

# ELIMINATING INCENTIVES FOR TORTURE IN THE OSCE REGION



## BASELINE STUDY AND PRACTICAL GUIDANCE

# Eliminating Incentives for Torture in the OSCE Region: Baseline Study and Practical Guidance



Published by the OSCE Office for Democratic Institutions  
and Human Rights (ODIHR) and Fair Trials

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© OSCE/ODIHR, Fair Trials 2020  
ISBN 978-3-903128-56-9

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## Acknowledgments:

Contributions to the development of this publication were made by a group of international and national experts and practitioners, through detailed responses to a questionnaire and an expert consultation held in Warsaw in December 2019. This includes representatives from:

Amnesty International; APADOR CH, Romania; The Association for the Prevention of Torture; The Association of Ukrainian Human Rights Monitors on Law Enforcement, Ukraine; The Belgrade Human Rights Centre, Serbia; Civil Organization “Forpost”/ Human Rights Group “Sich”, Ukraine; the Civic Solidarity Platform, Working Group on the Fight against Torture; The Eastern-Ukrainian Center for Civic Initiatives, Ukraine; The Expert Center for Human Rights, Ukraine; The Georgian Young Lawyers’ Association, Georgia; Golos Svobody (Voice of Freedom), Kyrgyzstan; The Helsinki Foundation for Human Rights, Poland; The Helsinki Association of Armenia, Armenia; the Hungarian Helsinki Committee, Hungary; the Human Rights Association, Turkey; The Kharkiv Institute for Social Research, Ukraine; The Kharkiv Human Rights Protection Group, Ukraine; The Macedonian Young Lawyers’ Association, North Macedonia; Nota Bene, Tajikistan; the Anti-Torture Coalition, Tajikistan; The Open Society Justice Initiative; The Public Verdict Foundation, Russia; Promo LEX, Moldova; The United Nations Committee against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Ukraine without Torture, Ukraine; and The World Organisation against Torture.

The initial drafts of this document were provided to ODIHR by Bruno Min, consultant, and Roseanne Burke, Legal and Policy Officer at Fair Trials.

# Executive Summary

The universal and absolute prohibition of torture has been established in numerous international and regional treaties, and all 57 participating States of the Organization for Co-operation and Security in Europe (OSCE) have ratified the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). In their OSCE Human Dimension Commitments, they have explicitly and unequivocally pledged to uphold the absolute prohibition of torture and other ill-treatment and have committed themselves to strive for its elimination.

The use of torture not only amounts to an egregious human rights violation in itself, but also leads to other serious human rights violations, including the violation of the right to a fair trial. The use of torture, and evidence obtained by torture, taints the entire criminal justice process, eroding the rule of law and public trust in the system's ability to deliver justice.

Across the OSCE region, however, the use of torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment) continues to be a problem in criminal justice systems. While torture is used for numerous, often intertwining reasons, some common aspects of domestic laws, policies, practices, and institutional and workplace cultures incentivize and facilitate its use by law enforcement officials and other criminal justice actors.<sup>1</sup>

A principal motivation for the use of torture by actors in criminal justice systems is the goal of obtaining evidence that will lead to more or more serious convictions. Accordingly, criminal justice systems that are overly reliant on the use of confessions as evidence incentivize the use of torture, especially by police. Overreliance on the use of confessions may sometimes be attributed to a lack of sufficient resources for adequate investigation; or may be the result of entrenched practices and mindsets that regard confessions as the "best" forms and means of evidence. When combined with a lack of training on investigative interviewing techniques and an absence of safeguards such as access to a lawyer or audio-visual recordings of interviews, police are incentivized to resort to torture and other ill-treatment to extract confessions.

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1 The term "law enforcement officials" although larger in scope will be denoted as police throughout the document; other criminal justice actors include the judiciary, prosecution services or corrections as well as the relevant oversight bodies.

The use of torture is also incentivized when evidence obtained through its use can be admitted as incriminating during trials. The reasons courts fail to exclude torture tainted evidence differ across countries and regions, but some of the most prevalent are: a) lack of clear procedures for excluding torture-tainted evidence; b) a lack of independence for criminal justice actors; c) the use of performance targets that result in these actors' having a vested interest in obtaining convictions; d) difficulties in substantiating allegations that evidence has been obtained by means of the torturing of a third-party; and e) a lack of clarity on the application of the exclusionary rule to derivative evidence or "fruit of the poisonous tree" evidence.<sup>2</sup> In the absence of clear international standards on the exclusion of evidence obtained by torture, there is a tendency in some countries to merge the procedure for excluding evidence in a trial with the separate criminal investigation into the act of torture. This can result in delays in trials and in the application of an inappropriate standard of proof.

Increasingly, OSCE participating States have been introducing trial-waiver systems, where suspects admit guilt and waive their right to a trial in exchange for some form of benefit.<sup>3</sup> If not properly regulated, trial-waiver systems can provide additional incentives for police to use torture to extract confessions or to coerce defendants, suspects and those accused into plea agreements. In waiving the right to a trial, suspects typically also waive their right to the proper scrutiny of evidence, including evidence of how they entered into the plea agreement, and most states require little, if any, corroborating evidence to conclude a plea agreement. The majority of OSCE participating States with trial waivers also employ some specific safeguards, such as access to a lawyer and judicial review. However, these safeguards alone are not sufficient to ensure that criminal justice actors are not incentivized to use trial waivers as quick ways to close cases without the same level of protections provided to suspects by the trial process.

Police and prosecutors in some countries are put under pressure to reach a certain number of arrests and convictions through the use of performance quotas or targets. These quotas can affect pay and promotions, and this can incentivize police and other criminal justice actors to use any means necessary to reach their targets, including torture or other ill-treatment. In some countries, the use of conviction rates as an indicator

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2 The exclusionary rule is codified in article 15 of the UNCAT and provides that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. The "fruit of the poisonous tree" doctrine provides that evidence discovered due to information found through illegal search or other illegal means (such as a forced confession) may also not be introduced by a prosecutor.

3 Fair Trials has defined a [trial waiver](#) as: "a process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences."

to measure prosecutorial performance has a damaging impact on judges' and prosecutors' abilities and willingness to investigate claims of torture and other ill-treatment.

The failure of states to properly investigate, prosecute and punish perpetrators of torture and other ill-treatment is another factor that contributes to torture and other ill-treatment remaining a reality in the OSCE region. States sometimes fail to provide independent and effective investigations into acts of torture and, when they do, investigations are often carried out without adequate powers and resources. Even where investigations do result in convictions, punishments do not always reflect the severity of the crime and, in some countries, convicted perpetrators are allowed to return to their law enforcement roles. Many victims are dissuaded from making allegations of torture or other ill-treatment by the difficulties in accessing justice. In some instances, they can even face prosecution if their allegations do not result in convictions. Inadequate internal complaint systems and the failure to provide defence lawyers, civil society organizations (CSOs) and independent monitoring bodies with regular access to all places of detention prevents detainees from accessing information about their rights and the opportunity to make complaints.<sup>4</sup> Obstacles to the reporting of torture, in addition to the failure to properly investigate, prosecute and punish perpetrators of torture, masks the true scale of the problem across the OSCE region.

In addition to direct incentives for acts of torture and other ill-treatment, there are also factors within criminal justice systems that facilitate their use. The overuse of pre-trial detention can facilitate the use of torture and other ill-treatment in several ways. When suspects are held in detention, they are at a much higher risk of being exposed to torture or other ill-treatment by both law enforcement officials and other detainees, and they face additional barriers to getting incidences of torture properly investigated. Pre-trial detention and prison conditions in several OSCE participating States are so poor that they, themselves, amount to ill-treatment.<sup>5</sup> There is evidence to suggest that suspects are sometimes placed in pre-trial detention in order to "persuade" them to plead guilty or confess.<sup>6</sup>

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4 Note that allegations of torture shall be investigated *ex officio*, even without a formal complaint. For prison settings, the revised UN Standard Minimum Rules for the treatment of prisoners (Nelson Mandela Rules) in Rule 71 explicitly state that a prompt, impartial and effective investigation has to be initiated whenever there are reasonable grounds to believe that an act of torture or other ill-treatment has been committed. See [Guidance Document on the Nelson Mandela Rules](#) (Warsaw: ODIHR/PRI, 2018), section 3.3. Investigations, page 91. See also [Fair Trials](#), "Rights behind bars – Access to justice for victims of violent crime suffered in pre-trial detention or immigration detention", (2019).

5 See following section on the abusive use and conditions of pre-trial detention; see also, ECtHR, "[Factsheet – Detention conditions and treatment of prisoners](#)", May 2020.

6 See e.g., Council of Europe, [Parliamentary Assembly \(PACE\) Resolution on Abuse of pretrial detention in State parties to the European Convention for Human Rights](#), Res. 2077 (2015) para. 7.1.

Another factor that facilitates the persistence of torture is a failure by states to conduct prompt and independent forensic medical examinations of those who allege torture. Independent medical examinations play an essential role in criminal investigations into acts of torture, in seeking compensation and in excluding evidence obtained by torture from proceedings. Detainees often have difficulties accessing medical examinations in line with the standards set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol),<sup>7</sup> and within appropriate time limits, due to a lack of forensically trained doctors. In addition, some countries require law enforcement officials to be present during medical examinations, contrary to international standards. This threatens the safety of detainees and medical practitioners who report torture, reducing their willingness to do so.

Each of these issues represents an incentive or factor that is conducive to torture and other ill-treatment. Each section of this publication includes detailed policy recommendations on how to effectively address and eliminate these factors and incentives.

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7 UN HIGH COMMISSIONER FOR HUMAN RIGHTS, Geneva, PROFESSIONAL TRAINING SERIES No. 8/Rev.1, 2004 [“Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”](#).

# Introduction

1. The universal and absolute prohibition of torture is a non-derogable norm of international human rights law. It is a principle of customary international law and a peremptory norm (*jus cogens*), meaning that the prohibition cannot be set aside by any other type of domestic or international law. The prohibition has been reaffirmed in numerous international and regional treaties.
2. All 57 participating States of the OSCE have ratified the ICCPR and the UNCAT.<sup>8</sup> In the OSCE Human Dimension Commitments, they have explicitly and unequivocally pledged to uphold the absolute prohibition of torture and other ill-treatment and committed to strive for its elimination.<sup>9</sup> Respect for human rights and fundamental freedoms are key to the OSCE's comprehensive concept of security.
3. In practice, however, many participating States are failing to uphold the international obligation to prohibit and prevent torture and other ill-treatment, and several have been repeatedly criticized for this by UN treaty bodies, regional human rights bodies, CSOs and human rights defenders.<sup>10</sup> While the reasons torture remains widespread in so many countries despite its universal prohibition are multiple and

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8 In addition, 47 OSCE participating States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and have ratified the European Convention for the Prevention of Torture and inhuman or Degrading Treatment or Punishment (1987).

9 OSCE Human Dimension Commitments Vienna 1989, Copenhagen 1990, Paris 1990, Moscow 1991, Budapest, 1994, Istanbul 1999, Ljubljana 2005, Helsinki 2008, Athens 2009. In particular, OSCE participating States have stressed that “no exceptional circumstances whatsoever, [...] may be invoked as a justification of torture” (Copenhagen 1990) and have committed to “ensure that all individuals in detention or incarceration will be treated with humanity and with respect for the inherent dignity of the human person; [...] and to observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the Code of Conduct for Law Enforcement Officials” (Vienna 1989). OSCE participating States have also committed to “take up with priority for consideration and for appropriate action [...] any cases of torture and other inhuman or degrading treatment or punishment made known to them through official channels or coming from any other reliable source of information” (Copenhagen 1990) and to “inquire into all alleged cases of torture and to prosecute offenders” (Budapest 1994). See also OSCE, ‘PREVENTING TORTURE A handbook for OSCE field staff’, (2009).

10 See e.g. “List of Issues and submissions of civil society organisations to the UN Committee against Torture regarding OSCE pS” and “Concluding Observations” ; “Civil Society Organisations Submission to the Universal Periodic Review (UPR)” ; see also Consolidated summaries of the Annual Human Dimension Implementation Meetings (HDIM); “2017 Recommendations of the Vienna Conference”, p. 34 ; “Recommendations of the CSP to HDIM 2017” .

interrelated, one key component of tackling this challenge is understanding what aspects of criminal justice practices and systems incentivize the use of torture.

4. The risk of torture and other ill-treatment exists in a wide variety of contexts, but is heightened when suspects, accused persons and defendants are detained in the context of criminal investigations and proceedings. Recognizing that this is one of the principal contexts in which torture occurs,<sup>11</sup> this paper will focus on incentives for torture and other ill-treatment in criminal justice systems. The analysis of such incentives in other contexts is beyond the scope of this publication.
5. Gender is a key aspect of any examination of criminal justice systems. For instance, while women often come in contact with criminal justice systems as victims of crimes, women are also increasingly represented among suspects, accused or among prison populations. Furthermore, experiences with the criminal justice system not only differ between men and women, but also elderly persons, persons belonging to minority populations, LGBTI persons, children in conflict with the law and other groups. While recognizing the importance of analysing criminal justice systems through a gender lens and acknowledging how existing incentives for torture and other ill-treatment affect women and men, LGBTI persons, children, the elderly, members of minorities and other groups differently, will warrant further in-depth research and analysis. This paper is a first step in the identification of remaining incentives for torture and other ill-treatment in criminal justice systems and the starting point for further research in the resulting gender aspects of its findings.
6. In the field of torture prevention, significant attention has been paid to procedural safeguards, including to their codification in law and their practical implementation, and to the treatment of prisoners and conditions of detention. Given that most instances of torture and other ill-treatment occur during the early stages of arrest and custody,<sup>12</sup> the effective implementation of procedural safeguards at these early stages is a particularly important deterrent against such practices.<sup>13</sup> More work is required, however, to identify and mitigate the reasons underlying the ongoing practices of torture and other ill-treatment, including with respect to incentives for criminal justice actors (such as judges, prosecutors, police officers and defence

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11 This is well-documented and evidenced by the definition of torture contained in the UN Convention Against Torture regarding the use of torture to obtain information or a confession, and the establishment of torture preventive mechanisms, including through the Optional Protocol to the Convention Against Torture, which monitor—amongst other places of detention—places of detention for those detained on criminal charges or convictions.

12 Association for the Prevention of Torture, “Preventing Torture in the OSCE Region through Implementation of the UN Convention against Torture”, (2014).

13 Richard Carver & Lisa Handley(eds), *Does Torture Prevention Work?*, (Liverpool University Press 2016.)

lawyers) either to engage in or ignore the use of such practices. Addressing these questions is central to assisting states in the OSCE region in complying with their commitments to eradicate torture and other ill-treatment.

7. This publication maps some key areas in criminal justice systems across the OSCE region in which incentives to use torture and other ill-treatment exist, as well as some of the factors that facilitate these practices through practical examples.<sup>14</sup> In order to obtain further up-to-date information and the perspectives of national and international experts on torture prevention, ODIHR and Fair Trials commissioned a survey of CSOs based in 13 different countries across the OSCE region, as well as of relevant international civil society organizations.<sup>15</sup> Drawing on the responses from that survey, supplemented by additional research, this paper maps incentives for torture, with a focus on those 13 countries to provide examples of both practices that raise concern and those that are promising in addressing torture and other ill-treatment. These have helped inform policy recommendations applicable for all OSCE participating States.
8. Each section of this report includes examples from OSCE participating States of specific challenges and possible incentives for torture and other ill-treatment. These examples are illustrative, rather than exhaustive, as not all OSCE participating States were examined for this publication. The examples given in this publication strive to provide a regional balance within the sub-regions of the OSCE. ODIHR may conduct further research into other OSCE participating States and existing incentives for torture in other jurisdictions as follow-up to this publication. Whether a participating State is mentioned – or not mentioned – is intended neither to indicate the full scope of challenges nor promising practices in any given place.
9. This paper is not a comprehensive analysis of the situation across the OSCE region. Instead, it presents a broad picture of areas of concern and possible ways to address incentives for torture, in order to assist all 57 OSCE participating States in their efforts to eradicate torture and other ill-treatment, with the aim of making the OSCE region a torture-free zone.

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14 A total of 185 practical examples/country references from 37 OSCE participating States are contained in this publication.

15 For the list of contributing organizations, see preface – acknowledgments. The 13 OSCE pS and the relevant CSOs have been selected in close collaboration with the OSCE Civic Solidarity Platform (CSP) aiming to strike a regional balance and to identify highly specialized national non-governmental organizations.



## A. Incentives for torture



# Obtaining a conviction – confession-based criminal justice systems

10. There is a consensus among international experts that it is in the period immediately after someone is deprived of their liberty that the risk of torture and ill-treatment is greatest.<sup>16</sup> In most criminal justice systems, this will usually be at the investigation stage, when an individual is deprived of their liberty for questioning by the police. At this stage, the police will be seeking evidence of who committed the crime, with a view to providing the justice system with evidence for prosecution and conviction. Significant challenges arise for the prevention of torture when criminal justice systems rely heavily on confessions – whether as an entrenched practice or because of a lack of police training and resources to pursue legitimate and effective forms of investigation. In justice systems that rely heavily on confessions as evidence, police are incentivized to obtain a confession or extract information by any means, including by torture or other ill-treatment. The incentive to obtain evidence through torture is perpetuated when the system allows that evidence to serve as the basis for a conviction, effectively validating torture and other ill-treatment as a means of investigation. Furthermore, the use of trial-waiver systems, where suspects admit guilt and waive their right to a trial in exchange for some form of benefit, incentivizes police to rely on suspects confessing guilt to close criminal cases, whilst at the same time waiving their rights to challenge evidence in a trial process.
11. There is a direct correlation between reliance on confession evidence and the incidence of torture.<sup>17</sup> The ability to gain a conviction through confession evidence provides a clear incentive for investigating authorities to coerce suspects into confessing to a crime, including through the use of torture. According to Juan Mendez, former UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Special Rapporteur on Torture): “Coerced confessions are, regrettably, admitted into evidence in many jurisdictions, in particular

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16 UN Commission on Human Rights, Sixtieth Session, Report of the UN Special Rapporteur on Torture, (2004), E/CN.4/2004/56/Add.2, para. 60.

17 Richard Carver & Lisa Handley (eds), *op. cit.*, note 13, p.78.

where law enforcement relies on confessions as the principal means of solving cases and courts fail to put an end to these practices.”<sup>18</sup> Although most countries have legal and procedural safeguards to prohibit forced confessions and to prevent the overreliance on confessions, these do not always provide effective protections against the use of torture.

12. Obtaining a confession remains one of the principle incentives for torture, if not the main incentive. As such, it is specifically included in the definition of torture in UNCAT.<sup>19</sup> The link between the use of torture and confessions was reflected in some of the survey responses: In one Central Asian participating State, for example, 83 per cent of the torture cases dealt with by the reporting CSO involved the obtaining of a confession.<sup>20</sup> In another State from Central Europe, the need to obtain a confession or witness testimony is perceived as one of the main incentives for the use of torture and other ill-treatment by police.<sup>21</sup> More broadly in the Council of Europe region, which is widely considered as having made significant progress in implementing safeguards against torture and other ill-treatment, the CSO DIGNITY found that “In more than half of the CoE Member States, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has in the recent past heard allegations and found forensic medical and other evidence ... of various forms of ill-treatment ... that were applied at police premises and in the course of questioning for the purpose of obtaining a confession or information. In some cases, the ill-treatment alleged was of such severity that it could be qualified as torture.”<sup>22</sup>
13. Several fair trial rights enshrined in international and regional human rights law can also safeguard suspects from being tortured or ill-treated to obtain a confession during the investigative stage of detention, where the risk of torture or other ill-treatment is highest. In particular, these include the right to the presumption of innocence, the right against self-incrimination, the right to legal assistance,

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18 UN General Assembly Seventy-first session, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, (2016) A/71/298, para. 99.

19 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Article 1.

20 Questionnaire response, Golos Svobody (Kyrgyzstan) (2019).

21 Questionnaire response, Hungarian Helsinki Committee (Hungary) (2019) citing also Borbála Ivány, András Kádár, and András Nemes, ‘Hungary’, in Richard Carver & Lisa Handley (eds), *op. cit.*, note 13, pp. 188–189 and 230.

22 DIGNITY, “Combating Torture During Police Custody and Pre-Trial Detention Discussion Paper”, Conference hosted by the Danish Chairmanship of the Committee of Ministers of the Council of Europe, (2018) p.4, para 7.

the right to have a third party informed of arrest and the right to be notified of one's rights.<sup>23</sup>

## Laws and measures relevant to the admissibility of confession evidence

14. OSCE participating States employ a variety of safeguards to ensure that confessions are not made as a result of torture or other ill-treatment. Of the 13 countries surveyed, for example, only three permit confessions to be the sole evidence of guilt.<sup>24</sup> In this context, the Supreme Court in one of these states has ruled that the parliament should review the relevant law. The case referred to a previous conviction of a woman with an intellectual disability, based solely on her confession, which was obtained without a lawyer present and with no corroborating evidence.<sup>25</sup> Outside of the countries surveyed, many of the OSCE countries that allow confessions to be the sole evidence of guilt are located in Western Europe, although these employ some form of additional safeguard (outlined below).<sup>26</sup>
15. Examples of measures designed to eliminate the use of confessions as the sole evidence of guilt from countries across the OSCE include:
  - a. **Corroborating evidence:** Many OSCE countries require corroborating evidence in addition to a confession.<sup>27</sup>
  - b. **Types of confession:** Some countries distinguish between confessions, based on the stage of proceedings in which they were given, or to which actors in the justice system they were given. In one Western European state, for example, confessions made before a judge can be relied on as the sole evidence of guilt, provided certain conditions are met,<sup>28</sup> but confessions made before a police of-

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23 International Covenant on Civil and Political Rights, (1976) Article 14; see also the EU Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings outlined at: European Commission, “[Rights of suspects and accused](#)”, (2019).

24 Questionnaire responses CSOs (North Macedonia, Poland and Serbia) (2019).

25 Supreme Court of Poland, judgment of 23 June 2016 (case no. II KK 39/16).

26 Fair Trials and REDRESS, “[Tainted by Torture: Examining the Use of Torture Evidence](#)”, (2018), p. 46–47.

27 This includes but is not limited to Armenia, Georgia, Hungary, Kyrgyzstan, Moldova, Romania, Russia, Turkey, Ukraine and the United States, Questionnaire responses (2019); Kenneth S. Broun et al., ‘McCormick on Evidence, 7th edition, June 2016 update, para. 145.

28 Judgment of the Spanish Supreme Court, 307/2008 of 5 June 2008.

ficer (if not then repeated during the trial) may not be the sole evidence of guilt.<sup>29</sup> A confession given in the pre-trial phase must be supported by other evidence.<sup>30</sup>

- c. **Judicial scrutiny:** The laws of some OSCE countries require heightened scrutiny of confession evidence by the courts. In another Western European participating State, for example, a “confession, like any other evidence, is left to [the] judge’s discretion” and can only be the sole evidence of guilt if the judge is satisfied it is sufficient.<sup>31</sup> Despite this, the admissibility of the confession must be subject to an adversarial process before the judge,<sup>32</sup> and the judge has to decide according to their “innermost conviction”.<sup>33</sup>
- d. **Procedural safeguards:** Some countries require the court to be satisfied that certain procedural safeguards have been met before admitting confession evidence. In Germany, for example, violations of suspects’ procedural rights, such as of the obligation to notify a suspect of their right to remain silent, can lead to a confession being deemed inadmissible.<sup>34</sup> In Hungary, confessions obtained by “significantly limiting procedural rights” are inadmissible.<sup>35</sup> In England and Wales, there are detailed codes of practice related to questioning by police officers and the audio recording of interviews with suspects. The audio recording of any interview is mandatory, and exceptions are clearly prescribed in those codes.<sup>36</sup> At the regional level, there are also developments linking the admissibility of confessions with the protection of procedural safeguards for suspects. The European Union has outlined minimum safeguards, namely, the right to access to a lawyer, the entitlement to free legal advice, the right to be informed of the accusation, the right to interpretation and translation, and the right to remain silent.<sup>37</sup>

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29 Judgment of the Spanish Supreme Court, 174/2015 of 14 May 2015.

30 Judgment of the Spanish Supreme Court, 655/2011 of 28 June 2011.

31 Code of Criminal Procedure of France (2006), Article 428: “Confessions, as any other type of evidence, are left to the free appreciation of the judges.”

32 French Supreme Court, Criminal Chamber, 21 October 1965, No. 65–90.318.

33 Code of Criminal Procedure (2006), Article 427: “Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction. The judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him.”

34 Strafprozeßordnung, (StPO), Section 136.

35 Questionnaire response Hungarian Helsinki Committee referencing Act XC of 2017 on the Code of Criminal Procedure, Article 167(5).

36 Home Office, Police and Criminal Evidence Act 1984 (PACE) 67(7B), CODE E Revised Code of Practice on Audio Recording Interviews with Suspects, (2016), para. 3; and CODE C Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (2018), for instance para. 11.5: “no interviewer may try to obtain answers or elicit a statement by the use of oppression.”

37 Directive 2012/13/EU of the European Parliament and of the Council 22 May 2012 on the right to information in criminal proceedings, Article 3.

16. Nevertheless, torture and other ill-treatment for the purpose of obtaining confessions persist in several OSCE countries. This may be, in part, because confessions are seen as the “best” form of evidence, despite the links between an overreliance on confessions and the systemic use of torture or ill-treatment. In several OSCE countries, the Soviet-era criminal justice principle that confessions are the “king” or “queen” of evidence, at the expense of other forms, is still the general rule.<sup>38</sup>
17. In one South-Eastern Europe OSCE participating State, although a suspect cannot be convicted on the sole basis of their own confession, they can be convicted on the sole basis of the testimony of a “secret witness”.<sup>39</sup> Difficulties in alleging this evidence has been obtained by the torture of a third-party are explored later in this document. The use of secret witness testimony in itself, however, raises significant concerns about its compatibility with international human rights standards.<sup>40</sup>

## Legal and procedural safeguards afforded to suspects

18. Where safeguards are in place, but in the view of police there is no viable investigative alternative to coercion and torture, police are often incentivized to sidestep these safeguards in order to obtain a confession from a suspect.<sup>41</sup> In one Central Asian participating State, although suspects have the right to a lawyer from the moment of arrest and before interrogation,<sup>42</sup> reports suggest that, because confessions are generally seen as the only way to obtain evidence needed to secure a conviction, police tend to sidestep safeguards, including the right of access to a lawyer, in order to obtain confessions. In 2018, CSOs in the country reported that “[m]ost allegations of torture and other ill-treatment concern the time between the arrest and the placing of the suspect in a temporary police detention

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38 Side Event on Coercion and Criminal Justice, Expert Fora for Criminal Justice in Central Asia in Bishkek, Kyrgyzstan 27 November 18; International Commission of Jurists, “[Independence of the Legal Profession in Central Asia](#)”, (2013), p. 56.

39 Questionnaire response Human Rights Association (Turkey) (2019).

40 In [Nedim Şener v. Turkey and Şik v. Turkey](#) (Nos. 38270/11 and 53413/11), the European Court on Human Rights found a violation of Article 5 para. 4 and considered transparency and capacity to examine documents and testimony crucial to challenge the lawfulness of detention. The Court made a factual determination that the accusations against both defendants were based mainly on information provided by third parties and not by the defendants themselves. Then, the Court concluded that neither of the two defendants nor their lawyers had the possibility of challenging the allegations against them as the key items of evidence were not revealed due to the governments claims of confidentiality.

41 This document does not discuss the safeguards provided to witnesses or victims in criminal investigations.

42 Code of Criminal Procedure of Tajikistan Article 46(4).

facility. Detainees continue to be held incommunicado during this period in many cases.<sup>43</sup>

19. In another participating State from the South Caucasus region, the European Committee for the Prevention of Torture (CPT) found that, contrary to the country's laws, access to a lawyer was systematically delayed until after suspects or accused persons had confessed, and that the use of torture or other ill-treatment to extract confessions remained widespread.<sup>44</sup> The Former UN Special Rapporteur on Torture, Nigel Rodley, called for a global prohibition of incommunicado detention, due to its links with torture: "Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal."<sup>45</sup> Numerous other UN Special Rapporteurs on Torture, as well as the UN Working Group on Arbitrary Detention, have also called for the practice to be abolished and criminalized.<sup>46</sup> The Working Group held that no jurisdiction could allow for incommunicado detention where no access to counsel or relatives was granted and no judicial control over the deprivation of liberty was exercised; in short, where no legal procedure established by law whatsoever was followed.<sup>47</sup>

### Availability of adequate investigation technologies and means

20. There may be several different factors that influence whether police or other investigative bodies are incentivized to pursue or rely on confessions as the main form of evidence. These include entrenched practices in some legal systems of relying on confessions, the lack of training in alternative forms of investigation, and the lack of resources and tools to carry out other forms of investigation. Moving away from a reliance on confessions requires access to other forms of evidence

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43 Civil Society Coalition against Torture and impunity in Tajikistan, Helsinki Foundation for Human Rights, OMCT, IPHR, "[Joint NGO submission to the Committee against Torture ahead of the consideration of Tajikistan's Third Periodic Report at the 63rd session in April/May 2018](#)", p.12.

44 Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 to 30 October 2017 CPT/Inf (2018) 37.

45 Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32E/CN.4/1995/34, 12 January 1995, p.173 para. d).

46 Statement by Mr. Nils Melzer, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Seventy-third session of the General Assembly Item 74(a) (2018); [Statement by Mr. Juan Méndez](#), Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Keynote address "The case against backsliding on the torture ban" (2015); Manfred Nowak, Joint Study on Global Practices in relation to secret detention, (20 May 2010); UN Working Group on Arbitrary Detention, Opinion No. 12/2006 (A/HRC/4/40/Add.1), p. 63.

47 Manfred Nowak, *ibid.*, para. 20.

gathering and investigation, such as DNA and surveillance evidence. Where police agencies are not equipped with the proper resources and tools to investigate and solve crimes, they are incentivized to obtain confessions by any means available to them. In one participating State in Central Asia, for example, where investigations are conducted with limited resources and in limited timeframes,<sup>48</sup> there are reports of systemic torture or other ill-treatment in pre-trial detention, primarily to extract confessions to use as evidence.<sup>49</sup> Following a visit to this country in 2012, the former UN Special Rapporteur on Torture, Juan Mendez, lent support to the claims, emphasizing that the tendency to consider obtaining confessions through ill-treatment or torture was at least partially based on a lack of capacity and expertise in investigating crimes.<sup>50</sup>

21. Even in jurisdictions where there are various forms of evidence gathering, and sufficient resources available (such as to gather DNA evidence), interviewing techniques that may amount to ill-treatment or torture and a tendency to over-rely on confessions for convictions can still be observed. In one North American participating State, for example, 30 per cent of the people exonerated by DNA evidence falsely confessed to crimes they did not commit.<sup>51</sup> This can be partly attributed to the use of interrogation techniques such as the Reid Technique, which has been widely criticized for containing coercive elements, and for the associated risk of eliciting false confessions.<sup>52</sup> In another North American participating State, where the technique is also used in some provinces, the Supreme Court stated that in one case where the technique was used, the interrogation was “intense, focused and unrelenting, and ultimately oppressive.”<sup>53</sup>
22. From the above, it becomes clear that there is a need for a holistic approach to moving away from confession-based convictions in the justice system to reduce the risk of torture or other ill-treatment during investigations, including through training and education for police and other investigative bodies. Legal safeguards,

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48 OMCT, “[Human Rights violations in Tajikistan alternative report to the United Nations Committee against Torture](#)”, 37th session, (2006) p. 8.

49 ICJ Global Redress and Accountability Initiative, “[Achieving Justice for Gross Human Rights Violations in Tajikistan](#)”, October 2017, pp. 5–6.

50 UN Human Rights Council Twenty-second session, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan E. Méndez, (2013) A/HRC/22/53/Add.1 p.7 para 31.

51 The Innocence Project, “[Leading Police Consulting Group Will No Longer Teach the Reid Technique](#)” in United States, (2017).

52 The Path to Justice: Preventing Wrongful Convictions, Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, (2011), [Chapter VI – False Confessions](#).

53 The Supreme Court of Canada, *R. v. Peters*, [2001] 1 S.C.R. 997, 2001 SCC 34 at paras. 14, 15, 66.

such as laws and measures relevant to the admissibility of confession evidence, are not sufficient alone to change practices and cultures within police and other investigative bodies. Legal and procedural safeguards afforded to suspects are only effective in combination with the availability of adequate investigation technologies and means. Countries that have successfully curtailed the use of torture or other ill-treatment have combined legal and procedural safeguards with investment in training and education on investigative interviewing techniques. In this context, it is crucial to entrench the understanding of all actors involved in the investigation phase that the aim of questioning is not to obtain a confession from somebody already presumed guilty by the interviewing officers. Rather, the principle aim is to obtain accurate and reliable information in order to discover the truth about matters under investigation.<sup>54</sup> Only when those different elements are brought together in a holistic approach do they reinforce each other and reduce the risk of torture or other ill-treatment.

### **Promising practice – alternatives to coercive interrogation practices that amount to ill-treatment, or even torture, and related safeguards**

23. Some countries that have made significant progress towards reducing the risk of torture or other ill-treatment have done so by adopting new investigative techniques. In a Western European participating State, high-profile miscarriages of justice involving coerced confessions resulted in the enactment of the Police and Criminal Evidence Act, in 1984.<sup>55</sup> The law includes mandatory audio recording of all suspect interviews, the right to legal representation for suspects in police custody, limits on detention before charge and new investigative interviewing techniques.
24. The shift from coercive interrogation practices for information gathering to investigative and non-coercive interviewing models was also facilitated by the adoption of a new technique of investigative interviewing, known as the PEACE model, which was developed in 1992 with the input of psychologists, lawyers and academics.<sup>56</sup> The model sets out techniques for interviewing that put the focus of the interview on eliciting accurate and reliable information that can be used as evidence, rather than on coercing a confession to confirm an existing theory the interviewer might

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54 OSCE/ODIHR, [Human Rights In Counter-Terrorism Investigations – A practical Manual For Law Enforcement Officers](#), (2013), p. 94.

55 In England and Wales.

56 Mary Schollum, "[Bringing PEACE to the United States: A Framework for Investigative Interviewing](#)", *Police Chief Magazine*, (2017) p. 32.

have. The success of the model in England and Wales resulted in its subsequent adoption in Australia, New Zealand, Norway and some parts of Canada.<sup>57</sup> For example, Norwegian investigators, during the questioning of the suspect of a terror attack in 2011, applied non-coercive investigative interviewing techniques and obtained all the relevant information as a result of the interviews, underlining the effectiveness of this approach.<sup>58</sup>

25. In its *Practical Manual for Law Enforcement Officers on Human Rights In Counter-terrorism Investigations*, published in 2013, and in its subsequent and ongoing training across the OSCE region, ODIHR advocates for training in interview techniques, such as the PEACE interview model, that improves the effectiveness of police interviews and enhances the human rights of suspects. Investigators and those who assist them should receive comprehensive training – backed up by regular refresher training – in general investigation techniques, including the interviewing of witnesses, the gathering of physical evidence and the packaging and handling of forensic exhibits, with an emphasis on ensuring the continuity of the evidence chain. Any improvement in dealing with witnesses and forensic evidence will reduce the reliance on obtaining confessions for the purpose of securing convictions.<sup>59</sup>

26. In his 2016 interim report to the UN General Assembly, Juan Mendez, the former UN Special Rapporteur on Torture, further underlined the need for investigative interviewing techniques by advocating for the development of a set of international guidelines for non-coercive interviews and associated safeguards:

*"The [guidelines] must address the need to change the culture of tolerance and impunity for coerced confessions in such cases. National legislation must accept confessions only when made in the presence of competent and independent counsel (and support persons when appropriate) and confirmed before an independent judge (see A/HRC/13/39/Add.5 and A/HRC/4/33/Add.3). Courts should never admit extrajudicial confessions that are uncorroborated by other evidence or that have been recanted (see A/HRC/25/60)."*<sup>60</sup>

27. The guidelines, which were under development at the time of writing, will outline a framework for non-coercive interviewing and the implementation of associated

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57 *Ibid.*, p. 33.

58 Richard Carver & Lisa Handley (eds), *op. cit.*, note 13, p. 79.

59 OSCE/ODIHR, *op. cit.*, note 54, p. 111.

60 UN General Assembly Seventy-first session, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, (2016) A/71/298 para 99.

safeguards, such as the elimination of confessions as the sole source of evidence, and legal and procedural safeguards at the pre-trial stages of investigation and custody, such as the audio-visual recording of interviews. They will draw on the large scientific evidence base supporting the effectiveness of investigative interviewing techniques in eliciting accurate and reliable information and evidence during questioning, and on best practices with respect to the implementation of key legal and procedural safeguards.<sup>61</sup>

28. Alternatives to coercive interrogations should also provide for specific provisions for particular groups that are more vulnerable during questioning. Factors that may increase vulnerability include age, gender, disability, nationality, ethnicity, sexual orientation, gender identity or expression, and being part of a minority or socio-economically marginalized group, as well as being pregnant or breastfeeding. Specifically, persons with intellectual disabilities, children, women and girls, and persons belonging to minorities or indigenous groups, as well as non-nationals, including migrants regardless of their migration status, refugees, asylum seekers or stateless persons should benefit from specific protection measures during questioning. Such measures include, for instance, the identification of a third person who may assist in guaranteeing the welfare of the person being questioned during the criminal procedures. Individual assessments should be made before the questioning takes place, in order to identify whether the interviewee may be facing a heightened situation of vulnerability.
29. Audio-visual recordings of police interviews are widely recognized as a crucial safeguard against the use of torture and other ill-treatment. Already in 2002, the Former UN Special Rapporteur on Torture, Theo Van Boven, stated that “all interrogation sessions should be recorded” and that “evidence from non-recorded interrogations should be excluded from court proceedings”.<sup>62</sup> As mentioned above, the audio-visual recording of all interviews is mandatory by law in one participating State, and practice in this area is slowly developing in other countries.<sup>63</sup> At

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61 The APT, together with Anti-Torture Initiative (ATI) and the Norwegian Centre for Human Rights (NCHR) launched in 2018 a three-year process to develop a set of guidelines on investigative interviewing by law-enforcement officials and on the implementation of associated legal and procedural safeguards. These guidelines aim to reduce the well-documented risk of mistreatment and coercion that persons face during questioning by law enforcement, and during the first hours of custody. The drafting of the current guidelines is ongoing and the Steering Committee plans to approve a final draft in autumn 2020. For updated information on the process, see [here](#).

62 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 17 December 2002, E/CN.4/2003/68, para. 26(g).

63 For example: A. Birtles, “The European Committee for the Prevention of Torture and the electronic recording of police interviews with suspects”, *Human Rights Law Review* (2001), 1, no. 1; J. Chalmers, “Recording of police interviews”, in J. Chalmers et al. (eds.), *Post-Corroborator Safeguards Review Report of the Academic Expert Group* (The Scottish Government, 2014), pp.

present, audio-visual recording is only mandatory by law in a few countries across the OSCE, and even in these cases it is limited either to some jurisdictions, where it is used for all suspect interviews, or to specific cases, or to the questioning of vulnerable defendants, suspects or accused persons. Audio-visual recording not only constitutes a strong deterrent against torture or other ill-treatment during interviews, but can also protect the police against false allegations of torture and serve as evidence in proceedings.<sup>64</sup> In the European Union, for example, the 2016 Directive on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings requires Member States to audio-visually record police interviews of child suspects “where this is proportionate to the circumstances of the case.”<sup>65</sup> While this is a welcome recognition of audio-visual recording as a human rights safeguard, there is no reason why it should be limited to children. In one Western European participating State, where there were numerous allegations of torture and mistreatment against detainees during the 1970s and 1980s, the requirement for audio-visual recording of questioning was introduced in 1999, and allegations of torture and mistreatment declined significantly. In 2018, the CPT commended the “enormous culture change that has taken place within the police of Northern Ireland since the late 1990s.”<sup>66</sup>

30. At the time of writing this publication, one OSCE participating State in Central Asia was developing a new system for keeping police records. The new system records information about the detainee, the arrest, the arresting officers and the subsequent stages of detention, including the questioning and interviewing of suspects or accused individuals. This was intended to allow access to this information to the various criminal justice actors and enhance transparency considerably. Such comprehensive and detailed records management and clear obligations for all professionals involved to log the required information may de-incentivize torture or other ill-treatment of persons deprived of liberty in the criminal justice system in the future.<sup>67</sup>

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118–123.

- 64 Penal Reform International and APT, “[Video recording in police custody Addressing risk factors to prevent torture and ill-treatment](#)”, Detention Monitoring Tool, Second edition Factsheet, p. 1.
- 65 Directive (EU) 2016/800 of the European Parliament and the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Article 9(1).
- 66 Report to the Government of the United Kingdom on the visit to Northern Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 29 August to 6 September 2017, CPT/Inf (2018) 47, p. 4.
- 67 See a short video in Russian here about the system in Kyrgyzstan: <https://youtu.be/ZnXUJzB4Mnw>.

## Policy recommendations

States should ensure that national laws prohibit practices that violate the prohibition of torture and fair trial rights, and provide for safeguards that uphold and protect these rights. It is recommended that states provide for:

1. The prohibition of confessions as the sole evidence of guilt;
2. Laws and measures designed to uphold and protect the presumption of innocence, the right to remain silent and the notification about rights;
3. Access to independent legal counsel, immediately after the moment of the deprivation of liberty, and before and during any questioning by authorities;<sup>68</sup> and free legal assistance for those unable to cover the cost of legal counsel for themselves;<sup>69</sup>
4. The prohibition of incommunicado and secret detention;
5. The legal requirement for, at a minimum, audio recording, and preferably video-recording of all police interviews; and
6. An independent law enforcement oversight mechanism.

## Practical recommendations

It is recommended that states:

7. Ensure that any person arrested or detained must, at the time of deprivation of liberty and before any questioning, be informed of their rights and ways to avail themselves of those rights;
8. Apply specific provisions for particular groups that are more vulnerable during questioning, including children, women and girls, persons with disabilities, persons belonging to minorities or indigenous groups and non-nationals, including migrants (regardless of migration status), refugees, asylum seekers and stateless persons;

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68 Compelling circumstances denying access to counsel must be strictly defined in national law and correspond to situations in which there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of persons, or where immediate action by investigators is imperative to prevent the destruction or alteration of essential evidence or to prevent interference with witnesses. Even then, the questioning of suspects without a lawyer must be accompanied by appropriate safeguards, limited to what is strictly necessary to achieve its singular purpose (i.e., obtaining information to address the exigent circumstances) and cannot unduly prejudice the rights of the defence (European directive 2013/48/EU). See e.g. UN Special Rapporteur on Torture, A/71/298 (2016), para. 71; see also UNODC, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013.

69 UNODC, *ibid.*

9. Ensure that witnesses, victims, suspects and persons deprived of liberty who do not adequately speak or understand the language of questioning are entitled to receive the free assistance of an independent, qualified and effective interpreter during interviews and, when necessary, during consultations with counsel;<sup>70</sup>
10. Ensure that the right of access to a lawyer entails the right to meet in private and consult and communicate in full confidentiality before any interview;
11. Ensure that lawyers that are provided under legal aid schemes have the necessary qualifications and experience in criminal law to ensure the quality of legal advice;
12. Support legal aid provisions by legal or bar associations where there is a shortage of lawyers in the country, and as a temporary measure while an adequately funded legal aid system is developed; support university law clinics; and sponsor CSOs, including paralegal organizations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas;<sup>71</sup>
13. Equip police forces with adequate resources, training and equipment to investigate crimes without the need to rely solely on confession evidence. In particular, it is recommended that states invest in training on investigative interviewing techniques, such as the PEACE model and the methodology for the forthcoming international Guidelines on Investigative Interviewing and Associated Safeguards;<sup>72</sup>
14. Ensure that such training is included as a mandatory component in the curriculum of police academies and other educational institutions for law enforcement, and forms part of continuous professional development;
15. Invest in training and equipment to enable police to gather forensic and surveillance evidence; and
16. Invest in equipment for the audio and the audio-visual recording of questioning and interviews from the outset of police custody, including police interviews; and in other control mechanisms and equipment.

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70 See International Covenant on Civil and Political Rights, art. 14 (3) (f).

71 UNODC, *op. cit.*, note 68, para. 61.

72 For more information on the upcoming guidelines see [here](#).

# Failure to exclude torture evidence – the exclusionary rule

31. The absolute prohibition on the use of evidence obtained by torture stems from the prohibition on torture itself.<sup>73</sup> In order to absolutely prohibit and oppose the use of torture, evidence obtained through the use of torture must also be absolutely prohibited. This is reflected in Article 15 of UNCAT, which prohibits the use of “any statement” in “any proceedings” where it is established that the statement was made as a result of torture. In practice, however, this prohibition is not always upheld. Article 15 is reported to be one of the most frequently flouted provisions of the UNCAT by states where torture remains in practice.<sup>74</sup> The ineffectiveness of efforts to put an end to the practice of torture or other ill-treatment is often the result of the fact that evidence tainted by torture or other ill-treatment is admitted during trials. The admission of evidence, including real evidence obtained through a violation of the absolute prohibition of torture and other ill-treatment in any proceedings, constitutes an incentive for law-enforcement officers to use investigative methods that breach these absolute prohibitions.<sup>75</sup> It indirectly legitimizes such conduct and objectively dilutes the absolute nature of the prohibition.<sup>76</sup> The exclusionary rule

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73 The rationale behind the exclusionary rule is manifold and includes the public policy objective of removing any incentive to undertake torture anywhere in the world by discouraging law enforcement agencies from resorting to the use of torture, thus to prevent torture and other ill-treatment. Furthermore, confessions and other information extracted under torture or ill-treatment are not considered reliable enough as a source of evidence in any legal proceeding. Finally, their admission violates due process and fair trial rights, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/25/60 (2014), para. 21.

74 *Ibid.*, para. 17: “Some States interpret “any proceedings” narrowly, to mean judicial proceedings of a criminal nature against the person who has made the statement. More importantly, some insist that the exclusionary rule is triggered only when it is established that the statement was made under torture”.

75 *Ibid.*, para. 30 stating that: “the admission of evidence, including real evidence obtained through a violation of the absolute prohibition of torture and other ill-treatment in any proceedings, constitutes an incentive for law enforcement officers to use investigative methods that breach those absolute prohibitions.”

76 Malcolm D. Evans, “‘All the Perfumes of Arabia’: The House of Lords and ‘Foreign Torture Evidence’”, *Leiden Journal of Law* (2006), 19, p. 1137.

prevents the use of tainted evidence at trial, thereby removing a key incentive for the use of torture and ill-treatment. One of the principal incentives to use torture is to gain evidence for a subsequent conviction. In theory, if police know that evidence obtained by torture will not be accepted at trial, they will have no choice but to pursue other, legal means of investigation.<sup>77</sup>

32. One of the main reasons torture is used is that evidence gained through its use can, either in law or in practice, be used to secure convictions. Procedural safeguards that apply from the time of arrest and improvements in investigative techniques are essential for the prevention of torture. However, the effectiveness of procedural safeguards and improved investigation techniques will be limited if there are violations of the exclusionary rule, resulting in torture-tainted evidence being used to secure convictions.
33. Legal frameworks governing the exclusion of torture evidence vary greatly among OSCE states, but the majority have some form of domestic legal prohibition on evidence obtained this way. Progress has been made, and confessions, once considered the “queen of evidence” in some legal cultures and jurisdictions, now must be accompanied by corroboration in most countries. All of the 13 countries surveyed through ODIHR’s questionnaire to CSOs for this report had prohibitions on evidence obtained by torture. Several states in Central Asia have made positive legislative reforms in recent years in excluding torture-tainted evidence.<sup>78</sup> However, despite reforms and, in some cases, explicit legal frameworks prohibiting the use of torture evidence, instances occur when forced confessions are still deemed

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77 Furthermore, as stated by the UN Special Rapporteur on torture, “of particular concern are attempts to undermine the prohibition of torture or other ill-treatment by using tainted statements outside of “proceedings”, narrowly defined, for other purposes, such as intelligence gathering or covert operations. Cooperation in sharing intelligence between States has expanded significantly in the fight against terrorism and some police, security and intelligence agencies (collectively, executive agencies) have shown a willingness to receive and rely on information likely to be obtained through torture and other ill-treatment and to share that information with one another. The global trend of giving executive agencies increased powers of arrest, detention and interrogation have retracted the traditional safeguards against torture or other ill-treatment and led to further abuse of individuals. The practice by executive agencies of using information obtained by torture or other ill-treatment outside court proceedings must be examined to ensure that the prohibition against torture is upheld, a practice made even more dangerous because of the secrecy and lack of transparency that surrounds it. Regrettably, some States have diluted the cardinal principles necessary for preventing and suppressing torture and other ill-treatment,” *ibid.*, para. 18).

78 For example, in November 2017, Uzbekistan President Shavkat Mirziyoev issued a decree prohibiting the use in courts of evidence obtained by torture. See: Human Rights Watch, ‘[US: Focus on Rights as Uzbek Leader Visits](#)’, (2018).

admissible and judges and prosecutors fail to promptly and impartially investigate allegations of torture or other ill-treatment across the region.<sup>79</sup>

34. There are numerous reasons courts fail to implement the exclusionary rule. Laws that prohibit all forms of evidence obtained by torture, alone, might not be sufficient where there are no fair and effective procedures for challenging and establishing whether evidence has been obtained by torture, and for excluding such evidence. Suspects, accused persons and defendants should be able to initiate these procedures without any obstacles. For instance, the UN Special Rapporteur on Torture has noted that, in jurisdictions where independent medical examinations must be authorized by investigators, prosecutors or penitentiary authorities, those authorities might delay authorization so that any injuries deriving from torture have healed by the time an examination is conducted.<sup>80</sup> The Rapporteur also found that these medical and forensic reports are often of such poor quality that they provide little assistance to judges or prosecutors when deciding whether to exclude statements.<sup>81</sup>
35. Decisions by regional courts and treaty monitoring bodies identify two distinct stages of procedures for challenging such evidence: (a) the initial stage of triggering the procedure to exclude evidence; and (b) the stage of establishing whether the evidence was obtained by torture. In order to trigger the procedure (stage a), defendants must bring a “prima facie” or “well founded” claim that torture has occurred.<sup>82</sup> Once the initial prima facie test is satisfied (stage a), the burden of proof should then shift to the state to prove that the evidence was not obtained by torture if it is to be admitted (stage b).<sup>83</sup>
36. International human rights law leaves the specific nature of procedures to exclude torture evidence to the discretion of states. In many countries, the procedure takes the form of an investigation or a hearing within the trial to establish whether evidence was obtained by torture. In practice, the procedure to exclude torture evidence can present insurmountable challenges to suspects, accused persons or defendants. In particular, this can be the case where the state does not bear

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79 See e.g. “[Outcome report, Seventh Expert Forum on Criminal Justice for Central Asia \(2018\)](#)”, organized by ODIHR, OHCHR, UNODC and OSCE field operations.

80 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *op. cit.*, note 73, para. 25.

81 *Ibid.*

82 *Deolall v Guyana*, CCPR/C/82/D/912/2000, 5 November 2004; *Singarasa v Sri Lanka*, CCPR/C/81/D/1033/2001, 23 August 2004; *GK v Switzerland*, 12 May 2003, Communication No 219/2002, para 6.10.

83 *Ibid.* See also report of the UN Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment, *op. cit.*, note 73, para 17.

the burden of proof in establishing through an impartial investigation that evidence was not obtained by torture but, instead, it is left to the alleged victim to prove that torture occurred, sometimes with unrealistically high standards for proof.

37. An OSCE trial monitoring project in a Central Asian state in 2005 and 2006 documented 133 instances where defendants alleged that evidence had been obtained under torture and other ill-treatment. Judges took action regarding the allegations in only 53 of these cases. In those 53 cases, judges summoned and examined the investigators accused as witnesses. All denied having used torture against the defendants. The OSCE's trial monitoring report noted that, in all of these cases, the judges' action was merely a formality, since more rigorous measures of verifying the defendants' allegations were not taken.<sup>84</sup> Although there are no clear requirements under international law restricting the types of evidence that may be presented in order to investigate an allegation of torture, calling alleged perpetrators to present evidence on the matter is highly problematic.
38. In some countries, there is a failure to distinguish the exclusionary procedure within the relevant criminal trial from the separate criminal investigation into the allegation of torture. These are two distinct processes, but there is a tendency to overlook differences in their objectives and procedures. All allegations of torture made in the context of criminal proceedings must be investigated, with a view to bringing the perpetrator to justice. The procedure to exclude evidence, however, should be an entirely separate process, as the decision on the exclusion of torture evidence should not depend on the outcome of any criminal investigation into the allegation of torture, nor should it require the same standard of proof.
39. In practice, the burden of proof in courts on the admissibility of material obtained by torture or other ill-treatment often falls on the alleged victim, rather than on the state. The UN Special Rapporteur on Torture has held that the applicant should only be required to demonstrate that their allegations are well-founded – in other words, that there are plausible reasons to believe that there is a real risk of torture or ill-treatment, and that the burden of proof should shift to the prosecution and the Courts.<sup>85</sup>
40. The UN Committee against Torture has also held that it is for the state to investigate with due diligence whether there is a real risk that a confession or other evidence was obtained by unlawful means, including by torture or other ill-treatment that

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84 OSCE/ODIHR, "Results of Trial Monitoring in the Kyrgyz Republic", 2005–2006, p. 77.

85 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *op. cit.*, note 73, para. 32.

occurred in a third country.<sup>86</sup> This approach has also been applied to third-party torture evidence by the European Court of Human Rights (ECtHR), where the court held that it is necessary and sufficient for the complainant to show that there is a “real risk” that the impugned statement was obtained under torture or other ill-treatment to invoke the exclusionary rule.<sup>87</sup> Despite this, in most of the countries surveyed, evidence, such as the results of a medical examination or witness testimony, is expected or required in order to exclude evidence. This generally goes beyond showing that there is a real risk.<sup>88</sup> Some countries go even further than this, by requiring the outcome of a separate criminal conviction to exclude evidence. It was found that in at least two OSCE participating States surveyed in this report, for example, the court will only exclude evidence if a separate criminal investigation has found that torture occurred.<sup>89</sup>

41. In some instances, evidence obtained by torture is admitted not because of faults and shortcomings in the legal procedure or poor medical and forensic reports but because judges are simply unwilling to exclude the evidence. In one OSCE participating State in Central Asia, a clear and explicit exclusionary rule is contained in the Criminal Procedural Code that prohibits all evidence obtained by torture.<sup>90</sup> However, it is reported that the exclusionary rule is not always implemented in practice, both because of the lack of a clear procedure and because of judicial discretion as to whether to open an investigation into allegations.<sup>91</sup>
42. There are many reasons why judges might be unwilling to exclude evidence, such as an unwillingness to part from entrenched practices, external interference in the judicial process, or even the potential for judges to face disciplinary measures for acquittals, which is in clear violation of the principle of judicial independence. In an OSCE participating State from the South Caucasus region, the judiciary has been under persistent pressure for almost three decades, and the issue of its independence was raised during protests that occurred there in 2018. While recognizing the vision for reforms in the justice sector since 2018, including by the Minister of Justice,<sup>92</sup> as well as concrete steps taken, such as the establishment

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86 UN Committee Against Torture, *Ktiti v. Morocco*, CAT/C/46/D/419/2010, para. 8.8.

87 *El Haski v Belgium*, App no. 649/08, (ECtHR, 25 September 2012), para. 88.

88 Questionnaire response from Human Rights Association (Turkey), Helsinki Association of Armenia, Golos Svobody, (Kyrgyzstan), Public Verdict Foundation (Russia), Kharkiv Institute for Social Research (Ukraine) (2019)

89 Questionnaire response from Golos Svobody (Kyrgyzstan), and from Public Verdict Foundation (Russia), (2019).

90 Tajikistan Code of Criminal Procedure, Article 88–1.

91 ICJ Global Redress and Accountability Initiative, *op. cit.*, note 49, p. 14.

92 “[Armenian justice minister discusses judicial-legal reforms with high-ranking EU officials](#)”, News.am, 6 December 2019.

of the Supreme Judicial Council, an independent body that seeks to guarantee independence of the judiciary and judges, evidence of interference by political actors remained.<sup>93</sup> In countries that face serious challenges to judicial independence, judges may be incentivized to ignore allegations that evidence has been obtained by torture. These issues may be exacerbated in civil law jurisdictions, where the standard of proof tends to be communicated as the judge's "innermost conviction", allowing them greater discretion in determining whether to exclude evidence.

43. Prosecutors can play a crucial role in removing this incentive for torture by, for example, proactively inquiring how evidence was obtained, initiating investigations where they suspect evidence may have been obtained by torture, and excluding evidence from the case file before it even reaches court. Just as with judges, there are a variety of reasons why prosecutors fail to uphold the prohibition on the use of torture-tainted evidence. These might include how prosecutors view their role in the criminal justice system (e.g., whether their role is to secure convictions or to search for the truth), or external pressures to secure convictions, which may include disciplinary measures for acquittals (explored further below, in the section on performance quotas).
44. In addition to judges and prosecutors, who have the power to exclude torture-tainted evidence and initiate investigations, defence lawyers can also play a crucial role in the exclusion of such evidence and in ensuring the safety and wellbeing of victims of these practices. Often, a lawyer will be the first person from the outside world with whom a detainee in custody will come into contact, and they will be the first point of contact in making a complaint of torture. Once a suspect or accused person makes an allegation of torture, the defence lawyer may undertake a range of actions, including: requesting the detainee's provisional release; requesting a medical examination; requesting access to evidence of torture (such a CCTV footage) and taking steps to ensure that any such relevant evidence is preserved; filing a motion to dismiss evidence obtained by torture at trial; and filing a separate criminal complaint of torture against the perpetrator. There are a myriad of different reasons why, in practice, lawyers cannot always provide these forms of assistance, even when they are acting in good faith. At times, defence lawyers are not fully independent or sufficiently qualified, which can have a devastating impact on the ability of a suspect or defendant to make an allegation of torture and to exclude evidence during legal proceedings. Several OSCE participating States surveyed for this report face concerns over the use of "pocket lawyers", who collude with

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93 ["Armenia: PACE monitors express concern at Prime Minister's call to block courts"](#), Call of the Parliamentary Assembly of the Council of Europe (PACE), 21 May 2019.

investigators to secure a guilty verdict.<sup>94</sup> These lawyers do not raise human rights abuses before the court and, instead, collude to cover up torture and other ill-treatment.<sup>95</sup> The International Commission of Jurists, in a 2016 report, highlighted the phenomenon of pocket lawyers as one of the most serious problems in legal communities, for instance, in Central Asia.<sup>96</sup> There are several reasons why lawyers might work with police and prosecutors in this way, including corruption and bribery.<sup>97</sup> Whatever the reason, suspects, accused persons or defendants who are appointed “pocket lawyers” as their legal representatives have little chance of excluding torture evidence or of receiving a fair trial.

45. In most European countries, the application of the exclusionary rule in criminal proceedings and the related procedures tend to be elaborated quite comprehensively. Nevertheless, there remain challenges in implementing the exclusionary rule for evidence indirectly obtained through torture (i.e., on the application of the “fruit of the poisonous tree” doctrine),<sup>98</sup> and in cases where evidence has been obtained through the torture of a third party.<sup>99</sup> It is clear that the exclusionary rule should apply not only where the actual defendant is the victim of the treatment contrary to the prohibition of torture or other ill-treatment, but also where third parties are concerned.<sup>100</sup>

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94 See e.g., comments by the International Commission of Jurists to the draft federal law “on amending certain legislative acts of the Russian Federation in regard to ensuring the right of a lawyer”, (April 2016) ; International Commission of Jurists mission report “The Birth of a New Advokatura in the Kyrgyz Republic”, 2016 ; [Submission of the International Commission of Jurists to the UN Committee against Torture in relation to Tajikistan](#), 28 March 2018, page 30.

95 Questionnaire response Nota Bene (Tajikistan) (2019).

96 International Commission of Jurists, *op. cit.*, note 93.

97 For more on the link between corruption and torture or other ill-treatment more broadly, see the thematic Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/40/59, 16 January 2019: “Corruption within the judiciary has been found to gravely undermine accountability for human rights violations, including torture or ill-treatment (e.g. A/HRC/13/39, para. 71; and CCPR/C/TKM/CO/2, para. 31)” and “Corruption has been causally linked to the direct infliction of torture and ill-treatment, to the denial of protection from such abuse, and to the failure to prevent, investigate and prosecute torture or ill-treatment more broadly. More generally, corruption can permeate government policy, the implementation of the law and the administration of justice in a way which undermines every aspect of the fight against torture and ill-treatment”; see also UN Committee against Torture (CAT), CAT/C/52/2, para. 91: “Corruption and torture and other ill-treatment are inextricably linked”.

98 Fruit of the poisonous tree or ‘derivative evidence’ refers to evidence obtained indirectly as a result of an illegal act. In the context of torture and ill-treatment, it usually refers to physical evidence obtained as a result of information obtained from torture. For more information, see Fair Trials and REDRESS, *op. cit.*, note 26, p.23; see also “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment”, *op. cit.*, note 73, para. 29.

99 ‘Third party torture evidence’ refers to evidence obtained by torturing someone other than the defendant in whose trial the evidence is being used, such as torturing a witness or co-defendant for a statement that incriminates the defendant.

100 Such a conclusion is plainly intended by the wording of article 15 of UNCAT, which provides that “any statement [...] in any proceedings” shall come within the scope of exclusion, and not just one

Invariably, in third-party torture cases, it is extremely difficult for an individual to substantiate even a prima facie case that evidence was obtained as a result of torture. A defendant will not normally know the circumstances under which the interviewing of another person has taken place, who has witnessed that process, whether torture has occurred, or even the identity of the third-party. Despite these difficulties, there have been several cases in European courts where the admissibility of evidence has been challenged on the grounds that it was obtained by the torture of a third party.<sup>101</sup> In *El Haski v Belgium*, the ECtHR established that where evidence comes from a third party, and states cannot guarantee adequate investigation into allegations of torture, only a “real risk” that torture occurred is required in order for evidence to be excluded.<sup>102</sup> The Committee against Torture has also advised against the use of torture-tainted evidence extracted from third parties, regardless of whether such evidence is used in domestic proceedings or in proceedings in a third state.<sup>103</sup>

## Promising Practice

46. As outlined above, there are many reasons why the exclusionary rule fails to be properly implemented in practice. While the roles of criminal justice actors, like those of judges and prosecutors, are essential to the proper functioning of the exclusionary rule, the relevant procedures must also present a fair process for the exclusion of evidence. In common law jurisdictions, the procedure can be more straightforward, due to clearer standards for the reversing of the burden of proof and the requisite standard of proof.
47. In a Western European OSCE participating State for instance, legislation mandates that where a criminal defendant provides evidence that their confession was obtained by “oppression” or under any other circumstance that may make the confession unreliable, “the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.”<sup>104</sup> The statute provides that “oppression” includes “torture,

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given by the accused in a domestic court.

101 These cases arose in Europe as a result of intelligence exchanges through the so-called ‘war on terror’. See, for example, *A & Others v Secretary of State for the Home Department* (No 2) [2005] UKHL 71; *El Haski v Belgium*, App no. 649/08, (ECtHR, 25 September 2012); the Hanseatic Higher Regional Court re the case of Mr. El Motassadeq (Beschluss, 2 BJs 85/01 – 2 StE 4/02 – 5 – IV – 1/04 –), 14 June 2005.

102 *El Haski v Belgium*, App no. 649/08, (ECtHR, 25 September 2012), para. 85.

103 *Ktiti v. Morocco*, *op. cit.*, note 86.

104 Police and Criminal Evidence Act 1984, Section 76(2), United Kingdom.

inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)".<sup>105</sup> The court may, of its own volition (without the defendant alleging torture or mistreatment), also require the prosecution to comply with the procedure to prove to the court, beyond reasonable doubt, that the confession was not obtained by "oppression" in order to admit a confession.<sup>106</sup> The defendant is not obliged to give evidence or call witnesses in such cases.

48. In Central Europe there is a clear division between the procedures for excluding evidence and criminal investigations into allegations of torture.<sup>107</sup> Judges can exclude evidence at trial, even if there is no final factual finding in separate criminal proceedings that a defendant or witness has been tortured. If a separate criminal investigation of alleged torture is ongoing, or if the defendant claims for the first time during the trial that their testimony was obtained unlawfully, evidence can still be excluded at trial by the judge without having to wait for the outcome of the separate criminal procedure. Furthermore, the judge may exclude evidence – even if the defendant does not claim that they were ill-treated – ex officio when, on the basis of the case file, the judge concludes that testimony was obtained in an unlawful manner.<sup>108</sup> In addition, ill-treatment can be reported by anybody (i.e., not just the alleged victim of the ill-treatment),<sup>109</sup> and criminal justice actors have an explicit obligation to report and initiate a criminal investigation if they become aware of a criminal offence. In order to establish to what extent those legal provisions are implemented in practice, additional research and statistical data would be needed.
49. The exclusionary rule cannot function properly if judicial powers to exclude evidence at trial are not clearly defined. The ability of judges to exclude evidence without relying on the outcome of separate criminal proceedings also means that suspects, accused persons or defendants are not forced to wait months, or even years, for the outcome of separate investigations, during which time they may remain in custody, and which is likely to deter them from reporting torture and other ill-treatment. In a South-Eastern European OSCE participating State, the procedure to exclude torture evidence follows the standard procedures for excluding illegally obtained evidence, which involves an evidentiary hearing with strict time limits.<sup>110</sup> Judges also have the power to exclude evidence ex officio if they believe it was obtained illegally.<sup>111</sup>

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105 *Ibid.* Section 76(8).

106 *Ibid.* Section 76(3).

107 Questionnaire response from Hungarian Helsinki Committee (2019).

108 *Ibid.* citing leading court decision BH2019. 295.

109 *Ibid.* citing Act XC of 2017 on the Code of Criminal Procedure, Article 376(1).

110 Questionnaire response Macedonian Young Lawyers Association (North Macedonia) (2019).

111 *Ibid.*

## **Policy recommendations**

National legislation should contain the necessary provisions to ensure that criminal justice actors, and judges and prosecutors in particular, have the necessary powers to exclude evidence. It is recommended that States have laws, rules and regulations that:

1. Reaffirm the absolute and non-derogable nature of the exclusionary rule;
2. Provide effective remedies for violations of procedural safeguards, including the exclusion of evidence, where appropriate;
3. Provide for the review of criminal investigation practices, with a view to promoting professional standards and eliminating confessions as the primary or sole evidence necessary for a prosecution;
4. Provide a clear procedure for the exclusion of torture evidence, with the burden of proof resting on the state;
5. Provide judicial powers to exclude torture-tainted evidence, irrespective of any separate criminal investigation into the allegation of torture;
6. Ensure the prohibition of the exercise of discretion by national authorities about excluding evidence in circumstances where torture or other cruel, inhuman or degrading treatment or punishment is alleged;
7. Ensure that the use of evidence obtained as an indirect result of acts of torture or other cruel, inhuman or degrading treatment or punishment is prohibited and excluded from any proceedings.

## **Practical recommendations**

States should take steps to ensure that the legal framework prohibiting the use of evidence obtained by torture is operating properly in practice. In particular, it is recommended that States:

8. Develop guidance on the operation of the exclusionary rule in practice and clarify the procedural rules on admissibility, including the burden of proof applied by courts. This should ensure that the burden of proof is shifted to the state when the appellant advances a plausible reason as to why evidence may have been procured by torture or other ill-treatment, and that the court enquires as to whether there is a real risk that the evidence has been obtained by torture or other ill-treatment and, if there is such a risk, that the evidence is not admitted;
9. Improve the quality of medical and forensic reports and enhance the admissibility of independent and impartial medical evidence in any court proceedings, in order to investigate allegations of torture or other ill-treatment effectively;
10. Ensure that courts should never admit extrajudicial confessions that are not corroborated by other evidence or that have been recanted;
11. Enforce existing international and regional standards on the independence of judges, prosecutors and lawyers;
12. Collect data on how often it is alleged that evidence has been obtained by torture or other ill-treatment, and how often evidence is excluded at trial on the basis that it was obtained by such practices; and
13. Work with CSOs and other relevant actors to conduct training for judges, prosecutors and defence lawyers on the operation of the exclusionary rule.

# Pleading guilty – trial waiver systems

50. The increasing use of trial waiver systems across the world contributes to an overreliance on confessions and creates barriers to the identification and exclusion of evidence obtained by torture.<sup>112</sup> Trial waiver systems incentivize suspects to admit guilt and waive some of their fair trial rights, such as the right to silence, in exchange for a shorter sentence or reduced charges.<sup>113</sup> The number of countries with trial waiver systems has grown in the OSCE region, as more than 40 of the 57 participating States have some form of such a system. The prevalence of the use of these systems varies greatly among the different states. In one state, 66 per cent of cases in 2019 were resolved via trial waiver,<sup>114</sup> and in another just over 2 per cent were resolved via trial waiver in 2018.<sup>115</sup>
51. An overreliance on guilty pleas can incentivize the police to use torture much in the same way that an overreliance on confessions does. This risk is heightened by the removal of the subsequent trial process and its associated safeguards for the exclusion of evidence obtained through torture. Criminal trials and procedures for challenging the admissibility of evidence are crucial forums that can expose torture and other ill-treatment, and they can also inform the wider public about instances of torture or other ill-treatment. Criminal court proceedings where allegations of torture are dealt with can also form the basis of collateral claims for compensation, or for the prosecution or establishing the civil liability of perpetrators. Plea deals may, at times, be used to avoid such claims by “cleansing” or “laundering” cases that are tainted by torture, ill-treatment or other human rights abuses by avoiding trials. Thus, trial waiver systems can provide an incentive for the use of torture or other ill-treatment, as accountability for such acts becomes less likely.

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112 In this document, the term ‘trial waiver’ is used. This guidance uses it broadly to represent the different terms in different systems but, technically speaking, it is: “A process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences”; see also Fair Trials, [“The Disappearing Trial: Towards a rights-based approach to trial waiver systems”](#), (2017).

113 *Ibid.*

114 Questionnaire response Georgian Young Lawyers Association (2019).

115 Questionnaire response Promo LEX Association (Moldova) (2019).

52. The potential for the abuse of trial waivers is exacerbated by the lack of clear international standards. The ECtHR outlined that, in order to ensure the fairness of proceedings, trial waivers have to be entered into voluntarily, with full awareness by the accused of the facts and consequences, and have to be subject to judicial review.<sup>116</sup> The UN Human Rights Committee, when considering a plea deal regarding a prisoner transfer has also highlighted the need for voluntariness and a real “choice” in entering into a plea deal.<sup>117</sup> The Committee noted that detention conditions and ill-treatment to which the individual in question was subjected left him little choice other than to accept the terms of the plea agreement offered to him. Aside from these limited rulings, which provide an inadequate degree of protection, the operation of trial waiver systems is left to the discretion of the state.
53. Concerns have also been raised that trial waivers have a negative effect on the overall quality of investigations.<sup>118</sup> Investigators have less incentive to ensure that rules on evidence and procedure are complied with if there is little risk that they will be scrutinized at trial. By pleading guilty, a suspect will typically waive their right to challenge the admissibility of evidence. In many legal systems, the evidence becomes irrelevant following a guilty plea, as the state is no longer required to establish guilt. Almost all of the countries surveyed for this study did not allow confessions to be relied on as the sole evidence of guilt at trial. This was not, however, the case with trial waiver systems. What can be drawn from the responses to the questionnaires is that, in most of these countries, a guilty plea is sufficient for a conviction, in addition to evidence that a crime has been committed, as opposed to evidence that specifically incriminates the suspect or accused person. One exception could be found in an Eastern European OSCE participating State, where the Criminal Procedure Code specifically requires “sufficient evidence of the accused’s guilt” in addition to “sufficient evidence for the existence of the act for which the criminal prosecution was initiated.”<sup>119</sup> In one North American OSCE

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116 *Natsvlishvili and Togonidze v. Georgia* App. no. 9043/05 (ECtHR, 29 April 2014) . para 92: “The Court thus observes that by striking a bargain with the prosecuting authority over the sentence and pleading no contest as regards the charges, the first applicant waived his right to have the criminal case against him examined on the merits. However, by analogy with the abovementioned principles concerning the validity of such waivers, the Court considers that the first applicant’s decision to accept the plea bargain should have been accompanied by the following conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.”

117 UN Human Rights Committee, *Hicks v Australia* Communication No. 2005/2010 (2015) CCPR/C/115/D/2005/2010, para. 4.9 and 4.10.

118 Fair Trials, *op. cit.*, note 112, p. 15, para 32.

119 Questionnaire response APADOR CH (Romania) (2019) citing articles 478 – 488 of the Criminal Procedure Code.

participating State where relevant statistical data is available, the dangers posed by a lack of incriminating evidence becomes evident. Numerous individuals have ultimately been exonerated, on the basis of subsequent DNA evidence, after having initially pled guilty.<sup>120</sup> In fact, it is reported that 18 per cent of those exonerated initially plead guilty to crimes they were ultimately found not to have committed.<sup>121</sup> These exonerations raise questions about the quality of investigations and the standard of evidence required in plea bargains, and other trial-waver programmes, for the entire OSCE region.

54. The most common safeguard with regard to trial waivers is legal assistance. With only one exception, in all of the countries surveyed, legal assistance is mandatory for plea bargains.<sup>122</sup> The level and scope of mandatory legal assistance varies from country to country, however. For example, in most countries surveyed, the law states that the participation of a defence lawyer is mandatory during the signing or conclusion of a plea deal.<sup>123</sup> This does not necessarily mean, however, that the lawyer is present during the initial police interview or questioning, as the conclusion of a plea agreement may take place after a suspect or accused person has already confessed guilt. Among the countries surveyed, one OSCE participating State in South Eastern Europe does have a legal requirement to have a lawyer present during interviews and when testifying in order to plead guilty.<sup>124</sup>
55. In a North American OSCE participating State, reliance on plea bargains has become particularly pervasive, where between 2012 and 2019, 97 per cent of federal cases annually were resolved via trial waiver, a system that is one of the least regulated in the world.<sup>125</sup> The powers of prosecutors to threaten suspects with additional charges or harsher sentences when going to trial – known as “the trial penalty” – may put undue pressure on the individual in question.<sup>126</sup> In other OSCE participating States, there are limitations on the types of cases that can be subject

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120 National Registry of Exonerations, “[Innocents Who Plead Guilty](#)”, (2015).

121 The Innocence Project, “[Why Do Innocent People Plead Guilty to Crimes They didn’t Commit?](#)” (2018).

122 Questionnaire responses (2019); the only exception from those OSCE participating States surveyed is Poland.

123 Questionnaire responses from CSOs, including Armenia, Georgia, Hungary, Moldova and Romania (2019).

124 Questionnaire response Human Rights Association (Turkey) (2019).

125 [United States Sentencing Commission’s 2016–2020 Sourcebooks of Federal Sentencing Statistics](#).

126 For more information on the trial penalty, see National Association of Criminal Defense Lawyers, “[The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It](#)”, (2018).

to plea bargains, for instance, only cases that would be punishable with a sentence of 15 years or less.<sup>127</sup>

56. In an OSCE participating State in the South-Caucasus region, it was reported that overloaded public defenders often persuade defendants to admit guilt and to proceed with an expedited trial procedure, which results in the defendant being sentenced to no more than one-third of the normal sentence.<sup>128</sup> As a result, innocent people sometimes plead guilty to crimes they did not commit.<sup>129</sup>
57. Capacity and resources are not the only factors that undermine the quality of legal advice and representation, key safeguards against torture or ill-treatment. This is particularly the case in countries where there are serious concerns about the independence of criminal lawyers. In one OSCE participating State from the Central Asian region, for example, where the trial waiver system was introduced in 2017, there is a requirement for legal assistance to conclude a plea bargain. However, as alluded to in the previous section, concerns have been raised for this particular state over the use of “pocket lawyers”, who collude with investigators to secure guilty verdicts.<sup>130</sup> In another OSCE participating State from the same region, lawyers are appointed *ex officio*, which does not ensure the independence and quality required for an effective defence, including during plea bargain procedures. In practice, lawyers often do not provide legal assistance to their clients, but simply sign procedural documents of bodies of inquiry or investigation and do not appeal against human rights violations that might occur during detention or investigation.<sup>131</sup> In countries where alleging torture and excluding torture evidence during the trial processes is already difficult, it is easy to see how even fewer safeguards presented by trial waiver systems can make it even more difficult to identifying whether plea deals were made voluntarily in practice.
58. In effect, trial waivers mean that questions of whether evidence has been obtained by torture and whether safeguards – such as access to a lawyer – have been complied with, may be ignored. The principal safeguard employed by states to mitigate those risks and uphold such safeguards in the trial waiver system is judicial review of the plea bargain. All of the countries surveyed required some form of judicial review of the trial waiver. These involve varying degrees of scrutiny and judicial powers over the deal, but all require the judge to ensure the voluntariness of

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127 Questionnaire response APADOR CH (Romania) (2019).

128 Questionnaire response Helsinki Association of Armenia (Armenia) (2019).

129 *Ibid.*

130 Ruslan Khakimov, “[The Legal Profession in Kyrgyzstan](#)”, background report was written at the request of ODIHR for the Workshop on Reform of the Legal Profession.

131 Questionnaire Response Nota Bene (Tajikistan) (2019).

the defendant in entering into the deal.<sup>132</sup> In South-Eastern European participating States, the judge plays an important role in reviewing and determining the validity of plea agreements.<sup>133</sup> All maintain some safeguards for protecting the accused's rights, including the judge's ability to review and accept or reject a plea agreement.<sup>134</sup> In all of those countries, with only one exception, judges are specifically required to assess whether the plea was entered into voluntarily and not coerced in any way,<sup>135</sup> and whether the suspect or the accused is aware of the nature and consequences of entering into the agreement.<sup>136</sup> In one OSCE participating State in the South Caucasus, judges are required by law to specifically inquire whether the person has been subjected to torture or other ill-treatment.<sup>137</sup>

59. Despite the legal framework for judicial review, concerns raised in the preceding section over the impact of judicial independence on the exclusion of torture evidence can be mirrored in its impact on trial waivers. Where judges feel compelled to resolve a case with a conviction, they will be dis-incentivized from making any meaningful inquiry into the compliance with pre-trial safeguards or the circumstances in which suspects, accused persons or defendants confessed guilt. Furthermore, even in systems with a high degree of judicial independence, concerns have been raised that judges simply end up “rubber stamping” plea deals. In the two OSCE participating States, which have a high proportion of cases resolved via trial waiver, the review of plea deals is largely a formality, and ensuring voluntariness can be in the form of asking the defendant a simple “yes or no” question.<sup>138</sup> Furthermore, while ensuring that defendants have not been subject to coercion or torture during judicial review is good practice, expecting a defendant to allege in an open courtroom that a plea deal was obtained by torture, potentially indicating complicity of the prosecutor present, places a large and potentially unrealistic burden on the defendant at this stage of the process.

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132 Questionnaire responses (2019).

133 William Van Caenegem, “Advantages and disadvantages of the adversarial system in criminal proceedings”, p. 77–78.

134 See legislation from e.g. Croatia CPC, Arts. 360–364; North Macedonia CPC, Arts. 483–490; Serbia CPC, Arts. 313–319; Montenegro CPC, Arts. 300–303; FBiH and BiHRS CPCs, Arts. 244–246.

135 See the North Macedonia CPC, Art. 488(2); Kosovo CPC, Art. 233(18.2); Serbia CPC, Art. 317(1); Montenegro CPC, Art. 302(8)(1); BiHRS CPC art. 246 (6) (d) and FBiH CPC, Art. 246(6)(a).

136 See the North Macedonia CPC, Art. 488(2); Kosovo CPC, Art. 233(18.1); Serbia CPC, Art. 317(2); Montenegro CPC, Art. 302(8)(3); BiHRS and FBiH CPCs, Art. 246(6)(a).

137 Questionnaire response Georgia Young Lawyers Association (2019).

138 *Ibid*; and [Emilio C. Viano](#), Plea Bargaining in the United States: a Perversion Of Justice, *Revue internationale de droit pénal* 2012/1–2 (Vol. 83), pgs. 109–145, para 45.

60. Better safeguards are needed in order to ensure that plea deals are not obtained through the use of torture and other ill-treatment in jurisdictions where trial waiver systems are used. In states where torture is endemic in the criminal justice system, trial waiver systems, at best, do nothing to change cultures of coercion and overreliance on confessions. At worst, they may facilitate the use of torture and ill-treatment, by providing an avenue to sidestep already poorly-implemented safeguards against torture.
61. Trial waivers are an area of criminal justice that warrant further research and data collection, in order to establish which safeguards most effectively prevent the use of torture or other ill-treatment in trial waiver systems. The Fair Trials research report *The Disappearing Trial*, highlighted several key considerations for the fairness of trial waivers. These included safeguards such as:<sup>139</sup>
- Mandatory access to a lawyer throughout the trial waiver process and, specifically, access to legal assistance prior to waiving the right to a trial;
  - Timely, comprehensive notification of rights;
  - Notification of the specific consequences of waiving rights;
  - Robust disclosure of both inculpatory and exculpatory evidence;<sup>140</sup> and
  - A meaningful judicial review procedure.

## Promising Practice

62. EU Member States, which includes 27 OSCE participating States, are required by EU law to ensure suspects have access to a range of pre-trial rights under the “Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings”,<sup>141</sup> including the right of access to a lawyer during police interrogations.<sup>142</sup> This should imply that suspects who intend to plead guilty also have access to legal assistance during police interviews, as well as during the conclusion of the plea deal. While the implementation of the directives varies across the EU, integrating the right to a lawyer during interviewing into national law for all suspects will have a significant impact on protecting suspects from torture and other ill-treatment. Procedural rights, such as access to independent legal advice, counteract incentives for torture presented by the use of confessions and trial waivers.

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139 For a full list of human rights considerations, see Fair Trials, *op. cit.*, note 112, para 147.

140 Inculpatory evidence is evidence which implies or attributes guilt, or incriminates; exculpatory evidence is evidence which removes blame or guilt, or which exonerates.

141 Resolution of the Council of 30 November 2009 “[On a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#)”, OJ C 295, 4.12.2009, p. 1–3.

142 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1–10.

## **Policy recommendations**

States should ensure that national laws provide for the following safeguards in the trial waiver process:

1. Mandatory access to a lawyer throughout the trial waiver process and, specifically, access to legal assistance during any police interview and prior to waiving the right to a trial;
2. A timely, accessible and comprehensive notification of rights;
3. Notification of the specific consequences of waiving rights (including the right to a trial);
4. Robust disclosure of both inculpatory and exculpatory evidence;
5. A meaningful judicial review procedure; and
6. A legal guarantee that if the trial waiver process is not completed, any negotiations cannot be used as evidence against the defendant.

## **Practical recommendations**

States should take steps to assess how trial waivers, a relatively under-researched area of criminal justice, may be impacting the right to be free from torture and other ill-treatment. It is recommended that states:

7. Collect data on the prevalence of trial waiver systems, the number of allegations of torture and other ill-treatment by suspects, accused persons or defendants who have concluded a trial waiver, and examine the impact of trial waiver systems on rates of arrest, prosecution, conviction and incarceration;
8. Share examples of promising practice, risks and safeguards in relation to trial waiver systems among OSCE participating States; and
9. Engage with civil society and local bar associations to assess the impact of trial waivers on the prohibition of torture and other ill-treatment and fair trial rights.

# Fulfilling performance quotas

63. There is reason to believe that performance indicators requiring police and prosecutors to meet quotas or targets for arrests, prosecutions and convictions incentivize the use of torture. Failure to fulfil quotas can result in a range of consequences, from being forced to work less-desirable jobs, to pay cuts and even job loss, which may incentivize officials to fulfil targets by any means, including torture. In one Central Asian OSCE participating State, for instance, suspects are reportedly more likely to be tortured at the end of the month, when police are attempting to meet monthly performance quotas.<sup>143</sup> While quotas for criminal justice officials remain a largely unreported aspect of the operation of criminal justice systems in the OSCE region, there are indications that some OSCE countries use quotas on either a formal or informal basis.

## Police

64. Police quotas were a distinct and formal feature of the justice system in the Soviet Union and, as such, have been studied extensively in post-Soviet states. The system is referred to as the “cane” or “stick” system, whereby officers or units are punished for failing to reach specific numerical arrest targets for different categories of crime. An article from 2012 described how this system continued to operate:

*“Police units today receive from the MVD [Ministry of Internal Affairs] a monthly work plan compiled along quantitative parameters, which includes quotas for prosecuting hooligans, illegal immigrants, and other types of criminals. In 2009, for example, one police district received a plan with quotas for 72 different types of potential crime. Failure on the part of a district as a whole to meet the quotas would mean that no individual employee from the district would receive a pay raise at the end of the quarter. Essentially, the Russian police force is evaluated on the basis of whether it is able to meet the quarterly plans, while no record is kept on the police’s achievements in crime prevention.”<sup>144</sup>*

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143 Richard Carver & Lisa Handley (eds), op. cit., note 13, p.572 (example of Kyrgyzstan).

144 Boris Gladarev, “Russian Police before the 2010–2011 Reform: A Police Officer’s Perspective”,

65. The article noted that, because the system is focussed only on numerical targets, officers are incentivized to falsify witness reports and use threats of violence in order to resolve cases and meet targets.<sup>145</sup>
66. Other post-Soviet states have also retained the quota system. In one South Caucasus OSCE participating State, high conviction rates are reported to guarantee bonuses and promotions for police officers.<sup>146</sup> In Central Asia, it is reported that in one state, police may be assessed on the required number of arrests that an officer must make each month or year, and bonuses may be awarded to officers who carry out the largest number of arrests leading to a conviction.<sup>147</sup> Police targets are reportedly still based on the number of convictions from the arrests they have made that lead to prison time.<sup>148</sup> Amnesty International has reported that these systems, wherever still in place, incentivize the use of unofficial detention and torture.<sup>149</sup>
67. Positive developments can be observed, however, across the OSCE. For example, one Eastern European OSCE participating State in 2015 eliminated the use of quotas for police.<sup>150</sup> In another State in the same region, attempts have been made to evaluate the work of the police according to the level of public confidence.<sup>151</sup> Despite this, the system of indicators for police and prosecutors was cited in survey responses as still being one of the principal incentives for torture in this country.<sup>152</sup> In 2016, the Subcommittee for the Prevention of Torture reported that it was “alarmed” at the pressure that the police force was under in the very same OSCE participating State to ensure that a high number of crimes were solved, which encouraged the practice of extracting confessions.<sup>153</sup> In one Central Asian state surveyed, the Ministry of Internal Affairs has repeatedly showed willingness,

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*The Journal of Power Institutions in Post-Soviet Societies*, Issue 13 (2012) : Police Brutality & Police Reform in Russia and the CIS, para 26.

145 *Ibid.* paras 28–29.

146 Questionnaire response Armenia Helsinki Association (2019).

147 Questionnaire response Nota Bene (Tajikistan) (2019).

148 *Ibid.*

149 Amnesty International, “[Statement for Working Session 4: Rule of Law I](#)” Human Dimension Implementation Meeting, (2012).

150 Questionnaire response Promo Lex Association (Moldova) (2019).

151 Questionnaire response Kharkiv Institute for Social Research (Ukraine) (2019) citing Article 11 of the Law of Ukraine “On National Police”.

152 Questionnaire response Ukraine Without Torture (2019).

153 UN OPCAT, “[Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine](#)” (2016) CAT/OP/UKR/1, para. 22.

since 2007, to abolish the quota system through reforms. However, an alternative assessment system has yet to come into practice.<sup>154</sup>

68. In a North American OSCE participating State , where targets for summonses and arrests are prohibited by law, it was revealed that they were still used informally by particular police forces. Officers denied benefits under the scheme ultimately took legal action against the city police department.<sup>155</sup>
69. In most of the 13 countries surveyed through the questionnaire the use of quotas for police was not an official policy, or at least not one that was openly stated or spoken about by criminal justice officials.<sup>156</sup> However, there are also examples in an OSCE participating State in South Eastern Europe where they are included in formal bylaws, rules, regulations or annual “professional minimum performance requirement” quotas for police units which include quantifiable performance indicators as well, such as the “success rate” of police measures and investigations.<sup>157</sup>
70. Although most countries do not ‘officially’ use quotas, many do so in practice. Where not officially ingrained in policy or practice, or even where banned by law, quota systems are used more informally, and practices may vary between precincts or stations that are part of the same police force. However, in jurisdictions where it is illegal to use quota systems, both the police officers subject to a quota system and the general public subject to wrongful police actions can seek compensation from the state.<sup>158</sup>
71. In an ODIHR report on torture prevention in the OSCE, the majority of OSCE field offices reported that they did not know whether, in practice, quotas for arrest and conviction played a role in promotions or performance evaluations.<sup>159</sup> Further

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154 Questionnaire response Golos Svobody (Kyrgyzstan) (2019).

155 ["Disgruntled cops say precinct ran arrest quota 'board game'"](#), New York Post, (2015); “NYPD accused of giving points to Staten Island cops for making arrests to hit quote, New York Daily News,” (2015). See also ["An NYPD sergeant blows the whistle on quotas"](#), The New Yorker, (2018).

156 Questionnaire responses (2019).

157 Questionnaire response Human Rights Association (Turkey) (2019) with reference to the “Bylaw on Evaluation of Personal Performance of Police Officers”, passed in 2012, under which the chief officer assesses officers on their duties and responsibilities with regard to pre-determined indicators; see also Decree 26/2013. (VI. 26.) BM of the Minister of Interior of Hungary, Annex 8 on the Recommended Elements of Assessing the Performance of Service Members of Armed Forces under the Command of the Minister of Interior, on the Procedural Rules of Applying the Recommended Elements, on the Order of Evaluation, and on the Organisational Performance Assessment (hereafter: Decree 26/2013. (VI. 26.) BM of the Minister of Interior), Article 2, Section 19, Article 14(2)–(3) and Article 16(5).

158 See the case described in para. 68 referring to the United States.

159 ODIHR, ["The Fight against Torture: The OSCE Experience"](#),(2009), p.22.

research and direct work with government and criminal justice officials is clearly needed to assess how these systems operate in practice across the OSCE region, and how they can be successfully reformed. The quantitative measurement of criminal justice actors' performance should be shifted away from the activities of criminal justice actors (e.g. arrests and prosecutions), which do not reflect accurately the numbers of crimes being committed, on public safety and on public satisfaction with the police.

72. In a Western European participating State, the last remaining police performance targets were formally abolished in 2010.<sup>160</sup> Despite this, a review in 2015 revealed some forces were continuing to use targets. The review highlighted that the use of targets encouraged police to underreport or misreport crimes, and to pressure suspects into confessing to other crimes they had not committed.<sup>161</sup> In the United Kingdom more broadly, police performance is independently assessed by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS). The HMICFRS commissions a survey each year on public perceptions of policing. In 2018, the survey was conducted with over 17,000 members of the public, and this constitutes a promising practice example on how to assess police performance without quota or performance target systems.<sup>162</sup>

## Prosecutors

73. It is not just police who can be pressured to fulfil performance quotas. Pressures to secure convictions inevitably affect the impartiality of prosecutors, who may face personal consequences if quotas are not met, such as job loss or pay cuts. One example from Eastern Europe shows that, conviction rates are used as the central indicator to assess the performance not just of police, but also of prosecutors.<sup>163</sup> Unlike the police, who have numerical targets to reach, prosecutors are expected to obtain convictions in court, and are penalized if defendants are acquitted.<sup>164</sup> This practice seems to persist despite the fact that the former Disciplinary Statute of the Prosecutor's Office from 1992 that stated that an acquittal is one of the grounds for evaluating a prosecutor's performance and initiating an investigation into their performance that could lead to disciplinary proceedings has been

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160 HM Government, "[Police reform: Theresa May's speech to the National Policing Conference](#)" referring to England and Wales, (June 2010).

161 Chief Superintendent Irene Curtis, "[The use of targets in policing](#)", (August 2015), pp 12–13.

162 HMICFRS, "[Public perceptions of policing in England and Wales 2018](#)", (January 2019).

163 Questionnaire response Ukraine Without Torture (2019).

164 *Ibid.*

abolished.<sup>165</sup> Acquittals can still constitute informal grounds for prosecutors to receive reprimands, meaning that they will not receive a bonus, which can represent 40 per cent of their earnings, for the next 6 months.<sup>166</sup> According to the European Commission for Democracy through Law (Venice Commission): “It seems that because of fear of performance indicators and of disciplinary proceedings prosecutors exert pressure on the judges to avoid acquittals.”<sup>167</sup>

74. States should not use targets measuring conviction rates or favouring high conviction rates, because this conflicts with the goal of upholding the prohibition of torture and the use of torture tainted evidence, as well as fair trial rights. Such targets actively disincentivize prosecutors from ensuring that confessions or plea bargains have not been obtained through the use of torture, as any finding that these had been obtained in this manner would inevitably have an impact on the admissibility of evidence, the fairness of the trial and whether the defendant is convicted. As outlined in the preceding sections, prosecutors should play an important role in ensuring evidence has been obtained lawfully and in initiating investigations into any allegations of torture.
75. In the surveys disseminated for this paper, respondents were asked to rate the independence of judges, prosecutors and defence lawyers. Prosecutors were ranked as less independent than judges or defence lawyers in the majority of responses. In two cases, prosecutorial independence was ranked with the lowest possible score.<sup>168</sup>
76. A recent report published by the National Prosecutors Office of one Eastern European OSCE participating State suggests that the number of acquittals is an important indicator in assessing workplace performance.<sup>169</sup> Of the other countries surveyed through the questionnaire to CSOs, it was reported that in at least two other OSCE participating States performance indicators for prosecutors are used.<sup>170</sup> It should be noted that, in general terms there is a difference between assessing prosecutorial performance by taking into account conviction rates,

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165 Yuriy Belousov, “[Чому в Україні не виносять виправдувальні вироки?](#)”, [Why aren't acquittals handed down in Ukraine?] (2016); Halya Coynash, Kharkiv Human Rights Protection Group, “[Why Ukraine acquits 10 times less often than in Stalin's Soviet Union](#)”, (2016).

166 Questionnaire response Ukraine Without Torture (2019).

167 Venice Commission, “[Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine](#)”, CDL-AD(2013)025 para. 128.

168 Questionnaire responses from Promo Lex Association (Moldova) and Human Rights Association (Turkey) (2019).

169 Questionnaire response Poland Helsinki Committee (2019).

170 Questionnaire responses from Armenia Helsinki Association and Public Verdict Foundation (Russia) (2019).

and actually requiring a set number of convictions or penalizing prosecutors for acquittals.

77. The use of quantitative indicators for prosecutors was also discussed at the 2018 Expert Forum on Criminal Justice for Central Asia, co-organized by ODIHR, OHCHR, UNODC and OSCE field operations. Experts advocated for a shift away from quantitative to more qualitative performance indicators:

*“Quantity may be a useful indicator prompting further enquiries into the work of a prosecutor, for example, if there is significant divergence of conviction rates amongst different prosecutors in similar types of cases. However, it was pointed out that even in these cases, there may be a reasonable explanation [...] Referring to international good practice, it was therefore recommended to include qualitative indicators of performance focusing on professional (e.g. ability to present evidence, capacity to draft motions, quality of court presence), personal (e.g. ability to cope with workload) and social factors (e.g. respectful treatment of parties, witnesses and victims).”<sup>171</sup>*

78. As a promising practice example, in one Western European OSCE participating State prosecutors are assessed according to a list of criteria, none of which are related to numerical statistics on acquittals. The assessment criteria include factors such as legal knowledge, ability to communicate and efficiency. Numerical data is only used to assess the prosecutor’s workload.<sup>172</sup>

## Judges

79. Judges are also known to be subject in some jurisdictions to performance evaluations on the basis of acquittal rates or conviction rates, respectively. In certain countries, acquittal rates or the outcomes of court cases are informally used as performance indicators, and are likely to affect promotion opportunities, pay and disciplinary measures. As outlined in the preceding sections, judges can and should play a pivotal role in identifying instances where torture has occurred and removing incentives for torture. This may take the form of inquiring into whether suspects have been ill-treated, ensuring compliance with procedural rights, excluding evidence obtained by torture and initiating investigations into allegations of

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171 ODIHR, “Seventh Expert Forum on Criminal Justice for Central Asia Conference Report”, (2018), p. 16.

172 MONITEUR BELGE, Arrêté royal modifiant l’arrêté royal du 20 juillet 2000 déterminant les modalités d’évaluation des magistrats, les critères d’évaluation et leur pondération, (13 September 2004) [C – 2004/0966], Belgium.

torture, and holding other criminal justice actors to account.<sup>173</sup> If, instead, judges are pressured to ensure that the majority, if not all, cases result in convictions, their ability to perform these functions fairly and impartially is undeniably compromised.

80. Pressure can come from a range of actors, including other criminal justice actors, such as prosecutors and police. In one Eastern European OSCE participating State it is reported that prosecutors exert pressure on judges to convict, and the acquittal rate is from one to two per cent.<sup>174</sup> Pressure can also be exerted by government officials or judicial authorities. In another OSCE participating State in the same region it was reported that, the practice of “telephone justice”, where judges are directly instructed by the court president how to resolve a specific case, operates “as a matter of routine”.<sup>175</sup> In this country, the acquittal rate is alarmingly low, at just 0.23 per cent.<sup>176</sup> According to the survey, specialized CSOs that have worked with torture victims in this country for over 15 years are not aware of any case where a judge has excluded evidence on the basis that it was obtained by torture.<sup>177</sup> It is reported that the powers of the prosecution (a relic of the Soviet system), are such that judges may face dismissal if they are seen as not being sufficiently “attentive” to the prosecution’s demands.<sup>178</sup>
81. The legal framework for the prevention of torture cannot be effective in practice if the actors who must implement that legal framework are constrained or significantly dis-incentivized from implementing it in practice. More work is needed to reform criminal justice systems that are reliant on quantitative indicators for the performance of criminal justice actors, including the manner in which these systems may also affect the independence and impartiality of criminal justice actors. Where the need to fulfil performance indicators by police results in torture or other ill-treatment, and the need for prosecutors to secure convictions exists, it is clear that this is likely to result in prosecutors and judges failing to protect suspects or accused person from torture or other ill-treatment, and to prevent the use of torture-tainted evidence.

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173 See, for example, ICJ, “[The role of judges, lawyers, and prosecutors in preventing torture](#)”, (October 2017).

174 Kharkiv Human Rights Protection Group, “[Why Ukraine acquits 10 times less often than in Stalin’s Soviet Union](#)”, (2016).

175 ICJ, “[Russian Federation: Independence and impartiality; Judicial integrity and accountability](#)”, (2014).

176 Questionnaire response Public Verdict Foundation (Russia) (2019).

177 *Ibid.*

178 ICJ, *op. cit.*, note 175.

## **Policy Recommendations**

States should ensure that national policies, regulations and directives on the assessment of criminal justice actors' performances do not incentivize the use of torture and other ill-treatment. In particular, it is recommended that states ensure that:

1. Numerical targets for arrests and convictions are abolished for police forces. The main focus of performance assessment should be on crime prevention and public satisfaction with and trust in the police;
2. Numerical targets based on convictions for prosecutors are abolished, and replaced with qualitative indicators, for example, the ability to present evidence, the capacity to draft motions, the quality of court presence, the ability to cope with workload, and social factors, such as the respectful treatment of suspects, accused persons or defendants witnesses and victims; and
3. International standards on the independence of the judiciary in national law are met.

## **Practical recommendations**

States looking to move away from quantitative-based performance assessment and priority setting should consider the following measures:

4. Engage with CSOs and the general public to better assess police performance and inform priority setting;
5. Assess police performance in an independent and transparent manner that involves input from the general public (such as through open surveys), with results being available to the public;
6. Put measures in place to make police more accountable to local communities;
7. Adopt good practice examples of qualitative performance indicators/evaluations from other OSCE participating States; and
8. Establish a national focal point on public opinion and the police.

# Impunity

82. It is crucial that perpetrators of torture face accountability for their actions. Impunity for perpetrators acts as an incentive for public officials to acquiescence in or commit other acts of torture or other ill-treatment, and masks the true scale of the problem, disincentivizing authorities from taking effective measures to prevent and eradicate torture and other ill-treatment in their respective jurisdictions. Impunity and the related low rate of criminal investigations and convictions for acts of torture remains a key concern throughout the OSCE region. Of the countries surveyed, CSOs in eight OSCE participating States all cited impunity as a key reason for the continued use of torture.<sup>179</sup> There are numerous and intertwining reasons why states fail to hold perpetrators of torture accountable, but the lack of effective mechanisms, including complaint and reporting mechanisms and the legal framework needed to investigate, prosecute and punish torture, is a significant area of concern.

## Reporting torture

83. In order for an investigation into torture or other ill-treatment to be conducted, an allegation of torture has to be made or the suspicion of torture has to be raised. Allegations of torture or other ill-treatment must be dealt with immediately and must result in a prompt and impartial investigation conducted by an independent authority.<sup>180</sup> In the majority of cases, the onus will be on the victim to raise an allegation of torture or to make a formal complaint. In some countries, victims of torture may face prosecution for a “false denunciation” of torture if their complaint of torture fails to result in the conviction of the alleged perpetrator.<sup>181</sup> Given the low rate of convictions for torture, this discourages many victims from even lodging complaints in the first place.<sup>182</sup> A report about one OSCE participating State in Central Asia noted that among victims of torture “[t]hose who do lodge complaints

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179 Questionnaire responses from Armenia, Kyrgyzstan, Moldova, North Macedonia, Russia, Serbia, Tajikistan, and Ukraine (2019).

180 See e.g. Nelson Mandela Rule 57(3) in relation to prison settings.

181 OSCE Human Dimension Implementation Meeting, Torture and ill-treatment in Central Asia (Working Session 5, Rule of Law II, 12 September 2018), page 2.

182 *Ibid.*

with the prosecutor's office frequently report reprisals and harassment from law enforcement officials to 'persuade' them to withdraw their allegations."<sup>183</sup>

84. As the risk for torture or other ill-treatment is highest during arrest and in the early stages of police custody, but also continues throughout detention, including in prison settings, safeguards need to be in place to ensure that detainees can make complaints safely and, if they request, in a confidential manner.<sup>184</sup> Where victims continue to be held in custody in reach of the state official accused of having committed acts of torture or other ill-treatment, making a complaint of torture can be extremely dangerous, and protections for detainees who allege torture are minimal to non-existent in many OSCE States. Measures should be taken immediately after allegations of torture have been raised to avoid any contact of the potentially involved persons with witnesses, the victim or the victim's family, and to prevent any involvement of the alleged perpetrator(s) in the investigation. The UN Special Rapporteur on Torture has emphasised that "measures in this regard include the transfer of the complainant or the implicated personnel to a different detention facility or the suspension from duty of the personnel."<sup>185</sup> The UN Committee against Torture has recommended "protective measures including relocation, on site security, hotlines, and judicial orders of protection to prevent violence and harassment against complainants, witnesses, or close associates of such parties."<sup>186</sup> A recent report highlighted the general failure across Europe to treat detainees who are victims of violence in detention as victims, and to allow them access to victims' rights.<sup>187</sup> These barriers to reporting torture or other ill-treatment are exacerbated by a lack of awareness among detainees about their rights, and lack of access for CSOs, defence lawyers and independent monitoring bodies to places of detention. In one South Eastern European country, for example, although CSOs have access to prisons, they need approval from a judge in order to access pre-trial detention facilities.<sup>188</sup> CSOs can play an essential role in educating detainees on their rights and facilitating the process for making an allegation of torture. Restricting access for CSOs and defence lawyers can, therefore, restrict a detainee's ability to seek justice.

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183 ICJ Global Redress and Accountability Initiative, *op. cit.*, note 49, p. 6, referring to Tajikistan.

184 ODIHR/PRI, *op. cit.*, note 4, Chapter 1.5; see also Nelson Mandela Rule 57(2).

185 Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, 9 August 2013, para. 77.

186 UN Committee Against Torture, Observations of the Committee against Torture on the revision of the Standard Minimum Rules for the Treatment of Prisoners, CAT/C/51/4, 28 March 2014, para. 55.

187 Fair Trials, *op. cit.*, note 4.

188 ODIHR and Fair Trials roundtable meeting on incentives for torture, (December 2019) regarding Serbia.

85. These factors, combined with the additional challenges of prosecuting perpetrators, outlined below, mean that many cases of torture or other ill-treatment throughout the OSCE region remain unreported. This lack of reporting serves to mask the actual scale of the problem.

### **Criminalisation of torture in national law**

86. The absolute prohibition of torture and other ill-treatment imposes a number of obligations on states, including the primacy of defining torture and other ill-treatment in national legislation in accordance with international law and reflecting the gravity of the crime in the suggested punishment for acts of torture.<sup>189</sup> States should take effective legislative measures to include torture as a separate and specific crime in national legislation and adopt a definition of torture that covers all the elements contained in article 1 of the UNCAT.<sup>190</sup> This serves to underline society's abhorrence of the crime and the fact that the prohibition of torture is one of the few absolute and non-derogable human rights standards. Without a separate offence of torture, it is difficult to ensure compliance with the obligation to investigate and prosecute instances of torture. The UN Committee against Torture has explicitly recognized that discrepancies between the definition of torture under the UNCAT and the definition incorporated into national law can create "actual or potential loopholes for impunity".<sup>191</sup>
87. There are examples where the definition of torture and its incorporation in criminal codes, as required by the UNCAT, are lacking in the OSCE region. This is true in at least one Western European OSCE participating State, where the UNCAT has noted that the provisions of the penal code that are applied in cases of torture do not reflect the gravity of the crime of torture and, therefore, do not provide for commensurate punishment for the perpetrators.<sup>192</sup> In the South Caucasus region, progress has been made. Before 2015, the definition of torture in one OSCE participating State referred only to acts by private parties, meaning that the use of torture by state officials was not criminalized, and no public official had ever

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189 Article 4, UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

190 For more information on anti-torture legislation see e.g. Association for the Prevention of Torture (APT), "[Guide on anti-torture legislation](#)", (2016).

191 See paragraph 9 of the [General Comment No.2](#) on Implementation of Article 2.

192 UN Committee against Torture, List of issues prior to submission of the eighth periodic report of Switzerland, 8 January 2018; ODIHR, "[Opinion on the Definition of Torture and its absolute prohibition in Polish legislation](#)", (2018).

been prosecuted for the use of torture.<sup>193</sup> After the definition was amended to re-address this, prosecutions were initiated for torture. Nevertheless, the UN Committee against Torture has expressed concern over the low number of investigations and prosecutions as compared with the number of complaints.<sup>194</sup> To date, it is reported that there have been no convictions of public officials for torture.<sup>195</sup>

88. In other OSCE participating States, in Eastern Europe for example, deficiencies in the definition of torture in the Criminal Code, mean that instances of alleged torture are generally prosecuted under the much lesser offence of “abuse of authority”.<sup>196</sup> In others, there is UNCAT-compliant, legislation prohibiting torture, but officials are rarely charged with the offence of torture but, rather, with the lesser offences of “abuse of office”,<sup>197</sup> “exceeding their powers”, “negligence”, “forced deposition”,<sup>198</sup> or “harassment while performing duties”.<sup>199</sup> Consequently, governments may rely on statistics that misrepresent the situation, indicating a low rate of torture cases. In one Central Asian OSCE participating State, in 2017, the Prosecutor General’s Office reported that it had registered 418 cases of torture and brought charges of “torture” against 15 law enforcement officers.<sup>200</sup> Others have responded negatively to international human rights bodies’ recommendations for establishing an independent domestic mechanism for investigating torture.<sup>201</sup>
89. Without an adequate definition of torture and the application of that definition to relevant cases, other important aspects, such as the inapplicability of amnesties to perpetrators of torture or the “no statute of limitations” rule for the crime of torture, are difficult to apply. That being said, some states do still employ amnesties for perpetrators of torture which has been criticized repeatedly by the UN Committee against Torture.<sup>202</sup>

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193 Committee against Torture Forty-eighth session, Consideration of reports submitted by States parties under article 19 of the Convention Concluding observations of the Committee against Torture- Armenia, (2012), CAT/C/ARM/CO/3, para 10.

194 Committee against Torture Concluding observations on the fourth periodic report of Armenia, (2017) CAT/C/ARM/CO/4, para 17.

195 Questionnaire response Armenia Helsinki Association (2019).

196 Questionnaire response Ukraine Without Torture (2019).

197 Questionnaire response Golos Svobody (Kyrgyzstan) (2019).

198 See also UN Subcommittee on the Prevention of Torture (SPT), report on visit to Kyrgyzstan, CAT/OP/KGZ/1, 28 February 2014, para. 30.

199 Questionnaire response Macedonian Young Lawyers Association (2019).

200 Human Rights Watch, “[World Report 2019](#)”.

201 Questionnaire response Nota Bene (Tajikistan) (2019).

202 OSCE Human Dimension Implementation Meeting, Torture and ill-treatment in Central Asia (Working Session 5, Rule of Law II, 12 September 2018).

## Investigation

90. Independent, prompt, impartial and effective investigations must be carried out ex officio whenever there are reasonable grounds to believe that an act of torture or other ill-treatment may have occurred, irrespective of whether a complaint has been received.<sup>203</sup> Where there is suspicion or indication that torture may have taken place, there is an obligation for the competent authorities to investigate, with a view to establishing whether the offence took place and, where sufficient evidence exists, to prosecute and punish the person(s) responsible.<sup>204</sup> This obligation derives from the absolute international legal prohibition of torture, and it is incorporated into numerous national constitutions.
91. Failure to conduct independent, prompt and impartial investigations into allegations of torture and bring perpetrators to justice were raised as significant concerns in several of the OSCE participating States surveyed, and were cited among the principle reasons why torture persists. A low rate of investigation and prosecution for torture is a consistent issue throughout the OSCE region.<sup>205</sup> Aside from issues with investigations themselves, as further elaborated below, investigations are not initiated for the majority of torture allegations in a number of OSCE countries, and even fewer reach court. Statistics from one OSCE Eastern European OSCE participating State surveyed may serve as an example for the low rate of charges for torture in comparison to the numbers of complaints made, which is a widespread phenomenon across the OSCE region: out of 687 complaints made in 2018, prosecutors initiated investigations in 242, in which charges were made in only 93 cases.<sup>206</sup>
92. The Civic Solidarity Platform, a coalition of over 90 CSOs from the OSCE region, has highlighted that “Even where there are bona fide attempts at prosecution, these are often undermined by a lack of adequate safeguards and by corrupt, obstructive and non-transparent investigative mechanisms.”<sup>207</sup> In the majority of countries surveyed, investigations into allegations of torture are carried out by the public prosecutor’s office, with a few exceptions, where investigations are conducted by separate bodies.
93. For several OSCE participating States, concerns were raised about perceived or actual collusion between prosecutors and the police officers they are investigating.

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203 Article 12 UNCAT, *op. cit.*, note 19.

204 *Ibid.*, Articles 12, 6 and 7.

205 Civic Solidarity Platform, “[Kyiv Declaration the OSCE Should Make Combating Torture a Priority](#)”, Adopted by the participants of the OSCE Parallel Civil Society Conference Kyiv, 2–4 December 2013.

206 Questionnaire response Promo Lex Association (Moldova) (2019).

207 [CSP Outcome report](#) – OSCE Parallel Civil Society Conference, Belgrade (2015), p. 29.

In one state in Eastern Europe, despite being tasked with investigating allegations of torture, the Prosecutor's Office does not have sufficient powers to require police officers to comply with investigations. As a result, police authorities end up conducting investigations into allegations involving fellow police officers in the majority of cases, thus severely compromising the independence and impartiality of the investigations.<sup>208</sup> In another OSCE participating State in Central Asia, the incentives to rely on torture-tainted evidence compromises prosecutors' decisions as to whether to launch investigations in the first place, often leading to a decision not to launch investigations because of the perceived conflict with the ongoing criminal case against the alleged victim.<sup>209</sup> If an investigation is initiated, domestic law allows prosecutors to delegate the investigation to the police authorities, meaning that police are effectively collecting evidence against colleagues, or potentially even themselves, for the investigation. Furthermore, prosecutors and police officers from the same regions often have close professional and, sometimes, personal ties, further endangering impartiality.<sup>210</sup>

94. Concerns over political influence and lack of independence of prosecutor's offices were also raised in two other OSCE participating States surveyed for this report. In one of them, there is a specific law regulating investigations and trials of public officials that requires prosecutors to obtain permission from the authorities to launch investigations into public officials.<sup>211</sup> Although investigations into allegations of torture or other ill-treatment have been excluded by a paragraph added to Article 2 of the relevant law in 2003,<sup>212</sup> in practice, prosecutors still request permission to launch such investigations, and these requests are generally rejected.<sup>213</sup>
95. In another OSCE participating State in the South Caucasus, investigations are carried out by the Special Investigations Service, which is considered structurally independent. Nevertheless, considering that only four cases of torture have reached courts, resulting in no convictions, the effectiveness of this Service may be questioned.<sup>214</sup> In another case in Central Asia, investigations are conducted by national security agencies, which lack transparency and cases simply tend not to be investigated.<sup>215</sup>

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208 Questionnaire response Belgrade Human Rights Centre (Serbia) (2019).

209 Questionnaire response Nota Bene (Tajikistan) (2019).

210 *Ibid.*

211 Questionnaire response Human Rights Association (Turkey) (2019) Citing Law No 4483 on the Prosecution of Civil Servants and other Public Employees from 5 December 1999.

212 *Ibid.*; In the paragraph added to Article 2 of the Law no. 4483 in 2003, it is stipulated that authorization for investigation shall not be sought for investigations and proceedings to be initiated into the offences of torture and that the investigation shall be directly carried out.

213 *Ibid.*

214 Questionnaire response Armenia Helsinki Association (2019).

215 Questionnaire response Golos Svobody (Kyrgyzstan) (2019).

96. If investigations are not conducted properly, including with respect to evidence gathering, this significantly affects the ability of any court to convict a perpetrator of torture. The numbers of convictions for torture in two OSCE participating States surveyed may serve as an example for very similar numbers in other OSCE participating States not included in this report. In one Central Asian participating State, it is reported that in the 16 years since torture has been criminalized, there have only been three convictions for this offence (which, as previously stated, is partly because perpetrators are instead convicted of “abuse of office”).<sup>216</sup> In a South-Eastern European OSCE participating State, of the 98 cases of torture and other ill-treatment that were resolved in the period from 2010 to 2016, 33 resulted in conviction.<sup>217</sup> In general, conviction rates for torture offences across the OSCE are drastically lower than the average conviction rate for other crimes. In several countries, comprehensive data on allegations, investigations and prosecutions for torture and other ill-treatment are not published.<sup>218</sup>

### **Punishment for acts of torture and other ill-treatment**

97. Article 4(2) of the Convention against Torture makes clear that torture is one of the most severe human rights violations and requires punishment severe enough to have a deterrent effect.<sup>219</sup> No specific information is given about the appropriate penalties, except that they must take into account the “grave nature” of the offence. This is not the case in many countries. Even where victims of torture have managed to secure convictions against their perpetrators, the punishment rarely matches the severity of the crime.
98. In one Central European state, officials are prosecuted under two separate offences of the Criminal Code, depending on the circumstances in which acts of torture or other ill-treatment took place: the offence of mistreatment in official proceedings,<sup>220</sup> or the offence of “coerc[ing] another person into giving information

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216 *Ibid.*

217 Questionnaire response Belgrade Human Rights Centre (Serbia) (2019).

218 Including Poland, Romania and Tajikistan.

219 For an interpretation of what punishments are in accordance with article 4 (2) or the UNCAT, see e.g. *The United Nations Convention Against Torture and its Optional Protocol – a Commentary, Second Edition*, edited by Manfred Nowak, Moritz Birk, Giuliana Monina, (OUP, 2019), p. 187: “The provision of Article 4(2) makes clear that torture is one of the most severe human rights violations that requires a punishment severe enough to have a deterrent effect. This means that torture should not be a misdemeanour, but a crime similar to the ‘most serious offenses under the domestic legal system’. This is confirmed by the practice of the CAT Committee that held that torture should also receive the heaviest punishment”.

220 Questionnaire response Hungarian Helsinki Committee citing Act C of 2012 on the Criminal Code, Article 301: (1) Any public official who physically abuses another person during his official proceedings is guilty of a felony punishable by imprisonment between one to five years. (2) The penalty

or making a statement, or to withhold information” by force or threat of force.<sup>221</sup> There is no definition of torture or other ill-treatment included in the national criminal code.<sup>222</sup> Between 2010 and 2018, four per cent or less, depending on the year, of alleged perpetrators were charged.<sup>223</sup> Of the small number of alleged perpetrators that were prosecuted, the number who were convicted ranged from 55 to 65 per cent per year.<sup>224</sup> Additionally, those convicted between 2010 and 2013, the majority received a suspended prison sentence or a fine. For those convicted of “coerc[ing] another person into giving information or making a statement, or to withhold information”, none received a custodial sentence. Since January 2012, the Minister of Interior has been entitled to “restore” the eligibility of law enforcement officers (police officers, penitentiary staff, etc.) sentenced to suspended imprisonment, potentially allowing those who have been convicted for torture or other ill-treatment to continue working in spite of the seriousness of their offences.<sup>225</sup>

99. In a recent periodic review of a Central Asian OSCE participating State, the UN Committee against Torture recommended that “the penalties for torture in its laws reflect the grave nature of the crime; that the crime of torture is not subject to any statute of limitations; and that perpetrators of torture are ineligible for amnesty under the Amnesty Act.”<sup>226</sup>

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shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang. (3) Any person who engages in preparations for mistreatment in official proceedings is guilty of a misdemeanor punishable by imprisonment not exceeding one year. (4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (1) to the authorities before the indictment is filed.

- 221 *Ibid.*, citing Act C of 2012 on the Criminal Code, Article 303: (1) Any public official who attempts by force or threat of force, or by other similar means, to coerce another person into giving information or making a statement, or to withhold information, is guilty of a felony punishable by imprisonment between one to five years. (2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang. (3) Any person who engages in preparations for the interrogation of a person for the coercion of information by force is guilty of misdemeanor punishable by imprisonment not exceeding two years. (4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (2) to the authorities before the indictment is filed.
- 222 *Ibid.*, Torture or other ill-treatment is, however, mentioned in the connection with trade in goods, which could be used for capital punishment, torture or other ill-treatment (Article 17 of Council Regulation (EC) No. 1236/2005 of 27 June 2005). According to Article 327 of the Criminal Code, the penalty shall be imprisonment between two to eight years if a violation of international economic restriction is committed.
- 223 Questionnaire response Hungarian Helsinki Committee.
- 224 From 2010–2013, for which statistics were available.
- 225 Questionnaire response Hungarian Helsinki Committee citing legal basis up until 1 July 2015: Act XLIII of 1996 on the Status of Members of the Armed Forces, Article 56 (6a); legal basis since 1 July 2015: Act XLII of 2015 on the Service Status of the Professional Members of Law Enforcement Services, Article 86 (10).
- 226 UN Committee against Torture, Concluding observations on the third periodic report of Tajikistan, CAT/C/TJK/CO/3, (June 2018), para 14.

## Promising practice

100. One of the most important factors in ensuring that torture is effectively investigated and prosecuted is that victims actually report allegations of torture to the relevant investigating authorities.<sup>227</sup> As previously outlined, independent access to prisons for CSOs, defence lawyers and monitoring bodies is a key way by which detainees are informed of their rights and provided the opportunity to report torture or other ill-treatment. In a promising example from Central Asia for instance, CSOs are given independent access to prisons, which allows them to make regular visits, provide information to detainees on their rights and provide writing materials with which to make complaints.<sup>228</sup> In many OSCE participating States, CSOs are part of the national preventive mechanism or working closely with national monitoring bodies.<sup>229</sup>
101. In a Western European OSCE participating State, prison authorities are under the obligation to inform detainees of the possibility to be put in touch with Victim Support Services. If the detainee agrees, prison authorities have to inform Victim Support Services by phone and in writing.<sup>230</sup>
102. In addition to facilitating the reporting of torture by detainees, some countries also incentivize public officials to report cases where they suspect torture or other ill-treatment has been used. In one South-Eastern OSCE participating State surveyed, public officials can be prosecuted for not reporting any crime that carries a penalty of 5 years imprisonment or more if they had reason to suspect that such a crime had occurred.<sup>231</sup>
103. One study found that legal frameworks prohibiting torture in broad terms do not necessarily have a significant relationship to the actual incidences of torture in a country, the prime exception was laws requiring the investigation of allegations of torture by an independent body.<sup>232</sup>
104. Many public departments that exert control over detainees have administrative complaints bodies or inspectorates that can investigate and sanction any unlawful conduct. These bodies sometimes operate in conjunction with the penal process,

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227 Richard Carver & Lisa Handley (eds), *op. cit.*, note 13, p. 84.

228 ODIHR and Fair Trials roundtable meeting on incentives for torture, (December 2019).

229 For further information about countries which use a Ombuds Plus Institution as their NPM type see: <https://www.apr.ch/en/knowledge-hub/opcat/list-designated-npm-regions-countries>.

230 Fair Trials, *op. cit.*, note 4, p. 26 regarding Austria.

231 ODIHR and Fair Trials roundtable meeting on incentives for torture, (December 2019) regarding Serbia.

232 Richard Carver & Lisa Handley (eds), *op. cit.*, note 13, p.83 referring to Hungary, Norway and the United Kingdom.

and investigations are intended to lead to prosecutions when there is sufficient evidence. In other instances, these bodies operate in addition to any penal process and take on an internal, disciplinary character. If sufficiently independent and resourced, such bodies can contribute to the accountability processes and act as important safeguards against misconduct.<sup>233</sup>

105. International standards require “a separate investigative mechanism or unit that is capable of carrying out effective criminal investigations and prosecutions of allegations of torture and other ill-treatment committed by public officials and which operates independently both of the authorities accused of having perpetrated the crimes and of the authorities responsible for prosecuting the person alleging torture.”<sup>234</sup>
106. In an OSCE participating State in Western Europe, most complaints about the police are dealt with by professional standards departments within the relevant police force. However, these departments must refer certain cases to the Independent Office for Police Conduct (IOPC), which investigates the most serious incidents and complaints. This includes indications of misconduct by police officers and staff or about situations where a person has suffered a serious injury in the course of contact with the police. The IOPC can initiate investigations independently, without the need for police involvement in investigative activities.<sup>235</sup>
107. As a promising practice, several OSCE participating States have conducted investigations into allegations of torture committed outside of their territory, in accordance with the principle of universal jurisdiction<sup>236</sup> recognized in the Geneva Conventions of 1949 and enshrined in the [Convention against Torture](#).<sup>237</sup>

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233 Fair Trials and REDRESS, *op. cit.*, note 26, p. 53.

234 UN Committee against Torture, *op. cit.*, note 226, para. 10.

235 Referring to the United Kingdom.

236 The term “universal jurisdiction” refers to the idea that a national court may prosecute individuals for serious crimes against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect. Generally, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction are not available, for example: the defendant is not a national of the State, the defendant did not commit a crime in that State’s territory or against its nationals, or the State’s own national interests are not adversely affected.

237 TRIAL International, “[Universal Jurisdiction Annual Review 2020](#)”, referring to Austria, Belgium, Finland, France, Germany, Hungary, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States.

## Policy recommendations

States should review their legal frameworks, as well as policies and practices, to ensure that they are compliant with international standards. It is recommended that States:

1. Include torture as a separate and specific offence in the national criminal code;
2. Ensure that penalties for the crime of torture are commensurate with the gravity of the crime, in law and in practice. This includes ensuring that, where public officials have been convicted of torture, they are legally prohibited from returning to public service;
3. Ensure that the definition of torture in national legislation is compliant with the UNCAT;
4. Ensure, in law and in practice, that suspected or convicted offenders of the crime of torture can never benefit from amnesties, pardons and similar mechanisms that lead directly or indirectly to impunity for the crime of torture or other ill-treatment;<sup>238</sup>
5. Stipulate in national legislation that the crime of torture is not subject to any statute of limitations;
6. Take measures to establish jurisdiction over the crime of torture and other ill-treatment whenever alleged perpetrators are present in their territory;
7. Ensure that officials suspected of torture are prosecuted under the specific offence of torture, and not lesser offences, such as “abuse of authority”;
8. Ensure that all criminal justice actors have the legal powers to initiate ex officio investigations into allegations of torture;
9. Ensure that investigations into allegations of torture or other ill-treatment are carried out in a prompt, impartial and effective manner by an independent body, in accordance with the principles and standards of the Manual on the Effective Investigation and Documentation of Torture and Other Ill-Treatment (Istanbul Protocol);
10. Ensure effective oversight and internal investigation mechanisms within law enforcement agencies;

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238 See also Recommendations to OSCE participating States, international conference on “[Effective Multilateralism in the Fight against Torture: Trends in the OSCE region and the way forward](#)” (June 2019), Recommendation 16.

11. Ensure that independent, impartial and effective complaint mechanisms are in place;
12. Publish data on how many allegations of torture are made against public officials every year, in addition to data on prosecutions and convictions;
13. Make it a criminal offence for public officials, including law enforcement, intelligence and military officials, not to report the crime of torture where there is evidence to suggest that officials would have had reason to believe that acts of torture or other ill-treatment have occurred or are about to occur. They should also ensure a safe and conducive environment for reporting cases of torture and other ill-treatment for professionals in the security sector, victims, medical staff, human rights defenders and other actors;<sup>239</sup>
14. Implement as state policy to not prosecute persons who have alleged torture by public officials on “false denunciation” charges;
15. Establish or reinforce specialized units with sufficient resources to efficiently investigate and prosecute torture under domestic and universal jurisdiction;<sup>240</sup>
16. Ensure that, where no specialized independent body investigating allegations of torture or ill-treatment is available, the investigators are adequately equipped with the necessary powers and resources to carry out independent and effective investigations (guaranteeing functional and financial independence); and
17. Share promising practices of domestic prosecutions of torture and other ill-treatment within the OSCE region.<sup>241</sup>

### **Practical recommendations**

In order for torture allegations to be properly investigated and prosecuted, victims need to be empowered to report incidences of torture without fear of reprisal. It is recommended that states ensure, in particular, that:

18. All professionals in the criminal justice system, including judges, prosecutors, investigative authorities and medical personnel, receive appropriate training (both initial and in-service) on the identification, reporting and prevention of torture and other ill-treatment, including training on the Istanbul Protocol;

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239 *Ibid.*, Recommendation 2.

240 *Ibid.*, Recommendation 25.

241 *Ibid.*, Recommendation 3.

19. Detainees are able to make complaints confidentially and without fear of reprisals or other negative consequences, and that protection schemes are available for detainees who allege torture;
20. Measures are taken immediately after allegations of torture have been raised in order to avoid any contact of the potentially involved persons with witnesses, the victim, or the victim's family, and that any involvement of the alleged perpetrator(s) in the investigation is avoided;
21. Procedures are in place to mitigate against the risk of complaints being tampered with or ignored;
22. Mechanisms dealing with complaints are effective, transparent and non-discriminatory;
23. Complaint mechanisms are simple and accessible, including through the installation of telephone hotlines or confidential complaint boxes in places of detention;
24. Detainees are provided with information on the rights of detainees, criminal defendants, and victims of violence, as well as information on complaint mechanisms and access to appropriate assistance and support, including legal aid and free legal assistance and victim support services, in the language the detainee understands;
25. Information on complaint mechanisms and the reporting of torture or other ill-treatment are available in both written and oral form, in Braille and easy-to-read formats, and in sign languages for deaf or hard-of-hearing individuals, and that this information is displayed prominently in all places of deprivation of liberty;
26. In addition to information about how to make a complaint, detainees are informed about what to expect when they make a complaint and the procedures to be followed once the complaint has been lodged, including protective measures, timelines for response and the procedures for follow-up; and
27. CSOs, defence lawyers and independent monitoring bodies have unrestricted access to all places of detention, including police stations and interrogation facilities.



## B. Factors that facilitate torture



108. In addition to direct incentives for the use of torture, there are also factors within criminal justice systems that facilitate or encourage the use of torture or other ill-treatment. Several of these factors have already been alluded to in this paper, including the improper implementation of pre-trial procedural rights and the lack of independence and impartiality of criminal justice actors. While these factors do not, in themselves, lead directly to the use of torture, they can create environments where torture or other ill-treatment are allowed to flourish with impunity. While analysing all of these factors is beyond the scope of this paper, several will be outlined below and have been chosen due to the extent of relevant international law and guidance available, as well as to states' potential for achieving tangible progress in reducing the risk of torture or other ill-treatment by addressing them.

# The abusive use and conditions of pre-trial detention

109. Pre-trial detention is supposed to be an exceptional measure, only to be used as a last resort, when alternative measures of restraint are insufficient to safeguard the integrity of the proceedings.<sup>242</sup> Yet throughout the OSCE region there are major differences in the use of pre-trial detention among states, despite the fact that they are all subject to the same standards, such as the principle of legality and certainty (e.g., lengths of pre-trial detention prescribed by law), the prohibition of arbitrariness, the concept of reasonable suspicion<sup>243</sup> and the right to trial within a reasonable time,<sup>244</sup> as well as the fact that alternatives to detention are available in many states.<sup>245</sup> Among the Council of Europe member States, the most recent detailed statistical data available were published in 2015.<sup>246</sup>

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242 See e.g. See *Varga and Others v. Hungary* (nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13; 10 March 2015), where the Court urged the Hungarian authorities to reduce the number of prisoners and to minimize recourse to pre-trial detention and to encourage the use of alternatives to detention.

243 The European Court of Human Rights has stated that for the decision on pre-trial detention and in order to be considered as a basis for the required “reasonable suspicion”, “*hearsay evidence must be supported by objective evidence. This is especially true when a decision is being made whether to prolong detention pending trial: while a suspect may validly be detained at the beginning of proceedings on the basis of statements by indirect witnesses, such statements necessarily become less relevant with the passage of time, especially where no further evidence is uncovered during the course of the investigation,*” ECHR, *Kavala v. Turkey* (No. 28749/18), para. 130.

244 Furthermore, case-law to article 5 ICCPR sets five distinct grounds for pre-trial detention, namely, 1) risk of absconding; 2) risk of obstructing the investigation; 3) risk of committing further offence; 4) risk of causing public disturbance if released, and 5) the need to protect the detainee (*Buzadji v. Moldova*, no. 23755/07, § 88).

245 In EU countries collectively, for example, 22% of the total prison population were detainees held on remand or awaiting a final sentence in 2016. Fair Trials, “[A Measure of Last Resort? The practice of pre-trial detention decision making in the EU](#)”, (2016), p. 3.

246 It shows the highest numbers of detainees without a final sentence as a percentage of the total prison population to be in Andorra (59.6), Luxembourg (41.6), the Netherlands (46.3), Switzerland (40.6) and Turkey (49.6).

## Abusive use or the lawfulness of pre-trial detention

110. In 2015, the Parliamentary Assembly of the Council of Europe (PACE), which includes representatives of 47 OSCE participating States, noted the multiple negative effects of pre-trial detention, including the exposure to violence by other inmates and officials, as well as difficult detention conditions, which are often worse for pre-trial detainees.<sup>247</sup> It also found that the laws of most member States regulating the use of pre-trial detention are generally in line with European Convention on Human Rights, but their application by the prosecutorial authorities and the courts is frequently not. Among the abusive grounds for pre-trial detention that have been observed in the Council of Europe region were to put pressure on detainees in order to coerce them into confessing to a crime or otherwise co-operating with the prosecution, including by testifying against a third person, or to intimidate civil society and silence critical voices.<sup>248</sup>
111. Among the root causes of the abusive use of pre-trial detention identified by PACE are: a political and legal culture that rewards those who are perceived as tough on crime, at the expense of the presumption of innocence; a structural imbalance between the prosecution and the defence in terms of power and available resources (access to relevant information, time, funding, etc.); in a number of instances, a widespread practice of the rubber-stamping by judges of requests by prosecutors, without taking into account the circumstances of individual cases; the possibility of “forum shopping” by the prosecution, which may be tempted to develop different strategies to ensure that requests for pre-trial detention in certain cases are decided by a judge who, for various reasons, is expected to be “accommodating”.<sup>249</sup>
112. An additional reason for the abuse of pre-trial detention in many OSCE participating States is that legislation provides for alternatives to remand in custody but, in reality, no social or administrative structures exist that can accommodate or deal with such a large number of persons under trial. This sometimes leaves the courts with pre-trial detention as the only realistic option for addressing pre-trial risks.<sup>250</sup>

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247 PACE Resolution 2077 (2015), Abuse of pre-trial detention in States Parties to the European Convention on Human Rights.

248 *Ibid*, para. 7; see also the Committee of Minister’s reply from 18 April 2016, Doc. 14020; for more information and facts and figures on pre-trial detention in the Council of Europe member States, see also the initial Report of the Committee on Legal Affairs and Human Rights, Rapporteur Mr. Pedro Agramunt, Doc. 13863 (September 2015)

249 PACE Resolution 2077 (2015), Abuse of pre-trial detention in States Parties to the European Convention on Human Rights, para. 11, referring to Georgia, Russia and Turkey.

250 Council of Europe, European Committee on Crime Problems, White paper on Prison overcrowding (2016), para. 64.

113. Access to independent legal advice and the opportunity to challenge detention are essential safeguards for the protection of detainees from ill-treatment. Despite this, some domestic legislation does not provide for a habeas corpus procedure. This lack of ability to challenge the lawfulness of detention is a violation of due process, and makes suspects, accused persons or defendants particularly vulnerable to human rights abuses. This is extremely concerning, given that initial hearings in which the lawfulness of detention are reviewed may be the first opportunity that suspects have to allege torture,<sup>251</sup> and judges at these hearings can – and should – play a crucial and proactive role in determining whether suspects or charged individuals have been subjected to torture or other ill-treatment.
114. Detainees in pre-trial detention are especially vulnerable to coercion, ill-treatment or even torture for the purpose of obtaining evidence, confessions or trial waivers. In the majority of countries surveyed, there are indications that pre-trial detention is used in some form to persuade suspects or accused persons to plead guilty or confess, which renders the detention unlawful. There are reports from OSCE participating States where not confessing was considered an informal ground or consideration for requesting or ordering pre-trial detention, or that pre-trial detainees were held in police custody rather than pre-trial detention centres in order to facilitate coercion into confessing.<sup>252</sup>

### **Conditions and practices common to pre-trial detention that are conducive to torture or other ill-treatment**

115. Even in cases where the use of pre-trial detention is lawful, used as a measure of last resort and based on an individualized decision, there are factors conducive to torture and other ill-treatment that can be observed across the OSCE region. The very fact that detainees are held in custody makes them more vulnerable to torture and other ill-treatment, including from police, prison guards and fellow detainees.<sup>253</sup> Limited contact with the outside world, combined with limited access for independent experts, CSOs and lawyers to places of detention, leave detainees in extremely vulnerable positions.<sup>254</sup> This lack of contact with the outside world can make torture and other ill-treatment in places of detention easier to conceal.

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251 Fair Trials and REDRESS, *op. cit.*, note 26, pp. 51–52.

252 Questionnaire responses from Hungarian Helsinki Committee and Nota Bene (Tajikistan) (2019); see also Open Society Justice Initiative, ‘Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk’, (2011) p.41 referring to Moldova and Kazakhstan.

253 Fair Trials, *op. cit.*, note 4; Open Society Justice Initiative, “Pre-trial Detention and Torture: Why Pre-trial Detainees Face the Greatest Risk”, (2011).

254 Fair Trials, *op. cit.*, note 4.

Furthermore, police and prison guards in places of detention can play a large role in preventing a suspect, accused person or defendants from speaking with their lawyer, either by restricting contact with the outside world, or by preventing them from having confidential discussions with their lawyers, by placing other police or guards in the room. The power dynamic of a detainee being in close quarters to or under the control of their abuser can have a serious impact in dissuading detainees from reporting torture or other ill-treatment. In one Western European OSCE participating State, judicial restrictions on pre-trial detainees' contacts with the outside world – notably with regard to supervised visits, withholding or monitoring of correspondence and the prohibition of telephone calls – has been a cause of concern for torture monitoring bodies.<sup>255</sup>

116. Conditions in the prison or place where pre-trial detainees are held may, in themselves, constitute cruel, inhuman or degrading treatment, and concerns were raised for several OSCE participating States surveyed for this report.<sup>256</sup> Further, prolonged pre-trial detention can in itself constitute ill-treatment.<sup>257</sup>
117. In another Western European OSCE participating State, the majority of pre-trial detainees have restrictions placed on their contact with the outside world, as well as with fellow inmates. The impact of the restriction is that most pre-trial detainees are “spending up to 23 hours per day alone in their cell, with hardly anything to occupy themselves.”<sup>258</sup> The CPT has repeatedly and extensively criticized this practice and highlighted the extremely negative impact it has had on the mental health of detainees.<sup>259</sup> In some instances, the severity of restrictions are akin to solitary confinement, which can in itself constitute cruel, inhuman and degrading treatment,

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255 Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture (CPT) from 3–12 April 2019, CPT/Inf (2019)35, paras. 35–37.

256 Factsheet, *op. cit.*, note 5; Questionnaire responses from APADOR-CH (Romania), Public Verdict Foundation (Russia) and Golos Svobody (Kyrgyzstan) (2019)

257 DIGNITY, REDRESS, ACAT, IRCT APT, CCPR, University of Bristol Human Rights Implementation Centre, “[Joint Submission to the United Nations Human Rights Committee Comments on Draft General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights](#)”, (2014); Sussex Law School Human Rights Law Clinic, “[The abusive use of pre-trial detention as a form of torture or ill-treatment](#)”, (2018).

258 Council of Europe: Committee for the Prevention of Torture, Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 28 May 2015, 17 February 2016, CPT/Inf (2016) 1, para 52.

259 *Ibid.*

and even torture, if exceeding 15 days without meaningful human contact.<sup>260</sup> Concerns have been raised that detainees held under these circumstances may confess to crimes they did not commit, just to have the restrictions lifted.

118. In a third Western European OSCE participating State, the Administration of Justice Act allows the placement of remand prisoners in solitary confinement for up to eight weeks for adults and four weeks for minors, which was criticized by the UNCAT in its concluding observations in 2016. It was recommended that the conditions and the length under which solitary confinement during pre-trial detention is permitted, be further restricted and to limit its duration to 15 days.<sup>261</sup> Recently, the European Committee for the Prevention of Torture found that the country made efforts to ensure that pre-trial detainees are only placed in solitary confinement in exceptional circumstances, and recommended that the authorities pursue their efforts “to ensure that court-ordered isolation of remand prisoners lasts no longer than is absolutely necessary and to counter the negative effects of this measure.”<sup>262</sup>

### Promising practice

119. Although pre-trial detention is overused throughout the OSCE region, there are some examples of promising practices that help to reduce its excessive use and the associated risk of torture. Several OSCE participating States have implemented substantial reforms to execute relevant judgments of the ECtHR or have adopted legal reforms, accompanied by practical measures that have led to a clear reduction in the number of pre-trial detainees and considerable improvements in the treatment of detainees, even though abuses of pre-trial detention continue to occur.<sup>263</sup> It is promising to see that, in several OSCE participating States, the number of detainees without final sentences makes up a very low percentage of the total prison population.<sup>264</sup>

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260 UN General Assembly, Sixty-sixth session, Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268, (August 2011).

261 Committee against Torture, Concluding observations on the combined sixth and seventh periodic reports of Denmark, CAT/C/DNK/CO/6–7, 4 February 2016, para. 32–33.

262 Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture (CPT) from 3–12 April 2019, CPT/Inf (2019)35.

263 PACE Resolution 2077 (2015), Abuse of pre-trial detention in States Parties to the European Convention on Human Rights, para. 9–10 referring to Poland, Georgia, Russia and Turkey.

264 [The Council of Europe Annual Penal Statistics \(SPACE I 2013\)](#), February 2015: Poland (8.3), Iceland (8.6), Bulgaria (8.8) and Romania (10.9).

- a. **Procedural rights:** In the European Union, six procedural rights directives have been introduced under the Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings.<sup>265</sup> These rights include access to legal aid and access to a lawyer, as well as, specifically, the right to confidential consultation with a lawyer.<sup>266</sup> Access to prompt and impartial medical examinations also constitutes a crucial pre-trial right for the prevention of torture in detention facilities.
- b. **The principle of using pre-trial detention only as a measure of last resort, and regular judicial review of detention:** In order to avoid the excessive or abusive use of pre-trial detention, courts should apply the principle of using deprivation of liberty only as a measure of last resort. Courts should not deprive a person of their liberty simply because it is provided by law and is carried out in a lawful manner, but also because it is reasonable and necessary in all circumstances (evaluated on a case-by-case basis). This requires the application of the principle of proportionality and a careful assessment of the risk of reoffending, as well as the risk of causing harm to the society. The length of pre-trial detention should be fixed by law and/or be reviewed at regular intervals,<sup>267</sup> in a process that all stakeholders (the detainee, judicial body, and prosecutor) must be able to initiate.<sup>268</sup> The need for the continuation of detention on remand of any suspect or accused should be reviewed at regular intervals, as the pressing necessity to remand someone in custody may decrease or even disappear with time.<sup>269</sup> In one Western European OSCE participating State, reviews of bail are heard in oral proceedings that ensure a rigorous assessment of whether grounds for continued detention exist. Those reviews of detention occur at the High Court and assess the situation of the defendant from scratch, rather than simply reviewing previous decisions; this provides crucial oversight of initial decisions by district courts.<sup>270</sup> The ECtHR has highlighted the need for a separate, reasoned, judicial decision to extend pre-trial detention in a case concerning a minor.<sup>271</sup>

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265 Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *op. cit.*, note 141.

266 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, Article 4.

267 *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76.

268 *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.

269 Council of Europe, European Committee on Crime Problems, “[White paper on Prison overcrowding](#)”, (2016), para. 87.

270 Fair Trials, *op. cit.*, note 245, p. 30, para 94, referring to Ireland.

271 ECtHR, *Grabowski v. Poland*, (application no. 57722/12) 30 June 2015.

- c. **Compensation for wrongful pre-trial detention:** In several countries across the OSCE region, defendants wrongfully held in pre-trial detention may apply for compensation, as is prescribed by the ECHR.<sup>272</sup> While there is limited evidence as to whether this lowers the imposition of pre-trial detention on suspects and accused persons, it should incentivize courts to think about the human and economic benefits of alternatives to detention.
- d. **Alternatives to Detention:** Good practices in the use of alternatives can be identified in several OSCE participating States, including, most significantly, a substantial reliance on conditional and unconditional bail as a regular alternative to detention. One Western European OSCE participating State has also pioneered a low-cost method of supervision via mobile phones and, in recent years, has produced sound jurisprudence on the proportional setting of money bail.<sup>273</sup> In another OSCE participating State from this region, some organizations routinely undertake risk assessments and produce bail reports in advance of pre-trial detention hearings, in order to provide an independent evidence base on which decisions about pre-trial detention can be taken.<sup>274</sup> Another promising practise was identified in an OSCE participating State where the law dictates that, with some exceptions, pre-trial detention cannot be ordered if the judge believes that the final sentence in the actual case will be less than three years.<sup>275</sup>

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272 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.' Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Article 5 para. 5.

273 *DPP v Broderick* [2006] IESC 34. See also Irish Penal Reform Trust, "[The practice of pre-trial detention in Ireland](#)", April 2016, p. 52.

274 Fair Trials, *op. cit.*, note 245, p. 28, para 84, referring to France.

275 Antigone, "[The practice of pre-trial detention in Italy Research report](#)", (September 2015), p.17.

## **Policy recommendations**

Further efforts are needed in all OSCE participating States to reduce pre-trial detention. In particular, it is recommended that States ensure that:

1. Incommunicado detention at any stage of detention, including the pre-trial phase, is prohibited;
2. The length of pre-trial detention is fixed by law;
3. There is no automatic deprivation of liberty at the pre-trial stage;
4. Procedural safeguards for suspects and accused persons in criminal proceedings, including the right of access to legal assistance, are strengthened;
5. There is a legal requirement for individualized decisions by judges and prosecutors on the reasons for ordering or requesting pre-trial detention;
6. There is an obligation for regular judicial review of detention, including a legal requirement for a reasoned decision for the renewal or extension of pre-trial detention;
7. National laws provide for a right to compensation for wrongful pre-trial detention; and
8. National legislation includes provisions that deter the overuse of pre-trial detention (e.g., restricting the grounds, imposing time limits, prohibiting detention for minor crimes, etc.) and provide for alternatives to detention.

## Practical recommendations

It is recommended that States take practical steps to reduce pre-trial detention rates, including:

9. Raising awareness among judges and prosecutors of the legal limits placed on pre-trial detention by international and national law, and of the negative consequences of pre-trial detention on detainees, their families and on society as a whole;
10. Refraining from using pre-trial detention for purposes other than the administration of justice;
11. Ensuring that alternative measures to detention provided by national legislation are properly implemented and applied in practice;
12. Encouraging defence lawyers to be trained on alternative measures, when and how to request alternative measures, and how to challenge pre-trial detention;
13. Ensuring greater equality of arms between the prosecution and the defence, including by allowing defence lawyers unfettered access to detainees, by granting them access to the investigation file ahead of the decision imposing or prolonging pre-trial detention, and by providing sufficient funding for legal aid schemes, including for proceedings related to pre-trial detention;
14. Ensuring that decisions on pre-trial detention are taken by more senior judges or by collegiate courts, and that judges do not suffer negative consequences for refusing pre-trial detention in accordance with the law;
15. Developing minimum standards for prosecutors and judges to instruct them on when and how pre-trial detention should be requested or ordered (including providing an explanation for the use of pre-trial detention);
16. Taking appropriate action to redress any discriminatory application of the rules governing pre-trial detention with regard to foreign nationals, in particular by clarifying that being a foreigner does not, per se, constitute an increased risk of absconding;
17. Collecting data on pre-trial detention decisions, including how many requests are made for pre-trial detention by prosecutors and how often judges order pre-trial detention, engaging with CSOs to conduct a cost-benefit analysis of the use of pre-trial detention, and conducting research on the effectiveness of alternative, non-custodial measures and inform the public about the findings.

# Improper medical examinations

120. In general, there are different categories of medical examinations in the context of the deprivation of liberty. There is the initial examination that states are required to offer people upon being detained (upon arrest), usually in a police detention facility.<sup>276</sup> This is distinct from the forensic medical examination that should take place once a detainee alleges torture or suspicion of torture has been raised. States are obligated to guarantee the availability of prompt, independent, impartial, adequate and consensual medical examinations at the time of arrest, and at regular intervals thereafter. Medical examinations must also be provided upon each transfer of a detainee. In some countries, medical examinations are required in certain circumstances, regardless of whether a detainee requests one. In one Central Asian OSCE participating State for instance, a detainee must undergo a medical examination before entering a temporary detention facility.<sup>277</sup> In another state in the same region, detainees must undergo a medical examination each time they are transferred to a different detention facility.<sup>278</sup> Such routine medical examinations of detainees after admission to every place of detention create a system of “check-points” that minimizes the number of unaccounted cases of torture and renders impossible a shifting of blame and accountability among various detention facilities and authorities.<sup>279</sup> In the event there is an allegation or any sign that torture or ill-treatment may have occurred, prompt, independent, impartial and professional examinations, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), must be carried out, as provided by international law.<sup>280</sup> Prison facilities should have general medical services available to detainees that are capable to perform medical examinations on request. In the European

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276 See e.g., Principle 24 of the [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#).

277 Questionnaire response Nota Bene (Tajikistan) (2019).

278 Questionnaire response Golos Svobody (Kyrgyzstan) (2019).

279 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “[Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention](#)”, A/HRC/13/39/Add. 5, para. 126.

280 Article 12, UNCAT, *op. cit.*, note 19.

Union, countries should provide a medical examination to all juveniles who are deprived of their liberty, under the Children's Rights Directive.<sup>281</sup>

121. The UN Special Rapporteur on Torture has noted the significant importance of forensic medical examinations in detecting torture, both for forming the basis of investigations of and prosecutions for torture, as well as for the exclusion of evidence obtained by torture and to aid in proceedings to obtain reparations for torture.<sup>282</sup> He also noted that governments often argue that a high standard of forensic evidence is out of the reach of states with limited resources. However, additional scientific tests such as X-ray analysis of wounded areas or blood analysis are available in almost every country and are not expensive.<sup>283</sup> In addition, many symptoms attributable to torture or other ill-treatment are not physical. In such cases, psychological assessment displaces medical evaluation as the main source of information. Psychological detection requires adequate training and time but much less investment in infrastructure than medical forensics.

122. The Istanbul Protocol<sup>284</sup> sets out standards for legal and health professionals on how to recognize and document cases of torture so that their findings can be used as evidence in proceedings.<sup>285</sup> A lack of trained experts was noted as a significant issue in many of the countries surveyed. In one Eastern European state surveyed, training on the Istanbul Protocol is not required for medical workers and other public officials dealing with persons deprived of liberty.<sup>286</sup> In a Central Asian OSCE participating State it was noted that although the government has taken legal steps to ensure that medical examinations are conducted in compliance with the Istanbul Protocol, practical constraints still exist, including a lack of trained medical staff and a lack of equipment and appropriate facilities in which to conduct medical examinations.<sup>287</sup>

123. In the majority of the countries surveyed, there was no requirement for medical personnel working at police stations or detention centres (as opposed to forensic

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281 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, pp. 1–20, Article 8.

282 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Sixty-ninth session, Agenda item 68 (a) (2014) A/69/387, paras. 19–20.

283 *Ibid.*, p.12, para 41.

284 Office of the United Nations High Commissioner for Human Rights, Professional Training Series No. 8/Rev.1 (United Nations, sales publication No. E.04.XIV.3).

285 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *op. cit.*, note 282, para 23.

286 Questionnaire response Public Verdict Foundation (Russia) (2019).

287 Questionnaire response Nota Bene (Tajikistan) (2019).

doctors) to have training on the Istanbul Protocol. This poses a significant issue, as a lack of trained doctors on-site can lead to delays in the detainee being able to access a forensic medical examination, during which time evidence of torture may fade. Timely examinations are crucial to preserving and documenting evidence of torture, and the results can be given to a forensic medical expert if a separate examination is also conducted. Despite this, medical staff often do not take steps to preserve evidence. Victims would be in a considerably stronger position if police officers, prison wardens, hospital administrators, prosecutors and judges were under a legal obligation to request proper forensic medical examinations as a standard procedure whenever there are suspicions or allegations of torture or other ill-treatment.<sup>288</sup> In one Central European OSCE participating State, medical staff rarely take photos of a detainee's injuries, because they are not legally obliged to do so, and a forensic medical expert is usually appointed months after the criminal complaint has been filed against a police officer, by which point visible marks of ill-treatment may have disappeared.<sup>289</sup> In other countries photographs must be taken of injuries during the medical examination, which is an important step in the proper documentation of cases of torture as described above.<sup>290</sup>

124. In one other OSCE participating State, additional legal barriers to accessing a forensic medical examination were reported. For example, situations where a lawyer must submit an official request for a detainee to receive a forensic medical examination, which must be approved by the investigator, prosecutor or judge participating in the case. In practice, such requests are rarely granted and are considered over a long period of time, meaning access is delayed and evidence is not preserved.<sup>291</sup>

125. The institutional independence of forensic medical institutions and medical staff is a core element for the effective documentation of torture or other ill-treatment and for the subsequent investigation, prosecution, and punishment of perpetrators. While much progress has been made in recent years in terms of scientific advances, medical standards, and in legal norm-setting, the impact of forensic medical science is undermined by a lack of institutional independence, rigorous implementation and sufficient training. As the UN Special Rapporteur on Torture has noted, "health professionals tasked with the medico-legal evaluation of alleged victims of torture, with investigations into deaths in custody and with providing

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288 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *op. cit.*, note 282, para. 60.

289 Questionnaire response Hungarian Helsinki Committee (2019).

290 Questionnaire response Macedonian Young Lawyers Association (2019).

291 Questionnaire response Nota Bene (Tajikistan) (2019).

forensic evidence in criminal proceedings must enjoy organizational, institutional and functional independence from the police, judiciary, military and prison services. The law and practice must ensure that they act in full impartiality.”<sup>292</sup>

126. In order to ensure the independence, efficiency and effectiveness of investigations and to include specialized independent institutions and national and international experts, the Istanbul Protocol refers to an “investigative authority” to investigate torture claims. The lack of an established independent body to carry out medical examinations should not, however, be used as an excuse to deny access to medical examinations, thereby contributing to impunity for torture and other ill-treatment. The independence of medical staff can be compromised in a number of ways, such as in cases where they are employed by the same ministry as the police, which may create a conflict of interest. In some OSCE participating States, medical examinations of detainees are not performed by an independent body or specialist, but by penitentiary medical staff.<sup>293</sup> In others, forensic medical examinations are carried out by professionals within the Ministry of Health.<sup>294</sup> However, even where medical staff are employed by a separate ministry, penitentiary medical staff who work alongside detention officers or police officers may allow these professional ties to impact their independence and, in some cases, they may collude with wardens of penal colonies to cover up allegations of torture.<sup>295</sup>
127. Another factor that affects the independence of medical examinations is the presence of law enforcement officials. As has been emphasized by the CPT, in order for medical examinations to be impartial, they should be conducted out of the sight and hearing of law enforcement officials.<sup>296</sup> Despite this, there have been reports from across the OSCE region of law enforcement officials remaining present during medical examinations.<sup>297</sup> In one OSCE participating State in South-Eastern Europe, the CPT found that medical examinations were carried out in the presence of police officers, who were often the same police officers who had allegedly

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292 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *op. cit.*, note 280, para 62.

293 Questionnaire response Armenia Helsinki Association (2019).

294 For instance in Kyrgyzstan, Romania and Tajikistan.

295 Questionnaire response Public Verdict Foundation (2019).

296 CPT, “[Developments concerning CPT standards in respect of police custody](#),” Extract from the 12th General Report of the CPT, published in 2002, CPT/Inf(2002)15-part p.3 para 42.

297 See e.g., “Report on the visit to Azerbaijan” carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 29 March to 8 April 2016, p. 8; OSCE Bishkek, USAID, Freedom House, ‘[OBSERVANCE OF THE RIGHT TO FREEDOM FROM TORTURE IN CLOSED FACILITIES OF THE KYRGYZ REPUBLIC MONITORING. RESPONSE. REHABILITATION](#)’ (2012); Amnesty International, ‘[SPAIN: OUT OF THE SHADOWS – TIME TO END INCOMMUNICADO DETENTION](#)’ (2009), p. 14; and Questionnaire response Human Rights Association (Turkey) (2019).

ill-treated the detained person.<sup>298</sup> This is also the case in at least one other OSCE participating State.<sup>299</sup> In addition to ensuring that the examinations themselves are confidential, medical staff should also ensure that the reports of medical examinations remain confidential, including from police.

128. In a number of countries, if the victim of torture can afford an independent medical examination, they may request one and pay for it themselves. However, in some countries, examinations conducted independently are not permitted as evidence or are perceived as less reliable than state medical examinations in court. In one Eastern European OSCE participating State, for example, only medico-legal reports provided by government officials are accepted as evidence in national courts to prove that torture occurred.<sup>300</sup>

### Promising practice

129. A number of countries across the OSCE region have taken positive steps towards training medical professionals on the standards contained in the Istanbul Protocol. In one South-Eastern European state, CSOs facilitated training for doctors from local medical institutions on the Istanbul Protocol during 2018 and 2019. Doctors who completed the training received accreditation, which provided an incentive for taking part.<sup>301</sup> In one OSCE participating State in Central Asia, the Ministry of Health worked with CSOs and state entities to create clinical guidance based on the Istanbul Protocol for medical professionals, forensic experts and forensic psychiatrists.<sup>302</sup> More than 500 doctors and medical workers have been trained so far, and the training has been introduced into the curriculum of the Medical Academy.<sup>303</sup>

130. In addition to ensuring there are sufficient trained forensic medical professionals to carry out forensic medical examinations, states should also be encouraged

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298 CPT, 'Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31 May to 7 June 2017', 21 June 2018, CPT/Inf (2018) 21, para. 37.

299 Questionnaire response Hungarian Helsinki Committee (2019).

300 Questionnaire response Promo Lex (Moldova) (2019).

301 Questionnaire response Belgrade Human Rights Centre (Serbia) (2019).

302 Convention Against Torture Initiative, '[PROCEDURES AND MECHANISMS TO HANDLE COMPLAINTS OF AND INVESTIGATIONS INTO TORTURE OR OTHER ILL-TREATMENT](#)', UNCAT Implementation Tool 7/2019 referring to Kyrgyzstan.

303 Questionnaire response Golos Svobody (Kyrgyzstan) (2019).

to take steps to ensure that all medical staff who come into contact with detainees, as well as criminal justice actors, receive training on the standards contained in the Istanbul Protocol. This should ensure that medical staff are able to preserve and document evidence of torture if there is a delay in accessing a forensic medical examination and to ensure that criminal justice actors are equipped to identify and report cases where torture may have occurred. In an example from Central Asia, the OSCE conducted training on the Istanbul Protocol for 150 judges, prosecutors and law enforcement officials in 2019, in line with the UNCAT's recommendations.<sup>304</sup>

### **Policy recommendations**

*In general, it is recommended that States:*

1. Ensure that the fundamental principles of investigation, such as competence, impartiality, independence, promptness and thoroughness are enshrined in legislation and officially recognized among relevant departments and personnel, including prosecutors, defence attorneys, judges, law enforcement personnel prison and military personnel, forensic and health professionals, and those responsible for detainee health care;
2. Put in place and apply an effective process of evidence collection that accords with the Istanbul Protocol, to comply with their obligation to investigate allegations of torture and other ill-treatment; and
3. Adopt and implement the Istanbul Protocol as an investigative tool and standard.

*Regarding medical examination in detention it is recommended that States:*

4. Implement a system of mandatory medical examination of detained persons, both physical and psychological, subject to informed consent by the individual, that is capable of detecting physical and psychological signs of torture and other ill-treatment at entry, transfer and exit from places of detention, including judicial remand, as well as periodically during incarceration and upon request;

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304 OSCE, "OSCE trains Tajik police, prosecutors and judges on Istanbul Protocol", (July 2019) referring to Tajikistan.

5. Provide for the independence of medical professionals conducting such examinations and allow for medical examinations by medical professionals of the detained person's choice;
6. Mandate that, if the health professional has grounds for presuming the existence of torture and other ill-treatment, they must notify the competent authorities, with the victim's consent, and refer the case for a full investigation, including full forensic evaluation, in accordance with Article 12 of the Convention against Torture;
7. In particular, ensure that, as a matter of policy, medical examinations are confidential and not conducted in the presence of law enforcement officials;
8. Ensure that effective access to forensic medical expertise is not subject to prior authorization by an investigating authority, including access to a medical professional of the detainee's choice for medical evaluation at any time during detention; and
9. Ensure that all relevant personnel (law enforcement officials, prison officials, state forensic experts and other health professionals, prosecutors, defence lawyers and judges) receive training on the effective legal and clinical investigation and documentation of torture and other ill-treatment.

*Regarding forensic medical examination of allegations of torture, it is recommended that States:*<sup>305</sup>

10. Ensure that funding and supervision of such health professionals is separate from the criminal justice system, and that health professionals have sufficient security of status and employment to ensure their independence;
11. Establish independent forensic institutions or transfer responsibilities to existing units outside of the Ministry of Interior or the Ministry of Justice, such as the Ministry of Health;
12. Make training on the Istanbul Protocol a mandatory component of forensic medical training;
13. Remove any requirement for police or prosecutors to approve requests for forensic medical examinations;

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305 For more information on the requirements for forensic medical examination of allegations of torture, see e.g. Vincent Iacopino, Rohini J.Haar, Michele Heisler, Rusudan Beriashvili, "[Istanbul Protocol implementation in Central Asia: Bending the arc of the moral universe](#)", *Journal of Forensic and Legal Medicine*, Vol. 69, January 2020.

14. Ensure national law and practice provide that courts accept and give equal consideration to forensic evidence presented by both governmental and independent forensic or medical experts, including international forensic experts;
15. Establish an investigative authority with guarantees of independence, efficiency and effectiveness and with powers to investigate allegations of torture, on its own, without formal prompting from another party, in accordance with the Istanbul Protocol; and
16. Ensure that powers of the “investigative authority” are enshrined in legislation.

### **Practical recommendations**

*Regarding safeguards for effective medical evaluations of alleged torture and other ill-treatment in detention, it is recommended that States:*

17. Ensure that all medical examinations and interviews with detainees in detention facilities are performed using audio and photographic equipment; and
18. Prohibit the transfer of medical reports to law enforcement officials except by order of and under the supervision of a judge, and with the consent of the victim.

*Regarding the effective investigation of allegations of torture or other ill-treatment, it is recommended that states:*

19. Ensure that all suspicions and allegations of torture and other ill-treatment are investigated and documented in a prompt, independent and transparent manner by qualified governmental and non-governmental experts, and that they are conducted with victim participation at all phases of the investigation, including access to such investigations;
20. Ensure that alleged victims of torture and other ill-treatment, their lawyers and/or families are able to request access to a prompt independent forensic examination;
21. Ensure forensic and medical reports are of sufficient quality, thereby requiring the use of standardized medico-legal evaluation report forms that comply with Istanbul Protocol guidelines;

22. Ensure that non-state legal and clinical actors have access to all relevant information, such as case files and investigations, in medico-legal cases of alleged torture or other ill-treatment, as well as of deaths in custody;
23. Ensure that prosecutors utilize and process medical evidence in accordance with national standards and procedures, and that prosecutors and judges order independent forensic evaluation, where appropriate; and
24. Encourage independent health experts to review state examinations and to conduct their own independent assessments.

*Regarding medical ethics, it is recommended that states:*

25. Ensure that all health professionals working with detainees are made aware of their ethical obligations, including the need to report torture and other ill-treatment, to maintain confidentiality and to seek the consent of victims prior to examination, and ensure that national legislation is clear that health professionals must abide by their ethical obligations at all times.

*Regarding capacity-building and training, it is recommended that states:*

26. Ensure that there is a sufficient number of forensic experts trained in the documentation of torture (Istanbul Protocol) and available to carry out examinations in line with demand;
27. Bring together key professionals, comprising both officials and civil society actors with established forensic expertise, to promote forensic capacity-building and to develop strategies and practices on how best to document and investigate torture cases, with a view to ensuring accountability and reparation;
28. Enhance the skills of health and legal professionals on the effective medical documentation of torture and other ill-treatment, through training on the use of the Istanbul Protocol and other relevant materials for forensic pathologists, medico-legal officers, general practitioners, psychiatrists, psychologists, Ministry of Health officials and social workers, as well as for lawyers, state investigators, prosecutors, judges, prison officials, police officers, immigration officers, CSO activists, members of national human rights commissions and similar bodies, and representatives of the Ministry of Justice, the Ministry of Defence and the Ministry of the Interior;

29. Ensure that judges are trained on how to interpret forensic medical opinions;
30. Engage with medical associations on anti-torture actions;
31. Encourage and support a national network of non-governmental medico-legal experts to conduct clinical evaluations of alleged torture, review the quality and accuracy of state evaluations, and participate in policy reform, capacity building and public education activities; and
32. Work with national preventive mechanisms to monitor access to regular medical examinations in detention and access to independent forensic examinations.

