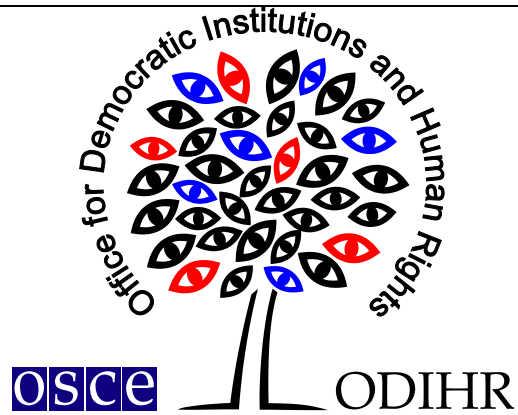


Warsaw, 22 May 2018

Opinion-Nr.: CRIM-POL/325/2018 [TO]

[www.legislationline.org](http://www.legislationline.org)



**OPINION ON**

**DEFINITION OF TORTURE AND ITS ABSOLUTE**

**PROHIBITION IN POLISH LEGISLATION**

OSCE Office for Democratic Institutions and Human Rights

Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

*This Opinion is also available in Polish Language.  
However, the English version remains the only official version of the document.*

## Table of Contents

<b>I. INTRODUCTION</b> .....	<b>3</b>
<b>II. SCOPE OF REVIEW</b> .....	<b>3</b>
<b>III. EXECUTIVE SUMMARY</b> .....	<b>4</b>
<b>IV. ANALYSIS AND RECOMMENDATIONS</b> .....	<b>5</b>
<b>1. International Obligations, Regional Instruments and OSCE Commitments</b> .....	<b>5</b>
<b>2. Existing Anti-torture Legislation in Poland</b> .....	<b>7</b>
<i>2.1 Legal Interpretation</i> .....	<b>8</b>
<b>3. Primary Elements of Definition of Torture</b> .....	<b>8</b>
<i>3.1 Nature, Intent and Purpose of the Act of Torture</i> .....	<b>9</b>
<i>3.2 Involvement of a Public Official</i> .....	<b>10</b>
<b>4. Additional Core Requirements beyond the Definition of Torture</b> .....	<b>11</b>
<i>4.1 State's Obligation to Investigate, Prosecute and Punish</i> .....	<b>11</b>
<i>4.2 Right to Legal Redress</i> .....	<b>12</b>
<i>4.3 Non-refoulement Principle</i> .....	<b>13</b>
<i>4.4 The Exclusionary Rule</i> .....	<b>13</b>
<b>ANNEX I: EXTRACTS FROM THE RELEVANT LEGISLATION</b> .....	<b>15</b>
<b>ANNEX II: EXAMPLES OF THE DEFINITION OF TORTURE</b> .....	<b>16</b>

# ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

## **I. INTRODUCTION**

1. *On 9 April 2018, Deputy Commissioner for Human Rights from the Office of the Commissioner for Human Rights of the Republic of Poland sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request to review Polish legislation in relation to the definition of torture and provide examples of legislation on the definition from other jurisdictions.*
2. *On 17 April 2018, ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on anti-torture legislation, particularly on the relevant provisions of the Penal Code, which will assess its compliance with OSCE human dimension commitments and international human rights obligations.*
3. *This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist OSCE participating States in the implementation of key OSCE commitments in the human dimension.*

## **II. SCOPE OF REVIEW**

4. The scope of this Opinion covers the definition of torture and other cruel, inhuman or degrading treatment or punishment (hereafter, “other cruel, inhuman or degrading treatment or punishment” is referred as “other ill-treatment”) in the Penal Code of Poland in relation to international human rights law and recommendations of the United Nations Committee against Torture (CAT). The Opinion does not constitute a full and comprehensive review of the entire legal framework; however it touches upon a number of essential elements pertaining to the absolute prohibition of torture and other ill-treatment, as provided by the CAT in its concluding observation report on Poland.
5. As requested, the Opinion also contains an annex with some selected examples of the definition of torture from other jurisdictions, chosen on the basis of their compliance with international law, as opined by CAT. The examples serve merely to illustrate the good legislative practice in other jurisdictions rather than implying any opinion or recommendation thereon, by ODIHR.
6. The Opinion raises key issues and provides indications of areas of concern. In the interest of concision, the Opinion focuses more on problematic areas rather than on positive aspects of regulation in this field. The ensuing recommendations are based on relevant international human rights obligations and OSCE commitments.
7. This Opinion is based on an English translation of the Constitution of the Republic of Poland, the Polish Penal and Criminal Procedure Code, the Act of Poland on Foreigners and the Act on Granting Protection to Aliens on the Territory of Poland. Errors from translation may result.
8. In view of the above, ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations or comments on the legal and institutional framework governing the absolute prohibition of torture and other ill-treatment, that ODIHR may issue in the future.

### **III. EXECUTIVE SUMMARY**

9. ODIHR welcomes the willingness of the Office of the Commissioner for Human Rights to seek international expertise in relation to the definition of torture, and hopes that this Opinion will provide further guidance on how the relevant legislation could be brought in line with international human rights obligations and OSCE commitments primarily related to the definition of torture and other ill-treatment in the Polish legislation.
10. The absolute prohibition of torture and other ill-treatment imposes a number of obligations on States, including the primacy of defining torture and other ill-treatment in national legislation in accordance with international law. While States do not need to adopt the exact definition as provided in the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), they should ensure that all the elements of the definition contained in Article 1 of the UNCAT, which include any act inflicting severe pain or suffering, whether physical or mental; the element of intent; the specific purpose; and the involvement of a State official, at least by acquiescence, are transcribed into the criminal legislation.
11. Poland is party to a number of regional and international agreements and treaties prohibiting torture and other ill-treatment. Furthermore, the right to be free from torture and other ill-treatment is guaranteed by Article 40 of the 1997 Constitution of the Republic of Poland, which provides that “[n]o one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment.” The prohibition of torture is further mentioned in the Penal Code of Poland under the “offences against peace, humanity and war crimes” (Articles 118a and 123) as well as “offences against the administration of justice” (Articles 246 and 247). While this inclusion is welcomed, it has a limited scope and torture and other ill-treatment are not explicitly defined in legislation, in particular, in the Penal Code as required by the UNCAT. Furthermore, the punishment suggested for acts of torture in those provisions do not reflect the gravity of the crime. In its concluding opinion on Poland, the CAT recommended that “the State party take effective legislative measures to include torture as a separate and specific crime in its legislation and to adopt a definition of torture that covers all the elements contained in article 1 of the Convention.” It further noted that provisions of the Penal Code that are applied in cases of torture do not reflect the gravity of the crime of torture and therefore do not provide for commensurate punishment for the perpetrators.
12. The central issues for consideration by Polish authorities relate to the obligation of States to ensure that acts of torture are serious criminal offences within its legal system and the associated definition of torture which includes the nature, intent and purpose of the act of torture as well as an involvement of a public official. Article 4 of the UNCAT requires each State to ensure that torture is included as a specific crime in their national criminal law. Thus, ODIHR makes the following key recommendation:
  - A) The definition of torture within Polish legislation should be broad enough to encompass all acts against person’s integrity that have been qualified as torture and other ill-treatment under international law, and should include all the elements envisaged by Article 1 of the UNCAT, particularly, an act inflicting severe pain or suffering, as well as the intent and purpose of an act or omission. In addition, the relevant legislation should explicitly expand on the State’s full responsibility for all acts of torture committed in any territory under its jurisdiction, when inflicted by or at the instigation of or with the consent or

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

acquiescence of a public official or other person acting in an official capacity.  
[par 37]

13. Beyond defining torture and other ill-treatment as serious crimes in the national legislation, additional core requirements for consideration include the State's obligation to investigate, prosecute and punish all acts of torture and other ill-treatment (Article 12 of the UNCAT), to ensure an enforceable right to redress, including fair and adequate compensation, for victims of torture (Article 14 of the UNCAT) as well as the full implementation of the non-refoulement principle (Article 3 of the UNCAT) and the exclusionary rule (Article 15 of the UNCAT). These requirements are not exhaustive but selected based on the CAT recommendations for Poland highlighting these deficiencies in the Polish legislation. Thus, additional recommendations include:

- B) Poland should take effective legislative, administrative and judicial measures to prevent acts of torture and other ill-treatment. When determining the punishment for acts of torture or other ill-treatment, the penalties provided for in the legislation should reflect the grave nature of the crime committed, but should not be less than six years of imprisonment, as recommended by the CAT. Furthermore, acts of torture should be explicitly excluded from any statute of limitations act; [par 42]
- C) Recalling the CAT recommendation (2013) "to take immediate legal and other measures to ensure that victims of torture and ill-treatment obtain redress and have an enforceable right to fair and adequate compensation," it is recommended that relevant legislation explicitly provides for effective legal redress for victims of torture and other ill-treatment; [par 44] and
- D) It is recommended that relevant legislation includes provisions that expressly prohibit the use of evidence obtained through torture and, in line with the exclusionary rule, declare any evidence or extrajudicial statement obtained under torture or other ill-treatment inadmissible. This could also be supplemented in Article 170 of the Criminal Procedure Code which lists the conditions when evidence is inadmissible. [par 51]

### **IV. ANALYSIS AND RECOMMENDATIONS**

#### **1. International Obligations, Regional Instruments and OSCE Commitments**

14. The prohibition of torture is a fundamental element of international human rights law. The absolute ban on torture cannot be derogated under any circumstances, not even in a state of war or public emergency.<sup>1</sup> States are not only obligated to refrain from using or tolerating torture, they are also required to take positive measures to prevent its occurrence, protect and support victims, investigate any allegations of torture and punish those responsible. Overall, all the characteristics of the prohibition of torture demonstrate that it is considered to be a serious crime under international law.

---

<sup>1</sup> The prohibition against torture is well established under customary international law as *jus cogens*. It has the highest standing in customary law and is so fundamental as to supersede all other treaties, except those that are also *jus cogens*).

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

15. As a leading principle, Article 5 of the 1948 Universal Declaration for Human Rights (UDHR) provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Subsequently, the ban on torture and other ill-treatment has been included in a number of international human rights treaties, including Article 7 and 10 of the 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup>
16. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is central component of international law protecting persons against torture and other ill-treatment.<sup>3</sup> Article 1 of the UNCAT defines torture as “*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*”
17. In addition, the Committee against Torture (CAT), which monitors the implementation of the UNCAT, interprets State obligations to prevent torture as indivisible, interrelated, and interdependent with the obligation to prevent other ill-treatment because “conditions that give rise to ill-treatment frequently facilitate torture.” Accordingly, the CAT has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.”<sup>4</sup>
18. Article 3 of the European Convention on Human Rights (ECHR,) echoes the international obligation of the States’ prohibition to torture and other ill treatment.”<sup>5</sup> Its definition should be read in conjunction with Article 15 of the ECHR that states that no derogation from Article 3 can be made, thus imposing an absolute prohibition on torture and other ill-treatment. The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recalls Article 3 of the ECHR and further establishes a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).<sup>6</sup>
19. OSCE participating States committed to prohibit torture and other ill-treatment and take effective legislative, administrative, judicial and other measures to prevent and punish

---

<sup>2</sup> Republic of Poland ratified the ICCPR on 18 March 1977. In addition, see the 1979 Convention on the Elimination of All Forms of Discrimination against Women, ratified by Poland on 30 July 1980, Convention on the Rights of the Child, ratified by Poland on 7 June 1991. See also the [UN Standard Minimum Rules for the Treatment of Prisoners](#).

<sup>3</sup> The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), adopted by General Assembly resolution A/RES/39/46 on 10 December 1984. Republic of Poland ratified the UNCAT 26 July 1989 and its Optional Protocol 15 September 2005.

<sup>4</sup> See paragraphs 2 and 3 of [General Comment No 2](#) on Implementation of Article 2 by States parties (CAT/C/GC/2), 24 January 2008.

<sup>5</sup> See the European Convention on Human Rights (ECHR), was adopted by the Council of Europe in 1950, and entered into force on 3 September 1953. Article 3, however, does not define elements of torture and other ill-treatment, thus the rulings of the European Court of Human Rights (ECtHR) are largely considered when defining an act of torture.

<sup>6</sup> The [CPT](#) is not an investigative body, but it provides a non-judicial preventive mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment. It thus complements the judicial work of the ECtHR.

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

such practices.<sup>7</sup> In addition, in the 17th OSCE Ministerial Council in Athens (1 December 2009) the participating States recognized that “torture is a most serious crime [...] and pledge to uphold the absolute prohibition of torture and other ill-treatment as set forth in the CAT, to implement fully and in good faith its provisions, and to act in full conformity with all its principles.”

### **2. Existing Anti-torture Legislation in Poland**

20. Poland is party to a number of regional and international agreements and treaties prohibiting torture and other ill-treatment. Furthermore, the right to be free from torture and other ill-treatment is guaranteed by Article 40 of the 1997 Constitution of the Republic of Poland, which provides that “[n]o one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment.”<sup>8</sup> The prohibition of torture is mentioned in the Penal Code of Poland, but within a limited scope. For example, under the offences against peace, humanity and war crimes it provides that whoever “uses torture or subjects a person to cruel or inhumane treatment” (Article 118a), and whoever “in violation of international law, commits the homicide....subjects such persons to torture, cruel or inhumane treatment” (Article 123.2), should be deprived of liberty from 5 to 25 years.
21. Furthermore, Article 246 of the Penal Code prohibits an act committed by “a public official or anyone acting under his orders for the purpose of obtaining specific testimony, explanations, information or a statement, uses force, unlawful threat, or otherwise torments another person either physically or psychologically.”<sup>9</sup> Article 247 expands on protecting the rights of detainees by providing that “[w]hoever torments either physically or psychologically a person deprived of liberty shall be subject to the penalty of deprivation of liberty for a term of between 3 months to 5 years.” The penalty is graver for those who act “with particular cruelty,” amounting to the deprivation of liberty from 1 and 10 years. This penalty also extends to acts not directly committed by a public official, but also to those who permit such acts to happen.
22. The Penal Code does not include torture and other ill-treatment as a separate offence. However, torture and ill-treatment is listed in the context of other crimes, that is, other articles of the Penal Code, mentioned above. However, those are not broad enough to encompass all elements of acts of torture and other ill-treatment as explicitly defined by Article 1 of the UNCAT and thus, would not cover all of the potential contexts and crimes within which torture and ill-treatment could take place. Furthermore, the punishment suggested for acts of torture in those provisions does not reflect the gravity of the crime.
23. In its 2013 concluding observation on Poland, the CAT recommended to “take effective legislative measures to include torture as a separate and specific crime in its legislation

---

<sup>7</sup> See all [OSCE commitments on torture prevention](#). This includes, paragraph 23.4 of the [1989 Vienna Document](#), paragraph 20 of the [1994 Budapest Document](#), paragraph 16 of the [1990 Copenhagen Document](#), paragraph 21 of the [1999 Istanbul Document](#).

<sup>8</sup> See the 1997 Constitution of the Republic of Poland (Dz.U. 1997, poz. 483).

<sup>9</sup> See the 2016 Penal Code of the Republic of Poland (Dz.U. 2016 poz. 1137).

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

and to adopt a definition of torture that covers all the elements contained in article 1 of the Convention.”<sup>10</sup>

24. The CAT further noted that the State should “ensure that penalties for torture are commensurate with the gravity of the crime” in accordance with Article 4, paragraph 2, of the UNCAT.... and “to take all necessary measures to ensure that the right of detainees to complain can be fully exercised, including for complaints of torture and ill-treatment.”<sup>11</sup>

### ***2.1 Legal Interpretation***

25. There have been number of legal precedents in Poland where the courts have recognized acts of torture. In a recent case, on 30 January 2018, the District Court in Lublin ruled, by referencing the UNCAT, that an applied punishment in a detention place meets the definition of torture. The court imposed, among others, a three-year imprisonment for the responsible officer, as well as one year for each accomplice.<sup>12</sup>

### **3. Primary Elements of Definition of Torture**

26. As already noted, international obligations deriving from the absolute prohibition of torture and other ill-treatment impose a number of obligations on States. Article 2 of the UNCAT obliges each State to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>13</sup> The central issues for consideration by Polish authorities relate to the obligation to ensure that acts of torture are serious criminal offences within its legal system and torture is defined in the legislation in line with Article 1 of the UNCAT.
27. While States do not need to adopt exactly the same definition as the one provided in the UNCAT, “serious discrepancies between the definition and that incorporated into domestic law may create actual or potential loopholes for impunity... thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State.”<sup>14</sup>

---

<sup>10</sup> See [the CAT’s Concluding observations on the combined fifth and sixth periodic reports of Poland](#) and its recommendations, 23 December 2013.

<sup>11</sup> In addition, in 2016, the CAT, with reference to the Committee’s previous concluding observations, asked the Polish government to provide detailed information on the measures taken to adopt a definition of torture in domestic penal law consistent with Article 1 of the Convention. In response, in the [7th Periodic Review Report](#), published on 20 February 2018, authorities noted that “[i]n spite of the fact that the Polish Penal Code does not contain a separate torture crime, all elements specified in the definition of torture in CAT are penalised in Poland – they meet the statutory definition of various crimes contained in Kk. Notwithstanding this, the Ministry of Justice started analytical works aiming at evaluation of the justified character of introducing the definition of torture to the Polish Penal Code.”

<sup>12</sup> See the [press release](#) of the Office of the Commissioner for Human Rights of the Republic of Poland from 1 January 2018. As decision of the court is not available at the time of this reporting, ODIHR is not able to assess the reasoning of the decision. In addition, see also a [Judgment](#) of the District Court in Wroclaw from 21 March 2014, and a [Judgment](#) of the Court of Appeals from 30 September 2014, both quoting Article 3 of the ECHR.

<sup>13</sup> See also paragraph 20 of the 1994 OSCE Budapest Document, which provides that the participating States “recognize the importance of national legislation aimed at eradicating torture. They commit themselves to inquire into all alleged cases of torture and to prosecute offenders.”

<sup>14</sup> See paragraph 9 of the [General Comment No.2](#) on Implementation of Article 2.



## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

28. Article 4 of the UNCAT requires each State to ensure that all acts of torture and offences are under its criminal law. The definition itself should encompass the following: the intentional infliction of severe pain or suffering, whether physical or mental; a specific purpose; and when (both directly and indirectly) inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
29. In addition, international torture prevention mechanisms stress the importance of a gender-sensitive interpretation of torture and the need to pay particular attention to issues such as rape in detention, violence against pregnant women and denial of reproductive rights, which have long been recognised as falling under the Convention's definition.<sup>15</sup>

### ***3.1 Nature, Intent and Purpose of the Act of Torture***

30. An act constitutes torture when it is intentional, causes severe physical or mental suffering, and is committed with a specific purpose. According to the UN Interpretation of Torture, torture is "the legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour...Because of the specific intensity or nature of certain acts, the qualification of torture may be easily granted in certain cases. However, in some others, the vulnerability of the victim (age, gender, status, etc.), as well as the environment and the cumulative effect of various factors, should be taken into account to determine whether this case amounts to torture or whether it does not reach this ultimate threshold and should be considered as cruel, inhuman or degrading treatment or punishment."<sup>16</sup> This relates both to physical, as well as to mental pain and emotional anguish.
31. While torture always requires the intentional and purposeful infliction of pain or suffering on a powerless person, other ill-treatment can comprise the infliction of pain or suffering without deliberate intention.<sup>17</sup> The CAT further clarified that the element of intent and purpose does not involve a subjective inquiry into the motivations of the perpetrators but rather must result from objective determinations under the circumstances.<sup>18</sup> The ECtHR also ruled that as opposed to other ill-treatment, torture involves "deliberate inhuman treatment causing very serious and cruel suffering."<sup>19</sup>
32. Consequently, due consideration should be given to the purposive element in the definition. At a minimum, this should include, among others, a purpose for extracting a confession, for obtaining information, for punishment, for intimidation and coercion or

---

<sup>15</sup> See also the [Report of the UN Special Rapporteur A/HRC/31/57](#).

<sup>16</sup> See the [Report](#) of the UN Voluntary Fund for Victims of Torture on the Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies (2011).

<sup>17</sup> See paragraph 32 of the [Report of the Special Rapporteur](#) on torture and other cruel, inhuman or degrading treatment or punishment (A/72/178), 20 July 2017.

<sup>18</sup> Paragraph 9 of [General Comment No. 2](#) on the Implementation of Article 2 by States parties (CAT/C/GC/2), 24 January 2008. The United Nations Special Rapporteur on Torture has also opined that distinguishing factor between torture and other ill-treatment "is not the intensity of the suffering inflicted, but rather the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim.... Cruel, inhuman or degrading treatment or punishment...means the infliction of pain or suffering without purpose or intention and outside a situation where a person is under the de facto control of another." - [Report of the UN Special Rapporteur on the Question of Torture](#) (A/HRC/13/39).

<sup>19</sup> See [Selmouni v. France](#), Judgment of 28 July 1999.

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

for discrimination.<sup>20</sup> In this respect Article 246 of the Polish Penal Code has a restrictive interpretation, as prohibits an act only when committed with a purpose of “obtaining specific testimony, explanations, information or a statement.” This scope is insufficient as it does not protect all individuals who could be subject to torture and other ill-treatment. Moreover, Article 247 states that only persons deprived of liberty are protected, while torture and other ill-treatment can be committed in other settings.

### ***3.2 Involvement of a Public Official***

33. As also noted above, a State is responsible when an act of torture or omission is “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” As a positive obligation, Article 16 of the UNCAT requires States to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture [...], when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” In a number of rulings the ECtHR has noted that the State has an obligation to protect individuals from the act of torture when inflicted by a person other than a public official.<sup>21</sup>
34. The CAT noted that “where State authorities or others acting in official capacity... know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”<sup>22</sup>
35. The UN Special Rapporteur further highlighted that “individual responsibility for complicity in torture arises also in situations in which State agents do not themselves directly inflict torture or other ill-treatment but direct or allow others to do so, or acquiesce in it. In addition, orders from superiors or other public authorities cannot be invoked as a justification or excuse.”<sup>23</sup>
36. It is welcomed that, in general, Article 246 of the Penal Code imposes sanctions for “a public official or anyone acting under his orders,” and that Article 247 further extends the sanctions for any perpetrator who “acts with particular cruelty” and a “public

---

<sup>20</sup> In its most recent [concluding observation report for Italy](#) (18 December 2017), the CAT welcomed the introduction of the crime of torture as a specific offence, however noted that “the definition set forth in the new article 613 *bis* of the Criminal Code is incomplete inasmuch as it fails to mention the purpose of the act in question, contrary to what is prescribed in the Convention. Moreover, the basic offence does not include specifications relating to the perpetrator — namely, reference to the act being committed by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.”

<sup>21</sup> For example, in the case of *H.L.R. v. France* (No. 24573/94; 29 April 1997), the court ruled that “[by] virtue of the positive obligations incumbent on the States and the absolute character of the right concerned, Article 3 applied to inhuman and degrading treatment resulting from the actions of private individuals where a Contracting State had, through its acts or passivity, failed to comply with its duties under the Convention.”

<sup>22</sup> Paragraph 18 of [General Comment No. 2](#) on Implementation of Article 2 by States parties (CAT/C/GC/2), 24 January 2008.

<sup>23</sup> See paragraph 23 the [Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez](#), 7 August 2015.

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

official” who allows such acts. However, these wordings do not encompass all forms of state involvement included in the CAT.

37. ***The definition of torture within Polish legislation should be broad enough to encompass all acts against person’s integrity that have been qualified as torture and other ill-treatment under international law, and should include all the elements envisaged by Article 1 of the UNCAT, particularly, an act inflicting severe pain or suffering, as well as the intent and purpose of an act or omission. In addition, the relevant legislation should explicitly expand on the State’s full responsibility for all acts of torture committed in any territory under its jurisdiction, when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.***

### **4. Additional Core Requirements beyond the Definition of Torture**

38. Beyond defining torture and other ill-treatment as serious crimes in the national legislation, additional core requirements for consideration include the State’s obligation to investigate, prosecute and punish all acts of torture and other ill-treatment (Article 12 of the UNCAT), to ensure an enforceable right to redress, including fair and adequate compensation, for victims of torture (Article 14 of the UNCAT) as well as the full implementation of the non-refoulement principle (Article 3 of the UNCAT) and the exclusionary rule (Article 15 of the UNCAT). Some aspects discussed below are already included in other pieces of legislation but these should be expanded with the aim to bringing the legislation in line with international obligations with regard to the absolute prohibition of torture and other ill-treatment.<sup>24</sup> The absence of the definition of torture in the legislation has a negative implication on these requirements and warrants additional attention. Lastly, these requirements are not exhaustive but selected based on the CAT recommendations for Poland.

#### ***4.1 State’s Obligation to Investigate, Prosecute and Punish***

39. Under Article 12 of the UNCAT, States are obliged to investigate promptly, effectively and impartially any alleged act of torture. Certain aspects of these obligations are not explicitly covered in the legislation. For example, penalties envisaged by the Penal Code for an act of torture vary from 3 month to 25 years depending on the severity of the act committed. While there is no formal standard to follow in terms of the number of years when it comes to determine the penalty for committing torture and other ill-treatment, in 2002, the CAT recommended a sentence from 6 to 20 years.<sup>25</sup> Therefore, the punishment suggested for acts of torture in those provisions do not reflect the gravity of the crime.
40. The CAT opined that “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.”<sup>26</sup> For example, the Police Reform Act of the United Kingdom envisages the establishment of the

---

<sup>24</sup> For example, some elements are discussed in the Criminal Procedure Code (Dz.U.z 997 r. poz. 555), Act on Granting Protection to Aliens on the Territory of Poland (Dz.U.z 2003 r. poz 1176) and the Act of Poland on Foreigners (Dz.U.z 2013 r. poz.1650).

<sup>25</sup> See Summary Report of the [93<sup>rd</sup> Meeting of the Committee \(CAT/C/SR.93\)](#).

<sup>26</sup> See paragraph 5 of [General Comment No. 2](#) on Implementation of Article 2 by States parties (CAT/C/GC/2), 24 January 2008.

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

Independent Police Complaints Commission, in charge of handling complaints on the police; and the Criminal Procedure Code of Luxembourg provides that when action of torture is established, authorities must either extradite or prosecute an alleged perpetrator.<sup>27</sup>

41. To combat torture, a number of States have included a specific clause in the related article or section on torture in their criminal legislation expressly precluding the application of general criminal law provisions relating to amnesties and pardons, as well as statutes of limitations.<sup>28</sup> The Penal Code of Poland partly meets this requirement in Article 105 by providing that the statute of limitation does not apply to crimes against peace, crimes against humanity or war crimes (which are Articles 118a and 123); however by virtue of absence of the definition of torture in the legislation, this does not apply to acts of torture committed in other contexts.
42. ***Poland should take effective legislative, administrative and judicial measures to prevent acts of torture and other ill-treatment. When determining the punishment for acts of torture or other ill-treatment, the penalties provided for in the legislation should reflect the grave nature of the crime committed, but should not be less than six years of imprisonment, as recommended by the CAT. Furthermore, acts of torture should be explicitly excluded from any statute of limitations act.***

### ***4.2 Right to Legal Redress***

43. Article 14 of the UNCAT provides for an obligation of each State to legislatively ensure that the victim of an act of torture has a right to legal redress. The CAT in Comment No. 3 considers that “Article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment...without discrimination of any kind, in line with the Committee’s general comment No. 2.” This would also require enacting the legislation “specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible.”<sup>29</sup>

---

<sup>27</sup> See Chapter 30 of the [Police Reform Act](#) of Great Britain and Ireland and Article 7(3) of [Criminal Procedure Code](#) of Luxembourg.

<sup>28</sup> For example, in Denmark recent amendments to the Criminal Code and the Military Criminal Code lifted the statute of limitations on violations committed by the use of torture, including attempts and complicity, in criminal cases. 2013 amendments to the Criminal Code of Turkey specify that criminal liability for acts of torture is no longer subject to a statute of limitations, as recommended by the Committee in its previous concluding observations. See also the [Report on Key Issues in Drafting Anti-Torture Legislation of the Association for the Prevention of Torture \(2013\)](#).

<sup>29</sup> The CAT also recognizes the elements of full redress under international law and practice as outlined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147. In addition, the Criminal Code of Slovenia provides that a “person against whom a criminal sanction is being implemented shall not be subjected to torture or any other form of cruel, inhumane or degrading treatment. Any person who has suffered such treatment shall have the right to legal redress.” The Criminal Procedure Code of Moldova provides that “The victim of an especially severe or an exceptionally severe crime, the victim of torture, inhumane or degrading treatments,...shall also have the following rights: to be assisted, in line with the law, by a court-appointed attorney to provide the legal assistance guaranteed by the state if unable to afford an attorney”, as well as “of the right to protection and compensation, as well as of the right to file a request for application of protection.” The Criminal Procedure Code of Georgia obliges a judge to “inform the accused of...the right to file a complaint (claim) for torture and inhuman treatment.”

## *ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation*

44. *Recalling the CAT recommendation (2013) “to take immediate legal and other measures to ensure that victims of torture and ill-treatment obtain redress and have an enforceable right to fair and adequate compensation,” it is recommended that relevant legislation explicitly provides for effective legal redress for victims of torture and other ill-treatment.*

### *4.3 Non-refoulement Principle*

45. Various international instruments oblige the States to apply the principle of non-refoulement in relation to possible risks of torture and other ill-treatment.<sup>30</sup> Paragraph 28 of General Comment No. 4 provides “that the infliction of cruel, inhuman or degrading treatments or punishments, whether or not amounting to torture, to which an individual or his/her family were exposed in their State of origin or would be exposed in the State to which he/she is being deported, constitutes an indication that the person is in danger of being subjected to torture if he/she is deported to one of those States.” Moreover, in a number of cases the ECtHR has held that Article 3 of the ECHR would be violated if the applicant were to be extradited, because s/he would be exposed to a “real risk” of inhuman or degrading treatment or punishment.<sup>31</sup> In addition, non-refoulement under ECHR equally applies to inhuman and degrading treatment, and acts committed by non-state actors such as domestic violence, homophobic violence, while under CAT it only applies to torture.
46. Article 55 of the Constitution prohibits the extradition of Polish citizens (with exceptional cases) and Article 56 provides a right for foreigners to seek asylum. It is also welcomed that the Polish Act on Foreigners and Act on Granting Protection to Aliens on the Territory of Poland legally protects persons against extradition in cases when their life, freedom and personal security might be threatened, or could be subject to torture or other ill-treatment.<sup>32</sup> However, by absence of the definition of torture in the legislation, additional safeguards are needed to ensure the full application of this principle on all acts of torture and other ill-treatment.

### *4.4 The Exclusionary Rule*

47. The exclusionary rule must be considered under the absolute prohibition against acts of torture and other ill-treatment. Article 15 of the UNCAT commits states to “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”<sup>33</sup> In addition, Article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman

---

<sup>30</sup> See paragraph 45 of the [General Comment No. 4](#) on the implementation of article 3 of the Convention in the context of Article 22, 9 February 2018. Please see also Article 33 of the [1951 Refugee Convention](#).

<sup>31</sup> See [Soering v. United Kingdom](#), (No 14038/88, 7 July 1989), [Chahal v. United Kingdom](#), (No22414/93, 15 November 1996), [Saadi v. Italy](#) (No 37201/06, 28 February 2008) and [M.S.S. v. Belgium and Greece](#) (No 30696/09, 21 January 2011).

<sup>32</sup> See Articles 348 and 351 of the Act of Poland on Foreigners (Dz.U.z 2013 r. poz.1650) and Article 15 of the Act on Granting Protection to Aliens on the Territory of Poland (Dz.U.z 2003 r. poz 1176).

<sup>33</sup> For example, the Criminal Procedure Code of Germany provides that “Statements which were obtained in breach of [among others ill-treatment, physical interference]... shall not be used, even if the accused consents to their use.” The Criminal Procedure Code of Georgia provides that when “a plea bargain has been entered into as a result of torture, inhuman or degrading treatment or other violence, threats, deception..., it shall transfer the case to a superior prosecutor.”

## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

or Degrading Treatment or Punishment provides that “any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence ... in any proceedings.”

48. The CAT’s concluding observations reiterate the exclusionary rule, recommending the States to “take the steps necessary to ensure that, in practice, confessions obtained under torture or duress are not admitted in court proceedings in line with relevant domestic legislation and Article 15 of the Convention.” It further recommends that the State “should ensure that the law governing evidence adduced in judicial proceedings is brought into line with article 15 of the Convention so as to explicitly exclude any confessions obtained under torture.”<sup>34</sup>
49. The Special Rapporteur on Torture further opined that “[t]he exclusionary rule is fundamental for upholding the prohibition of torture and other ill-treatment by providing a disincentive to use such acts. The rule forms a part of the general and absolute prohibition of torture and other ill-treatment.” The report further noted that the State shall “go beyond the literal remit of article 15 of the Convention and provide procedures in domestic legislation for the exclusion of any and all evidence obtained in violation of safeguards designed to protect against torture and other ill-treatment.”<sup>35</sup>
50. In Polish legislation, the exclusionary rule is not defined in cases of torture and other ill-treatment. For example, Article 170 of the Criminal Procedure Code notes on a number of conditions when evidentiary motion shall be denied, however this scope does not extend to the acts of torture and other ill-treatment.
51. ***It is recommended that relevant legislation includes provisions that explicitly prohibit the use of evidence obtained through torture and, in line with the exclusionary rule, declare any evidence or extrajudicial statement obtained under torture or other ill-treatment inadmissible. This could also be supplemented in Article 170 of the Criminal Procedure Code which lists the conditions when evidence is inadmissible.***

[END OF TEXT]

---

<sup>34</sup> See the annual Reports of the Committee against Torture from [2012](#) and [2014](#). See also the [CAT Concluding Observation report on Finland](#), 20 January 2017 where the CAT welcomed amendments “explicitly prohibiting the use of evidence obtained through torture in judicial proceedings, while noting that recent changes in legislation and practice may have reduced legal safeguards for asylum seekers and increased the risk of refoulement.”

<sup>35</sup> See paragraphs 63 and 69 of the [Report of the Special Rapporteur](#) on torture and other cruel, inhuman or degrading treatment or punishment, 10 April 2014.

**ANNEX I: EXTRACTS FROM THE RELEVANT LEGISLATION**

**1. The Constitution of Constitution of the Republic of Poland (Dz.U. 1997, poz. 483)**

**Article 40**

No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.

**2. The 2016 Penal Code of the Republic of Poland (Dz.U. 2016 poz. 1137)**

**Article 118 a**

§ 2. Whoever, while taking part in a mass attack or even in one of reoccurring attacks against a group of people, organized in order to implement or support policy of a state or an organization:

[...]

3) uses torture or subjects a person to cruel or inhumane treatment, [...] shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years.

**Article 123**

§ 1. Whoever, in violation of international law, commits the homicide of 1) persons who surrendered, laid down their arms or lacked any means of defence, 2) the wounded, sick, shipwrecked persons, medical personnel or clergy, 3) prisoners of war, 4) civilians in an occupied area, annexed or under warfare, or other persons who are protected by international law during warfare, shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

§ 2. Whoever, in violation of international law, causes the persons specified under § 1 to suffer serious detriment to health, subjects such persons to torture, cruel or inhumane treatment, makes them even with their consent the objects of cognitive experiments, uses their presence to protect a certain area or facility, or armed units from warfare, or keeps such persons as hostages shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years.'

**Article 246**

A public official or anyone acting under his orders for the purpose of obtaining specific testimony, explanations, information or a statement, uses force, unlawful threat, or otherwise torments another person either physically or psychologically shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

**Article 247**

§ 1. Whoever torments either physically or psychologically a person deprived of liberty shall be subject to the penalty of deprivation of liberty for a term of between 3 months to 5 years.

§ 2. If the perpetrator acts with particular cruelty, he shall be subject to the penalty of deprivation of liberty for term of between 1 and 10 years.

§ 3. A public official who, despite his duties, allows the act specified in § 1 or 2 to be committed, shall be subject to the penalty specified in these provisions.

## ANNEX II: EXAMPLES OF THE DEFINITION OF TORTURE

The examples below note the definition of torture as contained in different criminal laws, however, these do not represent any specific definition endorsed by ODIHR. In addition, it should not be assumed that other core requirements of the prohibition of torture and other ill-treatment were met by the given countries.

### **Criminal Code of Canada**

#### **Article 269.1 – Torture**

- (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
- (2) For the purposes of this section, *official* means (a) a peace officer, (b) a public officer, (c) a member of the Canadian Forces, or (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c), whether the person exercises powers in Canada or outside Canada;

*Torture* means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) for a purpose including (i) obtaining from the person or from a third person information or a statement, (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and (iii) intimidating or coercing the person or a third person, or (b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

See also [CAT concluding observation](#) where it positively notes that the definition of torture in the Canadian Criminal Code is in accordance with the definition contained in article 1 of the Convention.

### **The Criminal Code of Finland**

#### **Section 9(a) – Torture (990/2009)**

1. If a public official causes another strong physical or mental suffering (1) in order to get him or her or another person to confess or to provide information, (2) in order to punish him or her for something that he or she or some other person has done or is suspected of having done, (3) in order to frighten or coerce him or her or another person, or (4) on the basis of race, national or ethnic origin, skin colour, language, gender, age, family relations, sexual orientation, inheritance, incapacity, state of health, religion, political opinion, political or vocational activity or other corresponding grounds, he or she shall be sentenced for torture to imprisonment for at least two and at most twelve years and in addition to removal from office.
2. Also a public official who explicitly or implicitly approves an act referred to in subsection 1 committed by a subordinate or by a person who otherwise is factually under his or her authority and supervision shall also be sentenced for torture.
3. An attempt is punishable.
4. The provisions in this section regarding public officials apply also to persons performing a public fiduciary function and to a person exercising public power and,



## ***ODIHR Opinion on Definition of Torture and its Absolute Prohibition in Polish Legislation***

with the exception of the sanction of removal from office, also to the employee of a public corporation and to a foreign public official.

See also the [CAT concluding observation](#), where is positively noted the inclusion of a prohibition of torture and other treatment violating human dignity in the Constitution of Finland; in [2017](#), it further commended the State for initiatives to revise its legislation in areas of relevance to the Convention, including the Criminal Investigation Act.

### **Criminal Code of Georgia**

#### **Torture, Article 144**

1. Torture, i.e. exposing a person, his/her close relative or the person who is dependent on him/her materially or otherwise to such conditions or treating him/her in a manner that causes severe physical pain or psychological or moral anguish, and which aims to obtain information, evidence or confession, threaten or coerce, or punish the person for the act he/she or a third person has committed or has allegedly committed, shall be punished by imprisonment for a term of seven to ten years.
2. The same act committed: a) by an official or a person holding equivalent position; b) by abusing the official position; c) repeatedly; d) against two or more persons; e) by more than one person; f) by violating the equality of persons, or due to their race, colour, language, sex, religion, belief, political or other views, national, ethnic, social belonging, origin, place of residence, material status or title; g) knowingly by the offender against a pregnant woman, a minor, a person detained or otherwise deprived of freedom, a helpless person or a person dependent on the offender materially or otherwise; h) by contract; i) for the purpose of taking a hostage, shall be punished by imprisonment for a term of two to five years, with or without deprivation of the right to hold an office or carry out a particular activity for up to five years.
3. The same act committed by an organised group, shall be punished by imprisonment for a term of twelve to seventeen years, with deprivation of the right to hold an official position or to carry out a particular activity for up to five years.

See also [CAT concluding observation](#), where it positively noted that the current legislation in line with international norms with regard to the definition of torture.

### **The Criminal Justice Act of Ireland, (United Nations Convention against Torture Act N 11, 2000)**

#### **Section 1**

- (1) In this act... Torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) for such purposes as (i) obtaining from that person, or from another person, information or a confession, (ii) punishing that person for an act which the person concerned or a third person has committed or is suspected of having committed, or (iii) intimidating or coercing that person or a third person, or (b) for any reason that is based on any form of discrimination, but does not include any such act that arises solely from, or is inherent in or incidental to, lawful sanctions.

**Criminal Code of Slovenia**

**Torture, Article 265**

- (1) Whoever intentionally causes severe pain or suffering to another person, either physical or mental, in order to obtain information or a confession from him or a third person, punish him for an act committed by himself or a third person, or which is suspected as having been committed by him or a third person with a view of intimidating him or putting him under pressure, or to intimidate a third person or put such person under pressure or for whichever reason which is based on any form of violating equality, shall be sentenced to imprisonment for not less than one and not more than ten years.
- (2) If the pain and suffering referred to in the preceding paragraph is caused or committed by an official or any other person who possesses official status or on his initiative or upon his expressed consent or tacitly, he shall be sentenced to imprisonment for not less than three and not more than twelve years.

See also the [CAT concluding observation on Slovenia](#), which welcomes the introduction of the definition of torture in the legislation.