training sessions to a wide range of medical and legal staff that can directly deal with the production of investigations in cases of torture and other ill-treatment.

*To the Chapter – Participants of the criminal proceedings in terms of conducting medical examination (forensic medical examination, medical survey)*

**13)       Witness**

Part 1, Article 56 of the CPC RT provides that a person who may be aware of any circumstances relevant to the case may be involved as a witness for giving testimony. Pursuant to Part 6, Article 58 of CPC RT – an expert shall appear on-call for investigator, prosecutor, court, judge; - to provide reasonable and objective written opinion related to the examination and the questions posed;

However, in law enforcement practice forensic experts are often questioned as witnesses which entails a change in the status of participants in proceedings. Experts have information related to the examination, but are not witnesses of the circumstances of the case. Therefore following recommendation is offered:

**Amend Part 2, Article 56 of the CPC with the following content: "Are not questioned as a witness: - Specialist, expert»**

**14)       Specialist**

According to provisions of Part 3, Article 57 of the CPC RT - specialist has a right: - with the permission of the inquirer, investigator, prosecutor, court or judge to ask questions to the participants of the investigative action. In this case, there is a risk, and the likelihood that the investigator may refuse the specialist to questions concerning his research. It should be noted that sometimes questions are asked to clarify the circumstances of the case in terms and concepts of scientific knowledge and subtleties that are required for the specialist to give an opinion.

Part 5, Article 57 – Avoidance of specialist to appear (**to add - without a good reason**) on call of the preliminary inquiry, investigation and court or avoidance form performing their obligations shall be liable under the laws of the Republic of Tajikistan. According to the wording of this article the time of the specialist or expert's attendance remains unclear. *Therefore, the following recommendations are proposed:*

- **Exclude from Part 3, Article 57 of the CPC RT the following content and add "the word with the permission of an investigator and add - ask questions to the participants of investigation;**
- **Include into Part 5, Article 57, and Part 7, Article 58 of the CPC RT the following wording: "for a good reason."**

**15)       Expert**

CPC provides for the right to an expert to declare the *request for the additional materials required to produce an opinion, or to apply for the appointment of a **complex examination***. This Article gives an opportunity for conducting examination in cases associated with the use of torture and other ill-treatment in accordance with the

recommendations of the Istanbul Protocol (forensic medical and psychiatric examination).

However, it is necessary to specify to what extent the request of the expert is binding to the investigator to be fulfilled. It is considered necessary to include in this item the following: - refusal for fulfilment of the expert's request can be a ground for refusing to produce an opinion, i.e. to refuse production of examination. In this regard, the following recommendations are made.

- **Amend Part 4, Paragraph 7, Article 58 of the CPC RT with the following content - "to refuse to produce an opinion if the questions set go beyond the special knowledge or if the material presented are insufficient to produce an opinion, if the expert's request to carry out complex examination has been rejected unreasonably."**

#### ***16) The range of persons and motions, mandatory for consideration in criminal proceedings***

**Article 175 of the CPC RT defines a range of persons** to the suspected or accused person, and their advocates, as well as the victim, civil plaintiff, civil defendant or their representatives and **petitions** for questioning of witnesses, the production of examination and other investigative actions, if they **can be relevant to the case**. The phrase "can be relevant to the case" - again, a double standard. On the one hand the Legislation provides for the right to submit petitions to the expert that can be relevant to the case (examination). On the other hand the other Article of this Code restricts the number of participants whose applications are mandatory to the case. In this regard, the following recommendations are proposed:

- **It is necessary to amend Article 175 of the CPC with paragraph №3 indicating that: "Solicitations of the expert or expert institutions are binding" or remove the item - if the circumstances of the establishment of which they solicit, may be relevant to the case. Therefore it is better to do it as a separate item, so in other "unreasonable" cases the investigator was able to deny the "unnecessary" solicitations.**

#### ***17) Some thoughts on dispositions and sanctions of Article 143\1 of the CC RT***

The level of punishment for torture in the CC RT are established in particular on the severity of harm to human health, that is, if the average damage Part 2, if heavy damage Part 3, while torture in most cases is expresses by beatings, torment, sufferings and cruel treatment , which at one time stood out as special types of injury, since in most cases the damage inflicted during torture do not entail the consequences referred to in Article 110 (heavy); 111 (average damage) of the Criminal Code, and are of debilitating and painful nature. In this connection the following recommendations are made:

- **Exclude from Article 143\1 of the Criminal Code the phrase "recklessly", besides if to delete the phrase "recklessly" this is equivalent to murder a person and even harder because everything is done by an official (or with his consent, acquiescence ), in fact who is responsible for the protection of human rights and not committing a crime.**

#### ***18) Exclusion of evidence obtained by illegal means***

Procedural legislation provides that evidence obtained in the course of preliminary investigation by the use of force, pressure and the infliction of suffering, inhuman

treatment or other illegal means shall be deemed invalid and cannot be the basis for the charges (accusation) and are not applicable in proving circumstances. This article does not mention the word "torture", as in the majority of cases, it is during the application of severe physical or psychological pain \ suffering intentionally and with the purpose to punish or to extract a confession etc. In this regard, the following recommendation is proposed:

- **Include into Part 3, Article 88 of the CC RT the phrase "Torture".**

*To the heading Psychological \ psychiatric evidence of torture::*

**19)        *Conducting a forensic psychiatric examination at the solisitation of individuals (private collection of evidence***

Article 21 of the RT Law "On state forensics" serves as the basis for the production of the state forensic medical examination. It stipulates that forensic medical examination is carried out on the determination of the court, the judge's decision, the person conducting the inquiry, the investigator or the prosecutor, as well as the application of physical and legal persons. It is considered to be assigned from the date when relevant order or solicitation is received for conducting state forensics. According to the internal Regulations of FPE the ground for the production of FPE is the decision or determination on its conducting according to the CPC RT. The inconsistency between the Regulation on the FPE and the RT Law "On state forensics" is that the Regulation was adopted by the Order of the Minister of Health and Social Protection №54 on 09.02.2001. Recent amendments into the provision "**examination at the solicitation of the individual**" were included into the Law "On the State Forensics" on 16.04.2012. Therefore the following recommendations are proposed:

- **Make amendments into internal Regulations on conducting forensic psychiatric examination in Tajikistan the following text "conducting of the survey at the request of individuals to determine the post-traumatic stress disorder, or other types of deep depression."**

**20)        *Obligingness to conduct a complex forensic examination (forensic and psychiatric)***

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture and prohibits the use of physical and moral suffering.*

Article 209 of the CPC provides for a mandatory appointment and conducting of examination to identify possible facts of the use of physical violence, however, does not make provision for determining moral suffering as a form of torture. Paragraph 261 of the Istanbul Protocol requires that since psychological symptoms are so prevalent among survivors of torture, it is strongly recommended to include a psychological evaluation in any assessment of the effects of torture. In this regard, the following recommendation is offered:

- **Inclusion of changes and amendments to Article 209 of the CPC of the following content "the definition of post-traumatic stress state".**

### **21) *Informing the subject on the methods and the examination process***

The legislation provides that a person subjected to the state forensic examination is informed in a comprehensible form by the by about examination methods are to be used in respect with him or her, including alternative ones, possible pain or side effects. Analysis of the internal Regulations of the FPE showed that psychiatrists inform persons subject to examination about the purposes of analysis and examination methods, but no corresponding records are made in the history of the disease or in a separate log-book. In this regard, we propose the following recommendation:

- **It is necessary to conduct trainings to expert on the provisions of the legislation in order to ensure the provision of guarantees provided to detainees subjected to examination.**

### **22) *Degrees of diagnosis according to the Istanbul Protocol***

Regulations of the FPE provide that expert opinion consists of four parts including the final part (motivated conclusions). However, with respect to the consistency, the expert in the final part should specify the details of the psychiatric examination the extent of their consistency. In legal practice during the preparation of the final part of the report the psychiatrist indicates the level of compliance of the subject's data in the following text: "the data of the condition are classified on the basis of objective details of medical history, physical injury" or "physical data and psychiatric condition have probably resulted in PTSD." According to paragraph 288 of the Istanbul Protocol - Clinicians should comment on the consistency of psychological findings and the extent to which these findings correlate with the alleged abuse.

If the severity of symptoms in victims of torture corresponds to psychiatric diagnosis according to the classification of DSR-IV or ICD-10, it is necessary to specify a diagnosis. In this regard, the following recommendations are proposed:

- **Conducting analysis of internal Regulations on FPE and in the part concerning drawing up conclusions to include degrees of conformity assessments;**
- **Conducting training sessions for psychiatrists on the ways to determine the post-traumatic stress disorder and preparation of acts of examinations specifying degrees of compliance.**

## List of references and sources of information

1. Constitution of the Republic of Tajikistan, 1996, 1999;
2. Law of the Republic of Tajikistan "On militia" of 2004 as amended and supplemented in 2006, 2007, 2008, 2009, 2011, 2012;
3. Law of the Republic of Tajikistan "On the procedure and conditions of detention of suspects, defendants and prisoners", 2011;
4. Law of the Republic of Tajikistan "On protection the health of the population" of 15.05.1997 as amended and supplemented in 2003, 2004, 2005, 2009, 2013;
5. Instruction about detention as of 24 October 2012;
6. Regulation "On the forensic psychiatric examination in the Republic of Tajikistan", approved by the Order of the Minister of Health and Social Protection, as of 09.02.2001
7. International Code of Ethics (Adopted by the 3rd General Assembly of the World Medical Association, Geneva, Switzerland, October 1949);
8. International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) of the General Assembly on 16 December 1966, Tajikistan joined in 1999);
9. Resolution of the Plenum "On the application of the criminal law and criminal procedural law to combat torture" dated 25.06. 2012, №1;
10. Regulation on forensic medical examination "On certain procedural grounds of the forensics in RT" approved by order of the MoH as of 20.12.2008, №706;;  
Regulations on forensic psychiatric examination in the RT, approved by order of the MoH on 09.02.2001 №54;
11. Regulations of the interagency coordinating council on the issues related to state examinations at the Ministry of Justice, approved by the Government of the Republic of Tajikistan 03.04.2006, №136;
12. Regulations on the military-medical examination, approved by the Government of the Republic of Tajikistan on 04.07.2002, №290;
13. Government Resolution as of 31.12.2002 № 525 "On approval of the organizational structure of primary medical institutions";
14. Criminal Code of the Republic of Tajikistan, as of 1998, as amended on 1999, 2001, 2002, 2003, 2004, 2005, 2007, 2008, 2009, 2010, 2011, 2012;
15. Criminal Procedural Code of the Republic of Tajikistan from 2009, as amended on 2010, 2011.
16. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Resolution 39/46 of UN General Assembly as of December 10, 1984, Entered into force on 26 June 1987, Tajikistan joined in 1995);
17. "Guidelines on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" later Istanbul Protocol. (Recognized by UN General Assembly Resolution 55/89 (2000 and the UN Commission on Human Rights, 56th session (2000);
18. Tokyo Declaration of the World Medical Association, 1975;
19. Lisbon Declaration on the Rights of Patients of the World Medical Association, 1981 as amended in September 1995;
20. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other ill-treatment;
21. Minimum Standard Rules for the Treatment of Prisoners;