

**RESEARCH**  
**ON NEW RULE OF**  
**WITNESS INTERROGATION**

**2017**



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**ON NEW RULE OF WITNESS INTERROGATION**  
**IN GEORGIA**

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Non-governmental organization the Human Rights Center, formerly Human Rights Information and Documentation Center (HRIDC) was founded on December 10, 1996 in Tbilisi, Georgia. The HRIDC aims to increase respect for human rights, fundamental freedoms and facilitate peacebuilding process in Georgia. To achieve this goal it is essential to ensure that authorities respect the rule of law and principles of transparency and separation of powers, to eliminate discrimination at all levels, increase awareness and respect for human rights among the people in Georgia.

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- Human Rights House Network; [www.humanrightshouse.org](http://www.humanrightshouse.org)
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## INTRODUCTION

Human Rights Center implemented project – Researching New Rule of Witness Interrogation in Georgia – by the financial support of Open Society Georgia Foundation throughout August 10, 2016 – October 10, 2017.

The project aimed to promote transparent and effective functioning of new rule of witness interrogation. The research revealed positive and negative sides of the new rule.

Within the frameworks of the project, Human Rights Center studied following issues:

How the new rule works in practice; whether the rights of the witness are protected during the interrogation before the Magistrate Judge; number of cases where the Prosecutor addressed the Magistrate Judge regarding the interrogation of witnesses and the grounds of addressing the Court; whether the motion of the Prosecutor and the court decision are grounded; whether the principle of adversarial hearing is upheld during the interrogation of the witness; whether the existing rules on witness interrogation ensure the security of the witness; whether the witnesses have understood their rights, etc...

On February 20, 2016, the new rule on witness interrogation entered into force. The new rule envisages compulsory interrogation of the witness in front of the Magistrate Judge. The research revealed that the new rule contradicts the principles of adversarial hearing and immediacy and it neglects the voluntary questioning of witness in the criminal proceedings. Granting the right to request interrogation of witness before the Magistrate Judge to only the prosecution side significantly violates the principles of adversarial hearing and equality of arms. The research also revealed the lack of sufficient substantiation in the motions of the Prosecutor and the rulings of the Judges.

As a result of the research, Human Rights Center developed recommendations and will advocate in front of the relevant government bodies.

## RESEARCH METHODOLOGY

- The legal acts and statistical data were assessed through the methods of descriptive and systemic analysis. This enabled the collection of information regarding the legal regulations of new rule of witness interrogation (Georgian Criminal Procedural Code, Criminal Code);
- Through the method of descriptive analysis, the research by Richard Vogler and Bas de Wilde – Reform of Witness Interrogation Rules<sup>1</sup> – as well as the statements of Coalition for Independent and Transparent Judiciary regarding the existing and previous rules on witness interrogation were analyzed<sup>2</sup>;
- The interviews were held with 60 lawyers and 30 prosecutors using the written questionnaires; the lawyers and prosecutors were interviewed in Tbilisi;
- Following meetings were held in Tbilisi:
  - Meeting with 30 representatives of NGO sector and experts (mainly, with the specialists of criminal law);
  - Meeting with 10 judges of Investigative and Pre-Trial Collegiums of Tbilisi City Court who have an experience regarding the new rule of witness interrogation;
- Meeting with the Chairperson of Supreme Court of Georgia;
- The information was collected about the practical implementation of new rule on witness interrogation and role of judges through attending 3 courts hearings;
- Human Rights Center provided legal assistance to three individuals who were interrogated before the Magistrate Judge according to part II of Article 114 of Criminal Procedural Code of Georgia (CPCG). Providing legal assistance to the witnesses was one of the methods for obtaining information relevant for the research.

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<sup>1</sup>Richard Vogler, Bas de Wilde, Reform of Witness Interrogation Rules in Georgia, Tbilisi, 2015. [https://www.osgf.ge/files/2015/2015/Human%20Rights%20Program/Reports\\_ENG\\_web.pdf](https://www.osgf.ge/files/2015/2015/Human%20Rights%20Program/Reports_ENG_web.pdf)

<sup>2</sup> Statements of Coalition for Independent and Transparent Judiciary:

[http://www.coalition.ge/files/postponement\\_of\\_new\\_rule\\_of\\_interrogating\\_witnesses.pdf](http://www.coalition.ge/files/postponement_of_new_rule_of_interrogating_witnesses.pdf);  
[http://www.coalition.ge/index.php?article\\_id=106&clang=1](http://www.coalition.ge/index.php?article_id=106&clang=1).

## POSTPONING ENTRY INTO FORCE OF WITNESS INTERROGATION RULE

The 1998 Criminal Procedural Code of Georgia (CPCG)<sup>3</sup> which was based on inquisitorial legal system obliged the witness to appear when summoned before the inquirer, investigator, prosecutor or Court and give the testimony, as well as answer the questions. If the witness did not fulfill this obligation, he/she would have been fined or brought by force.

On October 9, 2009, the Parliament of Georgia adopted new criminal procedural code<sup>4</sup> which was based on the principle of adversarial hearing. The 2009 procedural code prohibited witness interrogation during the stage of investigation, except for the interrogation inside the courtroom.

The 2009 CPCG introduced two new institutions – investigative interviewing and interrogation. Investigative interviewing is of voluntary nature and is not taken under the oath. Before the start of the interviewing, the identity of the witness must be established and the information given by the witness must be documented in the protocol. The protocol must be accessible for another party, but it is not considered to be an evidence<sup>5</sup>.

The interrogation bears compulsory nature. The witness has an obligation to appear for the interrogation. If a witness refuses to fulfill this obligation, he/she might be held criminally responsible. The interrogation takes place in front of the Magistrate Judge. The interrogation at the pre-trial stage is permissible under specifically defined grounds.

According to the 2009 CPCG, before the start of the trial on merits, the only way<sup>6</sup> for obtaining information from the witness should have been voluntary interviewing. This norm ensured the real equality of arms and the principle of adversarial hearing.

According to the Article 49 of the 2009 CPCG, the witness was obliged to appear before the Court when summoned. The Code envisaged the possibility of witness interrogation before the Magistrate Judge during the investigation when the life and health of the witness was under threat or when he/she was going to leave Georgia for a long time.

The norm from the 2009 CPCG which envisaged the witness interrogation only in the courtroom with the participation of both parties was supposed to enter into force on

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<sup>3</sup> Criminal Procedural Code of Georgia: <https://matsne.gov.ge/ka/document/view/31882>

<sup>4</sup> Criminal Procedural Code of Georgia: <https://matsne.gov.ge/ka/document/view/90034>

<sup>5</sup> Criminal Procedural Code of Georgia, Article 113: <https://matsne.gov.ge/ka/document/view/90034>

<sup>6</sup> Except for the interrogation in front of Magistrate Judge

December 31 of 2013. However, since 2009 till December 18, 2015, Georgian government postponed the entry into force of this norm multiple times<sup>7</sup>.

According to the explanatory notes of the draft law<sup>8</sup>, “postponing the entry into force of rule of witness interrogation was caused on the one hand, by the necessity to prepare the employees of the law enforcement system and on the other hand, by the existing gaps in the legislation which needed eradication in order to avoid serious risks that could endanger the public order and fight against crimes”.

NGOs did not agree with the postponing of entry into force of rule of witness interrogation<sup>9</sup>. According to the assessment of the Coalition for an Independent and Transparent Judiciary<sup>10</sup> (hereinafter – the Coalition), the government and especially the law-enforcement bodies could not demonstrate as to what systemic gaps were in the model of witness interrogation envisaged by the 2009 CPCG. Every explanation given by the relevant bodies until today indicates that they do not support the entry into force of new rule by the argument of “complicating the investigation” which certainly does not represent a systemic argument. Lack of sufficient training of law-enforcement bodies cannot be a relevant argument when discussing the creation of guarantees for ensuring the right to fair trial<sup>11</sup>.

The postponing of entry into force of new rule of witness interrogation was criticized both by Georgian as well as international community<sup>12</sup>.

The Coalition negatively assessed the multiple postponing of new rule that violates the principle of equality of arms guaranteed by the Georgian Constitution. According to the explanation given by the Constitutional Court of Georgia, “Although the legislator has a right to put on halt the entry into force of a normative act, this should not have a permanent nature... Such approach endangers not only the realization of the right, but

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<sup>7</sup> On July 4, 2013, the draft law was initiated by the government of Georgia in the Parliament regarding making amendments to the Criminal Procedural Code according to which the entry into force of the new procedures on witness interrogation were postponed to December 1, 2014. On December 20, 2013, by another initiative of Georgian government, the entry into force of the new rules was postponed again – in this case, by two years, till December 31, 2015.

<sup>8</sup> Explanatory Note on Amendments to Criminal Procedural Code of Georgia, page 1.

<sup>9</sup> Statements of Coalition for Independent and Transparent Judiciary:

[http://www.coalition.ge/index.php?article\\_id=99&clang=1](http://www.coalition.ge/index.php?article_id=99&clang=1);

[http://www.coalition.ge/index.php?article\\_id=106&clang=1](http://www.coalition.ge/index.php?article_id=106&clang=1);

<sup>10</sup> The Coalition for an Independent and Transparent Judiciary unites approximately 35 NGOs. Human Rights Center is a member organization of the Coalition.

<sup>11</sup> <http://www.humanrights.ge/index.php?a=main&pid=18428&lang=eng>

<sup>12</sup> Hammarberg, T. (2013). Georgia in Transition. Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges. Assessment and Recommendations by Thomas Hammarberg in his Capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia. Strasbourg, European Union., p.11. Council of Europe (2014). Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following his Visit to Georgia, from 20 to 25 January, 2014. Strasbourg, Council of Europe., pp.8-9.

its existence as well. Under such conditions, the rights become fictitious and lose their content... Groundless halting and postponing of any act endangers the principle of rule of law and feeds the feeling of injustice in the society”<sup>13</sup>. “Society is well aware of a number of high-profile cases showing that the prosecution can use a compulsory and stressful process of interrogation for influencing a witness in order to obtain a testimony favoring interests of the prosecution. At the same time, denying the testimony given to the investigation earlier and providing the testimony different from the one given at the stage of investigation during a court trial may give rise to a criminal liability towards a person who does so”<sup>14</sup>.

Although EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, Thomas Hammarberg noted about significant progress in terms of reforming criminal justice sphere since 2005, he found necessary to also take further “steps to facilitate genuine adversarial proceedings”<sup>15</sup>.

Nils Muižnieks, Commissioner for Human Rights of the Council of Europe who visited Georgia in January of 2014, noted with concern that the Georgian Parliament made a decision to postpone the entry into force of new rule of witness interrogation<sup>16</sup>.

On April 12, 2015, special working group was created in the Parliament of Georgia in order to develop the rule of witness interrogation. The group worked within the frameworks of the Legal Issues Committee which included the representatives MPs and the representatives of government, Office of Prosecutor, Judiciary and NGOs<sup>17</sup>. The creation of this group was connected to the multiple postponing of entry into force of the 2009 rules of witness interrogation. It aimed to develop the model of witness interrogation which would be in line with international human rights obligations.

In July, 2015, Ministry of Justice of Georgia introduced the draft law regarding the reforming of rules on witness interrogation which was based on the opinions of the

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<sup>13</sup> The Decision of Constitutional Court, March 23, 2005, paragraph II.

<http://www.constcourt.ge/ge/legal-acts/judgments/saqartvelos-mogalageebi-davit-silagadze-liana-darsania-da-ekaterine-wowonava-saqartvelos-parlamentis-winaagmdg-220.page>

<sup>14</sup> Statements of Coalition: [http://www.coalition.ge/files/on\\_witness\\_interrogation\\_en.pdf](http://www.coalition.ge/files/on_witness_interrogation_en.pdf);

[http://www.coalition.ge/index.php?article\\_id=99&clang=1](http://www.coalition.ge/index.php?article_id=99&clang=1);

<https://idfi.ge/en/statement-on-possible-postponement-of-enactment-of-new-rule-on-interrogating-witness>;

<http://www.transparency.ge/en/post/general-announcement/coalition-rejoins-ongoing-discussion-witness-interrogation-rules>

<sup>15</sup> Hammarberg, T. (2013). Georgia in Transition. Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges. Assessment and Recommendations by Thomas Hammarberg in his Capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia. Strasbourg, European Union. Page 13.

<sup>16</sup> Council of Europe (2014). Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following his Visit to Georgia, from 20 to 25 January, pp 8-9.

<sup>17</sup> Information regarding the working group: <http://ick.ge/rubrics/society/21415-i.html>

Special Working Group created within the frameworks of Legal Issues Committee of Parliament of Georgia<sup>18</sup>.

According to the explanatory note of the draft law<sup>19</sup>, the draft law aimed to enact new rules on witness interrogation; develop existing mechanisms of investigative interviewing and interrogation and eradicate the existing gaps; to bring the norms of GCPC in line with those international standards which serve to protect the rights of both parties and enhance the efficiency of the investigation.

On December 18, 2015, the Parliament of Georgia adopted new rule on witness interrogation which envisages mandatory investigation in front of the Magistrate Judge. This rule went into force on February 20, 2016<sup>20</sup>. The working group did not consider the recommendations of the NGO sector. The recommendations touched upon the issues of equality of arms and guaranteeing a right of defense.

The President of Georgia vetoed the postponement of entry into force of the 2009 rules on witness interrogation. On December 17, 2015, President of Georgia signed the postponement of rules on witness interrogation<sup>21</sup>.

In June, 2017, through the legal assistance of the NGOs, the complaint was lodged against the new rule on witness interrogation in Constitutional Court of Georgia. The complaint claimed the violation of the principles of equality of arms and the adversarial hearing.

## LEGAL ANALYSIS OF NEW RULE OF WITNESS INTERROGATION AND ITS ASSESSMENT BY LOCAL AND INTERNATIONAL ORGANIZATIONS

### Review of Existing Legislation

According to the Criminal Procedural Code of Georgia (CPCG), the witness interrogation takes place inside the courtroom. Article 114 of CPCG regulates the witness interrogation during the investigation.

Part I of Article 114 enumerates the instances when the witness can be interrogated before the Magistrate Judge by the request of the prosecution or the defense side. These are the following instances:

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<sup>18</sup> Statement of Coalition: <http://www.transparency.ge/en/post/general-announcement/coalition-rejoins-ongoing-discussion-witness-interrogation-rules>

<sup>19</sup> Explanatory Note on Amendments to Criminal Procedural Code of Georgia, page 1.

<sup>20</sup> Criminal Procedural Code; <https://matsne.gov.ge/ka/document/view/90034>

<sup>21</sup> <http://netgazeti.ge/news/85920/>

- There is a real danger to the life or health of the witness that might hinder the interrogation in the courtroom during the trial;
- The witness plans to leave Georgia for a long time;
- Obtaining the necessary evidence for the trial on merits from other sources will require unreasonable efforts;
- It is necessary for the application of special protective measures.

These are the preconditions for the interrogation of the witness before the Magistrate Judge. The defense and prosecution side independently decide whether or not to address the Court with a motion for the interrogation of the witness during the investigation stage.

If the witness has a disease which endangers his/her life and health and might hinder his/her appearance in the courtroom during the trial for giving the testimony, in this case, one of the parties must address the Court with the request of interrogation of this person. The motion must be accompanied with the documents which prove that this person knows relevant information, as well as the document regarding his/her health state.

If the witness plans to leave Georgia for a long time and will be absent during the trial, the relevant document must be presented to the Court. If the interrogation is requested because of the application of the special protective measures, the relevant document proving the usage of the special protective measure must be presented to the Court.

According to the subparagraph C of Part I of Article 114 of CPCG, the witness may be interrogated in front of the Magistrate Judge by the request of the Prosecutor if “Obtaining the necessary evidence for the trial on merits from other sources will require unreasonable efforts”. In this case, the Prosecutor must argue that it is impossible to continue effective investigation and establish the truth through other means.

This provision ensures the interests of the investigation and presents a guarantee against the failure of the law enforcement system considering that it can be applied when there is no other evidence in the case or it would require unreasonable efforts to obtain such evidence. In such cases, the law-enforcement bodies can conduct preliminary interrogation of the witness in front of the Magistrate Judge. The interrogation envisaged by the Part I of Article 114 is attended by the defense and prosecution sides.

The interrogation of a witness before the Magistrate Judge is also envisaged by the part II of Article 114 of GCPC according to which, a person may be interrogated before the Magistrate Judge given that there is a fact or information which would bring an objective observer to the conclusion that this person possibly possesses necessary information for establishing the circumstances of the case and this person refuses the investigative interviewing.

The investigative interviewing is envisaged by the Article 113 of the CPCG. During the investigation of a criminal case, the parties have a right to interview anybody who may have important information for the case. The interview has a voluntary nature. The interviewed person does not gain the witness status, because he/she is not warned about the criminal responsibility in this case. However, the protocol of the interview represents ground for the interrogation of the witness in the courtroom. Investigative interviewing is an important mechanism for the cooperation between the citizen and investigation. Part II of Article 114 of GCPC envisages compulsory interrogation of the witness in front of the Magistrate Judge, in case he/she refuses the voluntary interviewing. The competence envisaged by the Part II of Article 114 is granted only to the Prosecutor who must prove to the Magistrate Judge that the person to be interviewed possesses relevant information in relation to the circumstances of the case.

### **GAPS IN RULE OF WITNESS INTERROGATION**

The research has revealed that the reviewed amendments are problematic in several aspects. Specifically, following problems have been identified within the frameworks of the research:

- Granting the right to interrogate the witness before the Magistrate Judge only to the prosecution side (Article 114 of CCG);
- Criminal liability for giving substantially contradictory testimony;
- The difficulty of providing proof when the interrogation has been conducted with grave violations.

In case of application of Part II of Article 114 of CPCG, the defense side is prohibited to attend the process of interrogation before the Magistrate Judge.

The new rule on witness interrogation adopted by the Parliament of Georgia on December 18, 2015, which envisage compulsory interrogation of the witness before the Magistrate Judge has been criticized by various NGOs.

According to the assessment of the Coalition, granting the right to witness interrogation before the Magistrate Judge to the prosecution side only significantly violates the **principles of adversarial hearing and equality of arms**. According to the new regulations, the defense side may not be present at the interrogation that means that it cannot verify the reliability of the witness. Although the defense side can cross-examine the witness at the trial and thus compensate the losses incurred as a result of exclusion from the witness interrogation process during the investigative stage, however this too has illusory and formal character. This does not effectively ensure verifying the reliability of the witness that endangers the principles of equality of arms and the adversarial nature of the proceedings.

According to the Coalition, **new rule on witness interrogation ignore the voluntary nature of cooperation with the witnesses and the need for their consent**. The voluntary interviewing procedure becomes ineffective and nominal, which casts doubts on the need for such an investigative activity in general. Retaining the compulsory nature of interrogation will hinder establishment of cooperation and trust based relations between citizens and law enforcement bodies, since in the cases of refusal to give information voluntary, the forcible mechanisms can easily be applied. Consequently, the law enforcement bodies will not have a professional interest to work on improving their skills, communication with the public and raising the trust towards them.

New rule on witness interrogation is incompatible with the **principle of immediacy** which implies substantial review of all evidence and verifying their reliability in front of the decision-making judge. In this regard it is critically important to hold witness interrogation in front of the judge who makes the final decision on the case. In any other case, the witness will be tied by the previous testimony, which will also be in conflict with the principle of immediacy and will negatively affect the quality of justice<sup>22</sup>.

When analyzing the rule of witness interrogation, it is important to underline the problem related to the criminal responsibility for giving substantially contradictory testimonies<sup>23</sup>. The witness interrogated before the Magistrate Judge will be restricted by the given testimony as changing of the testimony will result in the criminal responsibility. However, according to the Georgian legislation, criminal responsibility is envisaged for giving a false testimony and false accusation.

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<sup>22</sup> See assessment of the Coalition: <https://idfi.ge/en/statement-on-possible-postponement-of-enactment-of-new-rule-on-interrogating-witness>

<sup>23</sup> Article 371<sup>1</sup> of CCG

The Public Defender of Georgia negatively assessed granting right of witness interrogation only to the prosecution side. According to him, this puts the defense in unequal conditions and fails to ensure the equality of arms and principle of adversarial hearing<sup>24</sup>.

Majority of European Countries prefer the principle of cooperation with the witness and the voluntary nature of the testifying.

In the case of *Lucà v. Italy*, the European Court of Human Rights stated: “The evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defense. As a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage”<sup>25</sup>.

The witness testimony represents particularly important evidence in the criminal proceedings. Most of the verdicts in criminal cases are based on the witness testimonies. The Constitutional Court of Georgia underlines the importance of the witness testimonies, stating that “it might be one of the sources of information, sometimes even the most important source”.<sup>26</sup> Considering this, the rule which grants privilege only to the prosecution side in terms of obtaining of witness testimony, puts the defence in unequal conditions and affects the final decision in the case.

According to the research by Richard Vogler and Bas de Wilde<sup>27</sup>, “Most European nations and all those within the common law world, rely on the voluntary attendance of witnesses, without in any way diminishing the effectiveness of investigation and prosecution. Even states such as France, which have traditionally reserved the right to use force against unwilling witnesses, are rapidly abandoning their commitment to this form of compulsion and in 2011 this country enacted a provision requiring that witnesses should be interviewed “without being subjected to any physical compulsion whatsoever.”The “material witness” provisions, which have long disfigured United States procedure, survived a challenge in the Supreme Court in 2011 but are not

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<sup>24</sup><http://www.ombudsman.ge/en/news/public-defender-responds-to-proposed-rules-of-questioning-of-witnesses.page>

<sup>25</sup>*Lucà v. Italy* ECHR, 27.05.2001,§39, *Solakov V. "The Former Yugoslav Republic Of Macedonia"*, ECHR, 31.01.2002, § 57

<sup>26</sup>№1/1/548 Decision of Constitutional Court of Georgia issued on January 22, 2015 regarding the case “Citizen of Georgia, Zurab Mikadze v. the Parliament of Georgia”,

<sup>27</sup>Richard Vogler and Bas De Wilde, Reform of Witness Interrogation Rules in Georgia, 2015; page 3. [http://www.osgf.ge/files/2015/2015/Human%20Rights%20Program/Reports\\_GEO-web.pdf](http://www.osgf.ge/files/2015/2015/Human%20Rights%20Program/Reports_GEO-web.pdf)

extensively used and are coming under increasing pressure for abolition. Georgia would not be alone in abandoning witness compulsion but on the contrary would be aligning herself with the majority of democratic states”<sup>28</sup>.

### **RECOGNITION OF WITNESS TESTIMONY AS EVIDENCE AT PRE-TRIAL HEARING AND ITS APPLICATION BY TRIAL COURT (ANALYSIS OF LEGISLATION)**

Part 14 of Article 114 of CPCG grants a right to the defense side to make a motion at the pre-trial hearing with the request to find the testimony given by the witness before the Magistrate Judge inadmissible, if it considers that the interrogation before the Magistrate Judge took place with substantive violation of law.

One of the main issues which must be decided at the pre-trial hearing is the admissibility of the evidence. The Court is not limited only by the motions of the parties and is obliged to find the evidence inadmissible by its own initiative as well given the relevant legal grounds.

CPCG does not enumerate as to what can constitute the instances of substantive violations during the witness interrogation before the Magistrate Judge. However, through the definition of the norm we can conclude that following instances represent the substantive violations during the witness interrogation: interrogation by the unauthorized person; interrogation without explaining the rights and responsibilities of the witness; exercising pressure on the witness; threatening, forcing or lying to the witness; violating procedures of the witness interrogation and etc. It is quite hard to allege the aforementioned facts, especially, under the absence of the defense side during the process of interrogation due to the prohibition existing in the legislation. Therefore, existing restriction is not balanced by such possibility.

The parties can request from the trial judge a public reading of the testimony given by the witness during the investigation, which has now appeared in the courtroom and is questioned at the trial. Specifically, part I of Article 243 of CPCG envisages possibility of public reading of the witness testimony (given at the stage of investigation before the Magistrate Judge) at the trial on merits if the witness does not appear at the trial for giving the testimony. However, such testimony cannot be the only ground for reaching a guilty verdict. Such regulation restricts the defense side to conduct effective cross-examination.

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<sup>28</sup> Reform of Witness Interrogation Rules in Georgia, 2015; page 3.

[http://www.osgf.ge/files/2015/2015/Human%20Rights%20Program/Reports\\_GEO-web.pdf](http://www.osgf.ge/files/2015/2015/Human%20Rights%20Program/Reports_GEO-web.pdf)

## CRIMINAL OFFENSES WHICH FALL UNDER PART II OF ARTICLE 114 OF CPCG

According to the Article 332 of CPCG<sup>29</sup>, the 1998 rule on witness interrogation has been retained in relation to certain categories of crimes. The crimes against life and health as well as the crimes against the state belong to these categories. The crimes which are committed through violent ways and create a danger for the life and health of a person or state also belong to this category (premeditated murder, premeditated murder under the aggravating circumstances, robbery, assault, conspiracy or revolt to alter the constitutional structure of Georgia by violence, terrorism and etc.)<sup>30</sup>.

Depending on the categories of the crimes, the durations of the operation of the old rules differ<sup>31</sup>:

- Till January 1, 2017, the old rule on witness interrogation applies to the crimes against the state and crimes envisaged by the chapter on terrorism.
- Till January 1, 2018, the old rule applies, mainly, towards the crimes against the life and health.
- In regards with one of the categories of crimes, the term for the operation of the old rule till January 1, 2017 has expired and it has not been prolonged<sup>32</sup>.

The explanatory note of the draft law which established these rules indicated that under abovementioned instances, the relevant bodies should not be limited only to the possibility of the witness interrogation before the Magistrate Judge during the stage of investigation and that the deprivation of opportunity to imminently react to the crimes and conduct range of investigative activities, including, prompt investigation of the witness, may create dangers of destruction of evidence, damaging the crime scene and absconding. According to the explanatory note, this will put the effective investigation at risk and will weaken the means to fight against the crimes in the country.

In regards with the absolute majority of the cases of witness interrogation, the old rule is used.

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<sup>29</sup> Criminal Procedural Code of Georgia; <https://matsne.gov.ge/ka/document/view/90034>

<sup>30</sup> Till January 1, 2017, in relation with the Articles 315, 324, 324<sup>1</sup>, 329<sup>1</sup>- 330<sup>2</sup>, 331 and 331<sup>1</sup> of CPCG the interrogation will take place according to the rule established by the Criminal Procedural Code of 1998; Till January 1, 2018, in relation with the Articles 108, 109, 115, 117, 126<sup>1</sup>, 178, 179, 276, 323-323<sup>2</sup>, 325-329 and 378<sup>2</sup>, the interrogation will take place according to the rule established by the Criminal Procedural Code of 1998;

<sup>31</sup> Article 332 of CPCG of February 20, 1998,

<sup>32</sup> Part III of Article 332 of CPCG of February 20, 1998.

For instance, 90 890 witnesses have been interrogated during 2016 in total. 90 848 (99.95%) witnesses out of this number have been interrogated by the old rule and 42 witnesses by the new rule (0,05%)<sup>33</sup>(Chart 1).

**Chart 1: Number of Witnesses interrogated in 2016**

Number of Witnesses interrogated in 2016	In numbers	Percentage
Total	90890	100
Old rule	90848	99.95
New rule	42	0,05

**Analyzing of public information reveals that in reality, the transitional provision envisaged by the Article 332 of CPCG is the main rule, while the new rule on witness interrogation is the exception. In 99.95% cases the witnesses are interrogated according to the old rule. The analysis of the statistics reveals that the new rule on witness interrogation is rarely used in practice and is mostly used as an exception. Nearly absolute majority of the witnesses are still interrogated by the investigative bodies where there is a risk of ill-treatment of witnesses and pressure. This goes against the announced aim of the law, specifically, to protect the witnesses from the pressure and ill-treatment.**

The Criminal Procedural Code adopted in 2009 recognized the priority of the principles of equality of arms and adversarial hearing guaranteed by the Constitution of Georgia and unlike the inquisitorial model from the 1998 CPCG, it introduced the principle of adversarial hearing. One of the main principles of the new code was ensuring of voluntary nature of the witness interrogation, his/her protection as well as ensuring equality of arms between the defense and the prosecution.

As usual, the witness interrogation still takes place according to the inquisitorial principle of the 1998 CPCG. The compulsory interrogation takes place inside the investigative body where there is high risk of pressure and coercion of the witness.

It should be also noted that it has been reported that after taking statements from the witnesses, investigators frequently declare them to be indicted persons and all material that the person provided as a witness is then used against him/her<sup>34</sup>. This possibility is given by the transitional provisions envisaged by the Article 332 of CPCG.

<sup>33</sup>#13/79507 Letter of Office of Prosecutor, issued on December 20, 2016.

<sup>34</sup>Bokhashvili B., *Effective Criminal Defense in Eastern Europe*, p. 178.

<http://www.osce.org/odihr/124399?download=true>

In his 2013 report “Georgia in Transition”, Thomas Hammarberg, EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia talks about “questionable methods of investigation” and “pressure on apprehended persons to confess a crime or incriminate someone else”<sup>35</sup>. Nils Muižnieks, Commissioner for Human Rights of the Council of Europe also paid attention to the problems related to the old rule on witness interrogation<sup>36</sup>.

### **EXPENSES MADE FOR THE ENTRY INTO FORCE OF NEW RULE OF WITNESS INTERROGATION AND APPOINTING STAFF**

On October 31, 2015, at the meeting of the criminal justice reform interagency coordination council the chairperson of the supreme court of Georgia stated that additional material and human resources were required for the implementation of the proposed amendments in the draft law on the new rule of the witness interrogation and of the existing procedures of legal proceedings. In particular, an adequate number of courtrooms and judges is required, because there are few magistrate judges in the judicial system, while their functions and duties are quite extensive under the draft law. The supreme court chairperson noted that approximately 9 million was required for efficient implementation of the amendments, which is calculated on the basis of the statistics of persons examined as witness in 2014 provided by the prosecutor's office.<sup>37</sup>  
(Chart 2, Chart 3)

**Chart 2: Expenses for the activation and implementation of the new rule of witness interrogation in 2015-2016**

Total	Salaries	Material-technical resources
350752.47 GEL	283874.47 GEL	66878 GEL

In 2016, the Government of Georgia allocated 715 815 GEL for the activation of the new rule of the witness interrogation based on its Decree # 252<sup>38</sup>.

<sup>35</sup>Hammarberg, T. (2013). Georgia in Transition. Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges. Assessment and Recommendations by Thomas Hammarberg in his Capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia. Strasbourg, European Union., 11, 14, 20.

<sup>36</sup> Council of Europe (2014). Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following his Visit to Georgia, from 20 to 25 January 2014. Strasbourg, Council of Europe., pp.8-9.

<sup>37</sup> The 20<sup>th</sup> Minute from the October 31, 2015 meeting of the Criminal Justice Reform Interagency Coordination Council

<sup>38</sup> Letter of the Ministry of Finances of Georgia, October 5, 2016

**Chart 3: Expenses per year**

Year	Sum	Purpose
2015	10756 GEL	Material-technical resources
2016	56122 GEL	Material-technical resources
	283874.47	Salaries for the staff-members

On January 18, 2016 the High Council of Justice announced the competition for the selection of the judges with regard to the activation of the Article 114 of the Criminal Procedure Code of Georgia – about the rule to interrogate a witness during the investigation.<sup>39</sup> The competition was announced for 30 vacant positions. 50 applicants were registered.<sup>40</sup> Only 46 of them passed the first stage of the competition.<sup>41</sup>

In its December 12, 2016 letter to Human Rights Center, the High Council of Justice wrote that 17 judges were appointed in the common courts starting from February 23, 2016 with regard to the new rule of the witness interrogation during the investigation stage.

29 employees were recruited in the administrations of the common courts with regard to the enforcement of the new rule of witness interrogation (trial secretaries, bailiffs and curriers). The monthly budget of the salary was GEL 22 905.

**The analysis of the information revealed that in 2015-2016 the state spent funds for the entry into force and implementation of the new rule of the witness interrogation, which does not function in practice at all. 99.95% of the witnesses are still questioned in accordance to the old rule.**

#### **PREPARING EMPLOYEES OF MINISTRY OF INTERNAL AFFAIRS AND OFFICE OF PROSECUTOR REGARDING NEW RULES OF WITNESS INTERROGATION**

For the purposes of the survey it was interesting to estimate how well prepared the investigators and future investigators were for the implementation of the new rule of witness interrogation and what kind of trainings they took and take in this regard. This information is important for the present survey because the investigators are those who have direct contact with the witnesses and the academy of the MIA is the

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<sup>39</sup> See at <http://hcoi.gov.ge/en/konkursi/2594> (available only in Georgian). On January 18, 2016 the HCOJ announced the competition for the selection of judges, which aimed to recruit new judges for the vacant positions, which appeared after the new rule of the witness interrogation during the investigation stage in the courts went into force.

<sup>40</sup> See at <http://hcoi.gov.ge/en/mosamartleobis-kandidatbis-sia/2626> (available only in Georgian). The list of applicants for the January 18, 2016 competition of the HCOJ

<sup>41</sup> Decision 1/17 of the HCOJ, January 27, 2016

institution, which shall provide intensive training courses on the aspects of the witness interrogation for future investigators.

In accordance to the information provided by the Ministry of Interior,<sup>42</sup> from February 8 to May 26, 2016 the academy of MIA organized the training “Psychological and Legal Aspects of the Use of Interrogation Techniques”. The new procedural regulations were discussed during the training. 12 groups and 143 persons attended the trainings. The obtained information demonstrates that the MIA staff members did not take the training on the peculiarities of the new rule of the witness interrogation.

Some educational activities were conducted in the prosecutor’s office, which is responsible to supervise the investigation and does not have any connection with the use of new rule of witness interrogation.

In accordance to the public information provided by the Chief Prosecutor’s Office,<sup>43</sup> in the period of February 4-19, 2016, one-day trainings were organized with regard to legislative amendments about the new rule on the witness interrogation.<sup>44</sup> 20 educational activities were conducted and 409 prosecutors and investigators were trained. The training aimed to promote smooth implementation of the law in practice. On April 25-28, 2016, with the assistance of the International Narcotics and Law Enforcement Bureau (INL) of the U.S. Embassy in Tbilisi, the investigators of the prosecutor’s office took 4-day intensive training course on interrogation/questioning tools. On August 1-5, 2016 35 prosecutors and system investigators took 5-day intensive training course on interrogation/questioning of the witnesses. The trainings were delivered by the international experts from USA.<sup>45</sup>

## **PREPARING EMPLOYEES OF JUDICIAL SYSTEM REGARDING NEW RULES OF WITNESS INTERROGATION**

Information about preparing the judges with regard to the new rule of witness interrogation was requested from the Supreme Court of Georgia and High School of Justice. It was important to estimate how well-prepared the corpus of judges met the entry into force of the new rule.

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<sup>42</sup> January 18, 2017 Letter #2 17 00143993 of the Academy of the Ministry of Interior.

<sup>43</sup> February 6, 2017 Letter # 13/7980 of the Chief Prosecutor’s Office of Georgia

<sup>44</sup> Article 114 of the Criminal Code of Georgia

<sup>45</sup> February 6, 2017 letter # 13?7980 of the Chief Prosecutor’s Office of Georgia

In parallel to the entry into force of the new rule of witness interrogation the chairperson of the Supreme Court of Georgia and High School of Justice organized meetings with the judges and trial secretaries in the district and city courts.

The first meeting was organized on February 17, 2016 in the premises of the Supreme Court of Georgia and judges of the criminal cases panel of the Tbilisi City Court and district/city courts in the eastern Georgia participated in it. During the meeting, the national legislation and case law of the European Court of Human Rights with regard to the right to fair trial guaranteed under the Article 6 of the European Convention was discussed. The Chairperson of the Supreme Court presented the recommendation of the High Council of Justice about the entry into force of the new rule of witness interrogation. She also presented the forms of motion on the witness interrogation in front of the judge, in front of the magistrate judge and also form of the court summon. 63 judges and 26 trial secretaries of the Tbilisi City Court attended the meeting.

With the initiative of the chairperson of the Supreme Court of Georgia, similar meeting was organized on February 21, 2016 in the Tskaltubo regional educational center of the High School of Justice. Judges and trial secretaries of the criminal case panel of the district/city courts of the western Georgia – total 44 persons - attended the meeting.

By the time the new rule of witness interrogation went into force on February 23, 2016, the HCOJ prepared the special court rooms for the interrogation of the witnesses in the Tbilisi City Court for effective and smooth conduct of the process.

#### **CRIMINAL OFFENSES WHICH FALL UNDER PART II OF ARTICLE 11 OF CPCG**

From March 1, 2016 to April 31, 2017 the prosecutor’s office filed **35 motions** about witness interrogation to the magistrate judges under the Part II of the Article 114 of the CPCG. The court satisfied all motions.<sup>46</sup> Among them: **(Chart 4)**

**The analysis of the statistic information revealed the following:**

- **The court never refuses to satisfy the motion of the prosecutor regarding the request of the interrogation of the witness in front of Magistrate Judge;**

The result may be conditioned by the following factors:

- **Part II of the Article 114 of the CPCG determines such a low standard of substantiation that it is very easy to satisfy the motion.**

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<sup>46</sup> June 1, 2017 Letter # 121-17 of the Supreme Court of Georgia

**Chart 4: Number of the motions about witness interrogation filed by the prosecutor’s office to the magistrate judge from March 1, 2016 to April 31, 2017**

Article of the CPCG	clarification	Number of motions
Article 370 of the CCG	False testimony, false conclusion, failure to protect the object of the expert examination or incorrect translation	1
Article 284 of the CCG	Unauthorized access to computer system	3
Article 125 of the CCG	battery	12
Article 180 of the CCG	fraud	3
Article 181 of the CCG	extortion	1
Article 218 of the CCG	Tax evasion	1
Article 260 of the CCG	Drug-related crime	1
Article 333 of the CCG	Exceeding official powers	10
Article 362 of the CCG	Making, sale or use of a forged document, seal, stamp or blank forms	3

Part II of the Article 114 of CPGC determines the standard of substantiation according to which there should be a fact and/or information that would satisfy an objective observer that the person in question may hold information necessary for ascertaining the circumstances of the criminal case and the person refuses to be interviewed. The analysis of the norm reveals that Part II of the Article 114 of the GPCPC envisages very low substantiation standard, which may rely only on one concrete fact or information. The standard of interrogating the witness in front of the magistrate judge does not require total of facts and information, which makes the satisfaction of the motion easier.

- **Because of the Part II of the Article 114 of the CPCG, the Article 114 of the CPCG does not create grounds for the judge to reject the motion of the prosecutor.**

The analysis of the Article 114 of the CPCG reveals that judge may refuse the prosecutor to satisfy the motion only based on the Part I of the Article 114. Part VII of the Article 114 focuses only on the parties and on the interrogation as stipulated in the Part I of the Article 114. (Chart 5).

## CRIMINAL OFFENSES WHICH FALL UNDER PART I OF ARTICLE 114 OF CPCG

**Chart 5: The number of motions filed to the magistrate judges from the prosecutor’s office with regard to the new rule of witness interrogation from March 1, 2016 to April 31, 2017**

Article of the CPCG	clarification	Number of motions
Article 284 of the CCG	Unauthorized access to computer system	2
Article 19-108 of the CCG	Attempt of murder	1
Article 109 of the CCG	Murder under aggravating circumstances	1
Article 11 <sup>1</sup> -151	threat	1
Article 125 of the CCG	Battery	3
Article 126 of the CCG	Violence	1
Article 137 of the CCG	rape	3
Article 118 of the CCG	Intentional less grave bodily injury	1
Article 125 of the CCG	Battery	3
Article 144 of the CCG	Taking hostages	1
Article 177of the CCG	Theft	7
Article 180 of the CCG	Fraud	10
Article 181 of the CCG	extortion	4
Article 182 of the CCG	Appropriation or embezzlement	1
Article 185 of the CCG	Damage of property by deception	1
Article 187 of the CCG	Damage or destruction of property	1
Article 185 of the CCG	Damage of property by deception	1
Article 194 of the CCG	legalization of illegal income	3
Article 333 of the CCG	Exceeding official powers	2
Article 338 of the CCG	Bribe-taking	1

From March 1, 2016 to April 31, 2017, prosecutors filed **48 motions** to the magistrate judges under the Part I of the Article 114 of the CPCG with regard to the witness interrogation. The court did not satisfy 5 motions because the witness had left the territory of Georgia.<sup>47</sup> Among them:

**Analysis of the statistic data revealed the following:**

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<sup>47</sup> Jun 1, 2017 Letter # 121-17 of the Supreme Court of Georgia

- Court rarely refuses the prosecutor's office to satisfy the motion on witness interrogation.

### SUBSTANTIATION OF MOTIONS OF PROSECUTOR (PART II OF ARTICLE 114 OF CPCG)

In the line of the Part II of Article 114 of the CPCG, a witness may be interrogated if there is a fact and/or information that would satisfy an objective observer that the person in question may hold information necessary for ascertaining the circumstances of the criminal case and if this person refuses to be interviewed. This law has very low standard of substantiation, which is applied even if there is one concrete fact or information instead the total of facts and information. The standard envisaged by the Part II of Article 114 is the lower substantiation standard than the standard of *substantiated assumption* envisaged for the usual investigative activities.

Within the framework of the research, 16 motions of the prosecutors filed under Part II of Article 114 of the CPCG with regard to witness interrogation in front of the magistrate judge were analyzed. The analysis revealed the following miscarriages:

- Majority of motions indicate that "investigation was opened into concrete criminal case under the concrete article and the prosecutor wants to interrogate the person in connection with this case." In majority of motions it is not indicated which concrete circumstances the witness can confirm and why it is significant to question him/her; also it is not clear what kind of connection the person has with the mentioned criminal case.
- The motions mainly focus on the commenced investigation, while the fact or information, which would satisfy an objective person that the person in question may hold information necessary for ascertaining the circumstances of the criminal case is not revealed.
- Interviews with the lawyers demonstrate that the magistrate judge does not inquire the reasons why the person refused to be questioned.
- Analysis of one part of motions revealed that the investigation is opened under the concrete article, however, the prosecutor requests interrogation of the person to confirm those circumstances, which neither legally nor factually is connected with the commenced investigation. For example, the investigation was opened into unauthorized access to the computer system and dissemination of the information, but the prosecutor asked questions about bribe-taking case.
- Analysis of the motions exposed two facts when the witness agrees to provide the investigation with the information (investigative interviewing) but the

investigation still petitions the court to interrogate him/her. In one of his motions, the prosecutor states that “although the person has not formally refused to be interviewed, she/he did not provide the investigation with useful information,” for that reason the prosecutor concluded it was necessary to interrogate him in front of the magistrate judge. The office of prosecutor sent motion on questioning the witness to the magistrate judge without clarifying the position of the witness. There is very vague and general wording in the motion - “he could not provide the investigation with useful information” - and it is interesting whether the person did not provide the investigation with the information at all or the provided information was not “useful” for the investigator.

- Analysis of several motions showed that due to necessity to conduct the investigation operatively, the prosecutor requested the judge to question the witness under Part II of Article 114 of the CPCG, which envisages that the person may be questioned in front of the magistrate judge if the collection of evidence from other sources for the conduct of the trial on merits requires unreasonable efforts, although there was basis to question him/her under Part I of the Article 114 of the CPCG. Although the grounds for the Part I of the Article 114 were evident in the motion, the prosecutor petitioned the court about the interrogation of the witness under Part II of the Article 114 **in order to avoid presence of the defense side during the interrogation**, because in similar cases the defense side does not attend the hearing, that make the efforts of the prosecutor easier.

## INFORMING RIGHTS AND OBLIGATIONS TO PERSON CALLED ON TO APPEAR TO INVESTIGATIVE INTERVIEWING

Lawyer-monitors of Human Rights Center interviewed the members of the Georgian Bar Association, namely 60 lawyers practicing the criminal law, based on the preliminarily elaborated questionnaire. The interviewees were selected based on their experience in relation with the new rule of witness interrogation.<sup>48</sup> The interviews showed that clients/beneficiaries of the criminal law attorneys are summoned to the investigative bodies mostly with regard to the criminal offences against health like battery or other violence, as well as criminal offences against property and economic crimes.

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<sup>48</sup>There were 41 questions in the questionnaire and covered the issues related with the procedures of the witness interrogation in front of the magistrate judges. The questionnaire covers all main aspects of the process, practical implementation of the rights and obligations of the interviewees including the implementation of obligations by the investigator during the interrogation process. Considerable part of the questionnaire refers to the interrogation process of the witness in front of the magistrate judge, peculiarities of the new rule of witness interrogation, role of the attorney and judge in the process, and more. The purpose of the questionnaire was to obtain detailed information from the lawyers about practical functioning of the new rule on witness interrogation.

The following problems were identified as a result of the interviews with the lawyers:

***There are frequent instances when the individuals are summoned for the investigation interviewing, but verbally they are told to appear in the police for the interrogation. Thus, from the very start, the investigation incorrectly informs the citizens and fails to provide information about the voluntary nature of the investigative interviewing.***

As a result, incorrectly informed citizens, who are scared by the call from the investigator, go to the interrogation either without lawyer or they communicate with the lawyers and request their legal assistance.

The clients/beneficiaries who apply for legal aid inform the lawyers that the investigator has summoned him/her to be interrogated. According to the lawyers they check the information with the investigator and find out that concrete witness is invited to the investigative body for the investigative interviewing and not for the interrogation.

Often, the questioned/interrogated witnesses do not have attorneys. They apply to the lawyers for help if they are charged.

***Often, the persons, who arrive at the investigative bodies for investigative interviewing, are not clarified about their status. Nobody clarifies them difference between investigative interviewing and interrogation, what their rights-obligations are and also that they have a right to refuse investigative interviewing and request interrogation in front of the magistrate judge in the court as guaranteed under the Criminal Procedure Code.***

If the person to be interviewed has an attorney, he/she is more informed about his/her rights and obligations and the investigative body is compelled to inform him/her about procedural rights fearing that the lawyer attending the questioning process may identify the procedural violations.

In accordance to the information provided by the Supreme Court of Georgia<sup>49</sup>, from March 1, 2016 to March 31 of 2017, 10 persons enjoyed the service of the lawyer among those who were questioned as witnesses under Part II of the Article 114 of CPCG. It is worth to note that more than one year has passed since February 20, 2016 and only 35 witnesses were interrogated in front of the magistrate judges under the Part II of the Article 114 of CPCG (35 motions were submitted).

The fact that only 35 witnesses were questioned in accordance to the new rule is not conditioned by the fact that the citizens have become more open to cooperate with the investigation.

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<sup>49</sup> March 31, 2017 Letter of the Supreme Court of Georgia

The information analyzed in the frame of this research underlines the fact that the investigative bodies do not properly inform the citizens about voluntary nature of the investigative interviewing and that the Criminal Procedure Code allows them to refuse investigative interviewing and request interrogation in front of the magistrate judge in the court.

***Often investigator does not inform the person that the criminal liability is not applied in regards with the information obtained during the interview.***

The lawyers often said that the investigator formally lists the rights and obligations of the witness in accordance to the law and does not clarify the content, which is difficult to understand for the person, who does not have a legal education. There is a problem with regard to the articles mentioned in the questioning protocol because it does not present the content of the articles that causes certain misunderstanding and confusion particularly if the witness is interviewed without attorney.

If the witness appears to the investigative body together with the attorney, the problem is easily resolved because the lawyer clarifies his/her rights and obligations to the client. The lawyers said that it should be taken into account that witness who may be potentially indicted in the concrete case, often cannot afford the lawyer's service and may appear in front of the investigator/prosecutor alone.

According to the recently observed tendency, when witness arrives at the investigative body and refuses to be interviewed by the investigator and requests to be interrogated in front of the magistrate judge, the investigator/prosecutor expresses discontent and notes that with the refusal the witness complicates the situation and warns him/her that it will "impose more responsibility on him/her" if they wish to be interrogated in front of the magistrate judge in the court, and "suggests to finish everything at the investigation stage to avoid additional problems." Similar statements negatively influence the witness and he/she refuses to be interrogated in front of the magistrate judge.

### **SUBSTANTIATION OF JUDICIAL RULINGS (PART II OF ARTICLE 114 OF CPCG)**

In accordance to the Article 114 of the Criminal Procedure Code of Georgia, the Judge hears the motion regarding interrogation of the witness in front of the Magistrate Judge no later than 24 hours since the filing of the motion. In the case of denial of the motion, the magistrate judge shall render a reasoned ruling and send/deliver it to the party requesting the interrogation.

The judge shall answer the following questions in the ruling:

Whether there is a fact and/or information that would satisfy an objective person that the person in question may hold information necessary for ascertaining the circumstances of the criminal case and if this person refuses to be interviewed. In majority of rulings the regulation of the Part II of the Article 114 of the CPCG are referred without respective verification and analysis of facts. The rulings do not provide arguments whether the prosecutor ascertains the fact that the person in question might be possessing information necessary for ascertaining the circumstances of the criminal case. The judge mostly indicates in the ruling that ‘prosecutor’s office claims that the person allegedly holds the information’ but the ruling does not say anything about the standard of objective observer and whether the prosecutor’s office meets this standard. In the ruling, the court ascertains without additional substantiation that “person may hold information with regard to concrete circumstances and concludes it is necessary to examine him/her in front of the court.”

The standards of substantiation are envisaged under the Criminal Procedure Code of Georgia: well-grounded assumption, high level of probability and beyond reasonable doubt.

Analysis of the rulings showed that they do not indicate the reasons why the witnesses refused to give testimonies to the investigation. The rulings mainly focus on the fact that the person simply “refused to provide the investigation with the information voluntarily and agrees to give testimony to the court.”

#### **FINDING TESTIMONY OF WITNESS INTERROGATED IN FRONT OF MAGISTRATE JUDGE INADMISSIBLE**

Although the defense side does not attend the interrogation of the witness in front of the magistrate judge, in accordance to the Part 14 of Article 114 of the CPCG the defense may file a motion during the preliminary hearing requesting the court to recognize as inadmissible the testimony of a person examined as a witness sbefore the magistrate judge if it believes that the person was examined before the Magistrate judge in substantial violation of law. The lawyers interviewed within the frameworks of this research reported that their motions requesting the court to recognize the testimony of the witness during the preliminary hearing as inadmissible were never satisfied. In similar situation, when on the one hand the defense does not attend the examination of the witness in accordance to the Part II of the Article 114 of the CPCG, and on the other hand the judge does not satisfy the motions of the defense, the equality of arms and adversarial principle are violated.

In response to the Human Rights Center's letter, the Supreme Court of Georgia clarified that they do not process the statistical data as to how many lawyers filed the motions to the judge of the preliminary hearing requesting to recognize the testimony of the witness in front of the magistrate judge as inadmissible and what was the decision of the court. Lack of statistics hinders us to evaluate the issue of functioning the new rule on witness interrogation in practice in respect of equality of arms and adversarial principle.

### **ROLE OF JUDGE IN PROCESS OF WITNESS INTERROGATION (PART II OF ARTICLE 114 OF CPCG)**

The Criminal Procedure Code of Georgia does not determine the competence and role of the judge in the process of witness interrogation during the trial. The role of the judge in this process is just to examine the motion of the prosecutor without oral hearing.

The survey showed that the judge has only technical role in the process of witness interrogation.

Although the law fails to clearly regulate the involvement of the judge in the process of interrogation, in respect to the new rule's purposes, the judge should not have only technical role in this process. The research revealed two instances where the interference of the judge may become necessary. These are: ***threat of self-incrimination and questions asked beyond the purposes of investigation.***

Chairperson of the Supreme Court of Georgia, Nino Gvenetadze also highlighted these issues during the meeting with the representatives of Human Rights Center. She thinks that the threat of self-incrimination is created during the interrogation and the prosecutor's office really exceeds its power; in such situation, the magistrate judge is obliged to stop the interrogation or call on the investigation to ask questions only in connection with the concrete case.

As the role of the magistrate judge is not determined in the process of witness interrogation, it becomes difficult to refer to a concrete article which may regulate his/her competence. IN this case, the definition of the judge's role shall be made in compliance with the purposes of the new rule of witness interrogation.

One of the purposes of the new rule of witness interrogation was to protect witnesses from self-incrimination. The investigation often creates the risks of the self-incrimination when they question the individual in the investigative body. The new rule on witness interrogation shall protect the individuals not only from the torture or

inhuman treatment but also from the threat of self-incrimination and purposeful negative influence from the side of investigation, when the latter forces him/her to say what they want the witness to say in the testimony. If the investigation asks questions beyond the concrete case,<sup>50</sup> the judge shall remind the investigator that the investigation deals with the completely different case and the questions are asked about different case, which is not related to the present questioning and has no factual or legal connection with the ongoing investigation.

The lawyers interviewed within the frameworks of this research clarified that they many times raised this issue in front of the judge but in vain.

### **INTERROGATION OF NIKA GVARAMIA AND MAMUKA AKHVLEDIANI IN FRONT OF MAGISTRATE JUDGE**

Human Rights Center provided legal assistance to three persons within the frameworks of this research. They were interrogated in front of the magistrate judge as witnesses in accordance to the Part II of Article 114 of the CPCG. Legal aid to the mentioned persons was one of the methods to obtain the information necessary for the research. Human Rights Center provided General Director of Rustavi 2 with legal aid, who was interrogated in front of the magistrate judge as a witness. At the same time, HRC representatives met the former chairperson of the Tbilisi City Court, Mamuka Akhvlediani to receive information about his interrogation on February 17, 2017 within the frameworks of the research on the new rule of witness interrogation. Mamuka Akhvlediani provided HRC representatives with the information about his interrogation in the court. HRC got interested into abovementioned cases due to high public interest to those cases and due to the purposes of the research.

On February 16 and 17, 2017, the General Director of Rustavi2 Nika Gvaramia and former chairperson of the Tbilisi City Court Mamuka Akhvlediani were interrogated in the Tbilisi City Court under the witness status in accordance to the new rule.<sup>51</sup>

As Nika Gvaramia and Mamukha Akhvlediani had refused to be examined in the investigative body, they were interrogated in front of the judge under witness status.

Nika Gvaramia and Mamuka Akhvlediani were questioned based on the Article 284 Part I (illegal access to the computer information) and Article 159 Part I and II (illegal disclosure of the privacy of personal correspondence) of the Criminal Code of Georgia.

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<sup>50</sup> For example in the cases of Nika Gvaramia and Mamuka Akhvlediani, although the investigation was launched into illegal dissemination of audio-recording, the investigator was asking questions only about bribe-taking and content of the recording.

<sup>51</sup> See information about the interrogation of Nika Gvaramia and Mamuka Akhvlediani at <http://www.humanrights.ge/index.php?a=main&pid=19124&lang=eng> and <http://www.humanrights.ge/index.php?a=main&pid=19133&lang=eng> (respectively)

Nika Gvaramia and Mamuka Akhvlediani were questioned in front of the judge in the Tbilisi City Court through substantial violations: although they were questioned about illegal access to the computer information and illegal obtaining and dissemination of personal correspondence, the investigation mostly asked them questions about the content of the correspondence that was not related with the investigation of the concrete fact. Consequently, we have a legitimate doubt that the investigation tried to re-direct the process towards the bribe-accepting episode and asked the questions specifically about it.

It is important to note that the judge did not try to reject the questions, which were not in relation with the case and did not indicate the investigator to ask questions only about the case.

Part of the lawyers, who had relevant experience of witness interrogation, also spoke about the inactivity of the judges.

Passive role of the judge does not support effective defense of the witness during the stage of interrogation. The role of the magistrate judge is to promote fair and effective interrogation of the witness. At the same time, the main role of the judge is to prevent the risks of self-incrimination of the witness during the interrogation.

## **RECOMMENDATIONS REGARDING NEW RULES ON WITNESS INTERROGATION**

### ***To the Parliament of Georgia:***

- To amend the Criminal Procedure Code of Georgia and to allow the defense side to attend the interrogation of the witness in front of the Magistrate Judge in instances envisaged by the Article 114 of the mentioned law;
- To amend the Criminal Procedure Code of Georgia and to grant the defense side a possibility to examine the witness in front of the Magistrate Judge.
- The CPCG must determine the role of the judge in the process of witness interrogation in order to prevent the risks of self-incrimination and oppression on the witness;
- To revoke the operation of the transitional provision which envisages operation of norms from the 1998 CPCG during the stage of interrogation;
- To amend the Part II of the Article 114 of the CPCG and determine that upon the motion of the prosecution and defense side, a person may be also examined before the Magistrate judge according to the place of investigation or the location of the witness, **if there is a total of facts and/or information** that would satisfy an objective observer that the person in question may hold information

necessary for ascertaining the circumstances of the criminal case and if this person refuses to be interviewed.

***To the High Council of Justice and High School of Justice:***

- To elaborate a program to teach standards of substantiation in the judicial rulings on new rule of witness interrogation to the judges;
- To build capacity of the judges about their rights and obligations in the process of witness interrogation and about the standards and best practices in the defense of the witnesses during the examination in the court;

***To the Chief Prosecutor's Office:***

- To elaborate a program to teach the prosecutors and investigators from the Office of Prosecutor the standards of substantiation in the motions on the new rule of witness interrogation and to train them in questioning the witnesses in front of the Magistrate judges;

***To the Academy of the MIA:***

- To elaborate a program for the investigators regarding the substantiation of motions when requesting the interrogation of the witnesses in accordance to the new rule, clarifying rights and obligations to the persons in case of investigative interviewing or interrogation and issues of the witness interrogation before the Magistrate Judge.



# General Assembly

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## Seventy-first session

Item 69 (b) of the provisional agenda<sup>1</sup>

**Promotion and protection of human rights:  
human rights questions, including  
alternative approaches for improving the  
effective enjoyment of human rights and  
fundamental freedoms**

### **TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

#### **NOTE BY THE SECRETARY-GENERAL**

The Secretary-General has the honour to transmit to the General Assembly the interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, submitted in accordance with Assembly resolution 70/146.

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<sup>1</sup> A/71/150.

## **Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

### *Summary*

The Special Rapporteur elaborates on the legal, ethical, scientific and practical arguments against the use of torture, other ill-treatment and coercive methods during interviews of suspects, victims, witnesses and other persons in various investigative contexts. He advocates the development of a universal protocol identifying a set of standards for non-coercive interviewing methods and procedural safeguards that ought, as a matter of law and policy, to be applied at a minimum to all interviews by law enforcement officials, military and intelligence personnel and other bodies with investigative mandates.

## I. Activities of the mandate holder

1. The Special Rapporteur conducted a country visit to Mauritania from 25 January to 3 February 2016 and, together with the Special Rapporteur on the independence of judges and lawyers, a country visit to Sri Lanka from 29 April to 7 May.
2. During the week of 7 March, the Special Rapporteur presented several reports to the Human Rights Council, participated in side events and held bilateral meetings with several permanent missions and civil society organizations.
3. On 19 April, the Special Rapporteur appeared before the Senate in Mexico City and met parliamentarians and officials from the Ministry of Foreign Affairs to discuss legislation on torture.
4. On 7 and 8 July, the Special Rapporteur held expert consultations on the topic of the present report, with the support of the Anti-Torture Initiative.

## II. Universal protocol for interviews<sup>53</sup>

### A. Torture, ill-treatment and coercion during interviews

5. Law enforcement officials<sup>54</sup> and other investigative bodies, including intelligence and military services, play a vital role in serving communities, preventing crime and protecting human rights. In performing their duties, they are obliged to respect and protect the inherent dignity and physical and mental integrity of all persons under questioning, including suspects, witnesses and victims (see Human Rights Council resolution 31/31).
6. The right to be free from torture and ill-treatment is a rule of customary international law and a peremptory *jus cogens* norm of international law applying to all States. It is codified in international and regional treaties and national legal systems globally; it constitutes a grave breach of the Geneva Conventions of 1949 and a violation of common article 3 and of customary international humanitarian law; and it can constitute a crime against humanity or an act of genocide under international criminal law. The obligation to prevent torture and ill-treatment applies at all times, including during the investigation of serious crimes and in situations of armed conflict, and is complemented by a range of attendant standards and procedural safeguards.
7. Nevertheless, the sophisticated normative frameworks in place often do not translate into a reduction in practices of torture, ill-treatment or coercion during questioning, which are

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<sup>53</sup> The Special Rapporteur recognizes that in some jurisdictions the word “interrogation” is used to refer to interviewing during criminal investigations and employed in a neutral manner that does not necessarily connote coercion. In the present report, the word “interview” has been chosen deliberately, given that it encompasses the questioning of suspects, witnesses and victims alike. The word further emphasizes the non-adversarial, rapport-based nature of the interview with a suspect, one that first and foremost attempts to make the presumption of innocence operational and suggests a model of criminal investigation that is more likely to be effective in preventing any form of coercion and also be more effective in solving crimes. Throughout the report, the words “interview” and “questioning” are used interchangeably.

<sup>54</sup> The Special Rapporteur uses the term “law enforcement” to refer to traditional law enforcement agencies mandated with police powers, such as arrest, questioning and detention. In jurisdictions in which police powers are also exercised by military or intelligence services, the term “law enforcement officials” is understood as being inclusive of military and intelligence personnel. The Special Rapporteur explicitly references military and intelligence agencies when they wield powers of apprehension, detention and questioning outside the national law enforcement context, such as during military or intelligence operations, including in armed conflict.

frequently used by State agents worldwide during law enforcement investigations of common and serious criminal offences, during military and intelligence operations and during armed conflict.

8. Persons interviewed by authorities during investigations may be confronted with the entire repressive machinery of society. Questioning, in particular of suspects, is inherently associated with risks of intimidation, coercion and mistreatment. The risks are heightened for vulnerable persons and for persons questioned in detention. This holds particularly true during apprehension and the early stages of custody, when the authorities exerting control over the fact and conditions of detention and conducting the investigation are the same.

9. The persistent use of unlawful and improper interviewing practices is triggered by a range of local factors, including the erroneous assumption that mistreatment and coercion are necessary to obtain confessions or elicit information. The misconception that torture is a “necessary evil” is especially prevalent during interviews relating to organized crime and national security offences. In the anti-terrorism context, Governments resort to “ticking bomb scenarios” in attempts to justify the use of abusive and unlawful interviewing practices, implicitly challenging the absolute and non-derogable nature of the torture prohibition under any circumstances. While some have sought to proffer faulty legal interpretations to support the use of torture, a more common policy option has been to refute that certain practices amount to torture or ill-treatment under international law.

10. In many countries, detainees are mistreated during investigations of common crimes. Pressure from politicians, supervisors, judges and prosecutors to solve high volumes of cases and inadequate measures of police performance, including systems of appraisal focusing only on the number of crimes “solved” or convictions, create perverse incentives for arrests and mistreatment. A lack of forensic methodology, training in modern criminal investigation techniques and equipment often also creates the perception that torture, ill-treatment and coercion are the easiest and swiftest ways to elicit confessions or other information.

11. Serious concerns arise in legal systems that place a premium on confessions to establish criminal responsibility. While the admission and realization of guilt can be significant to offenders’ rehabilitation and reintegration, the ability to convict suspects solely on the basis of confessions without further corroborating evidence encourages the use of physical or psychological mistreatment or coercion. Similarly, legal systems that de jure establish that extrajudicial confessions are probative of guilt only if corroborated by other evidence nevertheless provide de facto incentives for mistreatment.

12. In some jurisdictions, structural and resource deficiencies in the criminal justice system create conditions conducive to the proliferation of mistreatment. When Governments do not invest sufficient resources in the administration of justice, judges, prosecutors and law enforcement officials lack the necessary training and are overworked, underpaid and more prone to corruption (see [A/HRC/13/39/Add.5](#)). Under such circumstances, it is not uncommon for law enforcement officials to resort to torture or threats of torture to extract money from detainees or their relatives during investigations.

13. Mistreatment is also regularly employed as a means of punishment or reprisals, often owing to the institutional culture of States’ law enforcement agencies. In such cases, torture is part of a cultivated culture of fear and used as an instrument of power to exert social control over particular groups or segments of the population.

14. Another recurrent problem is the frequent absence or denial of fundamental procedural safeguards designed to prevent torture and other ill-treatment during questioning. Although international law mandates fundamental safeguards designed to counter the risks of mistreatment in custody,<sup>55</sup> national legislation is often deficient. In cases in which procedural safeguards are enshrined in law, their effective implementation typically remains a major challenge. It is particularly concerning that legal loopholes are frequently exploited to circumvent the rights and safeguards of persons during questioning, giving rise to torture and ill-treatment.

15. The perpetuation of unlawful practices is exacerbated by an absence of determination and commitment to eradicate torture at all times and in all circumstances; a lack of adequate education and training for law enforcement, intelligence, military and medical personnel; deficient complaint, monitoring and investigative mechanisms, and inadequate responses to allegations and complaints; interference with the ability of national monitoring bodies and civil society to gain access to detention places, document violations and represent victims of abuse; and cultures of impunity and pervasive failure to ensure accountability and provide adequate remedies.

- **B. Arguments against the use of torture, ill-treatment and coercion during interviews**

16. The absolute and non-derogable nature of the torture prohibition in international law reflects the exceptional gravity of the crime, which constitutes an immoral affront to human dignity that can never be justified. Torture dehumanizes and denies the inherent dignity of victims by treating their bodies and minds as means to achieving particular ends. It constitutes one of the most extreme forms of suffering that a person can inflict on another and often results in lifelong consequences for victims.

17. History and science offer no body of data on the strategic effectiveness of harsh questioning techniques.<sup>56</sup> The popular belief that torture is an effective way of discovering the truth — or more effective than non-coercive interviewing methods — is perpetuated by misleading depictions in popular media. The use of torture and ill-treatment has in fact long been associated with high risks of obtaining false confessions and unreliable information. It is well established that victims will say anything — regardless of whether it is true — to appease their tormentors and make the pain stop (see European Court of Human Rights, *Othman (Abu Qatada) v. the United Kingdom*). It follows that the perpetrators cannot reliably assess whether information elicited through mistreatment — if any — is truthful, false or complete. Research on lie detection reveals that trained interviewers can differentiate fabrications from truths at a rate only slightly better than chance (slightly above 50 per cent). Those employing torture and ill-treatment during interviews tend to misread victims and fail to recognize the truth, often perpetuating a vicious cycle of mistreatment and fabrications.<sup>57</sup>

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<sup>55</sup> For example, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the General Assembly in its resolution 70/175; the Code of Conduct for Law Enforcement Officials, adopted by the Assembly in its resolution 34/169; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, approved by the Assembly in its resolution 43/173.

<sup>56</sup> See Darius Rejali, *Torture and Democracy* (Princeton, New Jersey, Princeton University Press, 2007).

<sup>57</sup> The United States Senate Select Committee on Intelligence, in its study on the rendition, detention and interrogation programme carried out by the Central Intelligence Agency, concluded that the use of what were

18. Behavioural and brain sciences underlie the recognition that mistreatment and coercion are unreliable and counterproductive means to elicit accurate information. Torture and ill-treatment harm those areas of the brain associated with memory, mood and general cognitive function. Depending on their severity, chronicity and type, associated stressors typically impair encoding, consolidation and retrieval of memories, especially where practices such as repeated suffocation, extended sleep deprivation and caloric restriction are used in combination. Such practices weaken, disorient and confuse subjects, distort their sense of time and render them prone to fabricate memories, even if they are otherwise willing to answer questions.<sup>58</sup> They are also detrimental to the establishment of trust and rapport, and compromise the interviewer's ability to understand a person's values, motivations and knowledge — elements required for a successful interview.

19. Irrefutable evidence from the criminal justice system demonstrates that coercive methods of questioning, even when not amounting to torture, produce false confessions. Coercion can overcome one's will to the point where he or she may doubt his or her own memory, believe accusations made against him or her or confess owing to a conviction that no one will believe his or her innocence (see Supreme Court of Canada, *R. v. Oickle*). DNA exonerations in some jurisdictions reveal that more than one fourth of wrongfully convicted persons made a false confession or incriminating statement.<sup>59</sup> Studies reveal that the more coercive the questioning, the higher the probability that it will result in a false confession, and, in addition, that criminal defendants who falsely confess and plead "not guilty" at trial are nonetheless convicted 81 per cent of the time, often on the basis of their confessions alone.<sup>60</sup>

20. Reliance on inaccurate information obtained through mistreatment has adverse operational consequences, wasting resources better applied to enhance investigative capacity or pursue other leads. Intentional misinformation also sends investigators on distracting wild goose chases.

21. Torture, ill-treatment and coercion have devastating long-term consequences for individuals, institutions and society as a whole, causing serious and long-lasting harm to victims and often injuring the humanity and mental health of perpetrators. Such practices corrupt the cultures of institutions that perpetrate, participate in, assist in or overlook them. They debase societies that endorse or accept their use, erode public trust in law enforcement and damage its relationships with communities, with negative consequences for future investigations.

22. Political decisions to resort to torture or ill-treatment and the failure to prevent its use jeopardize States' international cooperation and harm their reputations, moral authority and legacies. Ultimately, torture only breeds more crime by fuelling hatred and a desire for vengeance against the perpetrators. Its use in Northern Ireland in the 1970s and during the so-called "war on terror" has served as a recruiting tool for the groups against which it was perpetrated.

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termed "enhanced interrogation techniques" was an ineffective means of eliciting intelligence or gaining cooperation from detainees.

<sup>58</sup> See Shane O'Mara, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Cambridge, Massachusetts, Harvard University Press, 2015).

<sup>59</sup> See Innocence Project, "False confessions or admissions", 2016. Available from [www.innocenceproject.org/causes/false-confessions-admissions/](http://www.innocenceproject.org/causes/false-confessions-admissions/).

<sup>60</sup> See Mark A. Costanzo and Ellen Gerrity, "The effects and effectiveness of using torture as an interrogation device: using research to inform the policy debate", *Social Issues and Policy Review*, vol. 3, No. 1 (2009).

### **C. Universal protocol for non-coercive, ethically sound, evidence-based and empirically founded interviewing practices**

23. Professional interviewers repeatedly emphasize that interviews are conducted much more effectively without resort to torture, ill-treatment or coercion. The Special Rapporteur welcomes strides made by some States in fashioning and implementing human rights-based standards and guidelines for investigations and non-coercive interviewing practices, but is concerned that mistreatment and coercive questioning remain prevalent in many jurisdictions. Some progress notwithstanding, State practice most often ignores the relevant normative frameworks and fails to heed key due process guarantees and procedural safeguards designed to combat abuses committed during investigations and questioning that are codified in national legislation.

24. Noting the growing attention to and momentum around the issues of investigation, questioning and custody practices at the international, regional and national levels (see Human Rights Council resolution 31/31), the Special Rapporteur identifies an auspicious opportunity to promote the development of much-needed standards and guidelines on these fundamental practices, with the aim of assisting States to meet their fundamental legal obligations to prohibit and prevent torture and ill-treatment. He takes particular note of the successful recent revisions of the Standard Minimum Rules for the Treatment of Prisoners (now known as the Nelson Mandela Rules) and the Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol) and suggests the organization of a broad public consultation by States and other relevant stakeholders to engage in dialogue on the development of a universal protocol for interviews that is grounded in fundamental principles of international human rights law, including the prohibition of torture, ill-treatment and coercion.

25. Because the principal safeguard against mistreatment during questioning is the interviewing methodology itself, the protocol must outline the guiding principles of an interviewing model that fully respects this prohibition. The protocol must design a model that is non-coercive, ethically sound, evidence-based and research-based and empirically founded. It should champion a culture of human rights compliance, the highest standards of professionalism and the use of fair and ethical practices that demonstrably enhance the effectiveness of interviews and the elicitation of accurate and reliable information. The protocol must also promote minimum standards and procedural safeguards designed to prevent improper interviewing practices in different investigative contexts. By drawing upon scientific research and documented good practices, the protocol will enhance human rights compliance, improve effective policing and help to keep societies safer.

26. The protocol must also emphasize States' obligations to take measures to incorporate relevant standards into their national systems, promote its use across national institutions and provide training to relevant personnel, including prosecutors, defence lawyers, judges, law enforcement, intelligence and military officials and medical professionals.

27. The adoption and implementation of the protocol in national systems will assist States in fulfilling key legal obligations relating to the questioning of persons and the prohibition of torture and ill-treatment, by expounding and refining the standards<sup>61</sup> that States must incorporate into

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<sup>61</sup> For example, Human Rights Council, resolution 31/31; European Court of Human Rights, *Beortegui Martinez v. Spain*; European Committee for the Prevention of Torture and Inhuman or

national law and practice with regard to the conduct of interviews, and when systematically reviewing their interviewing rules, instructions, methods and practices, as mandated under international human rights law (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 11).

### **Scope of the protocol**

28. While recognizing that States face an array of challenges in successfully combating and preventing mistreatment during questioning, the Special Rapporteur insists that the future protocol be of universal application. Except for those lawful limitations demonstrably required by the fact of detention and investigation, persons questioned and/or deprived of their liberty unequivocally retain their non-derogable human rights. The prohibition of torture or ill-treatment and the principle of humane treatment of detainees are fundamental and universally applicable rules and cannot be dependent on the material resources available to States (see [A/68/295](#)). It follows that the set of minimum standards identified in the protocol should be applied, as a matter of law and policy, to interviews conducted by all agents of all States.

29. Many safeguards against coercive and abusive questioning techniques can be implemented with limited financial expenditure, in a cost-effective and sustainable manner. Where necessary, however, the protocol may identify additional approaches whereby States with limited material resources can guarantee effective and meaningful implementation and ensure adequate protection against abuses.

30. The protocol must also acknowledge that the successful eradication of torture, ill-treatment and coercion may require greater concerted efforts in some States, especially in jurisdictions in which such practices are routine or systematic. In such cases, it should underline States' obligations to ensure the proper functioning of their criminal justice system, in particular by taking effective measures to combat corruption and by providing for adequate selection, training and remuneration of law enforcement and judicial personnel (see Human Rights Council resolution 31/31). Such steps are indispensable to bringing about positive changes in the institutional culture and the mindset of law enforcement and other officials.

31. The protocol must apply to interviews conducted by law enforcement and other investigative bodies such as intelligence and military services and administrative bodies, during counter-terrorism operations and in situations of armed conflict, including extraterritorially. In this regard, the Special Rapporteur is concerned that in some jurisdictions intelligence services have been empowered to apprehend, detain and question persons in connection with national security offences, as a way to circumvent legal and procedural safeguards applicable to traditional law enforcement agencies — a practice that has at times lamentably enabled the perpetration of egregious acts of torture and ill-treatment. The protocol should emphasize that there are no legitimate reasons for granting intelligence agencies such powers duplicating those held by traditional law enforcement bodies. Intelligence agencies mandated by law to exercise such powers must comply fully with international human rights standards, including those pertaining to the rights to liberty, fair trial, the use of torture-tainted information and the absolute prohibition of torture and ill-treatment (see [A/HRC/10/3](#); [A/HRC/14/46](#); and European Court of Human Rights, *Öcalan v. Turkey*). Intelligence services entrusted with police powers

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Degrading Treatment or Punishment, second general report on the activities of the Committee (CPT/Inf (92) 3); and Inter-American Commission on Human Rights, report on the human rights of persons deprived of liberty in the Americas (OEA/Ser.L/V/II.Doc.64).

must comply with rules applicable to the conduct of interviews in the criminal justice system. The above rationale also applies where military services or other investigative bodies are entrusted with police powers in the national law enforcement context.

32. The Special Rapporteur is concerned by the deprivation of liberty of persons for the sole purpose of questioning, a practice that entails severe risks of torture and ill-treatment. Law enforcement, military and intelligence agencies cannot be permitted to detain persons without probable cause and for the sole purpose of gathering information or intelligence, including in armed conflict (see [A/HRC/14/46](#) and [A/HRC/10/3](#)). The apprehension and detention of individuals in the absence of reasonable suspicion that they have committed or are about to commit a criminal offence, or of other internationally accepted lawful grounds for detention, are prohibited. Administrative detention outside armed conflict is prohibited save the “most exceptional circumstances”; when justified by a “present, direct and imperative threat” that cannot be addressed by alternative measures, it must be accompanied by adequate safeguards, last no longer than “absolutely necessary” and be subject to prompt and regular review. When authorized, administrative detention must be ordered, implemented and supervised by judicial authorities. Standards and procedural safeguards applicable to interviews of suspects in the criminal justice systems must equally and unambiguously apply, as a matter of law and policy, to the questioning of persons held in administrative or preventive detention outside of armed conflict (see Human Rights Committee, general comment No. 35 (2014) on liberty and security of person (article 9 of the International Covenant on Civil and Political Rights); and [A/56/156](#)).

33. The protection offered by international human rights law remains applicable during armed conflict and supplements that offered by international humanitarian law.<sup>62</sup> The humane treatment requirements under the Convention against Torture (and customary international law) and international humanitarian law are substantially equivalent; the obligations relating to the prohibition and prevention of torture and ill-treatment in international and non-international armed conflicts are the same, with common article 3 of the Geneva Conventions constituting a minimum baseline of protection applicable at all times (see [A/70/303](#)). Most guiding principles, standards and procedural safeguards applicable to interviews conducted in the traditional law enforcement context must be applicable, as a matter of law or of best practice, during interviews conducted in times of war.

34. The standards and procedural safeguards mentioned herein must be guaranteed in law and practice during all interviews by law enforcement agents and other investigative bodies, including intelligence and military services, and must also apply to private contractors and all persons who act, de jure or de facto, on behalf of, in conjunction with or at the behest of the State, under its direction or control or otherwise under colour of law (see Committee against Torture, general comment No. 2 (2008) on the implementation of article 2 by States parties).

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<sup>62</sup> Accordingly, civilian internment during both international and non-international armed conflict must remain exceptional, limited in time and accompanied by procedural safeguards akin to those described in paragraph 29 (see Human Rights Committee, general comment No. 35 (2014) on liberty and security of person (article 9 of the International Covenant on Civil and Political Rights); and Geneva Convention relative to the Protection of Civilian Persons in Time of War, arts. 42 and 78).

### III. Elements of a universal protocol for interviews

- **Alternative model of investigative interviewing**

- 1. Legal framework against coercive questioning and techniques**

35. The protocol must provide detailed guidance on the purpose and parameters of a human rights-compliant interviewing model that promotes a human rights-based approach, enhances the professionalism and effectiveness of law enforcement and other State agents and is premised on the aim of ensuring that all interviews are conducted without resort to torture, ill-treatment or coercion.

36. Persons interviewed in connection with their alleged role in a criminal offence must not be compelled to testify against themselves or to confess guilt (International Covenant on Civil and Political Rights, art. 14 (3) (g)) and investigating authorities may not resort to “any direct or indirect physical or undue psychological pressure” to induce confessions (see Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (article 14 of the International Covenant on Civil and Political Rights)). Accordingly, the prohibition of torture and ill-treatment is complemented by the prohibition of any form of coercion during the questioning of suspects. The Rome Statute of the International Criminal Court likewise prohibits “any form of coercion, duress or threat” during investigations (art. 55). The protocol must expressly recognize this prohibition and extend it to interviews of witnesses, victims and other persons in the criminal justice system.

37. As a rule of general application, all States must refrain from using any type of coercion when questioning persons under any form of detention. International law acknowledges the need for special protection for all detained persons, who, during questioning, must not be subjected to violence, threats or practices that impair their capacity of decision or their judgment or force them to confess, incriminate themselves or testify against another person (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 21).

38. In situations of armed conflict, the use of torture or any other form of coercion against prisoners of war to extract any type of information from them is strictly prohibited. Those who refuse to provide information cannot “be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind” (Geneva Convention relative to the Treatment of Prisoners of War, art. 17). Physical or moral coercion against protected persons for any purpose, in particular to extract information from them or from third parties, is also forbidden (Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 31). In situations in which persons face criminal prosecutions, the Geneva Conventions and Additional Protocols I and II thereto also provide for the right not to be compelled to testify against themselves or to confess guilt, both during international and non-international armed conflicts (Geneva Convention relative to the Treatment of Prisoners of War, art. 99; Protocol I, art. 75; and Protocol II, art. 6). This must also be understood as the absence of any moral or physical coercion in order to induce them to confess. In situations other than the aforementioned, the prohibition of coercion during questioning should apply as a matter of policy, irrespective of the international or non-international character of the conflict and of the status of the person questioned.

39. Accusatorial models of questioning tend to be confession driven and characterized by a de facto presumption of guilt and the use of confrontation and psychological manipulation. Common manipulative techniques are coercive in nature and likely to impair the free will,

judgment and memory of interviewees. Threats, inducements, misleading practices, protracted or suggestive questioning and the use of drugs or hypnosis are examples of problematic practices. Demeaning or condescending comments or accusations based on individual qualities or cultural identities are also of concern.

40. Inducements may consist of promises of immunity or lighter sentences in exchange for confessions. Misleading practices include the use of trickery or deception, including by presenting false evidence, confronting persons with false witnesses or leading one to believe that his or her co-defendants have confessed. These methods are improper because they ultimately deprive a person of his or her freedom of decision through the use of false representations (see [E/CN.4/813](#) and Corr.1). Techniques designed to minimize or maximize the suspect's perceptions of responsibility or blame, including implicit promises of leniency and presentation of false evidence, claims or insinuations about the existence of evidence against him or her, also increase the likelihood of false confessions.

41. Protracted or suggestive interviews, wherein persons are questioned for extended periods without sufficient rest or asked confusing, ambiguous or leading questions with great intensity (see *ibid.*), are likely to become coercive and constitute ill-treatment and may induce sleep deprivation, impaired decision-making and a desire to admit anything in order to bring the questioning to an end.<sup>63</sup>

42. Coercive techniques, even when not amounting to torture or ill-treatment, are means to the same ends, administered by State agents to confirm their presumption of guilt. They are likely to produce faulty information and give rise to conditions conducive to the use of torture or ill-treatment. Strengthening protection against coercive questioning methods and championing an interviewing model based on the principle of presumption of innocence are accordingly key to preventing mistreatment during questioning and enhancing authorities' effectiveness.

43. It is well established that the term "cruel, inhuman or degrading treatment or punishment" must be interpreted to extend the widest possible protection against abuses (see the Body of Principles). When persons are deprived of liberty, the prohibition of torture and ill-treatment overlaps with and is supplemented by the principle of humane treatment of detainees (see [A/68/295](#)). The European Court of Human Rights, in *Bouyid v. Belgium*, has highlighted the inherent link between concepts of degrading treatment or punishment and human dignity, finding that treatment that "humiliates or debases an individual, show[s] a lack of respect for or diminish[es] his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance" may be characterized as degrading. Any act by law enforcement that diminishes a person's human dignity, including the use of physical force when not strictly necessitated by his or her conduct, violates the prohibition of torture and ill-treatment.

44. Depending on their degree, severity, chronicity and type, undue psychological pressure and manipulative practices may themselves amount to inhuman or degrading treatment. This may be the case, among others, when certain techniques are used in combination, over a lengthy period or against vulnerable persons, including children, persons with psychosocial disabilities, persons who do not understand or adequately speak the language of the interviewing officers

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<sup>63</sup> For example, Christian Meissner, Christopher E. Kelly and Skye A. Woestehoff, "Improving the effectiveness of suspect interrogations", *Annual Review of Law and Social Science*, vol. 11 (2015).

and other persons who may be particularly sensitive to coercion owing to their specific needs or physical or emotional development.

45. International and regional human rights mechanisms have to date developed an extensive body of jurisprudence on practices that amount to physical or psychological torture or ill-treatment, including but not limited to punching, kicking, beatings, electrocution, forms of suffocation, burns, use of firearms, mock executions, threats of reprisals against relatives, death threats, restraints in very painful conditions, rape, sexual abuse and humiliation, sleep deprivation, prolonged stress positions, prolonged solitary confinement, incommunicado detention, sensory deprivation, exposure to extreme temperatures or loud music for prolonged periods, dietary adjustments, blindfolding and hooding during questioning, prolonged questioning sessions, removal of clothing, deprivation of all comfort and religious items and exploitation of phobias during questioning (see A/HRC/13/39/Add.5; A/52/44; CCPR/C/USA/CO/3/Rev.1; CAT/C/USA/CO/2; and CAT/C/KAZ/CO/3). Deplorably, such illegal methods have often been combined with poor conditions of detention — which can alone amount to cruel, inhuman or degrading treatment in themselves — to exert additional psychological pressure on detainees to reveal information. The Special Rapporteur recalls that the physical environment and conditions during questioning must be adequate, humane and free from intimidation, so as not to run afoul of the prohibition of torture or ill-treatment.

46. The Special Rapporteur expresses serious concern about the practice of holding terrorism suspects in solitary confinement or other forms of isolation in order to break their resistance to questioning. The imposition of solitary confinement of any duration for the purpose of pressuring persons to confess, provide information or admit guilt violates the prohibition of torture (see A/66/268). Practices such as the “separation” technique described in appendix M to the United States Army field manual on human intelligence collector operations, whereby detainees are isolated and prevented from communicating with anyone except medical, detention and intelligence personnel, in an attempt to decrease their resistance to questioning, are coercive tactics and violate international law.

## **2. Guiding principles of investigative interviewing**

47. Encouragingly, some States have moved away from accusatorial, manipulative and confession-driven interviewing models with a view to increasing accurate and reliable information and minimizing the risks of unreliable information and miscarriages of justice. The essence of an alternative information-gathering model was first captured by the PEACE<sup>64</sup> model of interviewing adopted in 1992 in England and Wales. Investigative interviewing models fashioned after that model were subsequently adopted by other jurisdictions and the International Criminal Court. Initially developed for criminal investigations, models of investigative interviewing can provide positive guidance for the protocol and be applied in a wide range of investigative contexts, including during intelligence and military operations.

48. The investigative interviewing model comprises a number of essential elements that are key to the prevention of mistreatment and coercion and help to guarantee effectiveness. Interviewers must, in particular, seek to obtain accurate and reliable information in the pursuit of truth; gather all available evidence pertinent to a case before beginning interviews; prepare

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<sup>64</sup> The five steps of the PEACE model are preparation and planning; engage and explain; account; closure; and evaluation.

and plan interviews based on that evidence; maintain a professional, fair and respectful attitude during questioning; establish and maintain a rapport with the interviewee; allow the interviewee to give his or her free and uninterrupted account of the events; use open-ended questions and active listening; scrutinize the interviewee's account and analyse the information obtained against previously available information or evidence; and evaluate each interview with a view to learning and developing additional skills. The remainder of the present section provides an overview of some of these elements, on which the protocol should provide detailed guidance.

The protocol must reiterate the precise aim of questioning, namely to obtain accurate and reliable information in order to discover the truth of all relevant facts about matters under investigation. The aim of interviews must not be to elicit confessions or other information reinforcing presumptions of guilt or other assumptions held by officers.<sup>65</sup> Interviews are conducted to make the presumption of innocence operational. Officers generate and actively test alternative hypotheses through systematic preparation, empathetic rapport-building, open-ended questions, active listening, strategic probing and disclosure of potential evidence. Such interviews are far more effective and compliant with human rights.

49. Objectivity, impartiality and fairness are critical components of investigative interviews. They require officers to keep an open mind, even when the evidence against a person is strong. An objective, impartial and fair interviewing process will reduce the risks of resorting to confession-oriented techniques or coercion and of eliciting false admissions or faulty intelligence. In criminal investigations, a fair police process will form the preparatory basis for a fair trial.<sup>66</sup> Officers must remain professional and not allow their prejudices, preconceptions or emotions to affect their performance during interviews.

50. Systematic and solid preparation increases the quality and likelihood of successful interviews. Conversely, insufficient preparation is bound to cause setbacks and creates risks that agents will resort to pressure or physical coercion to elicit information or confessions. Adequate preparation requires full knowledge of and compliance with applicable rules of procedure governing the conduct of interviews. To conduct the most effective interview possible, officers should, among other things, have clear knowledge and understanding of all information pertinent to the case, be fully cognizant of the legal definition of the offence under investigation and identify all potential evidence in the case file and every possible explanation of its origin.<sup>67</sup> The preparation of a strategy and interview structure designed to best elicit information is also essential, as is the ability to remain flexible throughout the interview.

51. The development and maintenance of rapport is also a crucial determinant of effective non-coercive interviews. Rapport can help to reduce the interviewee's anxiety, anger or distress, while increasing the likelihood of obtaining more complete and reliable information. Rapport-building techniques must not be used for the purposes of manipulation or to exert undue pressure to induce confessions, which would be incompatible with the purpose and spirit of the investigative interviewing model. The protocol should clearly set out the duty of interviewers to

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<sup>65</sup> See the twelfth report on its activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (2002) 15).

<sup>66</sup> See the European Code of Police Ethics.

<sup>67</sup> For example, Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, *Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers* (Warsaw, 2013).

maintain a professional attitude and refrain from using any form of coercion during the entire interview process. It must also emphasize that interviewers ought to obtain the cooperation of persons questioned, rather than to demonstrate their authority or gain control over them, manipulate them or force them to comply with their wishes.

52. It is recommended that interviewers begin each topic by asking open-ended questions and allow the interviewee to provide a free and uninterrupted account of the events under investigation. Contrary to complex, leading or compound questions, open-ended and neutral questions encourage memory retrieval and are less likely to induce admissions against a person's will, influence his or her account or contaminate his or her memory. Broad and open-ended questions will enable innocent suspects to provide information freely, while preventing guilty suspects from understanding their evidentiary significance.

53. As a matter of best practice, interviewers are encouraged to proceed, when necessary, with probing questions designed to elicit information that will test all possible alternative explanations identified during the preparation of the interview. Strategic probing and disclosure of potential evidence allows officers to explore the interviewee's account in depth before proceeding to the next topic, helping to ensure that the presumption of innocence is respected while strengthening the case against a guilty suspect by preventing the subsequent fabrication of an alibi.<sup>68</sup> Although interviewers may be persistent with their line of questioning when probing the interviewee's account, questioning must never become unfair or oppressive.

54. The same guiding principles should apply to interviews of witnesses, victims and other persons in the criminal justice system. The protocol must additionally regulate objective, fair, human rights-based, non-coercive and rapport-based intelligence interviews during intelligence and military operations. Research and experienced practitioners agree that ethical information-gathering approaches similar to those employed in the criminal justice system lead to greater information gains and offer a more effective model than coercive intelligence interviewing.

### **3. Training and change in culture and mindset**

56. The questioning of persons is a specialist task that requires specific training in order to be performed successfully and in accordance with the highest standards of professionalism. The protocol must insist on the importance of adequate and regular training for law enforcement and other personnel involved in the questioning of persons (see [A/HRC/4/33/Add.3](#) and [CAT/C/USA/CO/2](#)).

57. The training of interviewers encompasses several components, beginning with effective training in international human rights law, including the prohibition of torture, ill-treatment and other form of duress;<sup>69</sup> where applicable, training on the Geneva Conventions should also be provided. Training should include but not be limited to theoretical knowledge about international and national standards and guidelines relating to questioning, in addition to practical information, preparation and practice in the steps of investigative interviews and

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<sup>68</sup> See Ivar A. Fahsing and Asbjørn Rachlew, "Investigative interviewing in the Nordic region", in *International Developments in Investigative Interviewing*, Tom Williamson, Becky Milne and Stephen P. Savage, eds. (Cullompton, United Kingdom, Willan, 2009).

<sup>69</sup> See the report of the Inter-American Commission on Human Rights on the human rights of persons deprived of liberty in the Americas (OEA/Ser.L/V/II.Doc.64).

exercises designed to facilitate skills development. The use of scenario-based exercises and the recording and review of interviews constitute best practices in this respect. References to empirical and scientific evidence on the unreliability and counterproductiveness of torture and coercion will also help to effect the needed change in mindsets and interviewing culture. Underlining the adverse impact of mistreatment on memory retrieval would be especially beneficial. Training should also include awarenessraising activities on effective protection of and adaptation to the specific needs of vulnerable persons.

58. States must further ensure that supervisors, judicial officers, prosecutors and medical personnel are also trained on international standards relating to the prohibition and prevention of torture, human rights-compliant interviewing techniques and the duties to report, effectively document and investigate allegations of torture and ill-treatment. Raising awareness among all personnel directly or indirectly involved in the questioning of persons is a necessary step towards changing law enforcement culture, especially in jurisdictions in which mistreatment is routine or systematic, and towards the effective implementation of the torture prohibition. It is also essential for law enforcement commanders and leaders to be made aware of the detrimental strategic impact that torture and ill-treatment have on the establishment and maintenance of their legitimacy within and relationships with communities.

59. The Special Rapporteur underscores the importance of developing corroborating methods of crime investigation, investing in adequate equipment and effectively training investigators on available modern and scientific investigation techniques. These measures can help to facilitate the transition from confession-led to evidence-led investigations and provide surplus information useful to the preparation and conduct of effective interviews, reducing the risk that officers will resort to mistreatment to extract information.

- **B. Set of standards and procedural safeguards**

60. A number of due process guarantees and procedural safeguards guaranteeing the right to justice and fair trial, and against arbitrary detention, are critical and inextricably linked to the prevention of torture and ill-treatment during questioning. Article 14 of the International Covenant on Civil and Political Rights provides guarantees against the use of all forms of direct or indirect physical or psychological pressure by authorities against a suspect for the purposes of obtaining a confession. The rights not to be compelled to testify against oneself or to confess guilt and to be guaranteed counsel and legal aid are particularly crucial. Aside from safeguarding the fundamental human rights of individuals, these measures benefit societies generally, by fostering trust in institutions, promoting the reliability of evidence and facilitating the effectiveness of national judicial processes (see [A/HRC/WGAD/2012/40](#)). Similarly, safeguards enshrined in article 9 of the Covenant help to prevent torture by reducing opportunities and incentives for mistreatment and coercion during detention.

61. The Special Rapporteur examines herein several safeguards of key significance to the future protocol, particularly as applicable to persons in detention. The protocol should also consider other scenarios, including the rights of suspects not deprived of liberty, safeguards attendant to informal questioning and additional preventive measures against mistreatment and coercion. The protocol must account for the reality that torture and ill-treatment during arrest or detention can also take place outside the interview room and induce forced confessions during subsequent questioning.

62. Judicial control of detention is a fundamental safeguard for persons deprived of liberty in connection with criminal charges. Persons detained on criminal charges must not be held in facilities under the control of their interviewers or investigators for more time than is legally required to hold a judicial hearing and obtain a judicial warrant of pretrial detention. This period should never exceed 48 hours, save absolutely exceptional and justified circumstances (see general comment No. 35). Suspects must be transferred to a pretrial facility under a different authority immediately thereafter, after which no further unsupervised contact with interviewers or investigators may be permitted (see [A/68/295](#)). As a matter of best practice, States ought to entrust different bodies with separate chains of command with the detention and questioning of persons, to help to protect detainees from mistreatment and reduce the risk of conditions of detention being used to pressure them during questioning. All detainees must be properly registered from the moment of apprehension, a public centralized detention register must be kept and the chain of custody thoroughly documented (see [A/HRC/13/39/Add.5](#)).

63. The practice of detaining persons incommunicado and questioning them in unofficial or secret facilities is of grave concern because it exposes individuals to heightened risks of torture. Secret detention amounts to torture or ill-treatment in itself and should be abolished and criminalized under national law. States must ensure that questioning is conducted only at official and accessible facilities, regardless of the form of detention. In the criminal justice system, any evidence obtained from detainees in unofficial places of detention and not confirmed by them during subsequent interviews at official locations ought to be inadmissible in court (see [A/56/156](#)).

## **1. Information on rights**

64. Any person arrested or detained must, at the time of deprivation of liberty and before any questioning, be informed of his or her rights and ways to avail himself or herself of those rights (see the Body of Principles). This includes the right to be informed without delay of the reasons — the factual and legal basis — justifying arrest or detention and the right to bring proceedings before the court and obtain appropriate remedies. Persons arrested or detained in connection with criminal charges are entitled to receive prompt information about the charges (see general comment No. 35).

65. Before the beginning of every interview, the information provided must include, at a minimum, the rights to remain silent during questioning; to a lawyer of one's choice and free legal aid where the interests of justice so require; to consult counsel before questioning and to be questioned in the presence of counsel; and to free and effective interpretation and translation if the individual does not understand or adequately speak the language of questioning (see the Rome Statute, art. 55; and European directive 2012/13/EU).

66. Information should be provided to interviewees in a manner that is sensitive to age, gender and culture and corresponds to the needs of vulnerable persons, and in a language, means, mode and format accessible to and understood by them. Means of verification and documentation that this information was provided must be established, whether by way of printed record, audiotape, videotape or witness accounts (see [WGAD/CRP.1/2015](#)).

67. The Special Rapporteur recognizes that the content of some procedural rights may vary, to a limited extent, depending on the legal status of the interviewee and the context of questioning. The provision of precise and accurate information on one's status and rights before questioning is therefore doubly critical. Authorities may not interview persons as "witnesses" or under the

guise of “informative talks” in order to evade the legal safeguards attendant to the questioning of suspects. Any person who is under a legal obligation to attend and remain at an establishment for questioning must be afforded the same rights as a suspect. When a person becomes a suspect during questioning, the interview must be suspended and begin again only if the interviewee has been made aware of this change and has been given a full rundown of his or her rights and is able to fully exercise them (European directive 2013/48/EU).

## 2. Right of access to counsel

68. The right of access to counsel is one of the most essential safeguards against torture and ill-treatment. Not only does a lawyer’s presence act as a deterrent against mistreatment or coercion and facilitate the undertaking of remedial action if mistreatment occurs, but also can protect officials facing unfounded allegations of improper conduct.

69. Access to counsel must be provided immediately after the moment of deprivation of liberty and unequivocally before any questioning by authorities.<sup>70</sup> Counsel must be present for all interviews, and for their entirety (see [A/68/295](#)). This right applies to, among others, detention on criminal charges, prisoners of war, criminal detention relating to armed conflict, detention of individuals considered to be civilian internees under international humanitarian law and administrative detention outside of armed conflict (see WGAD/CRP.1/2015).

70. The Special Rapporteur is concerned that, in many jurisdictions, access to a lawyer during questioning is routinely denied or unduly delayed until confessions or incriminating statements are elicited. The protocol must adequately reflect the prohibition on interviewing persons without counsel, except in compelling circumstances or when the interviewee gives his or her voluntary and fully informed consent to waive this right (see the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; [A/68/295](#); and [E/CN.4/813](#) and Corr.1), and reiterate that access to counsel must be enjoyed by anyone deprived of liberty, regardless of whether the offence in question is considered “minor” or “serious”.

71. Compelling circumstances denying access to counsel must be strictly defined in national law and correspond to situations in which there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of persons, or where immediate action by investigators is imperative to prevent the destruction or alteration of essential evidence or to prevent interference with witnesses. Even then, the questioning of suspects without a lawyer must be accompanied by appropriate safeguards, limited to what is strictly necessary to achieve its singular purpose (i.e., obtaining information to address the exigent circumstances) and cannot unduly prejudice the rights of the defence (European directive 2013/48/EU). Defence rights are in principle irreparably prejudiced when incriminating statements made during questioning in the absence of counsel are used for a conviction (see European Court of Human Rights, *Salduz v. Turkey*).

72. Where a person waives the right to counsel, means of verification should be employed to ensure that he or she received clear and sufficient information about the content of the right and the potential consequence of a waiver and to establish that the waiver was voluntary and unequivocal (see the United Nations Principles and Guidelines on Access to Legal Aid in Criminal

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<sup>70</sup> See the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly in its resolution 67/187; and Human Rights Committee, communication No. 770/1997, *Gidin v. Russian Federation*, views adopted on 20 July 2000.

Justice Systems). When a person invoked the right to assistance of counsel during questioning, a waiver cannot be established by evidence that he or she responded to further questioning in the absence of counsel, even if formerly advised of his or her right to remain silent. In such situations, the interview cannot continue until the assistance of counsel is actualized, unless the interviewee initiates further communication with interviewers (see European Court of Human Rights, *Pishchalnikov v. Russia*).

73. The right to a lawyer entails the right to meet in private and consult and communicate in full confidentiality before any interview, which is essential to preserve defence rights and enable detainees to raise issues about treatment in custody.

74. The protocol should further provide practical guidance on the role, rights and responsibilities of lawyers in relation to questioning, including, for example, advice on — and a rundown of potential consequences of — exercising the right to remain silent. It must affirm that counsel must be physically present and able to intervene during interviews to protect the interviewee's rights and ensure fair treatment. Lawyers should be allowed to ask questions, request clarifications, challenge improper or unfair questioning and advise clients without intimidation, hindrance, harassment or improper interference. Lawyers cannot, however, prevent interviewees from answering questions that they wish to answer, reply on their behalf or otherwise unduly interfere with questioning.

75. The protocol should contain guidance on the right to free legal assistance. Many States regrettably still lack the resources and capacity necessary to provide legal aid (see the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems). In the absence of a sufficient number of certified lawyers and a full-fledged legal aid system covering all stages of deprivation of liberty, authorities should, as an interim measure, grant detainees the right to have a trusted third party present during questioning during initial custody (see [CAT/OP/BEN/1](#)). The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, while asserting that lawyers are the first providers of legal aid, confirm that other stakeholders, including non-governmental organizations, community-based organizations, professional bodies and associations and academic institutions, may step in to fulfil this function.

### **3. Right to remain silent**

76. Persons arrested or detained on criminal charges must be informed of their right to remain silent during questioning by law enforcement in accordance with article 14 (3) (g) of the International Covenant on Civil and Political Rights. This right is inherent to the presumption of innocence and key to torture prevention efforts, given that interviewers respecting this right are unlikely to resort to abusive questioning methods. Suspects must be duly warned, at the beginning of every interview, that their words may be used in evidence against them. Persons' willing agreement to provide statements during questioning following this warning cannot be regarded as a fully informed choice when they were not expressly notified of the right to remain silent or when the decision was taken without the assistance of counsel (see European Court of Human Rights, *Stojkovic v. France and Belgium*).

77. Concern is expressed about the drawing of negative inferences from a person's failure to answer questions, and it is recommended that no inferences be drawn "at least where the accused has not had prior consultations with counsel" (see [CCPR/C/IRL/CO/3](#)). The Rome Statute and the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) expressly prohibit adverse inferences being drawn at trial from a suspect's

exercise of the right to remain silent, finding that anything to the contrary may improperly imply that a suspect's silence amounts to an admission of guilt and compromise the presumption of innocence.

78. The right to remain silent should equally apply, as a matter of law or policy, to prisoners of war, criminal detention relating to an armed conflict, detention of individuals considered to be civilian internees under international humanitarian law and administrative detention outside of armed conflict. With regard to interviews of witnesses and victims in the criminal justice system, courts alone may compel witness testimony. As a preventive measure against coercion and a matter of good practice, witnesses and victims should not be obliged to answer individual questions by which they could incriminate themselves during interviews.<sup>71</sup>

#### **4. Additional safeguards for vulnerable persons**

79. Given that particular groups are more vulnerable during questioning, the protocol should contain specific provisions for, among others, children, women and girls, persons with disabilities, persons belonging to minorities or indigenous groups and non-nationals, including migrants (regardless of migration status), refugees, asylum seekers and stateless persons. The vulnerability of persons should be promptly identified for special consideration of their needs to be reflected in the conduct of interviews and implementation of additional safeguards.

80. With regard to the need to inform persons of their rights during questioning, additional safeguards are required for certain persons, with thorough explanations of the rights of children and persons with intellectual or psychosocial disabilities being provided directly to, among others, their parents, families, guardians or legal representatives (see general comment No. 35; and Inter-American Court of Human Rights, *Tibi v. Ecuador*).

81. A complementary safeguard is the presence of a support person during questioning, in addition to counsel. A child must never be subjected to questioning or requested to make any statement or to sign any document without the presence of a lawyer and, in principle, his or her caregiver or another appropriate adult (whose presence is encouraged to help to prevent coercion, reassure the child and limit potential traumatization), at all stages of the investigation and proceedings (see the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; and Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice). Persons who appear to suffer from psychosocial or intellectual disabilities should be assisted by an independent support person, whether a relative, legal guardian, mental health professional or social worker with relevant experience and training, during questioning.

82. Witnesses, victims, suspects and persons deprived of liberty who do not adequately speak or understand the language of questioning should be entitled to receive the free assistance of an independent, qualified and effective interpreter during interviews and, when necessary, during consultations with counsel (see International Covenant on Civil and Political Rights, art. 14 (3) (f)). Persons with sensory impairments likewise have the right to interpreters. When no interpreter is available, a person who knows the interviewee and is able to adequately

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<sup>71</sup> See Vivienne O'Connor and Colette Rausch, eds. *Model Codes for Post-Conflict Criminal Justice*, vol. II, *Model Code of Criminal Procedure* (Washington, D.C., USIP Press, 2008), art. 110 (1).

communicate with him or her may be invited to act as one; alternatively, the interviewee should be asked and/or be allowed to answer questions in writing in his or her preferred language.

83. The interpreter's role during questioning is to facilitate communication neutrally and objectively. His or her presence serves as a safeguard against mistreatment and coercion. The protocol should provide practical guidance as to the role, rights and responsibilities of interpreters during the conduct of interviews and emphasize that the right to interpretation applies to the questioning of all persons who are arrested or deprived of liberty, including during armed conflict and in administrative detention (Body of Principles, principle 14).

## **5. Recording**

84. The recording of interviews is a fundamental safeguard against torture, ill-treatment and coercion and ought to apply in the criminal justice system and in connection to any form of detention. Every reasonable effort must be made to record interviews, by audio or video, in their entirety. Where circumstances preclude or when the interviewee objects to electronic recording, the reasons should be stated in writing and a comprehensive written record of questioning must be kept. Accurate records of all interviews must be kept and safely stored, and evidence from non-recorded interviews should be excluded from court proceedings (see [A/56/156](#)).

85. Suspect interviews must be at least audio, and preferably video, recorded (see [A/HRC/4/33/Add.3](#) and [A/68/295](#)). Video recorders should capture the entire interview room, including all persons present. Video recording discourages torture while providing an authentic and complete record that can be reviewed during the investigation and used for training purposes. It cannot, however, be used as an alternative to the presence of counsel (see [CAT/C/AUT/CO/3](#) and [A/HRC/25/60/Add.1](#)). The Special Rapporteur acknowledges the financial implications associated with the use of video-recording equipment. The protocol may explore alternative solutions, such as limiting the mandatory use of audiovisual recording to interviews of suspects, vulnerable victims or witnesses.

86. Recording should not be limited to confessions or other incriminating statements. Whatever the format, several elements must be recorded during an interview, including: its place, date, time and duration; the intervals between sessions; the identity of the interviewers and any other persons present and any changes in individuals present during questioning (see Human Rights Council resolution 31/31); confirmation that the interviewee was informed of his or her rights and availed himself or herself of the opportunity to exercise them and confirmation of any voluntary waiver; the substance and content of questions asked and answers, in addition to any other information, provided by the interviewer or interviewers or the suspect (see the Luanda Guidelines, guideline 9 (e)); and the time and reasons for any interruption and time of resumption of the interview (rules of procedure and evidence of the International Criminal Court, rule 112 (1)).

87. The records should be made available to the interviewee and his or her counsel. The interviewee should have the opportunity to verify that the written record, if used, accurately reflects his or her statements. As a matter of good practice, all persons present during questioning may be asked to sign the written record to attest to their presence and its accuracy. Audiovisual recordings must be clearly identified, properly labelled, safely stored and preserved. Destroying or tampering with records establishing proof of mistreatment should be criminalized under national law.

## 6. Medical examination

88. International standards provide for prompt and regular access to medical care for persons deprived of liberty. States are obligated to guarantee the availability of prompt, independent, impartial, adequate and consensual medical examinations at the time of arrest and at regular intervals thereafter. Medical examinations must also be provided as soon as a detainee enters a custodial or interview facility and upon each transfer. Prompt, independent, impartial and professional examinations in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment must be carried out pursuant to allegations of mistreatment or any sign that mistreatment may have occurred (see [A/68/295](#) and [E/CN.4/2004/56](#)). The well-established prohibition against medical personnel engaging, actively or passively, in acts that may constitute participation in, complicity or acquiescence in, incitement to or attempts to commit torture or ill-treatment (see [CAT/C/51/4](#)) merits recalling.<sup>72</sup>

89. Examples of other safeguards against mistreatment and coercion during questioning include ensuring that no interview occurs without direct or indirect supervision, among others by way of one-sided mirrors, live-feed or review of recordings. Save exceptional circumstances, strict national regulations must ensure that detained persons may not be subjected to questioning for more than two hours without a break and must be provided adequate breaks for refreshments and be allowed uninterrupted periods of at least eight hours for rest — free from questioning or any activity in connection with the investigation — every 24 hours.<sup>73</sup> Save in compelling circumstances, no interview should happen at night.

### C. Accountability and remedies

90. Accountability is critical to preventing the recurrence of human rights violations. The protocol must reiterate States' obligations to combat impunity and ensure accountability and the provision of remedies for torture and ill-treatment committed during questioning.

#### 1. Complaint mechanisms, investigations and sanctions

91. Victim of torture or ill-treatment must have access to impartial and effective complaint mechanisms and be protected from retaliation and reprisals. All complaints of mistreatment must be transmitted without screening to external independent bodies for prompt, impartial, thorough and effective investigation. Even in the absence of complaints, States have a duty to conduct investigations wherever there are reasonable grounds to believe that an act of torture or ill-treatment occurred in any territory under their jurisdiction (see Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties; and [A/68/295](#)).

92. Where investigations confirm allegations of mistreatment, victims must be provided with effective remedies and redress, including fair and adequate compensation, and as full rehabilitation as possible. Those who encourage, instigate, order, tolerate, acquiesce in, consent

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<sup>72</sup> See the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (General Assembly resolution 37/194); and the Declaration of Tokyo.

<sup>73</sup> See the report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 4 to 17 June 2009 (CPT/Inf (2011) 13).

to or perpetrate such acts of mistreatment must be brought to justice and punished in a manner commensurate with the gravity of crimes (see Human Rights Council resolution 31/31).

93. Law enforcement, intelligence and military officials who have reason to believe that torture or ill-treatment has occurred or is about to occur should report it to their superiors and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers, while medical professionals also have an obligation to report and document any signs of mistreatment that they observe (Nelson Mandela Rules, rule 34).

94. The obligation to report mistreatment should be enshrined in national law, with appropriate sanctions for non-reporting and protections for those who report.<sup>74</sup> The duty to report should be extended to violations of other standards and safeguards, including the prohibition against compelling detainees to confess, incriminate themselves or testify against others, and subjecting them to coercion, threats or practices impairing their judgment or decision-making capacities (Body of Principles, principle 7).

95. All violations, including of the right to be properly informed of one's rights and to legal assistance, must be impartially investigated upon complaint and subject to appropriate sanctions. The protocol should consider prospective remedies and sanctions, such as disciplinary or administrative action and obligation to undertake additional training, for breaches of standards and attendant procedural safeguards designed to prevent the use of coercive interviewing practices.

## **2. Exclusion of evidence**

96. Statements, documentary or other evidence elicited through torture and ill-treatment are inadmissible in any proceedings, except against suspected perpetrators. The exclusionary rule is a non-derogable norm of customary international law. It is fundamental to uphold the prohibition of torture and ill-treatment by providing a disincentive to them. The rule applies to mistreatment of both suspects and third parties, including witnesses, and against evidence obtained in a third State, and regardless of whether the evidence is corroborated or is uniquely decisive for the case. The exclusionary rule applies in full to the collecting, sharing and receiving of any information tainted by mistreatment (see [A/HRC/25/60](#)).

97. The exclusionary rule extends to any form of coercion. Confessions of guilt are valid only if made without coercion of any kind (see American Convention on Human Rights, art. 8 (3)). The Luanda Guidelines recall that confessions or other evidence obtained by any means of coercion or force, including during incommunicado detention, cannot be admitted as evidence or considered as probative of any facts at trial or sentencing.

98. The exclusionary rule also applies to evidence gathered or derived from information obtained under duress (see Inter-American Court of Human Rights, *Cabrera García and Montiel Flores v. Mexico*). States must carry the burden of proving that confessions were obtained without duress, intimidation or inducements.<sup>75</sup> As a matter of best practice, the exclusionary rule should also apply to collecting, sharing and receiving information tainted by any form of coercion.

99. Coerced confessions are regrettably admitted into evidence in many jurisdictions, in particular where law enforcement relies on confessions as the principal means of solving cases

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<sup>74</sup> See the Code of Conduct for Law Enforcement Officials, art. 8, commentary.

<sup>75</sup> See the report of the Inter-American Commission on Human Rights on the human rights of persons deprived of liberty in the Americas (OEA/Ser.L/V/II.Doc.64).

and courts fail to put an end to these practices. The protocol must address the need to change the culture of tolerance and impunity for coerced confessions in such cases. National legislation must accept confessions only when made in the presence of competent and independent counsel (and support persons when appropriate) and confirmed before an independent judge (see [A/HRC/13/39/Add.5](#) and [A/HRC/4/33/Add.3](#)). Courts should never admit extrajudicial confessions that are uncorroborated by other evidence or that have been recanted (see [A/HRC/25/60](#)). If doubts arise about the voluntariness of a person's statements, as when no information about the circumstances of the statement is available or when pursuant to arbitrary, secret or incommunicado detention, the statement should be excluded regardless of direct evidence or knowledge of abuse (see [A/63/223](#)).

100. National laws must provide for the exclusion of all evidence obtained in violation of safeguards designed to prevent mistreatment (see [A/HRC/25/60](#)), such as confessions or incriminating statements obtained in violation of one's rights to be informed of his or her rights and legal status before questioning, or duly warned that his or her words may be recorded and used in evidence against him or her. Evidence should also be excluded when access to counsel is unduly delayed or denied, or involuntarily waived; whenever specific safeguards applicable to the questioning of vulnerable persons are infringed; and when persons are denied adequate breaks and periods of rest during interviews save compelling circumstances. The protocol should account for situations where evidence or information is obtained in violation of preventive safeguards and the accused takes a plea without trial.

#### **IV. Conclusions and recommendations**

101. The Special Rapporteur calls upon States to spearhead the development of a universal protocol aiming to ensure that no person is subjected to torture, ill-treatment or coercion, including any forms of violence, duress or threat. A protocol, to be developed in collaboration with relevant international and regional human rights mechanisms, civil society and experts, must be grounded in fundamental principles of international human rights law and foremost in the absolute prohibition of torture and ill-treatment. The first step in this process ought to be the convening of a broad public consultation designed to set the parameters for the collaborative development of the protocol by the relevant stakeholders.

102. The model promoted by the protocol must promote effective, ethical and non-coercive interviewing and be centred on the principles of presumption of innocence and the pursuit of truth. By moving away from accusatory, manipulative and confession-driven techniques to an investigative interviewing model, States will enhance not only the human rights compliance of their questioning practices, but also their effectiveness in solving crimes and keeping societies safe.

103. The protocol ought to elaborate on a fundamental set of standards and procedural safeguards designed to protect the physical and mental integrity of all persons during questioning. In this respect, the Special Rapporteur calls upon States to consider adopting the elements considered herein (without prejudice to other elements suggested by experts and stakeholders), which should apply, as a matter of law and policy, at a minimum, to all interviews by law enforcement officials and other intelligence, military and administrative bodies with an investigative mandate, as well to those conducted by private contractors and other proxy agents of the State. The protocol should also provide for accountability mechanisms and appropriate remedies for victims.