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Combating Torture During Police Custody and Pre-Trial Detention

Discussion Paper
prepared by

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Introduction

1. This background paper briefly outlines the prevalence of police ill-treatment across Europe and identifies some of the reforms undertaken to combat such ill-treatment during police custody and pre-trial detention. Importantly, the paper addresses the two main pathways towards combating police ill-treatment, namely the effective implementation of procedural safeguards and investigative police interviewing.
2. The paper is firmly grounded in the findings and standards of the European Committee for the Prevention of and Inhuman or Degrading Treatment or Punishment (CPT). With its mandate to prevent ill-treatment and its system of regular visits to places of detention, the CPT is in a unique position to provide a comparative overview of the prevalence and evolution of police¹ ill-treatment in the 47 Member States of the Council of Europe (CoE).² In addition, the paper draws upon police reforms undertaken across the CoE region.
3. The purpose of the paper is to inform discussions at the Copenhagen Conference on 'Combating Torture during Police Custody and Pre-Trial Detention'. The event is hosted by the Danish Ministry of Foreign Affairs in the context of Denmark's chairmanship of the Committee of Ministers of the Council of Europe, and it is held in partnership with the CPT, the Convention against Torture Initiative and DIGNITY - Danish Institute against Torture, on 22-23 March 2018, in Copenhagen, Denmark.
4. The discussion paper has been authored by Dr Julia Kozma, lawyer, member of the CPT and university lecturer (University of Strasbourg); and Dr Asbjørn Rachlew, Police superintendent (Oslo police district) and guest researcher (Norwegian Centre for Human Rights) in cooperation with the DIGNITY - Danish Institute against Torture.

The prevalence of police torture and ill-treatment in Europe

5. Across Europe, practices of torture and other forms of inhuman or degrading treatment can be found in various circumstances, applied by different members of the law enforcement authorities, and for different reasons. The CPT chiefly distinguishes between
 - (a) excessive use of force - which amounts to inhuman or degrading treatment - at the time of apprehension,³
 - (b) ill-treatment during transport to police stations and in police custody,⁴ and

¹ In this connection, the term "police" refers to all law enforcement officials who exercise police powers, including members of Special Forces, operative police officers, criminal investigators, and police officers with custodial functions.

² Since its first mission in 1990, the CPT has carried out more than 420 country visits, in the course of which the members of its delegations have spoken in private with countless persons who were or had recently been detained by the police, and who provided the CPT with first-hand information about the treatment they had received.

³ Examples of excessive use of force are kicks to the back of the head, the chest, ribs, stomach or legs, truncheon blows or stepping on an apprehended person's back, even when the person concerned displayed no resistance or after he/she had been brought under control, had been handcuffed and was lying prone on the ground; the unjustified use of pepper spray; excessively tight handcuffing etc.

⁴ Please note that ill-treatment occurring as a consequence of inhuman or degrading conditions of detention in police custody are deliberately not included in this paper.

(c) ill-treatment, including torture as its most severe form, in the context of police questioning in criminal investigations, with the aim of extracting a confession or information.⁵

6. The situation of police ill-treatment in Europe in recent years, as documented by the CPT, and the trends in the eradication of this practice vary greatly across the region.⁶ Some countries appear to have eradicated police ill-treatment a long time ago, and in others, police reforms have led to a significant improvement of the situation. In yet other countries, hardly anybody complains of ill-treatment during questioning, while excessive use of force upon apprehension, excessively tight handcuffing or verbal abuse during transport are still noted as a challenge.
7. In more than half of the CoE Member States, the CPT has in the recent past heard allegations and found forensic medical and other evidence of both excessive use of force upon apprehension, and of various forms of ill-treatment - reaching from threats to mainly beatings to various parts of the body - 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.⁷
8. It is noteworthy that in several countries ill-treatment for the purpose of obtaining a confession or information is primarily applied in the initial period of police custody, prior to the first official interviews, and often by operational police officers rather than criminal investigators. Another important observation is that ill-treatment by police officers exclusively carrying out custodial duties is almost non-existent, where distinct police detention facilities exist or a system of dedicated custodial officers is in place.
9. The intention behind this brief overview is to highlight that there is still a relatively large proportion of countries in Europe that face various problems in overcoming police ill-treatment and in some countries, the situation has even deteriorated over the years. In conclusion, an inter-State discussion about achievements, challenges and good practices in combating police torture and ill-treatment in Europe is highly relevant.

Creating an environment for professional policing

10. International human rights conventions do not only prohibit torture and other inhuman or degrading treatment or punishment in absolute terms; they also oblige States to take positive measures to prevent torture and ill-treatment from occurring.⁸ Other

⁵ Police questioning in this context refers to both formal interviews (or interrogations) of suspects and “informal questioning/interviews” with the aim of gathering information outside the formal investigation.

⁶ For this analysis, published CPT reports, mainly from 2011 onwards, have been taken into account.

⁷ Methods identified by the CPT include extensive beatings with hard objects such as a wooden bat, truncheon blows on the soles of the feet (i.e. the so-called *falaka*), handcuffing of detained persons in stress positions for hours on end and suspension / hyperextension by handcuffs, the infliction of electric shocks using electrical discharge weapons, mock executions with a pistol pointed at the temple or with the barrel of a pistol inserted into the mouth, old car tyres placed around the heads and shoulders while being forced to squat, burning a person’s arm with a cigarette, infliction of burns to the genitals, asphyxiation with a plastic bag or a gas mask, or placing a plastic bag over the head and spraying teargas inside, as well as combinations of the various methods mentioned above.

⁸ Cf. in particular Article 2 (1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which states that, “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”, as well as Article 11 CAT, stating that, “Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture”. Article 16 CAT extends the obligation to prevent also to other forms of cruel, inhuman or degrading treatment or punishment. Note that all CoE Member States have ratified CAT.

international and European standards, such as those adopted by the United Nations General Assembly⁹ and the CPT,¹⁰ and judgments by the European Court of Human Rights (ECtHR)¹¹ provide further guidance on these positive obligations to prevent ill-treatment.

11. As early as 1992, the CPT highlighted in its 2nd General Report the importance of a number of fundamental safeguards for the effective prevention of police ill-treatment, namely:

- a) the right of access to a lawyer,
- b) the right of access to a doctor and
- c) the right to have the fact of one's detention notified to a relative or another third party of one's choice.

This "trinity of rights", as well as the basic precondition to be informed of these rights, can be further extended by other safeguards, including:

- d) meticulous registration of all arrested and detained persons (and thereby counteracting any unofficial detention),
- e) presentation before a judicial authority of any arrested person within a relatively short time after their apprehension,
- f) prompt transfer of persons remanded into custody to a pre-trial detention facility, and
- g) specific safeguards for vulnerable groups, such as juveniles, persons suffering from a mental disorder or foreigners.

With the development of technical means, such as CCTV, body- and helmet cameras, and audio- and video recording of interviews, additional possibilities for preventing police ill-treatment have emerged.

12. The importance of all of these safeguards has recently received new impetus, with the publication of a scientific study – "Does Torture Prevention Work?".¹² The study examines the effectiveness of more than sixty different measures for the prevention of torture, and comes to the conclusion that the classic safeguards, as described in this paragraph, are the most effective ones in the fight against torture – *if applied in practice*.

13. Equally in 1992, the police service of England and Wales adopted PEACE (Planning and preparation, Engage and explain, Account, Closure and Evaluation) as the framework for investigative interviewing. This laid the foundation for a change of mindset of police officers by replacing the objective of eliciting a confession with one of obtaining accurate and reliable information; thereby eliminating a major incentive for applying coercion and ill-treatment during questioning. This, in itself, constitutes a preventive measure against police ill-treatment. As described in more detail below (paras. 42-60), investigative

⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173 of 9 December 1988; Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169 of 17 December 1979.

¹⁰ See in particular, "Police Custody", 2nd General Report of the CPT, 1992; "Developments concerning CPT standards in respect of police custody", 12th General Report of the CPT, 2002; "Combating impunity", 14th General Report of the CPT, 2014; "Access to a lawyer as a means of preventing ill-treatment", 21st General Report of the CPT, 2011.

¹¹ Cf., e.g., *Salduz vs. Turkey*, Application no. 36391/02, GC judgment of 27 November 2008. Note that the so-called Salduz doctrine was incorporated into 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 (EU Directive on Access to a Lawyer).

¹² Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, Liverpool University Press, Liverpool, 2016.

interviewing was founded and refined through scientific studies. It has been embraced by police outside the United Kingdom and is promoted by various international human rights and torture prevention bodies.¹³

14. Other preventive measures, which are vital in combating police torture and ill-treatment, but which for the sake of space will not be further described in this paper, include monitoring of police work by independent mechanisms.¹⁴ Furthermore, a clear commitment by the highest authorities to fight impunity of perpetrators of police ill-treatment is another crucial preventive measure.¹⁵
15. While certain safeguards and measures will be more effective and better suited to eradicate particular forms of ill-treatment (e.g. investigative interviewing techniques reduce the risk of police ill-treatment during questioning; identification requirements and helmet cameras that are worn by police officers during arrests or crowd control operations aim at preventing excessive use of force), only a holistic approach will lead to lasting results. Indeed, practitioners in countries that have come a long way in overcoming police ill-treatment, will often refer to a change of police culture or even a change of culture within the criminal justice system as a whole, rather than single safeguards that have made a difference. Safeguards are not “watertight” and can in practice be circumvented,¹⁶ as long as police officers believe – and the police service condones - that ill-treating apprehended persons and suspects is an acceptable or even necessary and effective way of carrying out police work.
16. A change of police culture starts with competitive recruitment processes based on strict selection criteria of officers; adequate remuneration of police officers, and a review of performance indicators; initial and ongoing training in human rights standards and the application of national norms and safeguards. What is even more important is professional training in the proportionate use of force and investigative skills, such as investigative interviewing; equipping the police with modern forensic tools; and strong leadership within the police that supervises the observance of legal safeguards and conveys a zero-tolerance policy vis-à-vis ill-treatment.
17. In addition, other actors of the criminal justice system, such as judges and prosecutors, must support this institutional change, by *inter alia* insisting on alternative forms of evidence than confessions. Further, judges should exclude without exception any evidence that appears to have been extracted under duress. Finally, they could contribute

¹³ In particular the UN Special Rapporteur on Torture, in his interim report (A/71/298, 5 August 2016) makes a convincing case for the benefits of investigative interviewing and calls for the development of a universal protocol identifying a set of standards for non-coercive interviewing methods and procedural safeguards. See also, UN Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment: safeguards to prevent torture during police custody and pretrial detention, A/HRC/31/L.26/Rev.1, 23 March 2016, paras. 10-13; Report of the United Nations High Commissioner for Human Rights, Summary of the discussions held during the seminar entitled “Exchanging national experiences and practices on the implementation of effective safeguards to prevent torture and other cruel, inhuman or degrading treatment or punishment during police custody and pretrial detention”, A/HRC/37/27, 26 December 2017, paras. 17 ff.

¹⁴ These mechanisms should be endowed with a possibility to carry out regular and unannounced visits to places of deprivation of liberty and to speak with detained persons in private.

¹⁵ Preconditions for the fight against impunity are: a well-functioning complaints system and early detection of police ill-treatment through systematic medical examinations in pre-trial detention facilities; the existence of an independent investigative body that can carry out impartial, prompt and thorough investigations into allegations or indications of ill-treatment; victim and witness as well as whistle-blower protection measures; and a criminal offence of torture under national criminal legislation, with sanctions that are commensurate to the gravity of this offence.

¹⁶ For instance, the tightening of certain procedural safeguards can lead in practice to the emergence of other unwanted behaviour, such as the questioning of suspects in unofficial places outside of police stations.

to change by routinely inquiring during custody hearings how persons have been treated during apprehension and while in police custody.

All measures and safeguards outlined above seem to be mutually reinforcing, and it is difficult to tell which ones should be taken first. Which specific steps were or would be decisive in your country in order to change police culture?

Safeguards against torture and ill-treatment

Length of police custody and the role of judges and prosecutors

18. In CoE countries, the total time that criminal suspects can legally be held in police custody generally varies between 24 and 96 hours;¹⁷ within this period,¹⁸ they have to be presented to a judicial authority (either a prosecutor, or more often, a judge) who will remand them in custody or release them. A number of countries have introduced a possibility to further extend this period for persons suspected of certain crimes, such as terrorism or organised crime. As an additional safeguard, these provisions partly foresee that the detained persons must be physically brought before a judge within certain intervals, as is the case in Ireland, where persons suspected of drug-trafficking offences can be held in custody for a total of seven days, with intermittent court hearings.¹⁹
19. The important role that judges and prosecutors play in the prevention of police ill-treatment cannot be overstressed. Oftentimes, they are the first authorities, independent of the police, that get to see arrested persons, and in many cases shortly after their apprehension. It would be desirable for judges and prosecutors to routinely ask arrested persons whether all procedural safeguards (right to a lawyer, right to notify a family member, right to a doctor) have been observed, and to inquire about the treatment they have received from the police (ideally not in the presence of escorting officers), as well as to observe whether the persons before them display any visible injuries.
20. Any complaint or other indication of ill-treatment should be recorded and promptly transmitted to the appropriate investigating authority; a forensic medical examination should be ordered; and measures for the protection of the person should be taken. Ukraine, for instance, has made these precepts a legal obligation under its criminal procedure law (Section 206 Criminal Procedure Code), which has yielded already some positive results in the strengthening of this safeguard.²⁰

Could this example of an explicit legal obligation of judicial authorities to react to allegations or indications of police ill-treatment be introduced in other countries? What other measures could be taken to sensitise judges and prosecutors to police ill-treatment?

¹⁷ No. 35 in its General Comment No. 35 on liberty and security of person (CCPR/C/GC/35 of 16 December 2014, para. 33), argue that – save in absolutely exceptional circumstances – persons should not be held for longer than 48 hours in police custody.

¹⁸ In Montenegro and Serbia, criminal suspects have to be brought before a prosecutor after twelve and eight hours respectively.

¹⁹ Section 2 of the Criminal Justice (Drug Trafficking) Act, 1996.

²⁰ Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 November 2016, CPT/Inf(2017)15, para. 19.

21. Aside from detention of criminal suspects, the police in most countries can keep persons in administrative detention for a variety of other reasons, such as for identification, public order, intoxication, or for misdemeanours. The length of custody in these cases range from 3 to 48 hours; in many countries, some of the traditional safeguards, such as access to a lawyer, do not apply for these forms of police custody, despite recommendations by the CPT. Additionally, a number of countries foresee the possibility of inviting or summoning persons for “informal talks”, to “provide explanations”, or for “collecting information” under a “simplified procedure”. Countries maintain that legally speaking, these persons are not detained by the police, and could, in principle, leave the police station any time they want. It must be acknowledged that at times it will be necessary for police officers to obtain information from persons who are not (yet) suspects in a criminal investigation, or to administratively detain a person who poses a threat to security and good order. However, the CPT has on numerous occasions noted that administrative detention or informal questioning of “persons of interest” was abused in order to extend legal deadlines for detention and to deny procedural safeguards that would apply to criminal suspects. As a positive example, Georgia has extended all procedural safeguards applying to criminal suspects also to administrative detainees. Romania is currently considering doing likewise.

The CPT recommends that all persons who are *de facto* deprived of their liberty by the police benefit from all procedural safeguards (see below).

What additional (legal and practical) safeguards can be put in place in order to prevent the abuse of administrative detention or questioning of witnesses or persons who are not (yet) suspects in a criminal investigation?

Dedicated custody officers as a safeguard against ill-treatment

22. There are many good reasons why States should consider the introduction of dedicated police custody officers, or even the establishment of centralised police custody facilities with staff that exclusively fulfil the role of custodial officers. In terms of resources, a division of labour between operational officers, custodial officers and investigators can lead to greater specialisation, professionalism and efficiency. Furthermore, basic material conditions, such as sanitary facilities, outdoor yards, meeting rooms for lawyers and medical examination rooms, as well as food can be better provided in larger, specialised custody facilities than in small district police station.²¹

23. In recent years, Georgia has closed down all cells in local police stations; police custody is nowadays exclusively implemented in “temporary detention isolators”, which was welcomed by the CPT. In the United Kingdom, part of the larger police reforms was the introduction of custody officers, who were charged with ensuring the welfare of persons in police custody; every arrested person has to be presented immediately to a custody officer, before any other procedural steps can be taken. In Lithuania and Malta, persons can be held for five and six hours, respectively, in “holding cells” in smaller police stations, before they have to be transferred to larger and better equipped “police arrest houses” or “lock-ups”. In the Netherlands, the CPT gained a particularly positive impression of the functioning of the Houten Police Detention Facility, which was built in 2008 as the first step of a project to create several facilities of this kind throughout the country.

²¹ It should be noted, however, that the existence of dedicated police custody facilities should not lead to longer-term detention of remanded persons in these facilities, as is the case in various CoE countries.

24. In addition to making police custody, and police work in general, more efficient, and to providing better material conditions to persons in police custody, the separation of police tasks can also support the police in implementing their obligation of care vis-à-vis detained persons and serve as a measure of prevention of ill-treatment. Indeed, police officers who have to fulfil dual or even triple roles of (a) operative officers responsible for the arrest of persons, (b) caretakers and custody officers who should look after the wellbeing of those they have arrested (possibly under difficult circumstances), and (c) criminal investigators who have to question these persons in relation to a crime, will often find it personally challenging to assume all of these roles in a professional manner.
25. While it remains incumbent on the arresting officer(s) to inform persons of their rights - and provide them with the possibility to implement these rights even if they are held only for a few hours in a smaller police station - dedicated custodial officers can double-check upon admission to the custody facility whether the detained person has understood all the rights and was able to exercise them. Moreover, dedicated custodial officers could be the first instance for any complaints a person might have against arresting officers.

Which arguments speak against phasing out in law and practice police custody in local police stations, and the introduction of dedicated police custody facilities and/or dedicated custody officers?

Information on rights

26. It is common sense that persons who do not know their rights will not be in a position to exercise them. A precondition for all the other safeguards is thus that persons deprived of their liberty by the police are effectively informed of their rights, in a language they understand and in consideration of any specific condition that might prevent the person from fully understanding their rights (e.g. juveniles, illiterate persons, persons with mental disorders).²²
27. All persons detained by the police - for whatever reason – should be fully informed of their rights as from the very outset of deprivation of liberty (that is, from the moment when they are *de facto* obliged to remain with the police, not only when officially declared a suspect). This should be ensured by provision of clear verbal information at apprehension, to be supplemented at the earliest opportunity (that is, immediately upon arrival at police premises) by provision of a written information sheet. Detainees should be allowed to keep a copy of this information sheet.
28. Good practices have been observed in a number of countries, such as in Slovenia, where the CPT was pleased to note that persons detained by the police were in the large majority of cases verbally informed of their rights upon apprehension and shortly afterwards given an information sheet. Such sheets were available in 24 languages in all police establishments visited and additional language versions could be produced when necessary. In addition, a specific information sheet for detained juveniles was available in several languages. In other countries, such information sheets were supplemented by posters containing all the rights in places accessible to detainees, e.g. in waiting areas and on the inside of custody cell doors.

²² Cf., Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, in particular Art. 3; EU Directive on Access to a Lawyer, para. 39.

29. Persons deprived of their liberty by the police should be requested to sign that they have been informed of their rights, and whenever they waive certain entitlements. In case a person refuses or is not in a position to sign (e.g. because of severe alcohol intoxication), the absence of the signature should be duly explained.

Right to notify a third person of arrest

30. According to the conclusions of the above-mentioned study,²³ notification of family or friends is the most effective safeguard in preventing torture. This right is guaranteed in law²⁴ throughout all CoE Member States, at least for criminal suspects; a number of States, e.g. Georgia, Norway and San Marino, have made explicit provisions to extend it to all persons deprived of their liberty by the police, including persons apprehended for identification purposes, public order or other administrative detention.

Are there legitimate reasons for denying non-criminal suspects who are deprived of their liberty by the police the right to inform a third person of their detention?

31. Apart from legal possibilities to delay this right, the provisions regarding notification of custody, with few exceptions, foresee that this should be done immediately after arrest. However, in practice it appears that family members or other third persons are often only notified after considerable delays, during or after the first official interview with an investigator, when a statement has been drawn up, or even only at arrival in a pre-trial detention facility. A reason for such delays could be that the officers effectuating arrests and/or custody do either genuinely not feel responsible for ensuring that detainees can inform somebody of their arrest, or that they experience insecurities as to whether this information might jeopardise the investigation and therefore rather leave it to the investigators working on the case. In Scotland, during the initial reception process a custody sergeant, after inquiring with the detainee who to contact, would immediately check whether there is any particular reason why the named person should not be informed and, if satisfied that this was not the case, would notify the person.

How can communication between officers responsible for custody and criminal investigators be improved in order to allow for an expedient clarification whether there are legal impediments to notifying a specific person of an arrest? What other measures can be taken to keep delays in informing third parties to a minimum?

²³ Carver / Handley, Does Torture Prevention Work?, fn. 12.

²⁴ In many States, the right to notify is subject to limitations, which might be imposed to protect the legitimate interests of the police investigation. Note that such exceptions should be clearly defined in law and strictly limited in time, and resort to them should be accompanied by appropriate safeguards, such as recording any delay in writing with the reasons therefore, and the approval of a senior police officer unconnected with the case or a prosecutor. The EU Directive on Access to a Lawyer allows for a limitation of the right to notify a third person only in exceptional circumstances and only "where justified in the light of the particular circumstances of the case on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; (b) where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised". The EU Directive also notes that whenever such a limitation is imposed the competent authorities should consider whether another third person could be safely informed of the deprivation of liberty.

32. Giving feedback to persons in police custody – whether or not it was possible to reach a family member or other person - appears to pose another challenge to police officers. The CPT observed a positive practice in Georgia, where detainees gave the officer the number, and the officer would call the indicated person in the presence of the detainee. In Spain, persons in police custody have the right to directly communicate by telephone, in the presence of a police officer, with a third person of their choice, and in England and Wales the right to personally make a phone call can only be limited if the person in question is suspected of a serious crime.²⁵
33. The “Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers” (Code C) of England and Wales further provides that if a person indicated cannot be contacted the detainee may choose up to two alternatives. If they cannot be contacted, the person in charge of detention or the investigation has discretion to allow further attempts until the information has been conveyed.
34. In any case, the fact that a third person has been successfully notified should be recorded in writing, with the name, number and exact time when notification has taken place; conversely, if a detained person does not wish to have anyone informed, this should be recorded in the custody record, too, and countersigned by the detainee.
35. Finally, the notification of custody of foreign detainees, who do not have relatives or close friends in the country of their detention, can cause difficulties. The CPT has noted that informing an embassy is not a substitute for family notification. In Cyprus, foreign nationals who cannot contact family members and who do not wish to contact a consular representative are by law provided with the right to inform the Office of the Ombudsman of their detention.

Could these positive practices be applied in other countries?

Right to a lawyer

36. The right to a lawyer as a safeguard to prevent police ill-treatment – as opposed to a guarantee for due process and the right to a fair trial – must meet several criteria in order to serve its preventative purpose. In particular, the right of access to a lawyer must be enjoyed by anyone who is under a legal obligation to attend – and stay at – a police establishment, irrespective of his/her precise legal status (i.e. whether formally declared a suspect or not), as from the outset of the deprivation of liberty. Moreover, lawyers should see their clients in person at the police station, and detainees should be able to speak in private with their lawyer, before they get questioned; lawyers should be able to be present during questioning, including preliminary or informal questioning; and persons who do not have the means to pay for their own lawyer should be provided with effective legal aid.
37. The underlying reasons for promoting these criteria are obvious: the risk of police torture and ill-treatment has often been found to be highest during the first few hours after apprehension; administrative detention and summonses of persons for informative talks are regularly abused for bypassing safeguards that would usually apply to persons who are officially declared suspects; and indigent persons are more likely to be vulnerable to police ill-treatment than those who can afford their own private lawyer.

²⁵ Note that Art. 6 of the EU Directive on Access to a Lawyer provides the right for suspects or accused deprived of their liberty not only to have a third person informed of arrest (Art. 5), but also to *communicate* with a third person nominated by them (Art. 6), subject to certain limitations.

38. However, it remains the exception that States would make it a general rule that the right to a lawyer extends to all persons deprived of their liberty, including administrative detainees.²⁶ The reluctance to grant everyone, including persons who are deprived of their liberty for purely administrative reasons, such as for identification or because they have caused a minor public order offence, is understandable, particularly in the light of the fact that legal aid would also have to be accorded to those persons in order to make the right effective for everyone. Still, a solution has to be found to counter practices whereby persons who are in fact suspected of a crime, are questioned by (operative) police officers under the guise of administrative detention or as “witnesses”, and only benefit from the right to a lawyer once an official protocol of arrest is drawn up and they are ready to sign a confession. Experience has shown that such practices entail a high risk of ill-treatment.

How can it be ensured that everyone *de facto* suspected of a crime and questioned by the police is effectively afforded the right to a lawyer?

39. Another recurrent problem, identified by the CPT, is that persons who have to rely on legal aid lawyers would often only get to see these lawyers at the court hearing.²⁷ Such a system obviously renders the preventive function, which a lawyer could play by his/her mere presence during interviews with the police, futile.

How can it be ensured that legal aid lawyers attend police stations in person at any particular time in order to assist indigent persons from an early stage of their detention?

Right to a doctor

40. The provision of emergency care for persons in police custody who are in obvious need of urgent medical attention does usually not pose any significant problems to police forces in CoE Member States. However, the right to access to a doctor - if it is to act as a safeguard against ill-treatment - is more than just the provision of emergency medical care: it comprises the entitlement to be seen by a doctor upon request, without limitations, possibilities for denial or discretion on the part of the police to make an assessment whether medical care is indeed needed. The laws and regulations of a number of CoE States explicitly foresee this right, including the entitlement to see a doctor of one's choice at one's own expense, while other laws do not provide for such a right. In practice, detainees in many States frequently report that the police denied their request to see a doctor.

Why is there reluctance to introduce a right to access to a doctor in law? What are the practical obstacles to providing every detainee who requests it with the opportunity to be seen by a doctor or other medical professional?

²⁶ See, however, the cases of Georgia and San Marino, where the right to a lawyer is applicable to all persons deprived of their liberty, for whatever reason.

²⁷ Noteworthy positive exceptions are the United Kingdom and Spain, where access to legal aid lawyers is guaranteed in law and practice.

41. A number of CoE countries have introduced systematic medical examinations of all persons who are deprived of their liberty by the police,²⁸ before or during police custody. This is a commendable practice, which could – if properly implemented – serve as an important safeguard against police ill-treatment. These routine examinations are usually carried out by doctors, nurses or paramedics who are directly working at the respective police facility, by visiting doctors, or in public hospitals, where apprehended persons are brought before entering custody.
42. The most important practical shortcoming noticed in almost all countries – whether during medical examinations upon the request of a detainee, or during routine medical examinations – is the complete lack of medical confidentiality. In most cases, police officers are routinely present during medical examinations, which is likely to discourage persons who have been ill-treated from saying so.

In practice, how can legitimate security concerns be met while at the same time not rendering the preventive aspect of a medical examination entirely futile?

43. Further, in practice medical examinations are oftentimes done in a cursory manner; detected injuries are not documented properly; and medical staff do not report indications or explicit allegations of ill-treatment to a competent authority. These problems appear to arise regardless of whether the medical professionals are private doctors visiting police stations, are employed by the police, or are working in public hospitals.

Employing medical staff directly at police custody facilities has advantages and disadvantages. On the one hand, they could be more efficiently trained in documenting signs of ill-treatment and reporting obligations than general medical staff working in public hospitals. On the other hand, police doctors oftentimes lack independence. How could this be solved?

²⁸ In some countries, systematic medical examinations are carried out in a limited number of police establishments.

From interrogation to investigative interviewing - a change of mindset²⁹

Introduction

44. The safeguards discussed above are so important that we cannot ignore any of them. However, from a torture-prevention perspective, these (and other) safeguards are nonetheless complementary measures: The most important safeguard against torture and other ill-treatment is indeed the methodology employed by the police during arrest, detention and questioning of suspects.
45. The second part of this paper will highlight one of the most precarious undertakings in the criminal justice process: the pre-trial questioning of criminal suspects. There are - in addition to the disturbing CPT reports highlighted above – imperative reasons to take a closer look at police questioning. First of all, conducting interviews of victims, witnesses and suspects is a core task of law enforcement. Information obtained from these interpersonal encounters between the power and the people typically forms the basis for subsequent decisions by the police, prosecutors and judges. Consequently, *how* the police behave and conduct their interviews will have a profound impact on the outcome, fairness, efficiency and reliability of any subsequent criminal proceedings, and ultimately, how citizens perceive the fairness of the criminal justice system.
46. In the early 1990s, a complete overhaul of the judicial system was initiated in the United Kingdom. The police were requested nothing less than altering their mindset and completely changing their procedures when questioning suspects of crime: from a heuristic, interrogative practice aimed at getting the suspect to confess (interrogations) to an evidence-based approach, designed to gather and test accurate and reliable information (investigative interviewing).
47. Although the development from interrogation to investigative interviewing has influenced police training outside the UK and was extended to various regions of the world, the vast majority of police forces still have not committed themselves to the fundamental principles and ethos underpinning the concept of investigative interviewing.³⁰ In his last report as UN Special Rapporteur on Torture, Juan Méndez urged the United Nations to develop global standards for police questioning, endorsing investigative interviewing as best practice. Investigative interviewing was chosen because scholars and practitioners from different corners of the world advised the Special Rapporteur that rapport-based interviewing represents the safest and most efficient approach to solve crime and counter terrorism.³¹

²⁹ It is important to address the distinction between the terms interrogation and investigative interviewing. The historic literature around interrogation refers to a heuristic approach, including coercive and/or manipulative techniques, designed to obtain a confession. Investigative interviewing - as defined by the UK Home Office in 1992, developed and refined by pioneering scholars in close cooperation with the police - is an evidence based approach, designed to gather and test accurate and reliable information from victims, witnesses and suspects of crime. See Thomas M. Williamson, "From interrogation to investigative interviewing: strategic problems in police questioning", *Journal of Community and Applied Social Psychology*, 1993 (3), pp. 89-99.

³⁰ David Walsh et al. (eds.), *International Developments and Practices in Investigative Interviewing and Interrogation*, Volume 2: Suspects, Routledge Frontiers of Criminal Justice, 2015.

³¹ United Nations Special Rapporteur on Torture, interim report, fn. 13.

The underlying problem

48. In order to prevent torture and other coercive interrogation tactics, legislators and policy decision makers should reflect on the fact that coercive or manipulative confession-oriented interrogation techniques and torture are only different means to the same end, administered by the police to confirm their belief of guilt. Although manipulative confession-oriented techniques are less brutal than torture, the mindset of interrogating detectives is none the less the same: the police are trying to solve their (sometimes complex) tasks with a methodology designed to confirm their presumption of guilt.
49. Police engage in such thinking because they believe it is the right thing to do. Not only because our inherited and dominant thinking style forces us to believe that searching for confirmative information is the smartest way of solving problems,³² but also because the systems in which the agents are operating put a premium on confessions. The human tendency (cognitive predisposition) to seek confirmation and criminal justice systems that are encouraging their agents to do so are a perilous mixture, leading to wrongful convictions³³ and planting the seeds of torture.³⁴

Dismantling the myth

50. In line with Méndez' initiative for global guidelines to prevent harsh interrogations, it is essential to address the widespread myth that torture and other coercive interrogation tactics represent an efficient way of eliciting information and solving crime.³⁵ One may argue that the introduction of subtler, manipulative confession-oriented interrogation techniques into the torture-prevention framework only dodges the problem and diverts much needed focus.
51. However, if the Council of Europe were to address the dominant "crime fighting" argument for traditional interrogation techniques by unveiling the myth of their effectiveness, Europe would be in a unique position to introduce a sustainable framework, which could benefit all States pursuing a more effective and professional police force, including those in which torture no longer constitutes a serious threat.
52. Judges and prosecutors who are tacitly accepting that their police torture, coerce or manipulate their suspects, do so because they believe in the myth of the effectiveness of such practices. There are many reasons why actors within the criminal justice system believe in this myth. Their lack of relevant, scientific knowledge is arguably a dominant factor. Police and members of the judiciary receive limited (or no) training in interpersonal communication theories, explaining why ethical and empathic communication facilitates the flow of reliable information;³⁶ or information about the fact that memory is positively stimulated under these conditions.³⁷ They equally do not receive enough training to fully understand the impact coercion, manipulation, and even leading questions may have on the reliability of information gathered during traditional

³² Daniel Kahneman, *Thinking, Fast and Slow*, Farrar, Straus and Giroux, 2011; Ivar Fahsing and Karl Ask, "The Making of an Expert Detective: The Role of Experience in English and Norwegian Officers' Investigative Decision Making." *Psychology Crime and Law*, 2015, 22 (3), pp. 203-223.

³³ Richard A. Leo, *Police Interrogation and American Justice*, Harvard University Press, 2008.

³⁴ Darius Rejali, *Torture and Democracy*, Princeton University Press, 2007.

³⁵ Fred E. Inbau et al., *Criminal Interrogation and Confessions*, 4th edition, Aspen Publishers, 2001;

³⁶ Laurence J. Alison et al., "Why Tough Tactics Fail and Rapport Gets Results: Observing Rapport-Based Interpersonal Techniques (ORBIT) to Generate Useful Information From Terrorists", *Psychology, Public Policy, and Law*, 2013 (19), pp. 411-431.

³⁷ Shane O'Mara, *Why Torture Doesn't Work: The Neuroscience of Interrogation*, Harvard University Press, 2015.

interrogations, particularly when the interviewees are vulnerable and/or find themselves in a vulnerable position.³⁸

53. Dismantling the myth will invalidate the argument of necessity. Scientific studies, including systematic analysis of field experience have demonstrated that a more effective methodology is available.³⁹ This knowledge is equally relevant for police, security and military personnel in their quest of timely, accurate and reliable information.

Testing of alternative hypotheses - the implementation of the presumption of innocence

54. Training programmes that are encouraging detectives to solve their (sometimes) complex problems by searching for confirmation (confessions) are not only ignoring knowledge deriving from research on human reasoning and decision-making in which good thinking is promoted as a thorough search for an alternative without favouring the one already on mind;⁴⁰ they are in contradiction to the mindset required to put into practice the values and principles imbedded in the presumption of innocence.⁴¹
55. As pointed out above, the difference between *interrogations* and *investigative interviewing* is fundamental; these distinct approaches cannot be mixed up. The mindset of an investigative interviewer, in his/her preparations, interpersonal communication and questioning of suspects cannot be altered along the way. To start off with "investigative interviewing" and then move on to interrogation at the end - or in between - has been a common manipulative technique in confession-orientated interrogations for decades.⁴² Although the Netherlands have come a long way, Dutch police interviewing methodology still includes elements of manipulation.⁴³ This (and similar) combinations of methodologies do not facilitate the advocated change of mindset necessary to advance the much-needed replacement of interrogations with investigative interviewing.
56. In order to facilitate a successful transformation from traditional interrogations to contemporary investigative interviewing techniques it is essential to keep in mind that when one "tool" (torture, coercion and/or manipulation) is taken away from a practitioner, it needs to be replaced by an alternative "tool" - a better way of solving the task at hand. The *Convention against Torture Initiative (CTI) training tool* can serve as a

³⁸ Elizabeth F. Loftus and John C. Palmer, "Reconstruction of automobile destruction: An example of the interaction between language and memory", *Journal of Verbal Learning and Verbal Behaviour*, 1974 (13), pp. 585–589; Saul M. Kassin et al., "Police-Induced Confessions: Risk Factors and Recommendations", *Law and Human Behaviour*, 2009, 34, 1, pp. 3-38; Elizabeth F. Loftus and John C. Palmer, "Reconstruction of automobile destruction: An example of the interaction between language and memory", *Journal of Verbal Learning and Verbal Behaviour*, 1974 (13), pp. 585–589.

³⁹ Rebecca Milne and Ray Bull, *Investigative Interviewing: Psychology and Practice*, Wiley, 1999; Laurence J. Alison et al., "Why Tough Tactics Fail and Rapport Gets Results", fn. 36; Christian A. Meissner et al., "Interview and interrogation methods and their effects on true and false confessions", *Campbell Systematic Reviews*, 13, 2012;

⁴⁰ David V. Canter and Laurence J. Alison, 'Beyond profiling: Developments in investigative psychology', in David V. Canter and Laurence J. Alison (eds.), *Interviewing and Deception*, Aldershot, 1999, pp. 23–40.

⁴¹ Andy Griffiths and Asbjørn Rachlew, 'From Interrogation to Investigative Interviewing. The Application of Psychology', in Andy Griffiths and Rebecca Milne (eds.), *The Psychology of Criminal Investigation. From Theory to Practice*. Routledge. 2018 (forthcoming).

⁴² Richard A. Leo, *Police Interrogation and American Justice*, fn. 33.

⁴³ Willem-Jan Verhoeven, 'The complex relationship between interrogation techniques, suspects changing their statement and legal assistance. Evidence from a Dutch sample of police interviews', *Policing and Society*, 2016.

starting point.⁴⁴ This training tool has been written by leading experts for practitioners, developed to assist States to educate and inform officials on good practices in implementing the UN Convention against Torture, and to raise awareness of the general public so they understand and can exercise their rights under the Convention.

Article 11 of the UN Convention against Torture (CAT) requires States to keep their interrogation rules, instructions, methods and practices under systematic review. When was the last time your country carried out a systematic review?

57. With the power of the scientific argument, agents of change should argue that following these procedural steps (as outlined in the CTI tool) will stimulate the necessary change of mindset. As pointed out by Méndez in his interim report to the UN General Assembly:
- “As a matter of best practice, interviewers are encouraged to proceed, when necessary, with probing questions designed to elicit information that will test all possible alternative explanations identified during the preparation of the interview. Strategic probing and disclosure of potential evidence allows officers to explore the interviewee’s account in depth before proceeding to the next topic, helping to ensure that the presumption of innocence is respected while strengthening the case against a guilty suspect by preventing the subsequent fabrication of an alibi”.⁴⁵
58. The alternative hypotheses that the police must test in their investigation are the same hypotheses (alternative scenarios/explanations) that the prosecution and eventually the court must consider (ensure that they are tested) before the evidential threshold “proven beyond reasonable doubt” can be reached. The evidential value of information at hand is strengthened through strategic thinking without coercion.
59. This procedure stimulates open-mindedness and ultimately the application in practice of the presumption of innocence. It requires strategic thinking and flexibility, characteristics detectives and intelligence officers usually find attractive, as they are inducing a sense of pride in their own detective/intelligence work. Research and experience from the field show that police officers embrace the “new tool” because they find it applicable and effective.⁴⁶

From European to universal standard

60. Already in 2002, the CPT captured the essence of investigative interviewing:⁴⁷

“First and foremost, *the precise aim of such questioning* must be made crystal clear: that aim should be to obtain accurate and reliable information in order to discover the truth about matters under investigation, not to obtain a confession from someone already presumed, in the eyes of the interviewing officers, to be guilty.”

⁴⁴ Convention Against Torture Initiative (CTI) training tool 1/2017, “Investigative interviewing for criminal cases”, attached to this document and available at http://cti2024.org/content/docs/CTI-Training_Tool_1-Final.pdf.

⁴⁵ United Nations Special Rapporteur on Torture, interim report, fn. 13, para. 54.

⁴⁶ Andy Griffiths and Asbjørn Rachlew, ‘From Interrogation to Investigative Interviewing’, fn. 41; Ivar Fashing, and Asbjørn Rachlew, ‘Investigative interviewing – The Nordic region’, in Tom Williamson et al. (eds.), *International Developments in Investigative Interviewing*, Willan Publishing, 2009, pp. 39–65.

⁴⁷ CPT, 12th General Report, fn. 10.

61. Fifteen years of research on investigative interviewing has passed since the CPT formulated its standard. Moreover, fifteen years of experience from the field - training, developing and applying investigative interviewing in practice - has produced additional valuable knowledge.⁴⁸ Today, the Council of Europe is in a unique position, not only to influence the development of an updated European standard, but also to spearhead the ongoing development of a global standard for investigative interviewing.⁴⁹
62. The suggested text below attempts to capture the spirit of CPT's formulation, while taking account of the latest developments within the field of investigative interviewing, including strategic use of evidence and, with as few words as possible, the very essence of the PEACE-model of investigative interviewing.

Council of Europe standard 2018 (?):

The aim of *investigative interviews* with suspects (as well as victims and witnesses) is to collect accurate and reliable information to disclose all relevant facts about events; it is not about obtaining information that reinforces the assumptions already held by officers. Police officers with an open mindset are far more effective; they are applying in practice the *presumption of innocence* by generating and actively testing alternative hypotheses through systematic preparation, empathic rapport building, the use of open-ended questions, active listening, and strategic probing and disclosure of potential evidence.

Are there any impediments within your criminal justice system to introducing an investigative interviewing approach as the standard methodology for police (crime) investigators?

What are the steps that need to be taken within your country to develop and introduce an investigative interviewing approach?

⁴⁸ Andy Griffiths and Asbjørn Rachlew, 'From Interrogation to Investigative Interviewing', fn. 41.

⁴⁹ United Nations Human Rights Council, Torture and other cruel, inhuman or degrading treatment or punishment: safeguards to prevent torture during police custody and pretrial detention, fn. 13.