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Original communication

# The investigation of deaths in custody: A qualitative analysis of problems and prospects



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## ABSTRACT

The right to be treated humanely when detained is universally recognized. Deficiencies in detention conditions and violence, however, subvert this right. When this occurs, proper medico-legal investigations are critical irrespective of the nature of death. Unfortunately, the very context of custody raises serious concerns over the effectiveness and fairness of medico-legal examinations. The aim of this manuscript is to identify and discuss the practical and ethical difficulties encountered in the medico-legal investigation following deaths in custody. Data for this manuscript come from a larger project on Death in Custody that examined the causes of deaths in custody and the conditions under which these deaths should be investigated and prevented. A total of 33 stakeholders from forensic medicine, law, prison administration or national human rights administration were interviewed. Data obtained were analyzed qualitatively. Forensic experts are an essential part of the criminal justice process as they offer evidence for subsequent indictment and eventual punishment of perpetrators. Their independence when investigating a death in custody was deemed critical and lack thereof, problematic. When experts were not independent, concerns arose in relation to conflicts of interest, biased perspectives, and low-quality forensic reports. The solutions to ensure independent forensic investigations of deaths in custody must be structural and simple: setting binding standards of practice rather than detailed procedures and relying on preexisting national practices as opposed to encouraging new practices that are unattainable for countries with limited resources.

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## 1. Introduction

Every detainee is entitled to the right to be treated humanely and the right to have his or her life protected,<sup>d</sup> irrespective of the circumstances under which detention takes place.<sup>1–3</sup> These fundamental rights have been recognized and safeguarded by international jurisprudence and soft laws.<sup>4</sup> In cases of death in custody, both rights often converge. When the circumstances of a death are related to the custody environment and violate the right not to be subjected to arbitrary deprivation of life, issues related to the right to be treated humanely is likely have occurred as well. This, in particular, is the case when death occurs following ill-treatment or inadequate conditions of detention.<sup>e</sup>

Given the very specific context of custody, and based on the positive obligations of the State to protect the people it places in detention, it can be concluded that every death in custody should be considered suspicious. According to international case law, imprisoned persons constitute a vulnerable group and authorities have a duty to protect these individuals. Thus, any infringement of people's lives or integrity while in detention gives rise to a presumption of State responsibility.<sup>f</sup> Moreover, the duty to protect the right to life and the right not to be subjected to torture, inhuman, or degrading treatment imposes both positive and negative obligations on the State. Among these implied positive obligations is the responsibility to investigate any death occurring in a place of detention, defined as any place where a person is deprived of his or her liberty.

From a legal perspective, this investigation must meet international standards, that is, it should be independent, effective, and prompt.<sup>g</sup> Also critical is that persons carrying out such investigation are not in a hierarchical relationship with authorities. However,

serious concerns about the independence and effectiveness of medico-legal investigations remain. On the one hand, ethical and practical issues may arise, especially in countries facing political or socioeconomic challenges such as institutional coercion, complex political situations, or lack of human and/or material resources. On the other hand, mortality in custody is a complex phenomenon with a wide range of causes of death, including natural causes, self-inflicted deaths, violence, and lack of medical treatment,<sup>5–9</sup> as described for example in studies from North America, Australia, and Europe.<sup>6,9–13</sup>

The medico-legal examination of death in custody, therefore, is critical to the investigation process, determining in a scientific way the cause(s) of death and whether the death was linked to the detention environment.<sup>14</sup> It should nevertheless be noted that no internationally recognized definition of death in custody exists as there are inconsistencies concerning place of death, timing of death, and causes of death. For instance, it is unclear whether deaths that occur only “in” prison should be accounted as such or whether those that are related to imprisonment and prison conditions should also be included in the definition.<sup>6,10,15,16</sup> Also debated is whether deaths that occur immediately post-release should be considered in the definition and those deaths that are due to natural causes. Despite definitional challenges, forensic practitioners play a crucial role in ensuring high standards of medico-legal investigation and accurate determinations of the causes of death. It is important that thorough investigation of death in custody is performed and, when applicable, standards used for investigations of homicide are applied.<sup>14</sup> A handful of studies describing medico-legal investigations emphasize the importance of conducting and preserving information from laboratory (e.g., toxicology) analyses and/or autopsies.<sup>13,17–20</sup>

To provide ethically acceptable guidelines for the investigation and prevention of deaths in custody, an interdisciplinary qualitative study was conducted as part of the Death in Custody project. The aim this project was to address the circumstances and problems surrounding the issues of how and why prisoners die during imprisonment, capturing the experiences of professionals tasked with the investigation and prevention of these deaths. Thus, for this project, explorative interviews took place with stakeholders working in prison or for prisoners' rights. The goal of the interviews was to assess their understandings of the causes of deaths occurring in custody, their experiences in investigating such deaths, and their views on the prevention of deaths in custody. This manuscript presents a portion of the results from the project pertaining to forensic investigations. Thus, it identifies and discusses the practical and ethical difficulties encountered by stakeholders in the medico-legal investigation following a death in custody. Another manuscript from the same project evaluates the definitional challenge associated with defining death in custody and argues for a uniform definition (Ruiz, Wangmo, Mutzenberg, Sinclair, & Elger, in press).

## 2. Methods

### 2.1. Setting and sampling

A qualitative methodology<sup>21–24</sup> was employed in order to compare the knowledge, strategies, and difficulties with understanding the causes of death in custody and investigations of these deaths from the perspectives of stakeholders working in this field. This study was exempt from Research Ethics Committee approval in Geneva since it does not involve patients. Only stakeholders were asked to participate and their agreement to be interviewed was considered their consent. They received information about the study during participant recruitment via emails and direct

<sup>d</sup> The right to life and the right to be treated humanely are recognized by several international binding and non-binding instruments, applicable during peace time and internal troubles or war, from which a State Party cannot derogate depending on the considered treaty. See articles 3 and 5 of the Universal Declaration of Human Rights (December 10, 1948); articles 4, 6, 7, and 10 of the International Covenant on Civil and Political Rights (December 16, 1966; e.i.f. March 23, 1976), 999 UNTS 171; articles 1, 2, and 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December 9, 1975; e.i.f. June 26, 1987), 1465 UNTS 85; articles 2, 3, and 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950; e.i.f. September 3, 1953), STE 005; articles 4, 5, and 27 of the American Convention on Human Rights (November 22, 1969; e.i.f. July 18, 1978), OAS Treaty Series No. 36; articles 4 and 5 of the African Charter on Human and People's Rights (June 21, 1981; e.i.f. October 21, 1986), OAU Doc. CAB/LEG/67/3 rev. 5; articles 5, 8, and 20 of the Arab Charter on Human Rights (May 22, 2004, e.i.f. March 15, 2008), 12 Int'l Hum. Rts. Rep. 893 (2005); articles 3, 13, 14, 15, 22, 25, 26, 29, and 30 of the Geneva Convention (III) relative to the Treatment of Prisoners of War (August 12, 1949; e.i.f. October 21, 1950), 75 UNTS 135; articles 32 and 37 of the Geneva Convention (IV) relative to the Protection of Civilian Persons During Time of War (August 12, 1949; e.i.f. October 21, 1950), 75 UNTS 287. Moreover, minimum rules of treatment for detainees have been set up by the United Nations; see the UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the first UN Congress on the Prevention of Crime and the Treatment of Offenders, 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV), July 31, 1957, and 2076 (LXII), May 13, 1977. In addition to many cases at the universal and regional planes, see in particular Human Rights Committee, *General Comment No. 6: The Right to Life*, 1982; *General Comment No. 20: Article 7*, 1992; *General Comment No. 21: Article 10*, 1992, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 (2003), 127, 151, and 153, respectively.

<sup>e</sup> In this article, detention, custody, and prison will be used interchangeably.

<sup>f</sup> See, for example, *Tanli v. Turkey* (26129/95), Judgement, April 10, 2001, §141 and *Selmouni v. France* (25803/94), Judgement, July 28, 1999, §87. (1999).

<sup>g</sup> See, for example, the UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), which stipulates that States Parties have the “general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies”.

telephone calls and also at the time of interview, which was set only after their positive response to the email or telephone queries.

For this study, purposive sampling was used to select interview participants with firsthand knowledge of legal, ethical, criminological, and/or forensic issues related to death in custody as well as experience working for international organizations, nongovernmental organizations, national human rights groups, or national detention facilities. Thirty-three participants took part in the study belonging to different fields such as law, medicine, prison administration, and not-for-profit organizations committed to securing the rights of prisoners. Their participation was based on their interest in the overall project and the general issue of prisoners' human rights, health and well-being. Of the 33 stakeholders who were interviewed, 10 were working for non-governmental organizations, 8 each for international organizations and universities, 6 for national structures, and 1 for a private law firm. By profession, participants included lawyers ( $n = 15$ ), forensic doctors ( $n = 15$ ), prison administrators ( $n = 2$ ), and a national human rights administrator ( $n = 1$ ). A few participants also held double qualifications, such as psychiatry or training in other fields of medicine. Regionally, the 33 participants in total had experience working in 62 countries across North and South America, Europe, Australia, Africa, and Asia.

## 2.2. Data collection and analysis

Data were collected using a semi-structured interview guide consisting of the following themes: understanding the causes of deaths in custody; the role of and problems and perspectives related to medico-legal examinations and legal prosecution; preventive measures; and the functions and duties of international, regional, and national bodies. The interview guide provided the interviewer with a framework of questions to ask during the interviews; however, semi-structured interviewing is a process that also allows interviewers the flexibility to pose other questions based on participants' responses.

Eighteen of the 33 participants were interviewed in person mostly in Geneva, where they were attending international meetings. A few were also interviewed during a travel to South America. Whenever possible, the research team preferred to meet interviewees in person. Thirteen other participants were interviewed via telephone, as scheduling in the above circumstances was not feasible, and two wished to respond via written questionnaire.

All but three of the interviews were audio-recorded and transcribed. The exceptions were made due to technical and organizational issues from the part of the interviewers. However, notes were taken during the interviews and transcripts were completed promptly afterward. In order to ensure confidentiality and to avoid singling out or stigmatizing any one country, all identifying information was removed so that final transcripts were anonymous.

Data analysis was first performed by two authors using open coding.<sup>25,26</sup> The qualitative data analysis program Atlas.ti was used to manage and support analysis. Themes were predetermined by the research team based on the goals of the study and were refined during preliminary analysis. New codes were added when necessary, as they emerged from the data. One author independently analyzed the data to check for accuracy of both the initial coding and the interpretation of the results. All authors agreed on the coding scheme and the data interpretation.

## 3. Results

Forensic investigation was identified as a fundamental component to ensure justice not only for those who die in custody but also for those accused of causing or contributing to a death. Failure to

conduct forensic examinations means that crucial evidence that potentially could reveal the truth of events is not collected, which can result in two equally dramatic consequences: either imprisoning an individual despite innocence or failing to punish the guilty perpetrator(s). Several participants emphasized how important forensic evidence is for criminal inquiries following unnatural deaths. Ordinarily, forensic investigations are requested by a judiciary system when a death is deemed suspicious or when its causes are unnatural. Some stakeholders, however, stipulate that deaths in custody are always suspicious, whether appearing "natural" or "unnatural," and should therefore be investigated as such. Moreover, with regard to investigations of deaths in custody, several concerns exist, including lack of independence of the investigator, general apathy by the responsible investigators toward the victims, conflicts of interest within the medico-judicial system, and questionable quality of investigation reports due to all of the above. These concerns are presented in more detail below, followed by recommended solutions to improve the quality of investigations.

### 3.1. Lack of independence of investigators

Investigations of death in custody depend on the quality of investigation and how fair and unbiased the investigator is. The first general problem identified by participants when a death in custody occurs, however, is figuring out who is in charge of investigations. Interviewees felt that there often is a lack of clarity as to whom is administratively (and, by consequence, legally) responsible for upholding minimal standards of investigations. As lawyer working for a national NGO (P2) stated: "It's very hard in [name of country deleted] 'cause, um, who is in charge of investigating? It's a big problem ... who is in charge?" The same participant added, "This is another problem, because sometimes it's the prosecutor, sometimes it's the police that starts the investigation, it's a mess."

Second, participants spoke about the status of individuals working in the system such as police, lawyers, and forensic experts and whether they were legally and practically granted independence to conduct a proper investigation. This was particularly the case when the investigation was carried out by individuals who were under the same authority as those responsible for the death—for example, the forensic investigations conducted by state agents or police when the death was a result of actions of a colleague or indirectly caused by the institution. One participant, a lawyer with an NGO (P30), pointed out that "the police in [country name deleted] investigate the police [...] it is the police investigating themselves, so there's no independent body to conduct police investigations, nor deaths in custody." Another participant (P2) noted, "[I]f I kill you, of course, the police, the civil police will investigate, OK, but if I'm an inmate and you are a police officer [...] if you kill me, your peer is in charge of investigating you."

Concerns also were raised about pressures placed on forensic scientists by authorities. Different sets of practices were reported in which corruption was highlighted as an explanatory factor. A lawyer working with a national NGO (P1) revealed:

It's kind of easy to find out where people live and just drop in and say, hi, to make clear that I know where you live, I know how many children you have, I know which school they go to. ... It's impossible to say [...] that all the police forces are corrupted and to say that there are not [corrupted]. There [are] both, and it's kind of extreme, either very good or very bad.

Some interviewees reported that forensic doctors sometimes have their hands tied, and especially as political contexts become more sensitive, greater pressures are placed on forensic scientists investigating deaths occurring in that context. Participants

underscored the need to recognize the difficult position of forensic pathologists and thus called for greater sensitivity and understanding of their situation. A forensic doctor (P5) explained the situation as follows: “The forensic doctor, the expert [...], he’s going to be under pressure. [...] We’re always in this predicament. Denying it is extremely serious” (translated from French). Another forensic doctor (P18) stressed:

In some situations, we need to distinguish between people who essentially want to carry out a good job but are [...] intimidated into not doing it from those who positively are collaborating with the authorities to obscure the truth. And it’s necessary to be very careful in making that distinction. [...] They may have been placed in a situation where they were forced to, so it’s a rather difficult judgment.

### 3.2. Conflicts of interest and biased perspectives

Another potential obstacle to the independence of forensic scientists is their ability to remain unbiased and ethical. Some forensic experts may choose to comply with authorities who may be responsible for deaths, as these experts are under the State’s payroll. Moreover, difficulties and conflicts of interest were identified when the individual examining the body was a colleague of the person responsible for the death of the deceased. A forensic doctor (P18) highlighted this concern:

[There’s] a real potential [of bias] where in many countries [...] clinical forensic medicine and forensic pathology are a single discipline. And the same agency is doing both, so, you know, you might get your colleague treating the person in police detention and now you are called to the scene of death.

Another interviewee, also a forensic doctor (P13), stated, “We know it happens, doctors must do what they are told to, otherwise they are fired,” (translated from French), and a lawyer (P6) reported that “doctors are afraid, because of their intention of preserving their career” (translated from French).

Closely related to conflicts of interest and biased perspectives is the dilemma of corporatism among police or prison administration that results in limited as well as poor quality of investigations. These concerns were highlighted by several lawyers working for NGOs.

When it comes to an offender that is a police officer, everything is different, they don’t start an investigation as it’s written [...] in the law, they have a previous proceeding, a previous proceeding that, it’s not in the law, they just created it, in order not to stigmatize the police officers. (P2)

It’s difficult to identify the agent that did this thing. Sometimes when the police [open] an inquiry to investigate, it’s with another name [...] so there’s a lot of corporatism [...] they [call it] a [corporal lesion], and not torture. There’s a huge problem in [name of country deleted] in general, under notifications of cases of torture ‘cause the doctor doesn’t want to put the police because they are from the police. (P3)

### 3.3. Apathy toward the victims

Many interviewees criticized a perceived culture of apathy toward investigating cases of deaths in custody. They argued that some sort of crisis or whistle-blower is needed to break this

indifference and create a more vigilant and rigorous system. One participant (P2) referring to the authorities who oversee detention described apathy as follows: “They find thousands of ways, we don’t have transports, excuses, we don’t have transports, we don’t have cars to take this guy, we don’t have, we are only three guys to take care of 200 prisoners.” A lawyer working in an international organization (P7) put apathy as such: “There are additional difficulties, let me put it that way, in terms of the attitude of the institution, towards the event, to minimize the degree to which there is a responsibility.” And a director of a national NGO (P22) framed the culture of apathy as:

When there are highly contested deaths, they are not investigated as potential homicides, and there’s a kind of culture there about the fact that prison and police officers can do no wrong, so therefore I think that culture still is quite prevalent in terms of the investigation bodies and how robust or not their investigations actually are.

A mechanism by which apathy and indifference manifested involved delays and stalling of the investigation process. These concerns came up repeatedly during the interviews, and it is clear that such actions defy the principle of promptness of an investigation that is codified in international law. Participants engaged as lawyers in national NGOs revealed these gaps in investigations:

The police investigation [...] has been going very slowly, and although she [the investigator] recognized the person that opened the cell to allow the others to torture her [the detainee who was killed], and the person has been called in the police station to make a statement, and he denied all the accusations, it kind of stopped there. (P1)

Most of the cases, they take an eternity to investigate ... when we ask, after two or three years, they say, we are waiting for the medical exams, we’re waiting ... for the medical exam. ... How long are you going to wait for the medical exam? (P2)

### 3.4. Quality of forensic reports

The problems associated with independence of investigations and conflicts of interest echoed in the drafting of the forensic reports. The quality of a report was not linked to the competencies of forensic staffs but, rather, to their lack of independence from other bodies. Participants reported that quality suffered as a result of lack of independence and bias of forensic investigators. A lawyer with an NGO (P1) expressed this point as:

Not all the reports are bad, there are some very good reports and there are some very bad reports. [It depends] on the doctor, on the independence of the doctor usually; of course the quality is relevant, but usually on the independence of the doctor.

A forensic doctor (P18) echoed with similar views:

It’s not an issue of a work not being carried out competently by a forensic expert but rather that the forensic experts choose not to apply their intellect and arrive at an opinion which would be damaging to the authorities.

Reports labeled as “bad” were those that were false, insufficient in detail, or privileging one hypothesized cause of death above another. A lawyer working with an international organization (P7) clarified:

The death certificates, well, they say something like heart failure, that doesn't explain anything, especially if you're looking at the doctor's files and you see that the guy has been beaten. He may have died of a heart failure, but why did he have a heart failure?

Likewise, a forensic doctor (P20) highlighted how incomplete investigations lead to poor quality of reports:

Sometimes there's no autopsy, and sometimes the investigation is rudimentary: the people who are implicated, the policemen, or guards, or other inmates, they aren't even interrogated. I've read often enough that, the director of the prison makes a report, which says "we found him like that" [...] but that it's a suicide, he was depressed (translated from French).

Another participant, a forensic doctor (P5), reported that, without being false, a report can be partial, sometimes due to conflicts of interest or lack of independence, as noted above:

The extreme is of course people who are going to make false certificates, false reports, and the other one is people who may think, well, I had Mr. Minister X on [the] phone who told me that it would be extremely embarrassing if this hypothesis was released, so we will finally favor another one (translated from French).

When reports were false or partial, participants noted that investigators and/or medical personnel who overview and approve the report (on a regular basis) were more able to question the quality of a report, since it could be fairly simple to conclude that a cause of death is wrong, for example, and then request the full report or further inquiry. However, for other reports, assessing quality was described as a difficult task, especially for those individuals who are not from the field, are less experienced in finding nuances in written report or family members of the deceased. Thus, a second opinion from an (independent) forensic pathologist was deemed necessary.

### 3.5. Solutions to challenges of medico-legal investigation of deaths in custody

To ensure more accurate and more just investigations of deaths in custody, participants proposed several solutions. These included: (a) conducting counter autopsies, (b) guaranteeing the independence of an investigating body, (c) establishing means of avoiding bias, and (d) designing standards for real-world settings.

#### 3.5.1. Conducting counter autopsies

The counter autopsy was discussed as a means to identify and correct problems of partial first examinations. Requesting a second autopsy was possible in several settings described by participants and was seen as a right, specifically when one party was unsatisfied with the results of the first forensic investigation. Interviewees with a legal background spoke about the legal basis for requesting a second examination. A lawyer working with an NGO (P11) revealed:

The family members have room to request that an independent expert be involved in the forensic investigation and documentation. [...] This option is a procedural process that is allowed although it is not explicitly set in the criminal procedure code or other related laws.

Although it was possible to ask for second autopsies, some participants, especially those from the forensic sciences, remain

unconvinced about its scientific value. This skepticism primarily stemmed from the destructive nature of a first autopsy, which erases critical evidence as it is being performed. Second autopsies were described as useful only in circumstances when all evidence (such as body parts) were well-preserved and put back into place after the first autopsy. Another participant, a forensic doctor (P18), stated that second autopsies are helpful if the findings are dramatically different from the first; otherwise, the main purpose of a second investigation is to confirm the results of the first.

#### 3.5.2. Guaranteeing the independence of an investigating body

Related to the question of how to safeguard the independence of an investigating body, interviewees struggled to determine the appropriate authority under which a forensic institute should be placed to assure independence. A lawyer (P7) working with an international organization suggested "to link them with [a] university system [would be] a solution to the problems that otherwise you have with forensic services [being located] within the body that is the investigating service that may in fact have done the ill-treatment." Another participant, a forensic doctor (P18), pointed out that "[forensic] pathologists are never truly independent, forensic pathology services the legal system, the legal system services society [...], so it's only a question of how far removed from direct State influence the forensic pathologist is."

Depending on the specific circumstances of the country under consideration, a forensic institute under the Ministry of Interior or the Ministry of Justice was described as the least ideal configuration by some participants. When a forensic institute is housed within one of these ministries, it is important that laws or other safeguards exist that protect the investigating body's independence. For example, one participant engaged with national correctional services (P15) reported that, in his/her country, the "forensic scientists come under the direction of Ministry of Justice [...] but they're very independent, they have an independent, a law which makes them independent."

Others considered forensic bodies under the Ministry of Health as the best solution to ensure independence. A forensic doctor (P25) associated with a university and working with an international organization stated that the "health care service in custody [...] should be connected with the Ministry of Health [...] to have a better organization of the service and to have a responsibility for education of health care staff." There were also recommendations by the participants to place the forensic institute under the Ministry of Education, which may ensure independence of forensic examinations as the forensic investigators would not be under the same governance as those who may have an interest in the investigation such as the Justice Ministry. In one case, it was suggested that the institute of forensic medicine should be a private entity, with no institutional link to the government. According to a forensic doctor (P28) working with an international organization:

For the last ten years, the National Institute of Forensic Medicine [in country name de-identified] has worked as a private enterprise. We don't receive any budget from the State, but every expertise that we give has a price ... it's now considered one of the models for the future.

#### 3.5.3. Establishing means of avoiding bias

Because bias and conflicts of interest undermine the independence and quality of investigations, interviewees put forward several suggestions for mitigating such problems. The first is to request that an external expert be present at an autopsy. Stakeholders with international experience agreed that this option is a good idea; nevertheless, they recognized the difficulty of finding an

external expert, which in some locales means bringing in someone from another country. A forensic doctor (P5) underscored this point: “It is extremely tricky that all autopsies are performed with a forensic pathologist coming from a foreign country. Theoretically, it’s perfect, but in practice, can you imagine?” (translated from French).

A second proposed solution involves proper documentation of the forensic investigation and presence of a third party during the autopsy. According to a university forensic doctor (P33):

[An effective forensic examination should include] an autopsy made by an experienced coroner in a forensic institution equipped correspondingly, photographed and filmed, with the participation of an independent or of high integrity forensic expert, representing a[n] NGO for human rights protection.

In a similar vein, another participant raised the possibility of engaging prison doctors in the forensic investigation if the deceased person was their patient. The underlying assumption is that the physician–patient relationship will result in a better forensic examination. However, others did not agree with this suggestion. Although one described it as potentially advantageous if the death were caused by interpersonal or institutional violence, this participant also noted that this approach would not resolve problems in cases where death is caused by inadequate medical care, for which penitentiary physicians might be responsible. A forensic doctor (P18) explained this concern as follows:

In some jurisdictions, the people who do forensic pathology also do clinical forensic medicine, and they may actually be dealing with people in custody from the medical point of view. Where that occurs, I think there’s a conflict of interest, if the same medical agency, if you like, is responsible for the care of the detainees also is responsible for the autopsy. [...] Think of it this way. What if someone dies in a hospital after surgery, would you have the surgeon [...] participate in the autopsy?

Lastly, interviewees also suggested physicians should be present during the autopsy in cases of natural and non-natural death, some interviewees also suggested that the presence of all interested parties be required during the autopsy. Here again, concerns were raised about the feasibility of this suggestion, not only from a resource perspective but also a professional one. Emphasis was placed on the confidential character of forensic examinations and the dynamic dialogue that usually takes place between forensic experts and investigators. Yet the practice of informal third-party intervention by national medical councils was discussed by some participants and was described as being beneficial for the impartiality of a forensic investigation.

#### 3.5.4. Designing standards for real-world settings

The lack of consensus on what the best solution is to ensure independent, impartial, and effective forensic investigations reflects the difficulty of providing a universal answer to this issue. Additionally, even if and when effective solutions are developed, implementing them within real-world settings is not always achievable. Participants thus also offered suggestions that could be put into practice throughout the globe. The first of which entailed developing a framework for investigating deaths in custody that adheres to the necessary minimum standards, such as national homicide protocols, and could be universally applicable. A forensic doctor (P18) framed the importance of this “lowest denominator” approach in this way:

If you’re looking to think about systems, you have to think in terms of a worst-case scenario [...] and have a system which could operate even in the worst-case scenario. And therefore the authorities can never say, there would, there can be an exception, say we’ve already considered the situation where you might wish to make an exception and we designed the system so it can operate in that circumstance.

It was also recommended that the content of guidelines be kept very simple and contain only the fundamental steps of a medico-legal examination rather than detailed procedures.

In addition, given the lack of independence, limited resources, and institutionalized conflicts of interest forensic doctors often face, participants emphasized that guidelines should be tools to protect rather than to criticize forensic investigators. A forensic doctor (P23) underscored this concern:

It’s very hard to investigate death—although everyone is willing. Everyone is afraid that we will speak about guilt: is the director guilty, is the doctor guilty? We want to know what the reason is why someone dies in custody, but we don’t want to talk about guilt.

Addressing culpability, however, can have positive outcomes for both detainees and those responsible for them. For example, there is a need to confront, in a prospective way, the dangers inherent in detention, so that deaths in custody can be prevented. This pre-emptive approach would require that basic questions automatically be raised when a death has occurred. For example, if a prisoner dies of natural causes, questions could be asked about the quality of medical treatment that could have prevented the death. At the same time, if the cause of death is noted as a suicide, investigators should explore possible links to homicide, drug abuse, or mental illness.

In order to limit the potential of external pressure on investigators and to enable quality control and peer-review of autopsies, participants also suggested enacting requirements to videotape the performance of an autopsy, to take photos in order to document all of the findings, and to save samples. As one forensic doctor (P27) suggested:

In every case and that is a mandatory requirement, in all these cases [...] a CD will be prepared of the whole postmortem procedure so that it can be reviewed afterward and it contains an important piece of evidence that was the actual condition of the victim when he died.

Of course, the quality and effectiveness of any medico-legal investigation depends upon the proper training of forensic doctors and health care workers in custody, as two forensic doctors stated:

A good level of education is almost everywhere missing. In my opinion people who are dealing with detainees need a special education for that, it cannot be just [a] general practitioner without any further education for prison populations, for detained populations. (P25)

[Making a proper forensic report] requires some sort of training, but in [name of country] we don’t have that, they are amateurs and they don’t know what to focus on[;] they are not focusing on the injuries, or they are not examining all the injuries, the exact pattern of the injuries. [The report] is not of much use, because the acute findings are not listed, many of the time this medical examination it is not really possible to have it conducted by a medico-legal expert. So many of the times this district doctor conducts the autopsy [and] they are not well-versed with the injuries. (P27)



#### 4. Discussion and conclusion

Of the 33 participants, 30 were lawyers and forensic doctors working in the prison context, with a few of them also possessing training in psychiatry or public health. This overrepresentation of lawyers and forensic doctors is due to the fact that the majority of stakeholders in the above-mentioned organizations with knowledge and experience of medico-legal investigations of deaths in custody hail from these professions. This narrow sampling of professionals is, however, one limitation of the study. Second, response bias may have affected the quality of the data as respondents could have presented the best portrait of themselves or may have presented the worst cases. Third, several interviews took place via telephone, while others were conducted in-person. This may have slightly affected the comparability between the different interviews. Additionally, interviews were conducted both in French and English, and translation of French statements to English might have caused minor changes in meaning due to language-specific nuances. It should also be noted that, since no universal definition of death in custody exists, it is difficult to extrapolate data between different jurisdictions. Finally, as a qualitative study aimed at exploring stakeholder's perspectives of death in custody, the scope of the results remains limited. A next step towards should be to collect systematic quantitative data on inspection and from autopsies. Indeed, one of the findings from our qualitative study is that there is an urgent need to systematically collect standardized data in many countries, coordinated by an independent research institute and to publish such data. Despite these limitations, the overall agreement of the experts interviewed enables us to identify the most important and generally recognized problems and patterns associated with investigations of deaths in custody.

Although forensic investigations of death in custody were deemed important to ensure that justice is served and the alleged perpetrator is held responsible, study participants questioned the quality and the process of these investigations. Issues highlighted for further attention and redress include the lack of independence of forensic investigators, individual and institutionalized conflicts of interest, and external pressures, all of which foster investigation reports that are potentially poor in quality, biased, and/or false and, ultimately, useless. Unfortunately, these issues are not uncommon, as the participants in this study emphasized, and they have been recognized elsewhere as barriers to proper investigations of deaths in custody.<sup>14,27</sup>

Where and how the forensic body of any State is institutionalized is key to safeguarding independent, impartial, and effective investigations of death in custody. While there currently is a lack of agreement among stakeholders as to where forensic institutes should be housed, participants in this study underlined the importance of a separation of powers. Thus, it does not matter so much which authority governs the forensic body as long as the institutional division of power remains in effect. An independent investigation depends upon the relationship between or within the system (medical, educational, or legal) and the executive power. The fundamental issue is to ensure that the forensic body is not directly under the influence of the State. To provide an example, Rule 43 in England and Wales could be a means for a coroner to promote change and prevent future deaths in custody. However, the question remains how independent a coroner is in practice and how critical reports submitted by the coroner will be handled by the responsible authorities.

We did not find any relevant differences between countries (and this was therefore not highlighted in the results), except for the obvious question of material and human capacity that must be taken into account when developing and implementing solutions. There are some fundamental issues that the international

community must address in order to assure a comparable standard of investigations in all countries. For example, irrespective of the presumed cause, conducting an autopsy should be a standard protocol for all deaths in custody. A few scholars also have recommended a homicide investigatory standard when investigating death in custody,<sup>14,28</sup> while others have called for proper psychiatric assessments of those who are held in custody in order to prevent such deaths.<sup>20</sup> As revealed by the participants, a standard protocol of investigation should include proper documentation procedures, where samples are stored, autopsies and interviews are audio- or videotaped and saved, and thorough observational notes are taken so that initial collections of evidence are sufficiently detailed and, when second opinions are sought, these can be carried out in more meaningful ways.

Conflicts of interest and bias remain problematic when conducting such investigations in custody. It is critical that in cases where these may be evident means such as third-party presence and review are employed and secured. We reiterate that it is extremely important to guarantee the independence of the investigatory body from any external sources that could influence the fair process of investigation. So far, little has been done to address and resolve the conflicts of interest and other issues associated with the lack of independence of forensic scientists.<sup>29</sup> The relevant literature focuses mainly on questions related to the participation of forensic psychiatry witnesses in the criminal process, where medical and legal ethics oppose one another, particularly in adversarial systems.<sup>30–34</sup>

Luke and Reay underline that, in custody deaths, “the pathology is often less important than are the investigative circumstances” and further advise that “what should be emphasized here is the importance of the certifier having thought through the ramifications of the selection of manner of death”.<sup>28</sup> We would add that given the recurrent systemic causes of deaths in custody such as suicide,<sup>8,35,36</sup> drug overdose,<sup>15,37,38</sup> and others causes,<sup>5,6,13</sup> the role of forensic experts also could be to reveal the systemic character of the causes of death and thereby address mechanisms of investigatory procedures with the aim at preventing future similar deaths.

From the results of this study, several suggestions on the ethics and role of the forensic expert in the specific context of investigating deaths in custody have been made. Assuming that forensic functions are related to both medical and legal professions, two fundamental elements emerge: truth and professionalism. From these two concepts follow indicators of ethical conduct such as fairness, honesty, truth-telling, public scrutiny, self-examination, self-awareness, and professional responsibility.<sup>33,39</sup> A code of ethics that contains these elements and on which forensic scientists could rely when investigating deaths in custody is desirable. However, ethics is not law and some difficulties highlighted by stakeholders demand legal answers to resolve problems of structural dependence and pressure and threats from external sources.

The issue pertaining to effective forensic investigations has been addressed by the European Court of Human Rights.<sup>h</sup> The following elements are drawn from its case law: institutional and practical independence, critical professional assessment of all pieces of evidence, professional competency, objective analysis of clinical findings, production of explanations or conclusions, promptness, and public scrutiny.<sup>40</sup> These elements could constitute the starting point to produce a code of medico-legal ethics for an international

<sup>h</sup> See for example *Mahmut Kaya v. Turkey*, Application No. 22535/93, March 28, 2000, para. 104; *Velikova v. Bulgaria*, Application No. 41488/98, May 18, 2000, paras. 78–79; *Tanli v. Turkey*, Application No. 26129/95, April 10, 2001, para. 150; *Kelly and others v. United Kingdom*, Application No. 30054/96, May 4, 2001, paras. 95–98; *McKerr v. United Kingdom*, Application No. 28883/95, May 4, 2001, paras. 113–114.



binding instrument for forensic scientists. Likewise, evidence from forensic investigation is employed in the prosecution of crimes. As forensic sciences are increasingly called upon to contribute toward international justice,<sup>41–43</sup> the duty fulfilled by forensic experts remains critical in order to ensure that justice is served. Thus, it is extremely important that forensic investigators enjoy the professional independence necessary to conduct a thorough, professional, ethical, and unbiased investigation of all cases of deaths in custody.

#### Conflict of interest

The authors declare that there is no conflict of interest.

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#### Ethical approval

Ethical approval was not required for this study.

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