



EUROPEAN CENTER FOR
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Torture in Europe: The Law and Practice

Regional Conference Report

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Methodology

Participants were invited to the Europe Regional Experts Meeting on *Law and Practice on Torture in Europe* on the basis of their expertise and experience in litigation and advocacy on torture related issues. The participants completed a questionnaire regarding the law and practice of torture in their jurisdiction and made presentations at the meeting covering national as well as thematic issues. The meeting brought together experts from Armenia, Belgium, Croatia, Cyprus, France, Germany, Greece, Hungary, Poland, Romania, Russia, Spain, Ukraine, and United Kingdom and provided an opportunity to exchange information and experiences on litigating torture cases and advocating legal and institutional reforms.

This report builds on the presentations and discussions at the meeting, as well as the information shared by expert participants in their responses to the questionnaire that informed the content and structure of the meeting. It provides a review of laws, practices and patterns of torture, examining the availability and effectiveness of safeguards, accountability mechanisms and avenues to obtain reparation for torture in the countries considered. The Report reflects both systemic challenges and best practices identified by the participants in respect of key areas of concern.

Executive Summary

While the practice of torture varies considerably across Europe, reflecting country specific and sub-regional issues, the regional meeting clearly demonstrated that torture and ill-treatment constitutes a major concern across the region that engages all of the 15 countries considered. Torture and ill-treatment as a method of police interrogation is reported in many countries, particularly former communist States, with a view to extracting Statements or confessions which are frequently privileged as an expedient means of “solving” crimes and meeting quota for the successful resolution of cases. Excessive use of force by police was also identified as recurring practice, giving rise to ill-treatment and even torture in some cases where it is reportedly used in the course of arrest or in response to demonstrations. In some parts of the region, conditions in prisons and other detention facilities are reportedly so poor that they may amount to cruel, inhuman or degrading treatment, as evidenced in a number of European Court of Human Rights (ECtHR) judgments.

There is widespread recognition that persons belonging to marginalised groups, such as ethnic minorities, migrants and asylum seekers, women, as well as lesbian, gay, bisexual, transgender and intersex persons (LGBTI) are particularly at risk of torture. In the case of migrants and asylum seekers, this is attributed to their precarious legal situation. Entrenched notions of racial prejudice and discrimination contribute significantly to the ill-treatment. This is particularly so for members of the Roma community who face social and economic exclusion, as well as discrimination, prejudice and high levels of racism in much of Europe. In some parts of the region, gender-based violence is reportedly widespread, particularly at the hands of non-State actors, and takes a number of forms, including trafficking, domestic labour in diplomatic missions, female genital mutilation, and various other types of sexual violence, such as rape. While the response of national systems and the ECtHR to gender-based violence have been somewhat incoherent, the adoption of the European Convention on preventing and combating violence against women and domestic violence in 2011 is a welcome development.

Torture has also been a major concern in the global “war on terror”, where a number of European countries have been implicated, in particular in the form of complicity in renditions that have often resulted in torture. In some parts of the region, security legislation adopted under counter-insurgency and counter-terrorism efforts has undermined safeguards and facilitated recourse to torture. Furthermore, several of the countries exercise considerable military influence over foreign territories; such engagements have repeatedly given rise to allegations of torture and ill-treatment committed by troops extra-territorially.

All of the countries considered are obliged to prevent and prosecute torture under one or more international instruments, and they all prohibit torture and ill-treatment within their national legal systems. However, the definition of torture used differs considerably, with several falling short of the requirements of article 1 of UNCAT. In some countries, constitutional prohibitions are not translated into offenses under criminal law, resulting in lack of prosecutions or prosecutions for lesser crimes. Even where there are anti-torture provisions in statutory law, there is a tendency to prosecute perpetrators under less serious offenses such as abuse of power, felonious injury, or assault. With regard to jurisdiction for torture committed abroad, all the relevant countries have universal jurisdiction over torture except for Russia. However, these laws are rarely used due to a number of legal and practical obstacles. Participants highlighted retrogressive developments in some countries where universal jurisdiction legislation has been diluted as a result of political backlashes following the filing of cases against high-ranking officials from countries such as the United States, Israel and China.

Pre-trial detention safeguards, in line with internationally accepted standards, exist on paper in most countries, though practical and legal loopholes exist, in particular for certain categories of suspect under security legislation. The right to be brought promptly before a judge in criminal proceedings, and the right to *habeas corpus* is not always made effectively available to detainees in the region. While most countries have satisfactory safeguards in place relating to the right to access a lawyer, in practice problems have been identified in a number of countries, such as delays in access, or meetings with lawyers only being allowed in the presence of prison officials. Furthermore, the right to a medical examination in line with international standards such as the Istanbul Protocol is not recognised in many jurisdictions.

Traditionally, the European Committee on the Prevention of Torture (CPT) has played an important role in providing independent oversight for places of detention in the region. National systems of monitoring, including those designated under the Optional Protocol to the Convention against Torture (OPCAT), increasingly complement the regional oversight. While national monitoring mechanisms can play an important role in seeking to protect detainees, their effectiveness varies considerably across the region. Admissibility of statements obtained through torture is mostly prohibited, though problems in the legal systems of some countries means that in practice courts may accept such evidence. The principle of non-refoulement has been incorporated into the legal systems of most of the States, though is not strictly adhered to, and some countries do not provide effective remedies to protect against refoulement. Reports from across the region testify to a practice in which non-nationals have been returned to countries where they are at risk of torture and/or ill-treatment.

While special police or prosecution units or independent complaints bodies tasked with investigating torture cases exist, lack of independence and other problems abound in practice. The emerging picture is disconcerting. While standards are well established, investigations are frequently described as inadequate and ultimately ineffective. In several countries public prosecution services cooperate closely with the police, frequently resulting in impunity. Furthermore, there is a marked reluctance to bring cases against police officers. In some countries, investigations are marred by the lack of an independent investigative body, such as in Armenia and Turkey, or by a lack of political or judicial will, resulting in lack of accountability. Particular problems have also been encountered in the investigation of torture by armed personnel, as was seen in the case of *Baha Mousa* in the United Kingdom, who was tortured to death at the hands of British troops in Iraq.

Immunity and amnesties are not a prominent issue in the region, but statutes of limitation have at times prevented effective prosecutions. Statutes of limitation in criminal cases differ across the region. In some countries, such as the United Kingdom (UK), there is no limitation period, whereas in many others, such as Belgium, Poland and Spain, the period is the same as for other crimes, namely 15 years, unless the offense also constitutes a crime against humanity or a war crime. In practice, however, limitation periods can be significantly shorter, particularly where the authorities prosecute cases of torture as lesser offences, such as felonious injury and assault, a trend identified in the region. Accountability for torture is also hampered by the dearth of forensic evidence, resulting from *inter alia*, a lack of independence of forensic doctors lack of familiarity of relevant standards, and an inability to carry out timely and confidential examinations. While many of the countries considered have legislation that provides for the protection of victims and witnesses, implementation is frequently deficient and the intimidation still remains common.

The recognition of the right to reparation for torture varies. Some countries have special regimes in place, while in others; victims must seek reparation through the same criminal and civil procedures available to other crimes. In addition, several States have legislation providing some—usually limited—compensation for victims of crimes. In practice, the systems in place often fail to provide victims with access to adequate reparation, owing to a number of factors including the reliance on outcomes of criminal proceedings which hamper victims' ability to seek reparation through civil means.

The most common form of reparation awarded to victims of torture and ill-treatment in the region is monetary compensation, which is in itself often inadequate. The kinds of damages that can be compensated vary, with some jurisdictions allowing for pecuniary or non-pecuniary damages, or both. The amount of compensation awarded in practice varies widely across the region and even within countries and single courts, resulting in a shared dissatisfaction on the part of lawyers of the lack of certainty and predictability. In turn, this raises considerable concerns as to the adequacy of compensation in a given case. In addition, the settling of claims in particular has been viewed as a highly questionable practice where it was not complemented by effective investigations and other forms of reparation, including public acknowledgment. Across the region the lack of medical and psycho-social rehabilitation for victims of torture and ill-treatment, particularly in the form of psychological and psychiatric services, is seen a major shortcoming in both law and practice.

The shortcomings identified in preventing and punishing torture in the region point to broader structural problems, including a lack of political commitment to hold perpetrators accountable, weak domestic institutions and lack of respect for the rule of the law. As such, the effective tackling of impunity for torture and ensuring victims' rights in Europe requires multiple interventions on the part of human rights lawyers and civil society, focused on individual cases and strategic litigation, as well as advocacy for wider legislative and institutional changes.

1. Practice and Patterns of Torture in 15 Countries

The practice of torture varies considerably across Europe, reflecting country specific and sub-regional factors. In the numerous contexts considered, torture nonetheless constitutes a major concern, engaging all of 15 countries. This applies in particular to torture and ill-treatment, including excessive use of force, by the police, especially in most former communist countries. While the nature and prevalence of torture and ill-treatment by law enforcement agencies differs markedly between countries, there is widespread recognition that persons belonging to marginalised groups, such as ethnic minorities, immigrants and asylum seekers, women, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are particularly at risk of torture. The nexus between marginalisation and torture points to broader structural concerns of discrimination and prejudice across the region, which create and sustain an environment in which torture is frequently resorted to with impunity. While efforts have been made to tackle gender-based violence such as human trafficking, responses have been of limited effectiveness. In addition, the use of sexual torture continues to be a concern in several countries.

The last decade has witnessed two major developments implicating European States in torture: counter-terrorism and engagement in armed conflict. The context of counter-terrorism operations has implied complicity in renditions,¹ which is reported to have frequently resulted in torture. In addition, the use of torture and excessive force by troops operating extraterritorially has also been an issue, such as British forces in Afghanistan and Iraq.

1.1 Torture and ill-treatment by police in the course of criminal investigations

Torture as a method of police interrogation is reported throughout the region, and is particularly common in former communist countries such as Armenia, Russia and Ukraine. Torture and ill-treatment is most prevalent following arrest, which is frequently not executed in accordance with formal procedures, circumventing existing custodial safeguards. Law enforcement agencies intimidate and ill-treat suspects with a view to extracting statements or confessions, which are routinely privileged as an expedient means of ‘solving’ crimes and meeting quota for the successful resolution of cases.

Data from Russian NGOs estimates that approximately 30 per cent of criminal suspects are tortured by police with a view to extracting a confession.² In addition, it is estimated that 50 per cent of all torture victims in Russia are persons who were involved in criminal investigation proceedings, either as a suspect, witness, or informer.³ Forms of torture such as sustained beatings are reported to be widely used in criminal investigations, including punching, kicking and hitting the victim for a prolonged period, as well electrical shocks. *Mikheyev v Russia* is an emblematic case, followed by many other cases, in which the European Court of Human Rights (ECtHR) found a violation of article 3 of the European Convention on Human Rights (ECHR).⁴ *Mikheyev*, a police officer suspected in the rape and disappearance of a young woman in Nizhny Novgorod, was subjected to torture including the use of

¹ The illegal transfer of individuals suspected of being engaged in acts of terrorism for interrogation purposes

² Response to REDRESS questionnaire.

³ Expert Contribution, November 2011.

⁴ European Court of Human Rights, Judgment 26 January 2006, Case of *Mikheyev v Russia*, Application no. 77617/01, para. 129, available at:

<http://www.redress.org/downloads/casework/Mikheyev%20v.%20Russian%20Federation%20judgment%20of%2026%20Januar%202006.pdf>

electric currents by police investigating the case. When trying to escape, he jumped out of the window of the police station, as a result of which he is now permanently disabled.

Similarly, following its 2010 visit to Armenia, the UN Working Group on Arbitrary Detention reported on beatings of detainees and prisoners by police and National Security investigators to secure confessions, and the use of ill-treatment in criminal investigations.⁵ According to the European Committee for the Prevention of Torture (CPT), torture and ill-treatment in this context mainly consisted of punches, kicks and blows inflicted with truncheons, bottles filled with water or wooden bats. The use of torture for the purpose of obtaining confessions in investigations was also reported in Croatia, Cyprus, Hungary, Greece and Spain.

Excessive use of force by police other than during interrogations was identified as recurring practice. Such force gives rise to ill-treatment and may amount to torture in some cases, particularly where it is used in the course of arrest, as is the apparent practice in Belgium. In Spain, excessive use of force during the apprehension of suspects is reportedly followed by further ill-treatment in custody, including punching, kicking, whipping on the soles of the feet, and threats of death and sexual abuse towards the victim, or his or her family. The use of excessive force in response to demonstrations or public events, such as football games, was also highlighted as an area of concern.

1.2 Ill-treatment and torture of persons belonging to marginalised groups

Across the region, marginalised groups including ethnic minorities, migrants and asylum seekers, women, and LGBTI persons are particularly vulnerable to torture and ill-treatment owing to a number of factors. In the case of migrants and asylum seekers, one participant succinctly attributed this vulnerability to:

[A] combination of the lack of proper legal status in the country, the lack of certainty about what their rights are and their ability to come forward and defend those rights when they feel that they could be removed at any point [which makes them] feel [...] that they don't have full protection of the law as a citizen would.⁶

Indeed, there is evidence that the precarious legal status of migrants and asylum-seekers in some countries puts them at heightened risk of detention, and prejudice against non-nationals on the part of police and prison officials contributes to the prevalence of violence against immigrants and asylum-seekers.

In Cyprus, for example, there is reportedly a severe problem of ill-treatment in immigration detention centres and prisons, particularly against foreign or Turkish Cypriot detainees and migrants. Two recent cases before the ECtHR address this issue, namely *Egmez v Cyprus*, which concerned the ill-treatment of Turkish Cypriots, and *Shchukin v Cyprus*, which concerned the ill-treatment of Ukrainian migrants.⁷ In Turkey, it is reportedly common for asylum-seekers to be arrested at the border and to be ill-treated by

⁵ Report of the Working Group on Arbitrary Detention, Mission to Armenia, UN Doc. A/HRC/16/47/Add.3, 17 February 2011, p.12.

⁶ Expert contribution, November 2011.

⁷ European Court of Human Rights, Judgment of 21 December 2000, *Egmez v Cyprus*, Application no. 30873/96, Judgment of 29 July 2010, *Shchukin v Cyprus*, Application no. 14030/03.

the gendarmerie before being placed in “guest houses” where they are subjected to further abuse by police. In countries such as Belgium and the UK, law enforcement officials have reportedly used excessive force amounting to ill-treatment during expulsions of undocumented migrants and asylum-seekers whose applications have been rejected.⁸

Entrenched notions of racial prejudice and discrimination contribute to ill-treatment experienced by marginalised groups. Experiences in many European countries point to a practice where violence and abuse by police is motivated by discrimination. Throughout the region, members of the Roma community face harassment, discrimination and violence by police, including Greece, Hungary, Croatia, and Romania. The particular vulnerability of the Roma has been attributed to their social and economic exclusion, as well as the discrimination, prejudice and high levels of racism they face in much of Europe. In Greece, police reportedly use brutal and excessive force when apprehending a Roma person, resulting in treatment that violates of article 3 of the ECHR.⁹ Police violence towards the Roma is also common in Hungary. In addition, there are cases and reports of Roma women undergoing forced or coerced sterilization in some countries.¹⁰ Participants also reported that members of minority groups apprehended by police in Spain have been severely beaten, as a result of racial discrimination.

Violence against women amounting to torture or ill-treatment has also been reported from some parts of the region, such as Turkey. In Greece, women detainees have been subjected to invasive and humiliating vaginal examinations carried out by prison staff in the course of body searches. In addition, non-national women who are found to be in violation of Greece’s immigration laws are often detained alongside men, and are additionally subjected to sexual abuse by police officers.¹¹ Members of the LGBTI community have also been targeted, for example in Croatia where there are reports that such persons have been forcibly detained in psychiatric institutions for extended periods of time.¹² The case of *Zontul v Greece* before the ECtHR illustrates discrimination faced by LGBTI persons.¹³ The applicant, Zontul, was detained by the Greek coastguard along with over a hundred other migrants in extremely poor conditions, and many of the migrants were physically assaulted. Zontul was raped with a truncheon, and he believes he was singled out because of his sexual orientation (he is homosexual). The Court found that the Greek coastguard officials were responsible for torture and ordered Greece to pay €50,000 in compensation.

1.3 Gender-based violence and failure to protect

Participants identified violence against women as a primary concern in respect of torture and ill-treatment by non-State actors in the region. Gender-based violence specifically targeting women takes a number of forms, including trafficking, domestic labour in diplomatic missions, female genital

⁸ Amnesty International, “Belgium: Amnesty International submission to the UN Universal Periodic Review 11th Session of the UPR Working Group, May 2011, , available at:

http://lib.ohchr.org/HRBodies/UPR/Documents/Session11/BE/AI_AmnestyInternational-eng.pdf

European Court of Human Rights, Judgment of 4 October 2010, *Stefanou v Greece*, Application no. 2954/07, para. 52..

¹⁰ CEDAW, *A.S. v Hungary*, UN Doc. CEDAW/C/36/D/4/2004, 14 August 2006 available at:

http://www.bayefsky.com/pdf/hungary_t5_cedaw_2_2003.pdf. See also <http://www.praguepost.com/news/2902-government-admits-forced-sterilization.html>; and <http://www.humanrightseurope.org/2011/11/sterilised-roma-woman-wins-human-rights-appeal/>.

¹¹ Expert Contribution, November 2011.

¹² Expert Contribution, November 2011.

¹³ European Court of Human Rights, Judgement of 17 January 2012, *Zontul v Greece*, Application no. 12294/07.

mutilation, and various other types of sexual violence, such as rape. Responses to gender-based violence by national systems and the ECtHR (often failing to find a violation of discrimination under article 14 ECHR) have been characterised by lack coherence and effectiveness, though some recent responses may point to a more concerted efforts.

There have been some developments in this respect; in 2011, the Council of Europe adopted a Convention on preventing and combating violence against women and domestic violence, aimed at (a) protecting women against all forms of violence, and preventing, prosecuting and eliminating violence against women and domestic violence; (b) contributing to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women; (c) designing a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence; (d) promoting international co-operation with a view to eliminating violence against women and domestic violence; (e) providing support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

The ECtHR has issued several landmark cases though its approach to various forms of gender-based violence, such as domestic violence, has not been entirely consistent. One notable case is that of *Rantsev v Cyprus and Russia* on trafficking, in which the Court clarified the positive obligations of States in relation to trafficking under article 4 of the ECHR. The case was brought by the father of a Russian woman, Oxana Rantsev, who was found dead in Cyprus after being trafficked there from Russia for the purposes of sexual exploitation.¹⁴ An inquest in Cyprus found that she had died from injuries sustained from jumping off a balcony. Her father's complaint centred on the lack of an effective investigation into the circumstances of her death in Cyprus, the lack of protection provided by the Cypriot police while she was still alive and a victim of trafficking, and Russia's failure to punish those responsible for trafficking his daughter to Cyprus to be sexually exploited. Cypriot police had contact with Oxana in the hours before her death and failed to make appropriate inquiries about her circumstances, despite evidence that she may have been a victim of trafficking. According to the Court, States are obligated to adopt effective legal and administrative frameworks to prevent trafficking, as well as protective measures when it is suspected, and investigations where it has already occurred. Furthermore, the Court held that these obligations arise for all States potentially involved in trafficking—the State of origin, States of transit and destination States.

In the case of *Opuz v Turkey* before the ECtHR, a woman who had complained to the police about domestic abuse on a number of occasions was eventually killed by her husband. The complaint was brought by her mother, and the Court found a violation of articles 2 and 3, and, notably, article 14 of the ECHR. The Court's argument for finding an article 3 (prohibition of torture) violation was that the State had failed to meet its positive obligations to protect the victim.¹⁵ The Committee on the Elimination of Discrimination Against Women (CEDAW) has, in a number of cases involving domestic violence, found the State to be in violation of its obligations under article 2 of the CEDAW for failure to provide adequate protection.¹⁶ In the case of *M.C. v Bulgaria*, which was brought by a Bulgarian rape victim, the ECtHR similarly recognised rape as a violation of article 3 and 8 of the ECHR.¹⁷ Notably, it also found that

¹⁴ European Court of Human Rights, *Rantsev v Cyprus and Russia*, Judgment of 7 January 2010, Application no. 25965/04.

¹⁵ European Court of Human Rights, *Opuz v Turkey*, Judgment of 9 June 2009, Application no. 33401/02, para. 176.

¹⁶ CEDAW, *Sahide Goekce (deceased) v Austria*, UN Doc. CEDAW/C/39/D/5/2005; *Fatma Yildirim (deceased) v Austria*, UN Doc. CEDAW/C/39 D/6.2005.

¹⁷ European Court of Human Rights, *M.C. v Bulgaria*, Judgment of 4 December 2003, Application no. 39272/98.

Bulgaria had failed to put in place an effective criminal law system for the investigation and prosecution of rape, a positive obligation under article 3 of the ECHR.

1.4 Torture in the context of armed conflict and counterinsurgency

Following the 9/11 attacks, counterinsurgency operations have been portrayed or viewed as part of a broader effort against “terrorism”. In practice, States have repeatedly resorted to security legislation that undermines safeguards and fosters impunity, and, as a result facilitates recourse to torture. In Turkey, persons detained on terrorism-related offences, who are often of Kurdish origin, have reportedly been subjected to sleep deprivation and extremely long interrogations aimed at breaking their will and obtaining confessions and other information.¹⁸ In Russia, torture and related violations have been particularly prominent during and following the armed conflict in Chechnya. In addition to torturing those arrested on terrorism-related charges, if police suspect an individual has joined a terrorist organization or an illegal rebel group, one reported means of apprehending that person is for the police to arrest, detain and torture a relative until the suspect gives him or herself up. In Spain, persons arrested on suspicion of involvement with the ETA (“Basque Homeland and Freedom”) have reportedly been tortured by authorities in the course of investigations. Alleged forms of torture include forced exercise and being forced to remain standing to the point of exhaustion, sleep deprivation, exposure to severe cold, blindfolding, hallucinogenic drugs, humiliation of a sexual nature, beatings, threats of violence, threats (including threats of sexual violence) against family members, racist verbal abuse, insults and intimidation, and being forbidden to wash. The Special Rapporteur on Torture reported these violations following his visit to Spain in 2003, which drew extremely hostile reactions from Spain at the time.¹⁹

In Russia and Turkey, human rights defenders have also suffered harassment, including torture, when trying to document torture and to assist victims. In Chechnya, local human rights defenders are reportedly no longer able to carry out their work of monitoring and investigating allegations of torture by security officials as a result of threats received. In response, NGOs have put in place mobile units composed of Russians from outside Chechnya to carry out this work. While this has been a creative and effective initiative, harassment and threats towards human rights defenders is well documented in Russia, not only in Chechnya. In some cases it has even led to death or disappearance.²⁰

1.5 Torture and counter-terrorism

Torture has been a major concern in the global “war on terror”, in particular with regard to alleged complicity of security agencies in renditions, including torture committed in the course of arrest, detention and interrogation of suspects. The practice of refoulement, i.e. sending suspects of terrorism to countries where they may be at risk of torture, including by means of securing diplomatic assurances from receiving countries, has also given rise to concerns.

¹⁸ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Report to Turkish Government on the visit to Turkey from 4 to 17 June 2009, available at: <http://www.cpt.coe.int/documents/tur/2011-13-inf-eng.htm>.

¹⁹ Report of the Special Rapporteur on the question of Torture, Theo van Boven, Visit to Spain, 6 February 2004, UN Doc. E/CN.4/2004/56/Add.2.

²⁰ Expert Contribution, November 2011.

In the UK, for example, terrorism-related security concerns have led to the government's closer cooperation with foreign States where torture is known to be systemic. Several former Guantanamo detainees have brought civil claims against the UK Government on the basis of complicity in their rendition and torture, and these have been settled out of court but without admission of liability. Other civil cases in the UK are still pending, as well as police investigations into whether UK officials were complicit. A public/official inquiry into many of these allegations was announced in 2010 but was abandoned in early 2012, ostensibly because of fresh allegations, which the police needed to investigate arising from documents discovered in Libya after the fall of Gaddafi. At present, therefore, there remain unanswered questions as to what the UK's involvement in unlawful activities has been, and there is no indication when an adequate inquiry will be held. A recent ruling of the ECtHR in the protracted litigation relating to the extradition of *Abu Quatada* from the UK to the USA on terrorism charges held that extradition could go ahead, dismissing arguments that he risked unlawful treatment there.

Several States have also been implicated in the illegal transfer and secret detention of suspected terrorists under the US Central Intelligence Agency's extraordinary renditions programme. In Poland, "high-value detainees" including Khalid Sheikh Mohamed and Abu Zubaydah, were reportedly detained at a CIA detention facility in Szymany, where they alleged torture. Many suspects were also handed over to US authorities without going through any extradition process as required by law. While there is an ongoing investigation into these serious violations, and charges have been brought against the former head of Polish intelligence Zbigniew Siemiatkowski, there has been little movement, which was attributed to the lack of political will to investigate or prosecute them due to the Polish government's loyalty towards the USA government. Similarly, in Spain there is no apparent support for moving forward a case regarding the lawfulness of the CIA renditions programme, which included flights that went through Spain.²¹ The Romanian government has refused to acknowledge any role in the detention or transfer of suspected terrorists, though former CIA operatives disclosed that the US ran a so-called "black site" prison in Bucharest.²² In response to these failings, in September 2012, the European Parliament adopted a resolution calling on European countries, in particular Romania, Poland and Lithuania, to investigate and fully disclose their role in the illegal transfer and detention of suspects in the "war on terror".²³

1.6 Torture and ill-treatment abroad

Several European countries exercise considerable influence over foreign territory, such as Turkey in Northern Cyprus, or have troops stationed abroad, such as Russia in Transdniestra in Moldova, or the UK in Afghanistan and Iraq. These engagements have repeatedly given rise to allegations of torture and ill-treatment committed by troops. The ECtHR has recognised in several cases, especially *Al-Skeini v UK* that the ECHR applies extraterritorially, particularly in custodial situations and during occupation. In the UK, NGOs such as *Public Interest Lawyers* have litigated a number of such cases, including the case of *Baha Mousa*, an Iraqi who was beaten to death by UK soldiers in Basra. The case became a leading precedent, which exposed shortcomings in the training and responses of UK soldiers, and led to a major

²¹ Expert Contribution, November 2011.

²² "Romania denies hosting secret CIA prisons," CNN, 7 September 2011, available at: <http://edition.cnn.com/2011/WORLD/europe/09/07/europe.cia.rendition/index.html>

²³ European Parliament Press Release, *Alleged CIA prisons in Europe: MEPs urge member states to investigate*, 11 September 2012, available at: <http://www.europarl.europa.eu/news/en/pressroom/content/20120907IPR50813/html/Alleged-CIA-prisons-in-Europe-MEPs-urge-member-states-to-investigate>.

inquiry that recommended fundamental changes. In addition, the UK was held responsible in the ECtHR case of *Al-Saadoon & Mufdhi v United Kingdom* for handing over individuals to Iraqi forces where they would be at risk of the death penalty.²⁴ These developments are a testimony to litigation and advocacy efforts that exposed a series of practices amounting to violations by forces operating abroad, a practice that Judge Bonello referred to as “Gentleman at home, hoodlums abroad” in his concurring opinion in the *Al-Skeini* case.

1.7 Conditions of Detention

Conditions in prisons and other detention facilities are reportedly so poor in some countries that they amount to cruel, inhuman or degrading treatment. In Armenia, for example, the ECtHR found that detention conditions amounted to degrading treatment in violation of article 3, having regard to the overcrowding, inadequate sleeping conditions, lack of provision of basic food and water needs, and restricted access to a toilet.²⁵ In Croatia, the CPT also raised issues relating to prison overcrowding caused by the 40 per cent increase in the prison population in the previous three years.²⁶ In Russia, there have been long-standing concerns regarding detention conditions, also covered in an early case against Russia before the ECtHR, *Kalashnikov v Russia*. However, a number of reforms have been initiated following adverse ECtHR rulings, particularly *Ananyev and Others v Russia*.²⁷ In Greece, according to ECtHR case law, detention conditions for administrative detainees – detained on the grounds of having violated the country’s immigration laws – constitute degrading treatment.²⁸ In the UK, a pattern of ill-treatment of detainees held in Immigration Removal Centres, many of which are operated by private contractors, has given rise to concerns, including the use of excessive force in removal proceedings, restraint (including handcuffing) during medical examinations, and the detention of known torture victims with no provision for appropriate health care.

²⁴ European Court of Human Rights, *Al-Saadoon & Mufdhi v United Kingdom*, Judgment of 4 April 2010, Application no. 61498/08.

²⁵ European Court of Human Rights, Judgment of 4 May 2009, Case of *Tadevosyan v Armenia*, Application no. 41698/04, para. 51, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89969>

²⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Croatian Government on the visit to Croatia from 4-14 May 2007, para. 48, available at: <http://www.cpt.coe.int/documents/hrv/2008-29-inf-eng.htm>.

²⁷ European Court of Human Rights, (Pilot) Judgment of 10/04/2012, Case of *Ananyev and Others v Russia*, Applications nos. 42525/07 and 60800/08, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108465>.

²⁸ European Court of Human Rights, Judgment of 6 June 2001, Case of *Dougoz v Greece*, Application no. 40907/98, para. 46, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59338>.

2. Legal Framework

2.1 Regional and International Law on the prohibition of torture

The main regional and international treaties relating to torture are:

- the European Convention on Human Rights 1950
- the International Covenant on Civil and Political Rights 1966
- the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987
- the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and
- the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002.

Armenia, Croatia, Cyprus, France, Germany, Hungary, Poland, Romania, Spain, Turkey, Ukraine and the UK have become parties to all of the above treaties. Belgium, Greece, and Russia are equally State party to all treaties except the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (OPCAT). All 15 States considered are party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. All of these States have ratified the four Geneva Conventions of 1949, and with the exception of Turkey, all are also party to Additional Protocols I and II to the Geneva Conventions. Most of the States, with the exception of Armenia, Russia, Turkey and Ukraine, are also party to the Rome Statute of the International Criminal Court (ICC).

2.2 National Legislation on the Prohibition of Torture

International law requires States to adhere to their treaty obligations in good faith. Unless the adoption of legislation is specifically prescribed in a treaty, such as in articles 4 and 5 UNCAT, States retain a measure of discretion as to how best to implement their obligations. Across the region, the system of incorporation differs, following monist (direct incorporation with primacy of international law), dualist (implementing legislation needed) or mixed conceptions. In some of the States considered, such as Belgium and Croatia, binding international treaties are considered automatically to form part of the national legal order, making them directly applicable in so far as they are self-executing. In others, such as the UK, implementing legislation is required, such as the Human Rights Act 1998 (“HRA”). While national systems vary in respect of the status accorded to international law, its practical application depends to a large extent on whether it is reflected in statutory law, its use by national lawyers and human rights defenders and the receptiveness of the judiciary. In the UK, for example, domestic courts have become increasingly receptive to international law arguments, in particular in torture litigation. For example, international law sources are often cited by claimants and the courts as interpretive aids when considering ECHR rights, as was seen in the landmark *Al-Skeini* and *Pinochet* cases in which reference was made, *inter alia*, to the ICTY case of *Prosecutor v Furundzija* [1998].

As recognised in article 2 of UNCAT, States must take effective legislative measures to prevent torture. Anti-torture legislation, be it in the form of specific provisions or pieces of legislation, is an essential means of ensuring that torture is effectively prohibited and punished. Under article 4 of UNCAT, States

are obligated to enact legislation prohibiting torture in line with article 1 of UNCAT, which includes stipulating appropriate punishments that reflect the gravity of the crime and its consequences. All countries included in this report prohibit torture and ill-treatment, either under provisions of the constitution or under statutory criminal law, or both. However, while constitutional prohibitions are well-established in the region, these are not always reflected in statutory law. Aspects of the prohibition may not be explicitly or adequately covered by the relevant laws, for example: the lack of a criminal offence of torture, ambiguous or deficient definitions, or that the law may not provide for adequate reparation, or institutions, particularly those tasked with monitoring detention facilities and investigating allegations of torture.

2.3 Jurisdiction over torture committed abroad

The main bases for extraterritorial jurisdiction for torture in the region are active personality jurisdiction (based on the nationality of the suspected perpetrator), passive personality jurisdiction (based on the nationality of the victim), and universal jurisdiction, which is not linked to the nationality of the suspect, the victim, or to the harm caused to the forum State's national interests. In this report, universal jurisdiction provisions are those that allow for jurisdiction over a foreign national for crimes committed abroad not involving a victim from the State in question.²⁹

All of the countries considered, with the exception of Turkey, recognise the principle of active personality jurisdiction. The passive personality jurisdiction principle is also recognised in the majority of relevant countries, excluding Cyprus, Hungary, Armenia, Turkey and Ukraine. Furthermore, legislation in all the countries considered provides for universal jurisdiction for the crime of torture, excluding Russia. Despite the prevalence of such provisions in the region, these are rarely enforced in practice due to a number of legal and practical obstacles. These include the lack of a definition of torture in criminal law, the requirement that a link is established between the forum State and the State in which the violations took place, immunities and misperceptions about their application, the broad discretion afforded to prosecution authorities in some jurisdictions, and the apparent reluctance of some governments to prosecute politically sensitive cases.

Participants highlighted retrogressive developments in some countries where universal jurisdiction legislation has been watered down as a result of political backlashes following the cases against high-ranking officials from countries such as the United States, Israel and China. Belgium's well-known universal jurisdiction law was repealed in August 2003 and replaced, in a far more restrictive form, with amendments to the Belgian Criminal Code. The previous law had provided for universal jurisdiction over war crimes, crimes against humanity and genocide without any nexus requirements. The 2003 amendments provide Belgian courts with jurisdiction over genocide, crimes against humanity and war crimes, as well as ancillary offences, only if the accused is Belgian or has primary residence in Belgian territory, if the victim is Belgian or had lived in Belgium for at least three years at the time the crimes were committed, or if Belgium is required by treaty to exercise universal jurisdiction over the case. Similarly, the universal jurisdiction provisions in Spain were amended to include a link requirement in 2009. As such, universal jurisdiction in Spain is now limited to cases where the alleged perpetrator is present in Spain, the victims are of Spanish nationality, or there is some relevant link to Spanish interests. Nexus requirements are found in the universal jurisdiction legislations of the majority of

²⁹ This section draws on the REDRESS Report *Universal Jurisdiction in the European Union*, available at: <http://www.redress.org/downloads/conferences/country%20studies.pdf>, in addition to participants' contributions.

countries considered, though with differences. In Belgium, “presence” is required to initiate an investigation and to prosecute in court; in France presence is required to initiate an investigation, but not for a trial to proceed; while in Germany there is a nexus requirement for torture but not for war crimes committed after 2002. In practice, these nexus requirements dilute the scope and meaning of universal jurisdiction and create a legal obstacle to its effective implementation.

Participants discussed the role of strategic litigation in generating the political unease and backlash against universal jurisdiction laws in Spain and Belgium, and whether bringing high profile cases under universal jurisdiction actually contributed to the watering down of the relevant provisions. It was noted that many universal jurisdiction cases do not have a high likelihood of a success due to, among others, immunities and the broad discretion afforded to prosecutors. There is significant value in bringing cases that will provide scope for further judicial interpretation to extra-territorial jurisdiction. Other positive effects of such litigation were identified, such as applying pressure to violating States and raising awareness. However, participants also identified the inherent tension between the need to pursue strategic litigation that elaborates on judicial interpretation of universal jurisdiction on the one hand, and the rights of all victims to access justice on the other.

Another barrier to the effective application of extra-territorial jurisdiction for torture is the considerable amount of discretion allowed to prosecutors who are often inclined not to investigate or prosecute, or who appear to be pressured by powerful governments not to. This is evident in the lack of any universal jurisdiction cases to date against suspects from “friendly States”. For example, a Spanish investigation into the six US government officials involved in creating the legal framework allegedly permitting torture used by the US to justify coercive interrogations in the “war on terror” has been delayed and stalled as a result of significant diplomatic pressure exerted by the US government, which came to light through the Wikileaks cables.³⁰

Immunities and their misapplication also pose a serious obstacle to the effective application of universal jurisdiction. It should be noted that in most cases, decisions about immunity in extraterritorial cases in Europe are made by prosecutors rather than courts, who, as discussed below, may lack the knowledge of international law necessary to make such decisions. For example, in 2005 a criminal complaint was filed in Germany against *Zakir Almatov*, former Uzbek minister of interior, and *Rustan Inojatow*, head of Uzbek secret service, along with 9 other Uzbek officials, for torture and crimes against humanity carried out in Andijan on 13 May 2005. At the time, Almatov was undergoing medical treatment in Germany and fled as a result of the complaint. However, in 2006, the German Federal Public Prosecutor decided not to open an investigation. Moreover, Inojatow visited Germany in 2006, but the Public Prosecutor refused to take any action, arguing that he was in the country on an official invitation and consequently enjoyed immunity, though it is unclear where the invitation was issued and for what reason. In another example, in 2007 a complaint of torture was filed against Donald Rumsfeld, former US Secretary for Defense, who was on a private visit to Paris. Citing immunity, the prosecutor refused to investigate the complaint, even though Rumsfeld benefitted from neither personal immunity, as he was no longer Secretary of State, nor functional immunity, which is not applicable for crimes under international law. This is in contrast with the case of *General Pinochet* in the UK, where, in 1998, the House of Lords found that Pinochet was not entitled to immunity for acts of torture on the basis that torture was not part of his official functions as a head of State for which he would normally enjoy immunity.

³⁰ The Guardian, *US Embassy Cables: Spanish prosecutor weighs Guantanamo criminal case against US officials*, 1 December 2010, available at: <http://www.guardian.co.uk/world/us-embassy-cables-documents/200177>.

There are also a number of practical challenges to bringing complaints under universal jurisdiction provisions. Investigations into alleged torture in a foreign country can be difficult due to distance and access issues, and national authorities often lack the necessary training, expertise and resources to carry out investigations transnationally. However, these challenges need not stand in the way of effective prosecution, as was evidenced in the UK case of *Faryadi Zardad*, an Afghan warlord. Zardad's case was the first domestic prosecution of a foreign national for an act of torture committed outside the UK. He was tried under Section 134 of the Criminal Justice Act 1998 for torture and hostage taking in Afghanistan between 1992 and 1996. Zardad was living in the UK when the charges were brought, and despite investigations under very challenging circumstances in Afghanistan, the significant commitment from the UK authorities to hold him accountable for torture showed that this can be done.

Another practical obstacle is the fact that prosecutors may lack the requisite knowledge and familiarity of international law to make informed decisions regarding, for example, immunity. In some countries there have been positive developments in this regard, with specialised "war crime units" established within police and prosecutor's offices to address and overcome some of these practical challenges. In addition, authorities are often not aware that suspects are on their territory, making it crucial for victims or NGOs to alert authorities and work with them. Another practical challenge is the lack of knowledge amongst victims and NGOs regarding where and how to file complaints under universal jurisdiction. Victims may also face difficulties in accessing evidence and information essential to their case.

3. Prevention of Torture

3.1 Safeguards and complaint and investigation mechanism

3.1.1 Pre-trial detention and judicial control

Legal limits to the length of pre-trial detention are an important safeguard as detainees are often highly vulnerable to torture and ill-treatment during this period. The UN Committee against Torture has routinely emphasised the importance of limiting pre-trial detention as an article 2 obligation of States party to UNCAT.³¹ Most of the relevant countries have legislation that limits pre-trial detention in line with internationally accepted norms. However in many countries there are legal and practical loopholes that make it possible for pre-trial detention to be extended, thereby increasing the risk of torture and ill-treatment. In some countries, such as Turkey and the UK, security legislation allows for the extension of pre-trial detention for certain categories of suspect. In the UK, legislation passed in 2006 allowing for detention of terrorist suspects for up to 28 days lapsed early in 2011, but the present provision still allows for detention without charge for up to 14 days.³² In addition, even in those countries where limits to pre-trial detention exist, they are not always respected in practice.

A major safeguard during pre-trial detention is the right to be brought promptly before a judge in criminal proceedings. Equally in detention, the right to *habeas corpus*, such as in psychiatric hospitals, ensures that a judge determine the legality of detention within 48 hours and take any measures necessary to protect a detainee from torture. Croatian law, for example, requires that a criminal suspect must be brought before a court within 24 hours of their arrest. The judge may order that the suspect be further detained in a prison establishment, or released. In exceptional circumstances, the judge may prolong detention by the police by an additional 24 or 48 hours. Similarly, the Criminal Procedure Law of Cyprus requires that an arrested person be brought before a judge no later than 24 hours after apprehension. The judge must make a decision on whether to release or to remand the suspect in custody no later than 3 days after the appearance of the arrested person. A judge may remand a person in police custody for renewable periods of up to 8 days (the day following the remand being counted as the first day), if so requested by a ranking police official. The total period of remand detention must not exceed 3 months.

In Armenia, both the Constitution and the Criminal Procedure Code State that a person may not be subjected to detention for more than 72 hours unless a relevant warrant is issued by the court. Police are also obligated to draw up a protocol of detention within three hours from when a suspect is presented to the investigating body. The 72 hours period is unduly long as it exceeds the internationally recognised 48 hours limit. Moreover, experts noted that in practice, suspects are interrogated by police informally before any protocol is drawn up and before they are recognised as suspects or informed of their rights. This circumvents any judicial control and torture is reportedly most likely to take place at

³¹ For example, see Committee Against Torture, *Concluding Observations for Kazakhstan*, UN Doc. A/56/44/(SUPP), 17 May 2001; Committee Against Torture, *Concluding Observations for Cameroon*, UN Doc. CAT/C/CR/31/6, 5 February 2004; Committee Against Torture *Concluding Observations for Uzbekistan*, CAT/C/CR/28/7, 6 June 2002; Committee Against Torture, *Concluding Observations for Japan*, CAT/C/JPN/CO/1, 3 August 2007.

³² Hansard 26 January 2011, column 306, available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110126/debtext/110126-0001.htm>. In non-terrorist suspect cases the normal maximum period is 48 hours.

this stage when police seek to extract a confession. Similar practices are reportedly common in Russia, where suspects will be “invited to talk” at the police station, which can last up to 12 hours during which time they are not officially in custody and therefore do not benefit from legal assistance. Reportedly, beatings and abuse are most common during this period. Similarly, in Ukraine suspects apprehended are not immediately registered as being in custody, and torture and ill-treatment are most common during the initial period of unofficial detention.

3.1.2 Access to lawyer and medical examination upon arrest

Detainees’ rights of prompt access to a lawyer and a medical check-up are fundamental safeguards against torture and ill-treatment for those in pre-trial detention, and are firmly established in international and regional instruments, as well as the case law of the ECHR. The point at which detainees may access these safeguards, and the level of protection provided as a result, varies considerably in the countries considered. While most countries have satisfactory safeguards in place relating to the right to access a lawyer, there are problems in ensuring this is enforced in practice, particularly from the moment of arrest. The right to a medical examination is not similarly recognised in many jurisdictions, and practical problems abound in ensuring effective application.

Access to a lawyer

The discrepancy between the provisions of the law granting the right to access a lawyer and the practice has been noted in a number of countries. For example, while the Croatian Criminal Procedure Code provides that an arrested person must be promptly informed that he is entitled to legal assistance, the CPT reported following its 2007 visit that many of those detained by the police experienced delays in exercising their right to a lawyer, generally after an investigator had obtained a statement. Similarly, in Cyprus, the right to access a lawyer along with other fundamental safeguards are established in law.³³ However, the CPT report of 2008 noted that access to a lawyer was not being authorised from the very outset of police custody. There were also instances where access to a lawyer was made subject to conditions or denied outright.

In Armenia a criminal suspect has the right to defence³⁴ only from the moment the protocol of detention (the legal document which officially makes the detainee a suspect) is drawn up, which can be up to three days after arrest, resulting in no access to a lawyer prior to and during initial police interviews. Similarly, in Russia, experts noticed that it is common for suspects to be brought in for questioning before they are formally charged and therefore not officially in custody, and consequently are not granted their right to access a lawyer. In Belgium, access to a lawyer is also not immediate, but is provided only after the investigating judge has interviewed the suspect, which usually takes place before issuing a warrant of detention on remand. In practice, this means that in most cases the first contact between the suspect and his lawyer takes place 24 hours after of detention. This is also the case in Poland. A new Belgian law has recently been passed concerning access to a lawyer upon arrest. The Belgian “Salduz Act” gives arrested persons the right to access a lawyer at the initial stage of arrest, and before the first interrogation by police.³⁵

³³ Law 163(I)/2005 Law of the Rights of Arrested and Detained Persons.

³⁴ Article 63 of the Armenian Criminal Procedure Code.

³⁵ The Belgian Act of 13 April 2011 (“Salduz Act”), entered into force in January 2012.

In Turkey, a suspect can request access to a lawyer at all stages of the investigation and prosecution under article 149 of the Criminal Procedure Code. However, experts noted that in practice, in cases involving allegations of torture, the suspect's request to see a lawyer is most likely to be rejected. Furthermore, there are frequent problems experienced in ensuring the confidentiality of the conversation between lawyers and the suspects, as well as problems regarding the amount of time and facilities provided for these visits. In Germany, article 114(b) of the German Code of Criminal Procedure provides that persons accused and arrested of a crime "may at any time, also before his examination, consult with defence counsel of his choice." However, during its 2010 visit, the CPT noted allegations from a number of detainees that they had been denied their right to contact a lawyer.³⁶ The Hungarian Code of Criminal Procedure similarly provides that a person who is the subject of criminal proceedings has a right to legal assistance at every stage of the proceedings. However, the CPT reported in 2006 that "[i]t became clear during the visit that, in practice, it was rare for persons to benefit from the presence of a lawyer at any stage of police custody [...] it was alleged that in many cases lawyers appointed *ex officio* had had no contact with detained persons until the first court hearing or did not even appear in court."³⁷

In England and Wales, legislative reforms have significantly changed the system. The Police and Criminal Evidence Act 1984 and the Codes of Practice issued under it contain a variety of safeguards aimed at the protection of those in police custody, including the right to consult privately with a solicitor. Furthermore, free independent legal advice is available to all arrested persons, which one expert cited as a significant factor contributing to the UK successes in terms of litigating cases of alleged torture or ill-treatment as it enabled victims to make their complaints with legal representatives funded by legal aid

Access to a medical examination

The legal systems of many countries do not provide an explicit right to medical examination in line with international standards such as the Istanbul Protocol.³⁸ The Armenian situation illustrates some of the challenges. Article 21 of the Armenian law on "Treatment of arrestees and detainees" of 6 February 2002 provides detainees with the right to undergo a medical examination upon admission to the relevant detention facility. The CPT has also noted that in practice, access to medical treatment for detainees in Armenia can be subject to delays and that medical examinations often take place in the presence of prison staff.³⁹ In addition, the lack of trained medical staff at places of detention and the fact that many examinations take place in the presence of police and prison staff, contrary to international standards, creates serious obstacles to the enjoyment of this right for detainees.

Other countries do not provide for an explicit right to medical examination. In the UK, medical examinations are not required by law, but under the Code of Practice for the Detention, Treatment and

³⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the German Government on the visit to Germany from 25 November to 7 December 2010*, para. 19, available at: <http://www.cpt.coe.int/documents/deu/2012-06-inf-eng.htm>

³⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Hungarian Government on the visit to Hungary from 30 March to 8 April 2005*, para. 23, available at: <http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.htm>

³⁸ Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 9 August 1999, available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>

³⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Armenian Government on the visit to Armenia from 10 to 21 May 2010*, available at: <http://www.cpt.coe.int/documents/arm/2011-24-inf-eng.htm>.

Questioning of Persons by Police Officers. If a detainee is thought to be in need of medical attention, whether requested or not, the detainee must receive appropriate clinical attention as soon as reasonably practicable.⁴⁰ Similarly, in Belgium detainees can request to undergo a medical examination, though this is not provided for in law and experts noted that in practice there are difficulties in gaining access to medical care for detainees. In its 2007 report on Croatia, the CPT expressed regret that there were still no formal legal provisions guaranteeing the right of persons taken into police custody to have access to a doctor, which remains in practice at the discretion of police officers.⁴¹ The CPT also reported that medical examinations of detained persons in Croatia were often carried out in the presence of police officers. In Turkey, a medical examination must be conducted by a physician to determine the health condition of the individual, namely whether the apprehended person is to be detained; whether he was apprehended by the use of force; whether his or her place of detention changed for any reason; whether the period of detention is extended; or if he or she is released or transferred to a judicial body. However in practice, during forensic examinations, it has been found that there are serious problems with respect to the confidentiality of the doctor-patient relationship. The lack of respect for the privacy of detainee's medical information was also identified as a concern in Hungary.

3.1.3 Monitoring bodies

Traditionally, the CPT has played an important role in providing independent oversight for places of detention in the region. Its members carry out periodic visits to places of detention in all European countries, providing a non-judicial mechanism to prevent detainees from being subjected to torture or ill-treatment.⁴² Following the entry into force of OPCAT, member States are required to establish National Preventive Mechanisms, which now increasingly complement regional oversight.⁴³ In Croatia, for example, following the entry into force of the *Act on the National Prevention Mechanism for the Prevention of Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* in February 2011, the Ombudsman was designated the National Prevention Mechanism (NPM), empowered to systematically monitor conditions in places of detention. However, there are already concerns that the head of the Ombudsman's office has mostly advisory powers and it remains to be seen how effective it will become in practice. In Poland, the Ombudsman was made the NPM but the office has not been given funding to function effectively, which prompted public debates about Poland's commitment to honour its international law obligations.

National systems of monitoring differ considerably in their effectiveness, which undermine their preventive function in several countries. In the UK, for example, *Her Majesty's Inspectorate of Prisons* has responsibility for inspecting prisons, immigration detention facilities and, jointly with HM Inspectorate of Constabulary, police custody facilities. The Inspectorate's reports tend to be highly regarded and are frequently relied upon in litigation, including claims of breaches of article 3 of the ECHR. The Inspectorate therefore plays an integral role in identifying abuse and poor practices, but has

⁴⁰ Section 9, Code C of Police and Criminal Evidence Act 1984.

⁴¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Croatian Government on the visit to Croatia from 4 – 14 May 2007, para. 20, available at: <http://www.cpt.coe.int/documents/hrv/2008-29-inf-en.pdf>

⁴² For more information on the CPT, see: <http://www.cpt.coe.int/en/about.htm>.

⁴³ Current Status of NPM in Europe: Optional Protocol to the Convention against Torture (OPCAT), Part IV, available at: <http://www2.ohchr.org/english/law/cat-one.htm>. Armenia, Cyprus, France, Germany, Poland, Spain and United Kingdom of Great Britain and Northern Ireland, amongst other European countries, have designated NPMs and notified them to the SPT. Hungary, Romania, Turkey and Ukraine are some of the countries that have not notified NPMs to the SPT.

no power to compel the government to take action. Prisons and Immigration Removal Centres in the UK also have Independent Monitoring Boards appointed by the Secretary of State for Justice from among members of the community where the prison is situated though the quality of their work is varied. Cyprus has a number of monitoring bodies, the most important of which is the Office of the Commissioner for Administration (Ombudsman). Its main functions include the inspection of places of detention. It can also make recommendations or contribute expertise to the development of regulations. According to experts, the monitoring bodies are effective in their ability to act as pressure groups for the implementation of different laws and regulations which protect and defend human rights.

In Armenia, three public monitoring bodies are mandated to oversee penitentiary institutions, places of detention and boarding schools. One critical shortcoming of the prison monitoring body is that it does not have access to police stations. They have access only to the facilities where the arrested persons are detained. Furthermore, suspects are often held in police stations illegally, which cannot be recorded by the oversight body. The reports and recommendations of the oversight bodies are non-binding and in practice considered relatively ineffective. In Russia, Public Monitoring Commissions (PMCs) were established throughout the country in 2009 to oversee places of detention. These are composed of citizens, in many cases representatives from NGOs and civil society. They have access to places of detention following a formal notification. However their effectiveness is questionable particularly given that members of PMCs can only speak with detainees in the presence of prison staff. In some parts of the country, PMCs are non-functioning due to a dearth of active civil society members. In Greece, which to date has no independent supervisory body for prisons, the ratification of OPCAT has led to a recent draft law designating the Ombudsman's office as the NPM.⁴⁴ In some countries in the region, such as Ukraine, oversight mechanisms that had been in place were rendered ineffective following a change in government. Other countries, such as Romania, have no mechanisms for independent oversight of places of detention.

3.2 Admissibility of evidence obtained under coercion and confessions made to the police

The inadmissibility of statements obtained through torture in legal proceedings is a key safeguard and deterrent in respect of torture, as recognised in article 15 of UNCAT and ECtHR jurisprudence. Most countries considered prohibit this in their legislation and/or jurisprudence, and in some jurisdictions, special proceedings are in place when defendants allege that evidence submitted by the prosecution was obtained through torture or ill-treatment. In Cyprus, for example, evidence obtained through torture is not admissible. When an objection is raised as to the voluntariness of the confession, the court orders a "trial within a trial" to determine whether evidence can be used in legal proceedings. The prosecution must prove that the testimony was not taken in conditions that adversely impacted on the will of the accused or by inflicting direct or indirect violence or threat.⁴⁵

Notwithstanding these legal prohibitions, several problems remain. In practice, lack of prompt access to a judge, a lawyer and a medical examination frequently mean that it will be difficult to prove torture.

⁴⁴ UN Committee Against Torture Periodic Review of Greece, Opening Statement by Mr. Ioannis Ioannides, General Secretary for Transparency and Human Rights, Greek Ministry of Justice, available at: <http://www2.ohchr.org/english/bodies/cat/docs/statements/StatementGreece48.pdf>,

⁴⁵ Supreme Court of Cyprus, *Petri v Police* [1968] 2 CLR 40.

The burden of proof should in principle be on the prosecution, as it is in England and Wales.⁴⁶ However, in several countries, courts are seen to effectively require defendants to prove that a confession was extracted under torture. In many systems, officials and judges view the raising of allegations of torture as a means to evade criminal responsibility, including in the highly charged instance of ETA detainees in Spain.⁴⁷

Legal systems and courts may accept the “fruit of the poisonous tree” doctrine regarding evidence that has been obtained as a result of torture. One prominent example is the case of *Gäfgen v Germany*, where the suspect, Gäfgen, upon being threatened with torture, led the police to the body of the child he had murdered. This evidence was later admitted by the German courts, after having found that it was in the interests of justice, weighing the seriousness of the crime of murder against the breach of Gäfgen’s rights.⁴⁸ This case highlighted a grey area; while the ECtHR appear to suggest in its judgment that evidence obtained in breach of article 3 ECHR should be excluded under article 6 ECHR, it found that there had been a break in the causal chain in the case because Gäfgen had voluntarily confessed to the crime.⁴⁹ Some observers suggested that the ECtHR would not have come to this conclusion had it found that Gäfgen had been tortured. What is clear is that the ECtHR judgment in the Gäfgen case failed to settle the question though there was widespread agreement that an effective prohibition, and disincentive to using torture, should include the “fruit of the poisonous tree”.

The use of evidence obtained under torture has also featured prominently in several terrorism cases. In *A v United Kingdom*, which concerned the use of evidence in detention proceedings which may have been obtained through the torture of third parties abroad, the House of Lords found that evidence obtained under torture is always inadmissible in British courts although it differed on how the issue should be dealt with by the Special Immigration Appeals Commission (SIAC).⁵⁰ In *Othman v UK*, the ECtHR found for the first time that an individual should not be returned to a country, in this case Jordan, where he faces a trial in violation of article 6 ECHR because of the real risk that evidence obtained by torture would be admitted in his retrial.⁵¹ In *El-Haski v Belgium*, El Haski was convicted to seven years of imprisonment in Belgium for several offences committed with regard to an alleged terrorist group based in Afghanistan and Morocco. At his conviction, witness testimony from Morocco was used which, according to El Haski, was procured by torture. The ECtHR decided that an accused only has to prove a “real risk” that evidence has been obtained under torture or inhuman treatment. A higher standard, such as Belgian courts and the UK, intervening in the case, require with the proof of torture “beyond reasonable doubt”, violates the right to a fair trial enshrined in article 6 of the ECHR.

The *Binyam Mohamed* case⁵² illustrates the difficulties of ensuring that evidence obtained through torture is not used in the counter-terrorism context. Binyam Mohamed had been rendered to Guantanamo where he faced conspiracy charges based on evidence allegedly obtained through torture.

⁴⁶ Section 76 of the Police and Criminal Evidence Act 1984 provides that a court shall not allow a confession to be given in evidence against an accused person unless the prosecution have proved beyond a reasonable doubt that it was not obtained by oppression or in consequence of anything said or done which was likely to render it unreliable.

⁴⁷ Expert Contribution, November 2011.

⁴⁸ European Court of Human Rights, Judgment of 1 June 2010, Case of *Gäfgen v Germany*, Application no. 22978/05.

⁴⁹ *Ibid.*

⁵⁰ House of Lords, *A (FC) and Others v Secretary of State for the Home Department*, [2005] UKHL 71, 8 December 2005, available at: <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm>,

⁵¹ European Court of Human Rights, Judgment of 17 January 2012, Case of *Othman (Abu Qatada) v the United Kingdom*, Application no. 8139/09.

⁵² There were several judgements handed down in the course of protracted litigation. The final judgement was that of the Court of Appeal – see next footnote.

The charges were ultimately dropped and Binyam Mohamed returned to the UK where he brought legal proceedings to compel the UK authorities to provide evidence of the alleged abuse. Binyam Mohamed's lawyers invoked the equitable remedy known as a *Norwich Pharmacal Application*. This means that if someone, here the UK, becomes mixed up in the wrongdoing of another, even if innocent of that wrongdoing, they are under a duty to assist the wronged person by providing information. This argument was upheld in the Court of Appeal and as a result the UK failed to block Binyam Mohamed's request for disclosure.⁵³ While this jurisprudence is broadly encouraging, grey areas remain, particularly concerning the sharing of information that may have been obtained under torture for intelligence purposes. Furthermore, and as a result of former Guantanamo detainees (including Binyam Mohamed) bringing civil claims for damages against the UK Government,⁵⁴ legislation is currently before parliament,⁵⁵ which seeks to reverse the principles of open justice, which the Supreme Court upheld. The Government's aim is to enable *Closed Material Procedures* in civil claims against the security agencies. If this legislation is passed it will result in evidence being put before the court in closed hearings where the defendant will be present but not the plaintiff – instead, a Special Advocate is appointed to attend and make arguments for the plaintiff but the Special Advocate cannot divulge to the plaintiff what is being examined or take instructions.⁵⁶

3.3 Prohibition of refoulement, extradition and deportation to risk countries

The principle of *non-refoulement* is recognised in article 3 of UNCAT and the jurisprudence of the ECtHR. According to this principle, individuals must not be returned to a country where they are at a genuine risk of torture or ill-treatment. While the principle has been incorporated into the legal systems of most of the relevant jurisdictions,⁵⁷ it has not been strictly adhered to. Reports from countries across the region testify to a practice in which non-nationals have been returned to countries where they are at risk of torture and ill-treatment.

Several countries return refugees to their borders, or fail to provide effective remedies to protect against refoulement. Cypriot courts follow ECtHR precedents, namely the *Chahal v UK*⁵⁸ and *Saadi v Italy*⁵⁹ judgments on this matter and the principle of non-refoulement is also confirmed in article 4 of Law 6(I)/2000 on Refugees. However, experts expressed doubt as to their effectiveness in practice, noting that very few immigrants, asylum-seekers or refugees have the opportunity, resources or courage to bring their case to court. Furthermore, many may not even realise their rights or have the time to react before they find themselves deported. In Greece, article 79 of Law 3386/2005 (alien's law) explicitly prohibits deportation of individuals in a number of specific circumstances, including those who

⁵³ UK Court of Appeal (Civil Division), *R. (on the application of Binyam Mohamed) v The Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ. 65, 10 February 2010, available at:

http://www.reprive.org.uk/static/downloads/2010_02_10_Binyam_Mohamed_Court_of_Appeals_Judgment.pdf,

⁵⁴ UK Supreme Court, *Al Rawi v Security Service* [2011] UKSC 34, 13 July 2011, available at:

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0107_Judgment.pdf,

⁵⁵ Justice and Security Bill [HL], available at: <http://services.parliament.uk/bills/2012-13/justiceandsecurity.html>

⁵⁶ See REDRESS, *Justice and Security Green Paper: Consultation: Submission from the Redress Trust*, 6 January 2012, available at:

<http://www.redress.org/downloads/publications/Justice%20and%20Security%20Green%20Paper%20Consultation%20REDRESS%20submission%20-%20Copy.pdf>

⁵⁷ The principle of non-refoulement has been incorporated in the domestic law of e.g. Armenia, Belgium, Croatia, Hungary, Germany, Cyprus, Romania, Turkey, United Kingdom.

⁵⁸ European Court of Human Rights, *Chahal v UK*, Judgement of 11 November 1996, Application no. 70/1995/576/662.

⁵⁹ European Court of Human Rights, *Saadi v Italy*, Judgement of 28 February 2008, Application no. 37201/06.

have been recognised as refugees or have applied for asylum. While the law does not expressly prohibit deporting individuals to a country where they may be at risk of torture, according to one expert, the law incorporates and reaffirms the principle of non-refoulement. Furthermore, the competent authorities for issuing deportation decisions are reportedly under an obligation to consider in all cases the risk of serious harm in case of deportation, including the risk of torture, trafficking and violence. In practice, however, there are reports of new arrivals, including asylum-seekers, being arrested and issued with automatic deportation orders, effectively denying asylum-seekers access to the necessary procedures and potentially violating the principle of non-refoulement. While Hungarian law incorporates the principle of non-refoulement,⁶⁰ the Hungarian Helsinki Committee has recorded several practices that may constitute a breach of the principle in relation to the entry and residence of third-country nationals. Examples include alleged cases of forced return of asylum-seekers or foreigners likely in need of international protection to Ukraine, and the forced return of asylum-seekers, even persons who are particularly vulnerable, to Greece on a regular basis.

The Dublin II regulation of 2003 put in place a procedure in a majority of EU States, for determining the appropriate State responsible for dealing with asylum applications. Under the regulation, asylum seekers must submit their application for asylum in the country of their first point of entry into the “Dublin area”.⁶¹ The regulation is based on the assumption that the countries it applies to already respect the principle of non-refoulement, and that similarly, asylum seekers in all these countries would not be at risk of violations. However, in recent years it has become clear that this is not the case, and a number of asylum-seekers who have been expelled to Greece from other Dublin II countries have had their rights violated. This is both in terms of the asylum application procedures in Greece which do not provide guarantees against arbitrary return, and the conditions of immigration detention and lack of support provided to asylum-seekers, which the ECtHR has found amounts to ill-treatment and a violation of article 3 of the ECHR in the case of *M.S.S. v Belgium and Greece*, discussed in further detail below.

In Belgium, the law prohibits the expulsion, extradition, deportation or other removal of a person to a country where he or she would be at risk of torture and this risk is considered in the asylum application process—in cases where the risk is found to be real, asylum will be granted on these grounds. However, the 2009 recommendations to Belgium from the UN Committee Against Torture express concern regarding information received from NGOs with regard to the situation of several individuals who had been deported to their country of origin and who were at risk of torture, as was addressed in the recent ECtHR case of *M.S.S. v Belgium and Greece*.⁶² In this case, the complainant was an Afghan asylum seeker who had entered the EU via Greece in 2008 where he was immediately placed in immigration detention in extremely poor conditions. He travelled to Belgium in 2009 where he applied for asylum. Under the Dublin II agreement, the Belgian authorities submitted a request to the Greek authorities to take over his asylum application. After two months without a response, the Belgian Aliens Office, responsible for the processing of asylum applications, understood this to be tacit acceptance of its request and he was expelled to Greece, the country responsible for processing his application under the Dublin II agreement. The ECtHR found that by returning the applicant to Greece, Belgium was in breach of its non-refoulement obligations under article 3 of the ECHR for exposing him to both the asylum procedure

⁶⁰ Act II of 2007 on the entry and stay of third country nationals (TCN Act), Section 51 (1) stipulates the principle of non-refoulement.

⁶¹ The signatories to the Dublin II Regulation (Regulation 2003/343/CE) are Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Spain, United Kingdom, Slovakia, Slovenia, Sweden.

⁶² European Court of Human Rights, *M.S.S. v Belgium and Greece*, Judgement of 21 January 2011, Application No. 30696/09.

in Greece, which put him at risk of arbitrary removal, as well as to inhuman treatment as a result of the poor living conditions he would face. The Court also found Greece to be in violation of article 3. As a result of this judgment, Belgium reportedly no longer returns asylum seekers to Greece.

Refoulement is prohibited by law in the UK and is enforceable by persons at risk of *refoulement* under sections 6 and 7 of the Human Rights Act 1998. The UK has also enshrined its *non-refoulement* obligations in domestic asylum legislation. However, many individuals are reportedly returned to countries where there is a risk. Risk assessments of whole countries that are made by the British authorities tend to err on the side of finding low risks rather than a more accurate assessment of the dangers present in countries like Afghanistan or Somalia, to which removals still continue. Furthermore, the UK has concluded Memoranda of Understanding containing diplomatic assurances with a number of countries, including Jordan, Libya and Lebanon. Most recently, the UK has attempted to deport Abu Qatada, an alleged Muslim extremist, to Jordan, a country known for its use of torture and ill-treatment, where he is wanted on terror-related charges. The UK claims to have secured diplomatic assurances from the Jordanian government that Qatada will receive a fair trial and will not be subjected to torture or ill-treatment in Jordan. However there are serious questions regarding how such assurances are monitored in practice, and what recourse is available to Qatada in case of violation of these assurances. The ECtHR, controversially, found that the diplomatic assurances were sufficient to guarantee article 3 ECHR rights, but held that Qatada's extradition to stand trial in Morocco would violate article 6 ECHR (see above).

In an important extension of the scope of non-refoulement, the ECtHR found in *Al Saadon and Mufdhi v UK* that it applies to the in-country transfer of detainees handed over by British soldiers to Iraqi authorities.

While several States, such as Russia, Belgium, Turkey, Spain, and the UK, have ignored interim orders by the ECtHR not to return persons in breach of article 3 of ECHR, the European Court of Human Rights' jurisprudence has affirmed the absolute prohibition of refoulement and has led to changes in practice, as for instance in Ukraine.

4. Accountability for Torture

4.1 Torture as criminal offence

Constitutional prohibitions on torture and ill-treatment are well-established in the region. However, these prohibitions are not always translated into criminal law. This leaves the prohibition at an abstract level, making it difficult for perpetrators to be held accountable and for victims to secure redress. Even where courts interpret torture in line with UNCAT or the ECHR, this does not apply to criminal cases where an offence of torture is not recognised in criminal law. This has repeatedly resulted in a lack of prosecutions, or prosecutions for lesser crimes that fail to adequately capture the egregious nature of torture.

In Germany, the prohibition of torture is guaranteed by the constitution; it forms part of the inviolability of human dignity under Article 1 and the right to bodily integrity protected in article 2(1) of the Basic Law. Furthermore, article 104(1) provides that detained persons may not be abused physically or psychologically. Although torture is not defined by national law, according to commentary on the constitution, torture is understood in accordance with international treaties, particularly the ECHR. However, the lack of definition is problematic. In the *Gäfgen* case, for example, the deputy chief of the Frankfurt police and the detective officer who had threatened Gäfgen with torture were prosecuted and convicted for coercion and sentenced to a suspended fine.⁶³ The Committee Against Torture has repeatedly, though unsuccessfully to date, recommended that Germany make torture a criminal offence in line with article 1 of UNCAT.⁶⁴

In Poland, torture is explicitly prohibited under article 40 of the constitution. While the Criminal Code refers to torture as an element of international crimes, there is no explicit crime of torture. Acts of torture can therefore only be prosecuted under article 207 of the Criminal Code as “use of violence or threat thereof” in order to coerce witnesses or suspects within the scope of criminal proceedings – a public official (or an accomplice) who perpetrates such an act is subject to penalty of up to ten years of imprisonment, or other crimes, such as rape where applicable. In Hungary, torture is prohibited under article 54 of chapter XII of the constitution. However, the Penal Code does not include *per se* a criminal offence of torture, it contains several provisions that address offences that may constitute torture. Section 226 prohibits ill-treatment in official proceedings, section 227 addresses forced interrogation and section 228 unlawful detention. The UN Committee against Torture observed in its recommendations on Hungary, “that all elements of the definition of torture as provided by article 1 of the Convention are still not included in the Criminal Code of the State party.”⁶⁵ Under the Universal Periodic Review in 2011, the Hungarian government pledged to amend the Penal Code in order to bring the definition in line with article 1 of UNCAT.

Torture is prohibited in the statutory law of most countries in the region, namely Armenia, Belgium, Croatia, Cyprus, Greece, Romania, Russia, Spain, Turkey and the UK. However, the definition used differs considerably, with several definitions falling short of the requirements of article 1 of UNCAT. In addition, a major pattern demonstrates that even anti-torture legislation exists, prosecutions and convictions are

⁶³ ECHR, Case of *Gäfgen v Germany*, Application no. 22978/05, *supra* n. 44 above.

⁶⁴ UN Committee Against Torture, *Conclusions and Observations: Germany*, UN Doc. CAT/C/DEU/CO/5, 12 December 2011, available at: http://www.bayefsky.com/pdf/germany_t4_cat_47_2011.pdf.

⁶⁵ UN Committee Against Torture (CAT), *Conclusions and recommendations of the Committee against Torture : Hungary*, UN Doc. CAT/C/HUN/CO/4, 6 February 2007, available at: <http://www.unhcr.org/refworld/docid/45f6baaa2.html>

relatively rare, and, where they take place, are often for less serious offences, such as abuse of power, assault or felonious injuries.

In the United Kingdom, a new criminal offence of torture was introduced in section 134 of the Criminal Justice Act 1988. The definition complies with article 1 of UNCAT,⁶⁶ but incompatible defences have been introduced. Section 134(4) allows for a defence of “lawful authority, justification or excuse” against a charge of official intentional infliction of severe pain or suffering, and section 135(5) provides for a defence for conduct permitted under a foreign law, even if unlawful under UK law. Torture in the UK carries a maximum penalty of life imprisonment.

In Greece torture is prohibited under article 7(2) of the constitution and criminalised under article 137 of the Penal Code, which includes a definition of torture that is largely in line with article 1 of UNCAT. However experts noted that in practice, cases of torture are treated as severe bodily injury under the Penal Code, rather than torture. As a result, perpetrators are not held accountable specifically for torture. The same is reported in Cyprus, where torture is prohibited under the constitution, as well as under legislation adopted to incorporate UNCAT domestically.⁶⁷ However, there is reportedly no case law regarding torture *per se* as alleged perpetrators are usually prosecuted for lesser offences. Similarly, in Croatia, though torture is prohibited under a number of articles of the constitution as well as under article 176 of the Croatian Criminal Code, and even though the definition is in accordance with UNCAT, experts highlighted the fact that in practice there are very few prosecutions. This is largely because the offices of the public prosecutor and the courts have a tendency to treat acts of torture as beatings or ill-treatment. In Spain, torture is prohibited as element of international crimes and under article 174 of the Criminal Code, though the definition provided does not include acts committed with the intention of intimidating or coercing the victim *or a third person*, and is therefore not in line with article 1 of UNCAT. Experts reported that prosecutions for torture are extremely rare.

Armenia is an example of a country where the criminal law definition of torture is deficient. Torture is prohibited both under the constitution and in the Criminal Code.⁶⁸ The definition of torture in the Criminal Code falls short of the Convention in its failure to recognise (a) the purpose element and (b) the State official element. Court practices in Armenia demonstrate that the absence of a proper definition leads to perpetrators being prosecuted or tried for misuse of power, assault and battery, or causing medium gravity harm to a person’s health, rather than for acts of torture. Furthermore the gravity of the crime is inadequately reflected by the relatively minor punishments. These are, up to 3 years’ imprisonment, or, if aggravating circumstances are present, up to 7 years imprisonment.

In Turkey, torture is prohibited under article 94 of the Turkish Penal Code (TPC) which States, “[a]ny civil servant who carries out actions against a person that leads to bodily or mental pain incompatible with human dignity, that influences their ability to perceive or their will or is degrading [...]”, providing a broad definition for the offence of torture. Following amendments to the TPC in 2005, the distinction between torture and ill-treatment was abolished and acts that previously would have been considered ill-treatment now fall under the definition of torture. The definition does not include any specific intent or purpose, and is also not limited to severe mental or physical pain or suffering, and the offence can be

⁶⁶ The definition of torture in section 134 requires strengthening by expressly providing for article 2(3) of the Convention; “An order from a superior officer or a public authority may not be invoked as a justification of torture”. At present, the UK statutory provision refers to “lawful authority” as a potential defence that may be given a wide interpretation.

⁶⁷ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Ratification) Laws adopted in 1990, 1993 and 2002; Law No. 235/1990; Law No. 35(III)/1993; and Law No. 36(III)/2002.

⁶⁸ Article 17 of Constitution; article 119 of Criminal Code.

committed by negligence as well. As such, the definition is not fully in line with article 1 of UNCAT. Participants noted that in practice, many prosecutors and judges refrain from using the torture legislation, preferring instead to rely on provisions relating to felonious injury, which carries lesser punishment and a shorter statute of limitation.

Criminal offences of torture that do not make an explicit link to State officials as perpetrators have been ineffective in practice, which has been attributed to their failure to clearly identify the official nature of the act. In Russia, torture is prohibited under article 21 of the constitution, and article 117 of the Criminal Code. However, the definition provided for in article 117 fails to reflect all the elements of the UNCAT definition, in particular the involvement of a public official or someone acting in such a capacity. For this reason, cases of torture by government officials are rarely if ever prosecuted under this article. Rather, human rights lawyers often invoke, and prosecutors use article 286 of the Criminal Code relating to abuse of power. This provision applies where an official commits an act that exceeds his or her powers and entails a substantial violation of rights and legal interests of individuals or legal entities of public or State interest protected by law when it is committed with violence or the threat of violence. The Russian interregional NGO, *Committee against Torture*, based in Nishny Novgorod, reported that it had been involved in 70 successful cases of “abuse of power” in several Russian regions that resulted in the imprisonment of 80 police officers.

In Belgium, the prohibition of torture as set out in Article 417bis of the Belgian Criminal Code defines torture as “any intentional inhuman treatment which causes acute pain or very intense and severe physical or mental suffering”. It is not necessary for the treatment to be inflicted “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. As such, the range of the acts condemned and the protection against torture is wider than the definition in article 1 of UNCAT. However, experts also noted that there is some reluctance amongst the judiciary in Belgium to use the word “torture”. There have reportedly been only two cases of torture that have been brought, both involving acts by non-State actors. In the first case, a man threw sulphuric acid on his former partner’s face and in the second, a case of *roqia* (exorcism), a woman who was seen as being unable to bear children was subjected to various forms of ill-treatment resulting in her death.

4.2 The investigation and prosecution of torture in practice

The State’s duty to investigate allegations of torture or ill-treatment are well developed in articles 12, 13 of UNCAT, as well as in the jurisprudence of regional and international human rights treaty bodies and detailed in manuals such as the Istanbul Protocol. The ECtHR has developed standards of investigation into alleged torture or ill-treatment in its case law on article 3 of the ECHR. The Court has specified in numerous cases that investigations must be effective in the sense that it is capable of leading to a determination of what happened and of identifying the perpetrators. Furthermore, investigations must be prompt, impartial and effective.⁶⁹ While States have various systems in place for investigating torture, including special police or prosecution units and independent complaints bodies, obstacles abound in practice and often result in impunity.

⁶⁹ European Court of Human Rights, Judgment of 28 March 2000, Case of *Kaya v Turkey*, Application no. 22535/93, para. 105.

Independence of investigating bodies

In several countries, such as Poland, Russia and Ukraine, public prosecution services closely cooperate with the police, which frequently results in impunity, as evidenced by the growing number of cases before the ECtHR. There is a marked reluctance to bring cases against police officers. Investigations are frequently deficient, placing undue weight on the statement of suspects. Following a series of adverse ECtHR judgments, Russia changed its system in 2007 and established an Investigative Committee under the Office of Public Prosecutor. The purported objective was to break the close links between the prosecution and police in respect of crimes committed by police officers. The significance of changes are questionable in practice given that in reality when the investigator opens a case all the orders run through the police. Nevertheless, also due to the work of civil society and human rights lawyers, there have been a number of successful prosecutions of police officers for torture, with the exception of Chechnya.

In Armenia, one of the main problems in carrying out effective investigations is the lack of an independent investigative body. Under article 103 of the constitution, the office of the Prosecutor General shall oversee the lawfulness of preliminary inquiries and investigations. Reportedly, the Prosecutor's office does not ensure proper and effective investigations in cases of torture which would result in holding perpetrators accountable. A vivid example of this was seen in the case of *Levon Gulyan*, who was testifying in a murder case and died in May 2007 at police headquarters in Yerevan. On 21 March 2011, the Special Investigation Service of the Republic of Armenia closed the criminal case on his death for the third time, without further investigation, in defiance of the Armenian Court of Cassation of 27 August 2010, which had compelled the investigative bodies to "eliminate the violations of the rights and the freedoms of a person during the pre-trial investigation". Reportedly, victims of domestic violence in Armenia are also particularly affected by ineffective investigations due to discrimination: the police do not generally institute criminal cases based on statements made by women.⁷⁰ In Turkey, it is the police that are tasked to conduct investigations into alleged human rights violations, casting serious doubt on their impartiality and credibility, as highlighted in several cases before the ECtHR.⁷¹

In francophone systems, investigating magistrates play a major role in investigations. In Belgium, for example, judicial inquiries are conducted by the Investigation Department of the Standing Committee on the Supervision of the Police Services (Comité P), under instructions of either the Crown Prosecutor or an examining magistrate and in accordance with the Code of Criminal Investigation and the directives issued by the examining magistrates. The duration and thoroughness of these judicial inquiries depends directly on the magistrates' diligence. The independence of Comité P is questionable, as many of its members are police officers or are seconded from police services. The failure to investigate torture has in some cases resulted in lack of accountability, as in the case of *Ebenizer Sontsa*, an asylum seeker from Cameroon. Sontsa's asylum claim was rejected and he was forcibly restrained during an attempted removal.⁷² Other passengers protested against his treatment, and the removal was abandoned. He submitted a complaint about the ill-treatment which his family alleges was never investigated. He subsequently took his own life while awaiting deportation in the immigration detention centre. A 2003 report from Amnesty International also reported that impunity was a problem in Belgium due to the many obstacles to effective investigations into complaints against the police. These included the failure

⁷⁰ Expert Contribution, November 2011.

⁷¹ European Court of Human Rights, Judgment of 19 February 1998, *Kaya v Turkey*, Application No. 158/1996/777/978; European Court of Human Rights, Judgment of 3 June 2004, *Bati v Turkey*, Application nos. 33097/96 and 57834/00; European Court of Human Rights, Judgment of 18 December 1996, *Aksoy v Turkey*, Application No. 100/1995/606/694.

⁷² Amnesty International 2009 Annual Report: Belgium, available at: <https://www.amnesty.org/en/region/belgium/report-2009>

of police to identify themselves to persons in their custody, the tendency of police officers to close ranks and shield their colleagues, the failure to question victims and witnesses appropriately, and the inclination to give greater credibility to the police version of events.

In Spain, investigations are carried out by police under the instruction of investigative judges of the first instance territorial courts. Experts noted that judges and prosecutors tend to rely heavily on statements by police while not giving equal credence to victims or witnesses. Unsurprisingly, there have been few indictments for acts of torture. When cases do come to trial, they often end in acquittal due to the lack of identification of officers or in nominal sentences following conviction. Furthermore, it is not unusual for such proceedings to continue for several years, following repeated appeals against judicial decisions to provisionally discharge the complaint. In an important recent judgment condemning the use of torture and incommunicado detention against terrorist suspects, four members of the Spanish Civil Guard were convicted of torturing two persons arrested on suspicion of belonging to ETA. Following their arrest, Portu and Mattin Sarasola were placed in incommunicado detention and subjected to torture and ill-treatment including physical abuse and threats. The officers were sentenced to between 2.5 and 4.5 years' imprisonment.⁷³ This decision is currently pending on appeal to the Supreme Court.

The lack of independent bodies to investigate allegations of torture and ill-treatment is a problem across the region that is often particularly pronounced for persons belonging to marginalised groups who find it particularly difficult to approach the police. Efforts have been made in some countries to establish more effective oversight mechanisms, particularly following complaints by the public. The most far reaching model of a complaints body is the Police Ombudsman in Northern Ireland that investigates all cases of police misconduct and may recommend prosecution where sufficient evidence is found.⁷⁴ In the UK, for example, the Independent Police Complaints Commission, which replaced the Police Complaints Authority in 2004, has been given a broader mandate and powers to investigate, or monitor investigations, relating to police misconduct.⁷⁵ However, notwithstanding these changes, concerns remain about its actual independence and effectiveness. This is particularly marked in relation to death in custody cases. As highlighted by experts, there has not been a single conviction in 333 such cases over the last ten years. A notable case in this regard is that of Christopher Alder, a black man who died in police custody in the UK in 1998. A victim of assault, Alder was taken by police to a hospital where he refused treatment for a head injury. Police subsequently arrested him for breach of the peace, handcuffed him and placed him in a police van to take him to the police station, where he arrived unconscious. He was dragged by police into the station where he was left unconscious on the floor without any assistance, and where he subsequently died. The initial investigation, carried out by a neighbouring police force, included no forensic testing and the police officers involved were able to make statements in the same room while comparing notes. A subsequent inquest found that Alder had been killed unlawfully, but did not identify anyone responsible. While charges were brought against the officers allegedly involved, these were subsequently dropped and no one was held accountable. Alder's sister brought a complaint before the ECtHR under articles 2, 3 and 14, alleging he suffered discriminatory ill-treatment and that the investigation into his death was ineffective. The UK government subsequently issued a landmark apology for both the treatment Alder suffered and its

⁷³ Spanish Supreme Court, Judgment of 2 November 2011, Case of *Igor Portu and Mattin Sarasola*. See also, Amnesty International, "Spain: Civil Guards convicted of torture," 10 January 2011, available at: <http://www.amnesty.org/en/library/asset/EUR41/002/2011/en/60b24c89-1115-4124-aa36-68f3705efc84/eur410022011en.html>.

⁷⁴ See REDRESS, *Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities*, September 2004, available at: <http://www.redress.org/downloads/publications/PoliceComplaints.pdf>

⁷⁵ Response to the REDRESS questionnaire.

failure to effectively and adequately investigate the circumstances of his death. The case concluded in a friendly settlement.

A lack of concerted efforts on the part of the government and the judiciary in some countries has also been cited as contributing to poor investigations and lack of accountability. In the Republic of Croatia there are over 400 unprosecuted cases of war crimes, many of which have yet to be investigated. The situation is improving but experts noted that war crimes investigations have not been impartial, prompt or effective, reportedly because of a lack of political will to prosecute all the perpetrators. This is particularly the case when perpetrators are members of the dominant national group, especially where some remain politically active and continue to hold their posts as members of parliament.

Particular problems have also been encountered in the investigation of torture by armed personnel. In the UK these problems were exposed in a number of matters arising from the role of its soldiers in Iraq. The killing of Baha Mousa led to the House of Lords ruling that the provisions of the ECHR extended to UK detention facilities abroad⁷⁶ and as a result a comprehensive public inquiry was held.⁷⁷ The inquiry found that there were corporate failures within the Ministry of Defence over the use of banned interrogation techniques. A subsequent ECtHR decision found that the UK's Convention obligations extend to alleged unlawful killings even if they take place outside of detention facilities.⁷⁸ There are a number of on-going inquiries relating to other incidents in Iraq,⁷⁹ and a recent Court of Appeal ruling found that the UK's Iraq Historic Allegations Team (IHAT) set up to examine over 120 incidents was not sufficiently independent.⁸⁰ The Court found it critical that members of the Royal Military Police (Provost Branch) would be investigating acts allegedly committed by its own members.

Statutes of Limitation

The obligation to promptly, impartially and effectively investigate allegations of torture, be it following a complaint or *ex officio*, requires States to remove all barriers to accountability. While immunities and amnesties have not featured prominently in the region, statutes of limitation have been an issue at times.

It is widely recognised that there should be no statutes of limitation for torture, as stated by the Committee against Torture.⁸¹ While it is evident that prosecutions become more difficult as time passes, it is equally clear that torture victims may for a number of reasons be unable or unwilling to bring or pursue complaints shortly after the torture. The applicable criminal laws differ considerably in respect of statutes of limitation applying to torture. In several countries, such as the UK, no statutes of limitation apply in criminal cases. In many of the countries considered, such as Belgium, Poland and Spain, the

⁷⁶ House of Lords, *Al Skeini and Others v Secretary of state for defence and Others* [2007] UKHL 26, available at: <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-htmhttp://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm>.

⁷⁷ Baha Mousa Public Inquiry available at: <http://www.bahamousainquiry.org/report/index.htm>

⁷⁸ *Al Skeini and Others v United Kingdom* (Application no. 55721/07), available at: <http://www.unhcr.org/refworld/docid/4e2545502.html>.

⁷⁹ See Al Sweady Public Inquiry available at: <http://www.alsweadyinquiry.org>.

⁸⁰ Court of Appeal (Civil Division), Judgment of 22 November 2011, *Case of Mousa v Secretary of Defence and Another* [2011] EWCA Civ 1334 available at: <http://www.judiciary.gov.uk/media/judgments/2011/mousa-v-ssd-and-anr>

⁸¹ Committee Against Torture, Consideration of Reports submitted by the States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture Japan, UN doc. CAT/C/JPN/CO/1, 3 August 2007, para. 12, available at: <http://www1.umn.edu/humanrts/cat/observations/japan2007.pdf>.

limitation period for torture is the same as for other crimes, namely 15 years, unless the offense also constitutes a crime against humanity or a war crime. In practice, however, periods of limitation can be significantly shorter, particularly where the authorities prosecute cases of torture as lesser offences. As this situation is often compounded by delays in opening and conducting investigations, torture cases face prescription.

In Turkey, for example, article 66 of the Penal Code provides that statutes of limitation are based on the upper limit of punishment for the crime. A major problem noted by experts is that the judicial interpretation of article 94 of the Turkish Penal Code contains the requirement of a “systematic” element as part of the definition of torture. In judicial practice, acts that amount to torture as defined in international law but lack the systematic element are frequently qualified as falling under other lesser offenses, such as felonious injury, which carry a shorter limitation period of 8 instead of 15 years. Between 2005 and 2009, also due to the slow pace of investigations, disciplinary investigations on torture and the excessive use of force against 24 persons were reportedly dropped due to the expiry of the applicable statute of limitation.

As ECtHR proceedings often take a number of years to complete, the problem of limitation periods coming expiring can pose a particular problems as regards implementation of ECtHR judgments in Turkey and other countries. Under article 311(1)(f) of the revised Turkish Criminal Procedure Laws, a judgment from the ECtHR provides grounds for opening a new case or renewing a procedure domestically.⁸² However the law does not provide that the limitation period is suspended pending the outcome of ECtHR proceedings, which frequently means that further prosecution becomes time barred.

Forensic evidence

The lack of adequate forensic evidence, including timely documentation prepared by qualified doctors in line with recognised standards such as the Istanbul Protocol, is a major obstacle. A number of factors contribute to a dearth of forensic evidence in cases of torture or ill-treatment. In addition to shortcomings in national laws referred to in section 4.1 above, other factors include limited resources, including the number of qualified doctors or psychiatrists familiar with the relevant standards, the lack of independence of forensic doctors carrying out examinations, and the inability to carry out timely and confidential examinations.

In Russia, for example, doctors have reportedly refused to record all findings of their examination when assessing a victim of torture or ill-treatment by the police. If the victim discloses that the injuries were inflicted through abuse, doctors may refuse to include this in their report. While some Turkish doctors have been at the forefront of documenting torture, doctors reportedly continue to be intimidated by police if they document findings of torture or ill-treatment. Victims also face police intimidation in the form of threats of further torture before they are examined by a doctor in order to prevent them reporting their abuse. As a result, many victims tell doctors that they have no injuries to document and instead of carrying out a medical examination, doctors document what they have been told. Bias in

⁸² Article 311(f) of CPC: Grounds for a new trial in favour of the convicted individual.

Article 311 – (1) A lawsuit that has been concluded with a final judgment shall be tried again in favour of the convicted individual through the way of a new trial, under the following circumstances: f) If a final judgment of the European Court of Human Rights has established that the criminal judgment is violating the Convention on Protecting the Human Rights or its Protocols. In such cases, a motion for a new trial may be filed within one year after the date of the final judgment of the European Court of Human Rights.

forensic reports is also a problem in Cyprus, in particular in the north where the dearth of forensic experts compounds the problem significantly. Similarly, in Hungary, experts described a case where a forensic investigative report regarding the forced sterilisation of a Roma woman contained clearly prejudiced views about the Roma and how they live.

Witness Protection

The protection of victims and witnesses is integral to an effective investigation, and forms part of victims' rights to security and to an effective remedy.⁸³ It is also increasingly recognised, both at the national and international level, particularly in the context of the International Criminal Court, that such protection is a key component of the administration of criminal justice in respect of serious human rights violations. While many of the countries considered have legislation in place that provides for the protection of victims and witnesses, implementation is frequently deficient and the intimidation of victims and witnesses still remains common in many jurisdictions, such as Russia, Ukraine and Romania.

In Russia, applicants and witnesses are often subjected to pressure to discourage them from complaining to authorities and to force them to withdraw complaints. Reportedly, even applicants to the ECtHR have been subjected to threats and intimidation, and in some of the worst cases, individuals have been murdered or disappeared. This includes numerous human rights defenders and journalists in Russia who have been subjected to harassment, assault, threats and murder.

In Croatia, measures are in place for the protection of witnesses and victims such as testifying through video link and voice alteration, in accordance with international standards. However, in practice these are not always effectively implemented resulting in the intimidation of victims and of witnesses in some cases. In some instances, victims have participated in proceedings anonymously, only to have the perpetrator disclose their identity by making their names public. The challenges to victim and witness protection in Croatia are also attributed to the very small size of the country and population, as this makes it almost impossible for a victim or witness to effectively change their identity. However, the establishment of a pilot programme for victim and witness protection with international assistance in the Croatian special courts for war crimes, which is also available for victims of sexual or domestic violence, was noted as a positive development.

Under Hungarian law, victim and witness protection is provided during legal proceedings as well as outside of court procedures. Under section 95 of the Criminal Procedural Code, victims and witnesses shall be provided with protection a) in the interest of protecting her or his rights, bodily integrity or personal liberty, and b) in the interest of ensuring that the witness fulfils his or her obligation to give testimony and can do so without fear. However, experts noted that reports documenting how detainees who had been subjected to ill-treatment are in many cases fearful of reprisals from prison officials if they report the abuse, creating an effective obstacle to accountability.

In Cyprus, the Violence in the Family (Prevention and Protection of Victims) Law 2000 was enacted in order to improve protection, providing *inter alia*, for the taking of testimony of victims of violence by electronic means, protection schemes for victims and witnesses, setting up of a fund to meet certain

⁸³ See REDRESS, *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action*, December 2009, available at: <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

immediate needs of victims, establishment of a shelter, and making the spouse a compellable witness if the victim is another member of the family. While this is a positive development for some categories of victim, victims' fear of reprisals continues to be an obstacle to accountability, in particular for immigrants or asylum-seekers. This has been reported particularly in cases of human trafficking where victims and witnesses have been subjected to threats and harassment. The imbalance of power and information between the perpetrators of torture and ill-treatment and these victims creates particular problems for foreign nationals who are unaware of their rights or may fear facing deportation or return if they try to access them.

Threats were at times made in direct response to high level cases and advocacy that received negative media coverage. In the UK, Phil Shiner of Public Interest Lawyers, for example, has received death threats on at least one occasion relating to his work highlighting prisoner abuse and torture in Iraq. There have also been allegations of harassment and threats made against former detainees who have tried to lodge complaints about abuses they suffered at the hands of the British military within Iraq. These threats have been made in an atmosphere of intense media harassment and vilification of victims trying to pursue prosecutions or civil claims, particularly in the case of the former Guantanamo detainees who have taken legal action against the British government in respect of its alleged involvement in their rendition and torture.

Findings

The emerging picture is disconcerting. While standards are well established, both in general and in relation to a number of countries whose system has been subject to close scrutiny by the ECtHR and other bodies, investigations are frequently described as inadequate and ultimately ineffective. This points to systemic failures to establish effective complaints and investigation mechanisms. In practice, victims of torture still face numerous obstacles, namely:

- they often have to bring complaints in systems that do not recognise torture as separate offence subject to adequate punishments;
- they do not have access to lawyers and medical assistance during crucial stages of detention;
- they face threats, a hostile public or fear adverse repercussions when pursuing complaints, including due to a lack trust in the criminal justice system, which can be particularly pronounced in case of gender-based violence;
- they are confronted with partial investigative bodies or judges who fail to adequately respond to allegations of torture; encounter delays which may result in prescription;
- they feel alienated during the investigation and prosecution; and, even where a case results in a conviction, punishments are frequently considered inadequate.

From a broader systemic policy perspective, it is not known how many cases of torture have been prosecuted due to the lack of specific criminal offences of torture and/or the tendency to prosecute acts of torture as lesser offences. In Ukraine, for example, the prosecutor was reportedly unable to provide meaningful data. This is not an isolated incident but rather points to a lack of a coherent, coordinated system across Europe, in contrast to regional efforts to combat other crimes, such as money laundering and other financial crimes. Instead, as was evident during the meeting, evidence of prosecutions remains largely anecdotal, with most participants reporting very limited number of trials resulting in adequate punishment. The lack of transparency therefore seemingly goes hand in hand with a lack of accountability.

5. Reparation for Torture

5.1 Recognition of the Right to Reparation for Torture

The right to reparation for victims of torture and ill-treatment is well established in international law. It is enshrined in a number of international and regional human rights instruments, including UNCAT, ECHR, and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.⁸⁴ According to the Basic Principles, forms of reparation include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The right to reparation comprises the procedural right to an effective remedy and the substantive right to obtain adequate forms of reparation, which should be underpinned by a victim oriented perspective that grants victims procedural rights of participation and protection in a non-discriminatory fashion.

The recognition of the right to reparation for torture varies between the different jurisdictions in the region. In some countries, such as Greece, article 137D(4) enables victims of torture to make a claim for reparation. In other countries, such as Poland and Russia, victims can seek reparations through the same criminal and civil procedures available to victims of other categories of crime. Victims of torture may also invoke special legislation, such as the *Law on Responsibility for Damage Caused by Terrorist Acts* enacted in 2003, which replaced the *Law on Obligations* that had been in place until 1996, allowing victims of terrorist acts carried out by the Croatian armed forces or other State organs to claim reparation. In addition, several States, such as Belgium, the UK and Germany, have legislation providing limited compensation for victims of crimes. In Croatia, for example, the Law on the Compensation of Damages for Victims of Criminal Offences 2008 will enter into force when Croatia joins the EU which includes the creation of a special fund.

Reparation claims can be pursued by means of civil suits, administrative remedies, in the course of criminal proceedings and in some countries, fundamental rights petitions as provided by law or established by the judiciary. For example, the case of *Yiallourou v Nicolaou* in the Cyprus Supreme Court provides an important precedent for reparation litigation as it established that a human rights violation (as set out in the constitution or international instruments to which Cyprus is a party) gives rise to a cause of action in damages in the civil jurisdiction of Cyprus courts.⁸⁵ The standard of reparation is that of *restitution in integrum* insofar as possible and fair, and there is also the possibility of awarding punitive damages for particularly serious violations.

In practice, the systems in place often do not provide victims with access to adequate reparation, owing to a number of factors. In some cases, the reliance on the outcome of criminal proceedings hampers victims' ability to seek reparation through civil means. In Poland, for example, rulings on civil claims do not hinge on the outcome of a criminal investigation. However, civil cases have been suspended in order to await the outcomes of a criminal prosecution. In cases where a criminal prosecution leads to a guilty

⁸⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, available at: <http://www2.ohchr.org/english/law/cat.htm>; European Convention on Human Rights, art. 41, available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, Principles 20 – 23, available at: <http://www2.ohchr.org/english/law/remedy.htm>.

⁸⁵ *Yiallourou v. Evgenios Nicolaou*, Cyprus Supreme Court, Appeal No. 9331 [08.05.2001].

verdict, the civil court will no longer assess whether reparations or damages are due, and the only issue to determine is the amount to be awarded. Similarly, in Germany, it is possible to lodge a civil claim for compensation following torture or ill-treatment. Theoretically, the outcome of the civil case does not depend on the results of the parallel criminal investigation. However, in many cases the civil judges will prefer to adjourn the trial and wait for the result of the criminal investigation before continuing their trial. It is also possible to integrate civil claims into the criminal prosecution, but this is reportedly rarely used in practice. In Greece, civil claims for reparations are not reliant on the conclusion of a successful criminal prosecution and victims can apply for compensation to the administrative courts.

In Croatia, victims can request reparation in criminal or civil proceedings and civil claims are not reliant on a successful criminal conviction. However this is not always the case in practice, for instance some victims of torture in the context of war crimes were unable to pursue civil claims for reparations due to the incorrect application of the amnesty law in place and the consequent lack of a criminal conviction. Though there have been some positive outcomes in terms of victims securing reparations, these are marred by the fact that victims refrain from pursuing civil claims, even if perpetrators are convicted and imprisoned, out fear of reprisal as many perpetrators are still powerful persons in society. These examples demonstrate the intricate relationship between criminal prosecutions and civil suits. While it may be justifiable to adjourn a civil case pending the outcome of a criminal trial, conditioning reparation on a successful outcome of a criminal case is prone to undermine the role of civil legal action as effective remedy, particularly in the absence of effective investigations and prosecutions in torture cases.

5.2 Compensation

The most common form of reparation awarded to victims of torture and ill-treatment in the region is monetary compensation. The focus on monetary compensation (which is often inadequate), and limited other forms of reparation is problematic. The settling of claims in this context been viewed as a highly questionable practice when not complemented by effective investigations and other forms of reparation, including public acknowledgment.

The kinds of damages that can be compensated vary within the region, with some jurisdictions allowing for pecuniary, non-pecuniary damages, or both. In Belgium, notably, *The Financial Support Board for the Victims of Deliberate Acts of Violence (Composition and Operation) Act of 2003* has reportedly broadened the scope of compensation for victims of torture and ill-treatment. Victims of direct physical or psychological violence reportedly received compensation which covered moral injuries and took into account a range of factors, including permanent or temporary disability, medical expenses and hospitalization.

The amount of compensation awarded in practice varies widely across the region and even within countries and single courts. This is in marked contrast to compensation for unlawful detention, where quantum is more clearly established. The variations can be explained by the fact that compensation for torture must take case-specific factors into consideration; and there are differences in calculating heads of damages. However, experts share dissatisfaction of the lack of certainty and predictability. In turn, this raises considerable concerns from a victim's perspective as to the adequacy of compensation in a given case.

In Russia, amounts of compensation awarded for torture vary considerably from €1,000 to €20,000-50,000 depending on the region, with the degree of publicity said to influence the quantum awarded. In Croatia, family members of some victims of torture who were killed received between €30,000 and €200,000. The latter figure was seen as very high, considering the resources of the Croatian government and that the lower figure was more common in practice.

In the UK, there is also significant variance in the amount of compensation awarded—while victims of unlawful detention of terrorism suspects in the *Belmarsh* case received compensation amounting to less than £1 for each day they were detained, victims of torture have received amounts ranging from £100,000 to £900,000, and in the case of *Baha Mousa*, an Iraqi civilian killed by UK forces in Iraq, family members received £2.83 million *ex gratia*. One participant noted that it is common for victims of serious personal injury to receive more compensation than is awarded in cases of persons who were killed as a result of torture, and that this is an anomaly that needs to be reformed. In Germany, Gäfgen received €3,000 compensation for suffering ill-treatment (which was not paid out to him as he still owed money to the authorities) after the ECtHR finding that the delay in compensation had breached his rights. The circumstances of this case raise the spectre that German courts considered *Gäfgen* an “undeserving victim”, which may have also influenced awards in cases involving terrorism suspects.

5.3 Rehabilitation

Victims of torture have a right to rehabilitation, as explicitly recognised in article 14 UNCAT, which requires States to provide rehabilitation, including access to rehabilitation services. In practice, the availability of psycho-social and medical rehabilitation for victims of torture varies significantly across the region. Efforts to provide specialised services through the public health care system have reportedly been made in countries not represented at the meeting, including Denmark, the Netherlands and Norway. In several countries, rehabilitation services are available primarily as a result of the work of NGOs. However, across the region the lack of medical and psycho-social rehabilitation for victims of torture and ill-treatment, particularly in the form of psychological and psychiatric services, was seen a major shortcoming in both law and practice.

There are no specialised centres for rehabilitation of torture victims in Armenia or Turkey provided by the state, though victims of torture or ill-treatment can seek rehabilitation services through private actors such as NGOs. In Greece, a special centre for rehabilitation of victims of torture was closed down due to lack of funding, and there are reportedly no other institutions that provide effective rehabilitation. This example demonstrates the precariousness of relying on NGOs to provide rehabilitation services, particularly where access to funding is limited. The lack of psychological support for victims has also been identified as a problem in Croatia. In addition it has been frequently noticed that parties in criminal proceedings, including judges, prosecutors and defence attorneys, have not been trained in how to deal with victims or witnesses. This leads in many cases to re-victimisation, for example where victims are inappropriately interrogated by the judge or by the parties in criminal proceedings.

In Russia, the procedure of so-called rehabilitation, set out in article 133 of the Russian Criminal Code, has little in common with the contemporary understanding of rehabilitation for torture. Under rehabilitation, the Russian law understands the procedure of restoring the freedoms and rights of the individuals who suffered illegal or unwarranted criminal prosecution. This procedure entailed

compensation for property damage, moral damages and restoration of labour, pension or other rights, that had been violated by unwarranted legal actions. The law, however, does not list torture among the grounds for the provision of rehabilitation. Accordingly, even if an act of torture is proven in court, it does not mean that the rehabilitation procedure outlined in the Criminal Code will apply to the victim. Russian State institutions neither provide nor finance medical, physiological and social rehabilitation for victims of torture. Some efforts to provide medical, social and psychological rehabilitation of torture victims are made by NGOs. In Romania, basic medical services are provided by the government, though this does not include specialised services for victims of torture. According to experts, the government has been reluctant to recognise that victims of human rights violations are in need of specialised rehabilitation and the general attitude is that their needs can be met through the existing public health services.

6. Overarching themes

6.1 Tackling Impunity

Impunity has been identified as a persistent concern in many of the countries considered, which is often due ineffective investigations into complaints of torture or ill-treatment. In most countries, investigations into torture are carried out by the public prosecutor's office, which in many cases lack the requisite independence to effectively and impartially investigate alleged violations by State agents. In some countries, this is compounded by a culture of impunity amongst the police and State security forces. This includes partial impunity as evidenced in the tendency to charge perpetrators of torture with lesser offenses, even in countries where torture is criminalised.

In several countries that have experienced armed conflict, authoritarian regimes or both, perpetrators of torture and ill-treatment have enjoyed impunity as a result of a lack of political action and adequate mechanisms to hold them accountable. For example, perpetrators of ethnic cleansing in Croatia during the 1991-95 war were responsible for widespread use of torture, yet many cases remain unprosecuted and some perpetrators continue to be politically active. It is also widely accepted that torture was widely used during the uprising against British occupation from 1955-59, though victims of these crimes have also not seen their abusers held accountable or received reparations. During World War II, the last conflict experienced by Poland domestically, torture was employed freely by the Nazi military and secret police (Gestapo). From the end of the war to 1990, Poland was under a communist regime, which employed torture against political dissidents, particularly in the 1950s. There was no effective justice mechanism in place for such cases, yet even after the democratic government was established in the early 1990s, relatively few perpetrators have been tried for these crimes. In Romania, the communist regime in power for 45 years was responsible for torture and ill-treatment. In the post-1989 period, torture was legally prohibited but no mechanisms were adopted to acknowledge the persistent use of torture, hold perpetrators accountable or provide the many victims with reparations. However, reportedly, Romania's president issued a public apology in 2007 for the violations committed.

Despite adequate legislation being in place in most countries, impunity has also been of concern in the exercise of universal jurisdiction. While the limited impact is due to multiple factors, it is equally clear that there has been a backlash against universal jurisdiction in response to political pressures. The prosecution of Judge Garzon in Spain is perhaps the most vivid illustration of the challenges faced by

those who take on powerful interests at home and abroad, which demonstrates that Europe faces structural problems familiar from other continents.

6.2 Counter-terrorism and torture

Counter-terrorism and security legislation that leads to a dilution of rights of suspects and detainees facilitates torture. Suspects arrested and detained on terrorism related charges in some countries are at heightened risk of abuse. This is due to perceived national security imperatives to obtain terrorism-related information from such suspects, as reported in the context of counter-insurgency efforts in Turkey and in Russia. In addition, in countries across the region, counter-terrorism measures adopted in the name of national security have led to a weakening of detainees' and suspects' rights. In Turkey, the *Fighting with Terror Law* of 2006 limits the right of detainees to access legal counsel. Terror suspects' lawyers can also face restrictions in accessing case files and information. Under the *Fighting with Terror Law*, if investigating authorities deem it necessary, detainees can also be denied confidential meetings with their lawyer. Moreover, the scope of situations in which the law applies means that in practice, a vast number of suspects are not able to exercise their right to access counsel.

The context of the global "war on terror" has resulted in a number of violations by European States. The UK *Crime and Security Act* of 2001 allowed indefinite detention of foreign nationals who were terror suspects. This law has now been abolished as a result of a judgment by the House of Lords. However, the current system of control orders applicable to all persons within the UK, that replaced the *Crime and Security Act* also raises significant problems. The UK, along with a number of other European countries including Germany, Romania, Poland, Lithuania and Spain, are alleged to have been complicit in the US CIA's extraordinary renditions programme involving the unlawful transferring of suspected terrorist detainees to countries or authorities who are known to use torture. In Poland and Romania, secret detention facilities were reportedly established by the US where so-called "high value detainees" were interrogated using methods that amount to torture. The extent of violations in the context of the global war on terror are not yet fully known, though it is hoped that further investigations will be carried out.

In this regard, the European Parliament adopted a resolution calling on European countries to conduct investigations into these issues in 2012.⁸⁶ Such efforts have been pursued in Poland where an investigation has been pending since 2008 with no outcomes as yet. While charges were brought against the former head of Polish intelligence, *Zbigniew Siemiatkowski*, in early 2012, he refused to cooperate with the investigation, which is seemingly severely lacking in transparency. Furthermore, investigators have been denied access to essential documentation on grounds of national security and the investigation has reportedly been marred by political meddling. According to one participant, the case was transferred from Warsaw to Krakow and the prosecutor responsible for the investigation was removed from the case with no explanation just two weeks before an official visit from President Obama. In Romania, the government has persistently denied any role in the CIA rendition flights or so-called "black sites". Equally, plans to establish the extent of UK complicity by means of a public inquiry, which was subject to intense debates, have been shelved by the UK government. Together with plans to limit disclosure of security in civil cases as discussed in section 3.1.2 of this report, these measures have,

⁸⁶ European Parliament, European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-309>

or are prone to undermine, efforts to find out the truth about UK complicity in torture, prosecute any perpetrators where appropriate and obtain reparation for victims of such torture.

6.3 Marginalisation, gender based violence and torture

The targeting of marginalised groups, in particular members of ethnic minorities, foreign nationals and women, is of major concern in many countries across Europe. When preventing torture, States have an obligation to take special measures to protect marginalised individuals or groups especially at risk of torture. Torture and ill-treatment often reflect systemic discrimination, which is compounded by lack of access to justice and the wherewithal to pursue criminal cases, a reality that further entrenches powerlessness. Across the region, members of the Roma community have been harassed and abused by police, in many cases amounting to torture or ill-treatment, due to widespread discrimination and prejudice against this group. Moreover, this discrimination makes Roma women particularly vulnerable to abuse, including trafficking, forced sterilization and ill-treatment by police. Detained immigrants and asylum seekers are also particularly at risk of torture and ill-treatment, as in many cases they are unaware of their rights or of the mechanisms in place to access them.

6.4. The Role of Regional and International Mechanisms

The impact of regional and international mechanisms in combating torture has been largely positive albeit rather varied in the region, with the judgments of the ECtHR being particularly influential in law and practice. The ECtHR has reportedly had a significant impact on national law enforcement practice in Russia, and decisions have addressed some of the most serious problems of the Russian legal system, such as detention conditions, fair trial, and torture. Equally, ECtHR jurisprudence has contributed to several reforms and measures to tackle torture though it has not yet resulted in effective accountability mechanisms being in place.

The case-law of the ECtHR has also become increasingly important in German legal practice. For instance, the *Jalloh* case stopped the practice of using emetics in order to detect evidence in drug cases.⁸⁷ Similarly, the ECtHR's decision in *Gäfgen v Germany* has brought into focus the debate surrounding the absolute prohibition of torture. While it reaffirmed the absolute prohibition of torture, it left a number of questions unresolved, such as the lack of a criminal offence of torture in the Germany system and the possibility of using "fruit of the poisonous tree" that may have been obtained as a result of torture. In the UK, the ECtHR, as well as domestic courts, have played a major role – though not always entirely consistent- in upholding the prohibition of torture in a series of cases. Notably, the jurisprudence resulted in the recognition that the ECHR applies where UK troops operate extraterritorially in situations of occupation and/or taking individuals in custody.⁸⁸ While there have been a series of ECtHR decisions in favour of application from Greece, in particular regarding unacceptable detention conditions amounting to inhuman and degrading treatment, these are yet to be implemented domestically.

⁸⁷ European Court of Human Rights, Judgement of 11 July 2006, *Jalloh v Germany*, Application No. 54810/00,.

⁸⁸ European Court of Human Rights, Judgement of 7 July 2011, *Al-Skeini and others v The United Kingdom*, Application no. 55721/07.

ECtHR jurisprudence was seen as problematic in so far as the Court has repeatedly failed to find a violation of article 14 ECHR (discrimination) in addition to article 3 where the facts pointed to sexual, racial or other forms of discrimination. A more consistent jurisprudence in this regard could send a strong signal towards more effective recognition of the nexus between marginalisation and torture, and more effective protection. In respect of domestic violence, the ECHR has frequently relied on article 8 ECHR rather than article 3 ECHR when assessing State responses, which was seen as providing less protection in terms of State's obligations to investigate.⁸⁹

The European Committee for the Prevention of Torture has also played an important role in upholding the prohibition of torture and influencing domestic actions to prevent it. In Belgium for example, following the CPT's declaration that solitary confinement of persons suspected of terrorism constitutes inhuman and degrading treatment, the Belgian parliament adopted a new law drastically limiting this practice which, following a series of complaints, has been implemented effectively since 2007. Similarly, following the CPT visit to Cyprus in 2004 and the subsequent 2008 report, the Government of Cyprus approved a budget for the improvement of existing police cells and the construction of new ones. A number of other recommendations were also acted on, including the creation of an *Independent Authority for the Investigation of Complaints against the Police* and the passing of the *Law of the Rights of Arrested and Detained Persons* of 2005. While progress has been made in the last decade, more needs to be done to change the culture of impunity.

UN treaty bodies, monitoring mechanisms and special procedures have also had an impact in combating torture in the region. For example, Hungary has been reviewed by several UN monitoring bodies and several recommendations have been formulated with regards to torture. Most recently, Hungary undertook to comply with recommendations coming out of the Universal Periodic Review review process, including the ratification of OPCAT. However, experts remained concerned as the draft law establishing a national preventive mechanism, to become operational in 2015, does not cover all types of places of detention and NGOs which are experienced in monitoring detention facilities are excluded. UN mechanisms have also had an impact in Russia. The recently adopted *Law on Police* incorporates international standards such as the *UN Code of Conduct for Law Enforcement Officials*, though there are on-going concerns that this will not be effectively implemented, as is the case for many of the recommendations made by the various parts of the UN human rights system.

6.5 Litigating torture cases

The meeting brought together rich experiences of litigating torture cases. Lawyers and NGOs have pursued cases at the national, transnational (universal jurisdiction), regional and international level, drawing on international human rights law, international humanitarian law and international law when addressing torture in various contexts. This included responsibility for torture during colonial times, including numerous cases in the counter-terrorism context, torture committed by armed troops abroad, refoulement, and seeking to hold perpetrators to account. It became clear that strategic litigation comprises both case-specific strategies and broader advocacy. Quite often, a sea-change in attitude and ways of doing things is needed, such as accepting the rights of marginalised persons or holding troops

⁸⁹ ⁸⁹ See for example: European Court of Human Rights, Judgment of 12 June 2008, *Bevacqua and S. v. Bulgaria*, Application no. 71127/01; European Court of Human Rights, Judgment of 14 October 2010, *A. v. Croatia*, Application no. 55164/08; European Court of Human Rights, Judgment of 13 November 2011, *Hajduová v. Slovakia* (no. 2660/03); European Court of Human Rights, Judgment of 24 April 2012, *Kalucza v. Hungary*, Application no. 57693/10.

accountable for torture abroad. The success of litigation therefore frequently has to be assessed beyond the case at hand, taking into consideration broader objectives. Even apparent defeats, such as the lack of action taken against high-ranking US officials alleged to be responsible, *inter alia*, for torture in various European can be considered a success in so far as it helps to discredit – name and shame - those concerned and even stops them from travelling to the countries in question.

Action towards making the prohibition of torture more effective

The anti-torture experts from across Europe highlighted the need to take action to address the strategic challenges identified. While the following list was not formally agreed upon, it reflects some of the priority needs for the work of lawyers and NGOs identified during the meeting:

1. The importance of lawyers and civil society building networks at the regional level with a view to:
 - a) Sharing experiences of, and collaborating on cases relating to the prohibition of torture, particularly where these cases involve more than one country;
 - b) Effectively advocating policy, legislative and institutional reforms relating to the prohibition of torture in their respective countries;
 - c) Sharing experiences of, and supporting each other's work, particularly where human rights defenders face risk on account of their work, such as in Chechnya.
2. The importance of, and value in bringing strategic cases before domestic and regional bodies that have potential to expand/advance judicial interpretation, including by invoking comparative and international precedents, and the need to pursue parallel advocacy efforts to raise awareness and generate the momentum needed to bring about broader changes.
3. The value of bringing cases before the ECtHR with a view to highlighting systemic problems and to developing the Court's jurisprudence on reparation. This should include engaging with the Committee of Ministers to enhance implementation of judgments, particularly to bring about systemic changes.
4. The need to explore ways to ensure accountability for the torture alleged to have been carried out by US authorities, with complicity of European authorities, in the context of the war on terror, including by bringing complaints in European courts using universal jurisdiction laws as appropriate.
5. The need to address broader structural concerns such as exclusion and discrimination, which, if not appropriately dealt with, can help to create and sustain an environment in which torture and ill-treatment of marginalised groups is accepted.