

Death in Custody: Towards An International Framework For Investigation and Prevention

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I. Executive Summary

A. Introduction

The University Centre for Legal Medicine of Geneva and Lausanne, the Geneva Academy of International Humanitarian Law and Human Rights, the University of Bern, the International Centre for Prison Studies (King's College London), and the International Committee of the Red Cross (ICRC) collaborated to undertake research relating to the conditions under which deaths in custody should be investigated and prevented in ethically acceptable ways that are based on principles and procedures in line with respect for human rights and humanitarian law. The project unfolded in several simultaneous steps:

- 1) collection of questionnaire and interview data from CPT/SPT members, ICRC delegates, NGO staff, and other legal and forensic experts to better understand the causes, forensic/legal investigation, and prevention of deaths in custody in various global settings;
- 2) a comprehensive review of the scientific legal literature, as well as existing national guidelines and legal documents about investigation and prevention of deaths in custody;
- 3) the production of draft practice guidelines and a training manual, based on prior analytic work and the results of the questionnaire and interview data. The guidelines shall be of use for ICRC delegates and other specialized persons or humanitarian workers confronted with deaths in custody;
- 4) a final consultative process (conference and email exchange), to take up unresolved or controversial issues and to foster expert interdisciplinary dialogue on this difficult topic.

Each of these research steps will be treated separately below before a brief summary of the overall results of the project.

B. Results and Analysis

1. Interviews and Questionnaire

a. Aim

Part of the Death in Custody Project was to conduct a qualitative study based on interviews conducted to know more about the experiences of stakeholders in the investigations and the prevention of deaths in custody. The qualitative approach was chosen to compare strategies, knowledge, perceptions and difficulties encountered by stakeholders working in this field in an explorative manner. The scientific interest was to determine whether there are any transversal problems encountered worldwide, whether there are specific problems in some places of the world or encountered by some types of actors, and what the perceived decisive factors are. A thorough understanding of the situation was necessary to evaluate the potential for possible solutions.

b. Methods

Interview guidelines for the semi-structured interviews were developed on the basis of a literature review, which searched the words “death” and “prison” as well as “death” and “custody” in MEDLINE. A total of 64 articles was deemed relevant for the research and further analysed in a review article. The interview themes identified from the literature review were the following: understanding of the causes of deaths in custody; problems and prospects concerning the investigation; preventive measures

and role of international, regional and national bodies. An interview guide base on these topics was developed.

Interviewees were selected based on the desired profile of people with a broad, deep, and reliable knowledge of the issue of deaths in custody, from both a theoretical and a practical point of view. We thus focused on people with international recognition, working either for non-governmental, regional or international organizations. We also included among the interviewees members of national prison administrations and of national human rights mechanisms.

Thirty three interviews were conducted by Patrick Mutzenberg and Geraldine Ruiz. Among the interviewees were lawyers, forensic doctors, and national prison administrators. Information at their disposal concerned sixty two countries, spread over six continents. The interviews were done face-to-face or by phone, were recorded and were subsequently transcribed. In order to safeguard confidentiality, all interviews were made anonymous: personal information, confidential information and names of countries were deleted and replaced by code-numbers.

Content analysis was operated thematically with the qualitative software Atlas.ti using open coding. Key codes were pre-determined and then refined. The results of each code were analysed in a general way, then systematically addressed by types of actors and by countries.

c. Results and Implications

Four journal articles were drafted to present the results of the qualitative study. The first article is a literature review. Three more articles examine the interview data, in particular the: 1) causes of deaths in custody; 2) role of forensic scientists in the investigation of deaths in custody; 3) legal processes in the investigation and prosecution of death in custody. Preliminary results were also presented during the Conference “Violations of Human Rights and Humanitarian Law: Investigation and Prevention of Torture and Deaths in Custody”, held in Linköping (Sweden) in May 2010 as well as during the guideline launching event in March 2011.

Interviewees’ understanding of deaths in custody stressed that deaths in custody were often the result of prior problems; that the detention environment was in itself a key factor resulting in a higher risk of death; and that, although it was difficult to address deaths in custody in a generic manner across countries, some patterns were identifiable. Firstly, interviewees brought up issues of contextual and cultural factors which influence circumstances of the custody environment itself and the limited means available in certain countries for maintenance of and health care in prisons. While overcrowding deteriorates health conditions in many countries, it may be protective against deaths in custody in rich countries where suicide is frequent. Indeed, detention in single cells may favour suicide in vulnerable subpopulations of prisoners. Secondly, interviewees highlighted that deaths in custody vary according to the political context, the characteristics of the place of detention, and the characteristics of the detainees. Interviewees generally relied on the dichotomy between natural and unnatural causes to conceptualize deaths in custody, although this dichotomy was seen as hard to maintain with regards to deaths linked to health issues in detention. In a few cases, structural issues amenable to change were highlighted as the primary underlying factor contributing to deaths in custody.

With regard to the role of forensic scientists in the investigation of deaths in custody, forensic experts were perceived by interviewees to be an essential part of the investigation process. They produce crucial evidence on which to base the indictment and the eventual punishment. Their independence when investigating deaths in

custody was seen as being problematic, because of frequent structural links with the authorities, conflict of interests and self-biased perspectives. Those difficulties were seen as key factors in the production of low-quality forensic reports, and were seen as being an important point of reference in thinking about solutions. The need for a robust set of guidelines built around a 'worst-case' scenario or national homicide protocols was stressed, along with the incorporation of a mechanism for ensuring and legally enforcing independence of the medico-legal investigators.

Finally, regarding the legal investigation and prosecution as a whole, interviewees expressed similar concerns as those related to the forensic investigation. In particular, they underlined the fact that the independence of the investigation and the prosecution bodies are two key elements to ensure an effective legal inquest. Issues of corporatism, a lack of transparency surrounding the investigation and an institutional apathy or lack of will to investigate/prosecute were raised across the board, as well as persistent issues of a gap between law and practice even in countries with a robust legal framework in place. In order to move from no sanctions, or weak administrative sanctions, to criminal sanctions and transparent prosecutorial proceedings in instances of unnatural or suspicious deaths in custody, the independence of investigating bodies as well as a protocol for automatic and systematic complete investigation were seen as essential. The role of NGOs and international organisations was also seen as crucial in overseeing this process and ensuring its effectiveness.

In summary, the three articles about the results from the qualitative study shed light (1) on the causes of death in custody, (2) the problems in its investigation and prosecution, and (3) best practices and possible solutions for the future. While there were some limitations regarding generalization due to the impossibility to be fully representative of different regions in the world, the exploratory worth of these unique data is evident. The issues highlighted by the interviewees were useful to advance the project goal: to propose a prescriptive set of guidelines for key stakeholders in the issue of death in custody. In addition, the results from the qualitative study will be useful to encourage new research into some of the broader issues raised in more specific contexts.

In addition, Goria Gaggioli, a doctoral student of Paola Gaeta, and Jehan Martin, a master student of Bernice Elger, as well as Bernice Elger herself, distributed questionnaires at three international conferences of prison administrators (Barbados and Las Vegas in 2009 and Ghent in 2010). The questionnaires asked participants to describe the way they investigated a recent death case in their detention facility. In addition the questionnaires collected participants' opinions on different hypothetical and existing strategies of investigation of deaths in custody. In addition, after having collected the questionnaires, results from our study were presented to the conference participants. Jehan Martin has analysed the questionnaires as part of his master thesis at the University of Geneva medical school which was successfully submitted in summer 2011 and permitted Jehan Martin to obtain the master thesis credit points required for the curriculum in medicine.

2. Legal Research and Academic Book

A review of the international and regional human rights bodies' rulings was undertaken, as well as a comprehensive review of the legal literature and other sources (*inter alia* UN and regional bodies' soft law docs) on investigating death in custody. The aim of this review was initially to gather and summarize the existing data on how deaths in custody have been examined by national authorities and by

judicial and quasi judicial human rights bodies in the past, and secondly to analyze how the obligation has emerged in international human rights law and essentially turned to be part and parcel of public international law.

The information gathered from the case law of the international and regional judiciary organs¹ concerning death in custody was put together in appropriate excel lists from which data on the obligation to investigate death is easy to pull out. The case-law review covers the years 1998-2010. Once the lists are converted into a user-friendly-web version they will be published also on the SNIS, CMU and ADH websites for the usage of, among others, specialized agencies, medicine and law students and practitioners².

Why was this case-law review necessary?

International and regional human rights treaties do not include a provision obliging States to launch an investigation once a death in custody occurred in their jurisdiction. Hence, given the lack of an explicit human right's obligation to investigate death in custody, these case-law lists become an important source to support the obligation to investigate as recognized and underlined by various human rights bodies. In light of the lack of synoptic legal publications on the issue of deaths in custody the lists we have established are of practical use for future researchers or other interested persons.

In addition to these case-lists, the legal research will also produce academic written contributions to be published in one or more of the leading international legal journals. G. Gaggioli, collaborator in the death in custody project is now member of the legal unit of the ICRC. The articles' titles are³:

1. The Legal Framework of the Obligation to Investigate Death in Custody; The Right To Life.⁴
2. Legal Basis and the Nature of the Obligation to Investigate Death in Custody.⁵
3. Minimum Standards of Investigation.⁶

The novelty of these articles is that they confirm an absolute obligation of States to investigate all deaths in custody occurring within their jurisdiction. So far, the content as well as the standards of the investigation has only been vaguely touched upon in earlier legal publications. Thus, the nature of this obligation and the criteria under which States shall investigate death in custody were inferred from the rich legal resources researched over the course of this project and thereafter described in depth in the before-mentioned articles. These articles compile, analyze and conclude vividly on the substance of the obligation's characteristics.

In addition, a text book outline co-edited by team members (Profs Bernice Elger, Andrew Coyle) together with the president of the International Academy of Legal Medicine (Nuno Vieira) is under submission with an interested international publisher. The book comprises among others several presentations delivered during

¹ Namely the UN HR Committee, the European Court of Human Rights, the European Committee for the prevention of torture and inhuman, or degrading treatment or punishment (CPT), the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights.

² The excel sheets are attached in the *Working Paper* of this report.

³ The articles' outlines/abstracts are part of the *working paper* section of this report.

⁴ By Gloria Gaggioli

⁵ By Samar Khamis

⁶ By Patrick Mutzenberg

the Sweden Conference on investigating and preventing torture and death in custody⁷. A second book project on prison issues which also contains a section related to death in custody has been accepted and is under contract with the publisher Springer (Editors: B. Elger, C. Ritter, H. Stoever) to be finalized in 2012.

3. Guidelines for Practitioners and launching event in March 2012

The first draft of the guidelines had been produced by the ICRC in 2007. This draft was further developed within the scope of the present project and a second draft was discussed among the authors in March 2010 in order to avoid overlap and to assure coherence among the different chapters. It was also presented to legal and medical experts (academics and practitioners) during the conference in Sweden in May 2010, and their feedback was eventually merged with the final version of the guidelines. In a final step we conducted a launching event on March 22, 2011 in the Centre medical universitaire of the University of Geneva and an article on the topic has been published in the journal "Le temps" (lundi 21 mars 2011: «Il faudrait des experts hors canton pour élucider les décès en prison» Fati Mansour; Interview avec la professeure B. Elger). Several invited experts commented the guidelines and a large public was invited, as well as project members and members of the press.

4. Sweden Conference May 2010

In order to complement the SNIS funding budget for travelling and to be able to invite a larger number of international experts for the planned consultative meeting Professor Elger and Professor Gaeta obtained additional funding from the European Science Foundation (ESF). A conference which was held between 4 to 7 May 2010 in Linköping, Sweden where the unresolved and controversial issues of guidelines concerning the investigation and prevention of deaths in custody were taken up during interdisciplinary discussions with experts in the field. The meeting dealt overall with core aspects of the prevention and investigation of torture and death in custody, and brought together human rights law and legal medicine experts and practitioners in order to further research in this important domain. The conference program can be found on the official webpage⁸.

Given that all the authors involved in drafting the guidelines on death in custody attended this unique gathering, the drafts of the guidelines' chapters were shared and discussed among these and other experts at the Linköping Conference. The added value of these discussions was taken into consideration and where necessary incorporated into the new draft version of the guidelines. Moreover, a few experts from both legal and forensic domains showed full interest in maintaining this cooperation in the future as far as the guidelines are concerned and thus the guideline's final version (before publication) had been sent to them for final comments.

As mentioned above a book project has been submitted to a well known international publisher in order to produce a text-book on different aspects of deaths in custody. The book addresses legal and forensic, practical as well as theoretical aspects of the

⁷ Read more on that in Chapter 4 below.

⁸ <http://www.esf.org/index.php?id=6351>

obligation to investigate death in custody. Different national practices will be displayed in this book unfolding the different manners in which States assume this duty, and therefore the book will be innovative not only concerning its content, but also regarding its wide geographical coverage.

C. Summary Indicating Whether the Results Obtained Correspond To Those Expected At the Beginning of the Research

The project has been carried out in line with the planned content and schedule. We had expected to find important geographical differences as regards the causes and investigation of deaths in custody in different regions of the world. This expectation has been confirmed. However, we were somewhat surprised about (1) some persistent similarities which concern overall the difficulties to obtain independent investigation of deaths in custody across different countries, and (2) the lack of standards in the forensic investigation of deaths in custody even in rich countries. Part of this problem seems to be that in these countries forensic practitioners are often not aware of the larger context of prison and detention conditions which influence causes of deaths. In addition, no systematic data are collected concerning the fact whether a person was detained when death occurred. This might not be surprising as for example in Switzerland, no data exist on the number of forensic autopsies carried out in the country as a whole. In line with this general lack, data on the number of autopsies concerning persons deceased while in detention are not available either.

As expected, death in custody proved to be a highly sensitive issue and we were very careful to anonymise interviews and interviewees in order to avoid identification of cases and circumstances that were mentioned, unless they are already part of publicly available reports.

The results from our study confirmed the need for guidelines and information of all those who are professionally involved in the investigation of deaths in custody, as well as their prevention.

D. Conclusion

The practical implications of our results have been mentioned separately under sections I.B.1-4 above. The novelty of this research and its finding is recapitulated in section II.D below. As far as past and future activities and publications are concerned, and in order to avoid repetition, please consult section II.B below.

Our findings highlight the need for States to enforce good practice in line with humanitarian and human rights law, namely by cooperating and applying the recommendations proposed in our guidelines when it comes to investigating death occurring in detention facilities within their jurisdiction. Our guidelines try to account for the lack of sophisticated forensic infrastructure in many countries. They propose basic standards of investigation. One of their main features is to underline the absolute obligation to investigate every death in custody while showing that it is possible for all States to be able to comply with this obligation regardless of their level of development. Indeed, we opted to introduce guidelines which are in line with international human rights and humanitarian law but also universally applicable, unlike previous manuals which might be

rejected by States with the argument that they are applicable only to more resourceful States.