



# Effective investigation of ill-treatment

*Guidelines on European standards*

*Eric Svanidze*

Council of Europe  
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# EFFECTIVE INVESTIGATION OF ILL-TREATMENT

## GUIDELINES ON EUROPEAN STANDARDS

*by*

Eric Svanidze

Directorate General of Human Rights and Legal Affairs  
Council of Europe

This book has been financed by the European Commission and the Council of Europe. It is published as part of the European Commission/Council of Europe Joint Programme “Combating ill-treatment and impunity”. The author is a long-term consultant to the Joint Programme.

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Justice Reform and Police Division  
Legal and Human Rights Capacity Building Department  
Directorate of Co-operation  
Directorate General of Human Rights and Legal Affairs  
Council of Europe  
F-67075 Strasbourg Cedex

<http://www.coe.int/justice/>

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## Preface

Absolute prohibition of torture and inhuman or degrading treatment or punishment<sup>1</sup> clearly results in the need to combat impunity where it is breached. Contemporary concerns surrounding impunity have been based on many recent complaints received by international human rights mechanisms citing failures by states to properly hold to account the perpetrators of ill-treatment.

The European Court of Human Rights (“**the Court**”), for example, continues to make a considerable number of adverse judgments in this area, despite its clear elaboration of the relevant standards over many years. Thus, in 2008, in addition to 140 substantive breaches of Article 3 of the European Convention on Human Rights (“**ECHR**”),<sup>2</sup> there were 55 findings of violation in respect of the procedural aspect of the same Article imposing the requirement for states to effectively investigate allegations and other indications of ill-treatment.<sup>3</sup> The problem has also been highlighted by the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“**CPT**”), particularly in its 14th General Report<sup>4</sup> and in many of its visit reports.

Against this background, a Joint Programme was launched by the European Commission and the Council of Europe entitled “Combating ill-treatment and impunity”. The programme, of which this publication forms part, focuses on police and law enforcement activities in five Council of Europe member states: Armenia, Azerbaijan, Georgia, Moldova and Ukraine.

This publication comprises two parts:

- 
1. Hereinafter collectively referred to as “ill-treatment”.
  2. Article 3 ECHR prohibits torture and inhuman and degrading treatment.
  3. 2008 Annual report of the European Court of Human Rights, Council of Europe, p. 133.
  4. See its section entitled “Combating Impunity”.

- **Part I** highlights the relevant guidelines on international standards as regards effective investigation of ill-treatment (the “**Guidelines**”);
- **Part II** is the **Explanatory Note** to the Guidelines explaining the steps required in order for states to comply with the Guidelines.

The Guidelines and the Explanatory Note contain a comprehensive summary of contemporary standards dealing with the procedural duties originating from the prohibition of torture and other forms of ill-treatment. It is expected that they might serve as a useful summary of the relevant norms and provide guidance as to how they may best be attained.

The Guidelines focus upon ill-treatment by law enforcement officials.<sup>5</sup> It is envisaged that they might also have useful application in other areas, such as the prison systems, and in relation to the procedures for protection of other human rights, such as the right to life enshrined in Article 2 ECHR.<sup>6</sup>

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5. Article 1 of the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly resolution 34/169 of 17 December 1979, defines this area in the following terms:

“(a) The term ‘law enforcement officials’, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

(b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

(c) Service to the community is intended to include particularly the rendition of services of assistance to those members of the community who by reason of personal, economic, social or other emergencies are in need of immediate aid.

(d) This provision is intended to cover not only all violent, predatory and harmful acts, but extends to the full range of prohibitions under penal statutes. It extends to conduct by persons not capable of incurring criminal liability.”

In the Guidelines and Explanatory Note, the terms “police” and “law enforcement” are used interchangeably.

As to the obligation to investigate ill-treatment by private individuals, see *97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, judgment of 3 May 2007, application no. 71156/01, paras. 96 and 97.

6. See *İpek v. Turkey*, judgment of 17 February 2004, application no. 25760/94, paras.182-183; *Timurtas v. Turkey*, judgment of 13 June 2000, application no. 23531/94/94, paras. 91-98; for more recent authorities see *Lyanova and Aliyeva v. Russia*, judgment of 8 October 2008, application nos. 12713/02 and 28440/03, paras. 116-119.

## **Abbreviations**

<b>CAT</b>	United Nations Committee against Torture
<b>CEHRC</b>	Human Rights Commissioner of the Council of Europe
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
<b>ECHR</b>	Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”)
<b>ECPT</b>	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
<b>HRC</b>	UN Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>Istanbul Protocol</b>	Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>OPCAT</b>	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>UN</b>	United Nations
<b>UNCAT</b>	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment





## **Guidelines on international standards**

### **I. The origins of the obligation to investigate ill-treatment**

#### **I.1. The absolute prohibition of ill-treatment**

*I.1.1. The use of torture or inhuman or degrading treatment or punishment is absolutely prohibited in all circumstances. No derogation from this prohibition is permissible.*

#### **I.2. The obligation to investigate ill-treatment**

*I.2.1. Without a positive obligation to investigate allegations or other indications of ill-treatment, the prohibition would be rendered theoretical and illusory, thus allowing state authorities and their agents to act with impunity.*

*I.2.2. The obligation to investigate demands a coherent system of measures capable of ensuring an adequate response to credible accounts of torture and other forms of ill-treatment. It requires that states maintain mechanisms and procedures through which investigations can be initiated and that they adequately punish the perpetrators of ill-treatment.*

*I.2.3. State authorities must discharge their investigative duties in a manner consistent with their commitment to combating impunity.*

## **II. Facilitating prospects for effective investigation and access to investigative mechanisms**

### **II.1. General considerations**

*II.1.1. States should maintain a clear system of mechanisms and procedures through which allegations, indications and evidence of ill-treatment can be communicated.*

*II.1.2. This system should be available to all individuals, including detainees, on an equal basis.*

*II.1.3. Failure to secure such a system may in itself amount to a violation of the obligation to carry out an effective investigation.*

### **II.2. The fundamental safeguards against ill-treatment**

*II.2.1. The rights to have the fact of one's detention notified to a third party, to access to a lawyer, and to access to a doctor are all crucial to the gathering of evidence and communication of information relating to ill-treatment.*

*II.2.2. These rights should apply from the very outset of deprivation of liberty. Legitimate interests of the police investigation may exceptionally require that a notification of the detention to a third party or the detainee's access to the lawyer of his choice are delayed for a limited period. These restrictions should be clearly defined and accompanied by further appropriate guarantees.*

- II.2.3. *The right to access to a lawyer incorporates the corollary rights to a private discussion and to have the lawyer present at interrogations. States must secure the availability of legal aid for persons unable to pay for legal representation.*
- II.2.4. *The right to access to a doctor incorporates the corollary right to have medical examinations conducted out of earshot and (unless the doctor expressly requests otherwise) out of sight of police and other non-medical staff. Results of medical examinations should be properly recorded and made available to the detainee and his or her lawyer.*
- II.2.5. *The right of access to a doctor of the detainee's choice demands direct and unimpeded access to the services of recognised forensic doctors.*
- II.2.6. *The individual should be expressly and promptly informed of these fundamental safeguards and their corollary rights.*

### **II.3. Other arrangements**

- II.3.1. *Comprehensive custody records are essential to providing for the communication of information and evidence relating to ill-treatment.*
- II.3.2. *Prosecutors and judges should seek to provide for the communication of information and evidence relating to ill-treatment. They must take resolute action in response to information that ill-treatment may have been suffered by persons brought before them. They must conduct proceedings in such a manner as to ensure that the*

*individual has a real opportunity to make an open statement about the manner in which he or she has been treated.*

*II.3.3. Public officials (including police officers and prison staff) should be formally required to notify the competent authorities immediately upon becoming aware of allegations or other indications of ill-treatment. Where the authorities receiving these notifications are not themselves competent to deal with them, they must communicate the relevant information to the competent authorities.*

*II.3.4. Prison health services have a special role. Adequate and confidential medical screening is key to securing avenues for the communication of information and evidence relating to ill-treatment. Health services should adequately record any allegations made by or injuries to newly arrived prisoners and notify the competent authorities accordingly.*

*II.3.5. States should ensure a wide range of avenues through which individuals or their representatives can confidentially communicate complaints of ill-treatment to the competent domestic and international authorities, including superior officers and governmental institutions, judicial and prosecutorial authorities, specialised complaints bodies and inspection and monitoring mechanisms.*

*II.3.6. Individuals must be able to exercise their rights under Article 8 of the ECHR by sending to the competent authorities/bodies uncensored written correspondence.*

- II.3.7. Where requested, public authorities should be required to register all representations which could be deemed to constitute complaints. An appropriate form should be introduced for acknowledging receipt of each complaint and confirming that the matter will be pursued.*
- II.3.8. Inspection and monitoring mechanisms empowered to determine representations of ill-treatment should also adhere to these Guidelines.*
- II.3.9. Individuals who come into contact with law enforcement authorities should be fully informed of their rights that counter ill-treatment and of the mechanisms and procedures available to them.*

### **III. The investigation: grounds and purposes**

#### **III.1. Grounds for investigation**

- III.1.1. The obligation to initiate an investigation arises when the competent authorities receive a plausible allegation or other sufficiently clear indications that serious ill-treatment might have occurred. An investigation should be undertaken in these circumstances even in the absence of an express complaint.*
- III.1.2. It is mandatory to conduct an investigation when confronted with credible accounts of physical or psychological abuse, excessive use of force, or other forms of serious ill-treatment.*
- III.1.3. Particular care must be taken in probing possible racial or other discriminatory motives that may lie behind ill-treatment.*

*III.1.4. Investigations into ill-treatment which do not fall into the mandatory categories must meet the same standards on effectiveness.*

*III.1.5. Decisions to terminate or to refuse to initiate investigations into ill-treatment can be taken only by an independent and competent authority upon thorough and prompt consideration of all the relevant facts. Such decisions should be subject to appropriate scrutiny and challengeable by means of a public and adversarial judicial review process.*

### **III.2. Principal purposes of investigations**

*III.2.1. Effective investigation requires genuine efforts to be made to properly establish the relevant facts and, where appropriate, to identify and punish those responsible for ill-treatment.*

*III.2.2. Investigating authorities could also be tasked with identifying*

*III.2.3. and implementing measures to prevent recurrences of ill-treatment.*

## **IV. Measuring effectiveness: the key criteria**

### **IV.1. Independence and impartiality**

*IV.1.1. Officials involved in conducting investigations and all decision-makers must be independent from those implicated in the facts being investigated.*

*IV.1.2. This requires independence in practical terms, not only the absence of hierarchical or institutional connections.*

*IV.1.3. Officials involved in conducting investigations and all decision-makers must be impartial. In particular, they should not be involved in investigations or decisions regarding the alleged victims of the case in question.*

## **IV.2. Thoroughness**

*IV.2.1. Investigations into ill-treatment should involve the taking of all reasonable steps to secure evidence concerning the relevant incident(s).*

*IV.2.2. The typical inventory of required investigative measures and evidence includes:*

*– detailed and exhaustive statements of alleged victims obtained with an appropriate degree of sensitivity;*

*– appropriate questioning and, where necessary, the use of identification parades and other special investigative measures designed to identify those responsible;*

*– confidential and accurate medical (preferably forensic) physical and psychological examinations of alleged victims. These should be carried out by independent and adequately trained personnel capable of identifying the causes of injuries and their consistency with the allegations;*

*– other medical evidence, including records from places of detention and health care services;*

*– appropriate witness statements, possibly including statements of other detainees, custodial staff, members of the public, law enforcement officers and other officials;*



*– examination of the scene for material evidence, including implements used in ill-treatment, fingerprints, body fluids and fibres. Examinations should involve the use of forensic and other specialists able to secure and examine the evidence, create appropriate sketches, and/or reconstruct the relevant events; and*

*– examination of custody records, decisions, case files and other documentation related to the relevant incident.*

*IV.2.3. Evidence should be assembled and investigations conducted in conformity with domestic procedural rules. Procedural failures that contribute to the collapse of subsequent legal proceedings constitute failures to take all reasonable steps to secure evidence concerning the incident.*

*IV.2.4. Information and evidence relating to ill-treatment must be assessed in a thorough, consistent and objective manner.*

*IV.2.5. Investigations should be comprehensive in scope.*

### **IV.3. Promptness**

*IV.3.1. Investigations and eventual legal proceedings must be conducted in a prompt and reasonably expeditious manner.*

*IV.3.2. Promptness is a key to maintaining public confidence.*

### **IV.4. Competence**

*IV.4.1. Investigative bodies must have full competence to establish the facts of the case and to identify and punish those responsible where necessary.*

*IV.4.2. No legal or practical obstacles should impede investigations.*

*IV.4.3. Investigative bodies should have the power to suspend from service or from particular duties persons under investigation.*

*IV.4.4. Investigative bodies should be able to apply protective measures to ensure that alleged victims and other persons involved in the investigation are not intimidated or otherwise dissuaded from participating in investigations.*

#### **IV.5. Victim involvement and public scrutiny**

*IV.5.1. Alleged victims of ill-treatment or their representatives must be involved in investigative procedures to the extent necessary to safeguard their legitimate interests. Victims should be entitled to request specific steps to be taken and to participate in specific investigative actions, where appropriate. They should be regularly informed as to the progress of investigations and all relevant decisions made. They should be provided with legal aid, if necessary, and be able to challenge actions or omissions of investigating authorities by means of a public and adversarial judicial review procedure.*

*IV.5.2. In particularly serious cases, a public inquiry may be required in order to satisfy this requirement.*

### **V. Forms of investigations and punishment**

#### **V.1. Procedural forms of investigation**

V.1.1. *The appropriate investigative procedures will depend upon the facts of each case, but may include criminal, disciplinary and/or administrative procedures.*

V.1.2. *Alleged victims may also benefit from a standing to initiate judicial procedures without waiting for the competent authorities to do so.*

## **V.2. Investigative systems**

V.2.1. *The various forms of investigation should be incorporated into a coherent and interactive system.*

V.2.2. *An independent and effective police complaints body should be set up with powers to investigate allegations of ill-treatment.*

## **V.3. Forms of punishment**

V.3.1. *Findings of ill-treatment should lead to appropriate administrative, disciplinary and/or criminal penalties provided by law and that are proportionate to the gravity of the ill-treatment involved.*

V.3.2. *Amnesties or pardons frustrate the aims of effective investigation and adequate punishment and should be avoided.*

## **VI. Guaranteeing effectiveness**

VI.1.1. *Investigative systems should be provided with adequate financial and technical resources and appropriately trained legal, medical and other specialists.*

*VI.1.2. Ill-treatment investigations should be evaluated by a coherent, uniform, nationwide system based on accurate statistical data relating to the complaints made, investigations performed, judicial procedures held and punishments administered.*

*VI.1.3. The competent authorities should continually keep the public and law enforcement personnel informed with regard to ill-treatment investigations that are taking place, the levels of ill-treatment being detected, and the action taken as a result.*



## Explanatory note

### Legal basis

The Guidelines incorporate international standards set out in the ECHR, in the constantly developing case law of the Strasbourg Court and in other international instruments. They are therefore important in terms of their capacity to assist states in avoiding adverse judgments for failure to fulfil the procedural obligations to effectively investigate ill-treatment cases.

Using the case law of the Strasbourg Court as a source of guidance, the CPT has expanded the scope of both its fact-finding activities and its recommendations relating to investigations into ill-treatment. The CPT standards are set out in its 14th General Report.<sup>1</sup>

Due to their evidential value and significance as indicators of commonly accepted approaches, the CPT's findings and standards are now referred to in the majority of the Court's judgments in cases related to the rights of persons deprived of their liberty.<sup>2</sup> However, the importance of the CPT's work goes further. Due to the power of the CPT's recommendations, its *ex officio* visits across member states, and its power to control implementation, it is playing a standard-setting, quasi-legislative role. Its requirements have therefore attained considerable significance for the protection of the human rights of persons deprived of their liberty.

Other international sources used in drafting the Guidelines include the IC-CPR and UNCAT, as well as the observations, general comments and jurispru-

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1. See the section entitled, "Combating Impunity".
  2. See among other cases *Kalashnikov v. Russia*, no. 47095/99, judgment of 15 July 2002, para. 97; *Fedotov v. Russia*, judgment of 25 October 2005, application no. 5140/02, paras. 54-55; *Mammadov (Jalaloglu) v. Azerbaijan*, judgment of 11 January 2007, application no. 34445/04, paras. 38-39; *Ramishvili and Kokhreizde v. Georgia*, judgment of 27 January 2009, application no. 1704/06, para. 70.

dence of their treaty bodies, the HRC and the CAT. The set of specific standards known as the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the “**Istanbul Protocol**”) is of particular importance. It deals with assessing, documenting and investigating allegations of ill-treatment. It is also referred to in the Court’s judgments.<sup>3</sup>

These international instruments often leave implementation to the state, but the frameworks they establish provide a basis for their incorporation into domestic law. Some are even directly applicable to particular persons and situations, and so the need for guidance on the standards they contain is crucial.

**I. The origins of the obligation to investigate ill-treatment**

**I.1. The absolute prohibition of ill-treatment**

***I.1.1. The use of torture or inhuman or degrading treatment or punishment is absolutely prohibited in all circumstances. No derogation from this prohibition is permissible.***

The absolute and non-derogable nature of the prohibition of ill-treatment is clear from the text of the ECHR. Article 3 provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment” and Article 15(2) states that “[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.” This is also reflected in the standard wording used by the Court in Article 3 cases:

“As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation

3. *Bati and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, para. 100.

from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation [...]”<sup>4</sup>

Similarly, the CPT’s position is unequivocal:

“In fact, it is precisely at a time of emergency that the prohibition of torture and inhuman or degrading treatment is particularly relevant, and the strength of a society’s commitment to the fundamental value it embodies truly put to the test.

Like the prohibition of slavery, the prohibition of torture and inhuman or degrading treatment is one of those few human rights which admit of no derogations. Talk of “striking the right balance” is misguided when such human rights are at stake. Of course, resolute action is required to counter terrorism; but that action cannot be allowed to degenerate into exposing people to torture or inhuman or degrading treatment. Democratic societies must remain true to the values that distinguish them from others.”<sup>5</sup>

The absolute prohibition of ill-treatment is also a cornerstone of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism,<sup>6</sup> and has also recently been affirmed by CAT.<sup>7</sup>

## **I.2. The obligation to investigate ill-treatment**

### ***I.2.1. Without a positive obligation to investigate allegations or other indications of ill-treatment, the prohibition would be rendered theoretical and illusory, thus allowing state authorities and their agents to act with impunity.***

Despite the lack of express wording, Article 3 contains not only an obligation to refrain from ill-treatment but also imposes obligations to take positive action. The concept of positive obligations has evolved as part of the Article 1

4. *Zelilof v. Greece*, judgment of 24 May 2004, application no. 17060/03, para. 42.

5. 15th General Report on the CPT’s activities, CPT/Inf (2005) 17, Preface.

6. See Guideline IV of the text adopted by the Committee of Ministers on 11 July 2002.

7. “Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.” General Comment N2, CAT/C/GC/2, para. 3.



duty to secure the rights and freedoms enshrined in the ECHR. The word “secure” raises the inference of the existence of positive obligations to take measures to ensure that rights are adequately protected, both in theory and in practice.

This existence of a positive duty to investigate ill-treatment has been clearly set out by the Court, which “recalls that Article 3 of the Convention creates a positive obligation to investigate effectively allegations of ill-treatment (*Assenov and Others* . . . §§ 101-106).”<sup>8</sup> The Court has set out its reasoning as follows:

“The Court recalls that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in... [the] Convention”, requires by implication that there should be an effective official investigation. . . . Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).”<sup>9</sup>

Similarly, the CPT has indicated that:

“The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity.”<sup>10</sup>

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8. *Afanasyev v. Russia*, judgment of 5 April 2005, application no. 38722/02, para. 69.

9. *Bekos and Koutropoulos v. Greece*, judgment of 13 December 2005, application no. 15250/02, para. 53.

10. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 25.

The obligations to prevent torture and other forms of ill-treatment are most comprehensively set out in UNCAT. In addition to the duty to investigate (Article 12), it refers to “legislative, administrative, judicial or other measures” (Article 2) and the need for particular provisions on:

- preventing the expulsion, return or extradition of a person to a country when there are substantial grounds for believing that he or she would be tortured (Article 3);
- the criminalisation of acts of torture (Article 4);
- making torture an extraditable offence,
- and assisting other States Parties in connection with criminal proceedings brought in respect of torture (Articles 5, 7 and 8);
- taking alleged perpetrators into custody (Article 6);
- training of law enforcement and other relevant personnel (Article 10);
- the systematic review of rules, instructions, methods and practices of law enforcement activities (Article 11);
- the operation of an adequate complaints system (Article 13);
- the availability of fair and adequate compensation (Article 14);
- and ensuring that any statement found to have been made as a result of torture is not admitted as evidence against victims (Article 15).

This list is non-exhaustive and has been updated by the OPCAT. It incorporates universal minimum standards on monitoring arrangements in the form of a system of regular visits to places of detention by independent expert bodies, including national preventive mechanisms.

The connection between the obligation to prevent ill-treatment and the duty to investigate has been expressly underlined by the CAT, with an emphasis upon state representatives and the anti-terror context:

“The Committee emphasizes that the State’s obligation to prevent torture also applies to all persons who act, *de jure* or *de facto*, in the name of, in conjunction with, or at the behest of the State party. It is a matter of urgency that each State party should closely monitor its officials and those acting on its behalf and should identify and report to the Committee any incidents of torture or ill-treatment as a consequence of anti-terrorism measures, among others, and the measures taken to investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.”<sup>11</sup>

The European human rights treaties are less specific, leaving modalities open. The CPT guidance is therefore instructive. Its views as to other components of the proactive approach are illustrated in its 14th General Report:

“26. Positive action is required, through training and by example, to **promote a culture** where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and professionally rewarding to belong to a team which abstains from such acts.”

“42. Finally, no one must be left in any doubt concerning the **commitment of the State authorities** to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be ‘zero tolerance’ of torture and other forms of ill-treatment.”

The Court has also referred in its judgments to certain elements of the preventive component of the prohibition. Some of these are viewed as a part of the requirement for effective domestic remedies, i.e. obligations inferred from Articles 3 and 13 of the ECHR.<sup>12</sup> Other standards have been endorsed by the Court via other Convention rights that are seen as interrelated with the prevention of ill-treatment, including:

- the banning of incommunicado deprivation of liberty;
- the requirement of proper recording of detention;<sup>13</sup> and
- the proscription of the use of evidence obtained in violation of Article 3.<sup>14</sup>

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11. General Comment N2, CAT/C/GC/2, para.7.

12. Such as the requirement to pay compensation – see *Balogh v. Hungary*, judgment of 20 July 2004, application no. 47940/99, para. 62.

13. *Menesheva v. Russia*, judgment of 9 March 2006, application no. 59261/00, para. 87.

***1.2.2. The obligation to investigate demands a coherent system of measures capable of ensuring an adequate response to credible accounts of torture and other forms of ill-treatment. It requires that states maintain mechanisms and procedures through which investigations can be initiated and that they adequately punish the perpetrators of ill-treatment.***

***1.2.3. State authorities must discharge their investigative duties in a manner consistent with their commitment to combating impunity.***

The Court acknowledges that this positive obligation requires legal, procedural and other measures to combat impunity:

“[T]he applicants were ill-treated while in custody. However, no police officer was ever punished, either within the criminal proceedings or the internal police disciplinary procedure for ill-treating the applicants. [...] It is further noted that neither Mr Tsirikas nor Mr Avgeris were at any time suspended from service, despite the recommendation of the report on the findings of the administrative inquiry [...]. In the end, the domestic court was satisfied that the applicants' light clothing was the reason why the latter got injured during their arrest. Thus, the investigation does not appear to have produced any tangible results and the applicants received no redress for their complaints.”<sup>15</sup>

Across the Court's judgments are a variety of different approaches to the legal characterisation of the duty to investigate. It is either classified under a combination of Articles 3 and 13,<sup>16</sup> or simply under Article 3. While suggesting that the appropriate characterisation depends on the facts of the case,<sup>17</sup> it seems that the Court leans towards the Article 3 approach.<sup>18</sup> In any case, the chosen classification does not affect the essence of the obligations.

14. *Harutyunyan v. Armenia*, judgment of 28 June 2007, application no. 36549/03, paras. 63-66.

15. *Bekos and Koutropoulos v. Greece*, judgment of 13 December 2005, application no. 15250/02, paras. 54 and 55.

It is clear from the case law, however, that the Court views compensation for damages through civil and administrative avenues as falling squarely outside the procedural head of Article 3. They are considered as a separate remedy covered by the obligations under Article 13 of the ECHR. Its effectiveness as a remedy may depend, however, on the results of the investigation:

“For the reasons set out above no effective criminal investigation can be considered to have been carried out in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 3 (see *mutatis mutandis*, *Buldan v. Turkey*, no. 28298/95, § 105, 20 April 2004; *Tanrikulu v. Turkey*, no. 23763/94, § 119, ECHR 1999-IV; and *Tekdağ*, cited above, § 98). Consequently, any other remedy available to the applicant, including a claim for damages, had limited chances of success and could be considered as theoretical and illusory, and not capable of affording redress to the applicant. While the civil courts have the capacity to make an independent assessment of fact, in practice the weight attached to a preceding criminal inquiry is so important that even the most convincing evidence to the contrary furnished by a plaintiff would often be discarded and such a remedy would prove to be only theoretical and illusory (see *Menesheva v. Russia*, no. 59261/00, § 77, 9 March 2006, and *Corsacov v. Moldova*, no. 18944/02, § 82, 4 April 2006) [...] The Court can therefore conclude that, in the particular circumstances of the case, the possibility of suing the police for damages is merely theoretical.”<sup>19</sup>

The international standards point to a range of components of the obligation to effectively investigate allegations of ill-treatment. In addition to the requirement of adequacy of investigations, it includes measures that secure the avenues through which investigations can be initiated and appropriate

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16. *Çelik and İmret v. Turkey*, judgment of 26 October 2004, application no. 44093/98, paras. 54-60; *Yaman v. Turkey*, judgment of 2 November 2004, application no. 32446/96, para. 49; *Afanasyev v. Ukraine*, judgment of 5 April 2005, application no. 38722/02, paras. 69-70; *Cobzaru v. Romania*, judgment of 26 July 2007, application no. 48254/99, paras. 80-84.
  17. *Batı and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, paras. 126-127.
  18. See *Assenov v. Bulgaria*, judgment of 28 October 1998, application no. 24760/94, paras. 106 and 118.
  19. *Cobzaru v. Romania*, judgment of 26 July 2007, application no. 48254/99, para. 83.

punishment of the perpetrators. In comparison to the narrow understanding of the duty to investigate contained in some instruments,<sup>20</sup> the application of a broader interpretation<sup>21</sup> necessitates a high degree of consistency in discharging the duty, with the overarching aim of excluding impunity for ill-treatment. This need for consistency is taken into account by the CPT when preparing recommendations following its visits.<sup>22</sup>

- II. Facilitating prospects for effective investigation and access to investigative mechanisms**
- II.1. General considerations**
- II.1.1. States should maintain a clear system of mechanisms and procedures through which allegations, indications and evidence of ill-treatment can be communicated.***
- II.1.2. This system should be available to all individuals, including detainees, on an equal basis.***
- II.1.3. Failure to secure such a system may in itself amount to a violation of the duty to carry out an effective investigation.***

The guarantees and standards described in these Guidelines have been developed with a focus upon persons deprived of their liberty. They should, however, be secured to everyone within the jurisdictions of states, in accord-

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20. See the Istanbul Protocol and the Istanbul Principles, in particular, that consider an investigation into torture or other ill-treatment as simply aiding prosecution or disciplinary sanctions (para. 78 of the Istanbul Protocol). The narrow understanding has its justification for the purposes of focusing on investigative techniques and methodologies.

21. As seen in the Court's judgments and in CPT guidance.

22. See the CPT's Report on the visit to Albania from 23 May to 3 June 2005, CPT/Inf (2006) 24, paras.19-55.

ance with Article 1 of the ECHR. The guarantees must therefore apply to all victims of ill-treatment.

## **II.2. The fundamental safeguards against ill-treatment**

### **II.2.1. *The rights to have the fact of one's detention notified to a third party, to access to a lawyer, and to access to a doctor are all crucial to the gathering of evidence and communication of information relating to ill-treatment.***

These fundamental safeguards are designed not only to dissuade “those minded to ill-treat,”<sup>23</sup> but are essential to ensuring effective avenues through which allegations and evidence of ill-treatment can be communicated. The Court has noted in this regard that:

“allegations of torture in police custody are extremely difficult for the victim to substantiate if he or she has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence (see *Aksoy* [. . .] § 97).”<sup>24</sup>

Accordingly, a failure to secure the safeguards can amount to “omission[s] of investigation”.<sup>25</sup>

“. . . as a result of the failure to perform the additional medical examinations in the instant case, Bülent Gedik, Müştak Erhan İl and Arzu Kemanoğlu were deprived of the fundamental guarantees to which persons in detention are entitled. Not only does this *constitute an omission in the investigation*, it may also amount to ‘inhuman and degrading treatment’ (see *Algür v. Turkey*, no. 32574/96, § 44, 22 October 2002).”<sup>26</sup>

The prohibition of ill-treatment is closely related to the right to liberty and security, particularly in the sphere of unacknowledged detention. Conse-

23. 6th General Report on the CPT's activities, CPT/Inf (96) 21, para. 15.

24. *Mammadov (Jalaloglu) v. Azerbaijan*, judgment of 11 January 2007, application no. 34445/04, para. 74.

25. See *Bati and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, paras. 134 and 143 (with further references).

26. *Ibid*, para 143, italics added.

quently, some of the safeguards are considered by the Court under Article 5.<sup>27</sup> This does not detract, however, from the centrality of these components to the prohibition of ill-treatment.

As for the CPT, the fundamental safeguards described above are also key:

“The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).”<sup>28</sup>

**II.2.2. *These rights should apply from the very outset of deprivation of liberty. Legitimate interests of the police investigation may exceptionally require that a notification of the detention to a third party or the detainee’s access to the lawyer of his choice are delayed for a limited period. These restrictions should be clearly defined and accompanied by further appropriate guarantees.***

The CPT has underlined these “three rights” as pre-requisites to compliance with the guarantees against ill-treatment, and emphasised that “should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.)”<sup>29</sup> The Court mirrors this approach and will often not tolerate even short

27. Cf. *Orhan v. Turkey*, no. 25656/94, §§ 354-355, 18 June 2002: “The Court considers that the alleged failure of the authorities to inform the relatives of the Ormaniçi villagers taken into detention on 20 February 1993 of the latter’s whereabouts does not raise, as such, an issue under Article 3 of the Convention but might give rise to an issue under Article 5, and has been considered below in this context (see *Orhan v. Turkey*, no. 25656/94, §§ 354-355, 18 June 2002).”

28. This right has subsequently been reformulated as the right of access to a doctor, including the right to be examined, if the person detained so wishes, by a doctor of his own choice (in addition to any medical examination carried out by a doctor called by the police authorities), 2nd General Report on the CPT’s activities, CPT/Inf (92) 3, para. 36.

29. *Ibid.*



delays.<sup>30</sup> Equally, however, the CPT stresses that the three rights should be secured without unduly impeding the police in the proper exercise of their duties:

“The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person’s access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.”<sup>31</sup>

“[S]uch exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefore, and to require the approval of a senior police officer unconnected with the case or a prosecutor).”<sup>32</sup>

Yet, the CPT does not refer to any such exceptions to the right of access to a doctor, short of accepting that it may be necessary for the examination by a doctor of the detainee’s choice to be carried out in the presence of a doctor appointed by the competent authority. The safeguard is applicable to persons required to stay with the police regardless of their status.<sup>33</sup>

**II.2.3. The right to access to a lawyer must include the corollary rights to a private discussion and to have the lawyer present at interrogations. States must secure the availability of legal aid for persons unable to pay for legal representation.**

The standards on access to a lawyer are designed to secure the communication of information regarding ill-treatment from detainee to lawyer. They in-

30. *Yüksel v. Turkey*, judgment of 20 July 2004, application no. 40154/98, para. 27.

31. 12th General Report on the CPT’s activities, CPT/Inf (2002) 15, para. 41.

32. *Ibid*, para 43.

33. See the CPT’s Report on the visit to France carried out from 14 to 26 May 2000, CPT/Inf (2001) 10, para. 35.

clude the rights to talk in private, to have the lawyer present during police interrogation and the right to legal aid, where necessary.<sup>34</sup>

**II.2.4. The right to access to a doctor must include the corollary right to have medical examinations conducted out of earshot and (unless the doctor expressly requests otherwise) out of sight of police and other non-medical staff. Results of medical examinations should be properly recorded and made available to the detainee and his or her lawyer.**

The standards on access to a doctor serve two main purposes: (i) they secure avenues for the communication of information regarding ill-treatment from the detainee to the doctor, and (ii) they are key to gathering evidence.<sup>35</sup> The CPT is clear that requests by detainees to see a doctor should always be granted, that detainees taken into custody should receive an examination by a doctor of their own choice, and that all medical examinations should be conducted out of earshot and out of sight of police, unless the doctor requests otherwise. It stresses that results of examinations should be made available to the detainee and his lawyer and that medical data must be kept confidential.<sup>36</sup>

The Court has endorsed the CPT standards in this area, as well as some of the stipulations of the Istanbul Protocol, as important elements in fulfilling the obligation to effectively investigate, particularly from the perspective of gathering evidence.<sup>37</sup> Moreover, medical professionals owe obligations both to the persons they treat or examine and to society at large, which has an in-

34. 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 41.

35. Cf. Guideline IV.2.2, page 15.

36. CPT's Report on the visit to Azerbaijan carried out from 24 November to 6 December 2002, CPT/Inf (2004) 36, para. 36.

37. *Mehmet Eren v. Turkey*, judgment of 6 April 2004, application no. 21689/93, para. 355.

terest in ensuring that justice is done and that perpetrators of abuse are brought to justice.<sup>38</sup>

**II.2.5. The right of access to a doctor of the detainee's choice demands direct and unimpeded access to the services of recognised forensic doctors.**

Forensic medical evidence is often crucial to the effective investigation of alleged ill-treatment. Its importance is repeatedly emphasised by the Court:

“The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including *inter alia* forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard (see *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, § 134, ECHR 2004-IV (extracts)).

The Court therefore considers that the failure to secure the forensic evidence in a timely manner was one of the important factors contributing to the ineffectiveness of the investigation in the present case. A timely medical examination could have enabled the medical expert to reach a more definitive conclusion as to the time of infliction and cause of the injuries.”<sup>39</sup>

Similarly, the CPT emphasises that there should be no “barriers” between forensic doctors and persons alleging ill-treatment, whether or not the services of such doctors have been formally requested by investigative, prosecutorial or other officials.<sup>40</sup>

The CPT’s requirements in this area go further than the following restrictive and somewhat ambiguous provisions of the Istanbul Protocol:

“123. Forensic medical evaluation of detainees should be conducted in response to official written requests by public prosecutors or other appropriate officials. Requests for medical evaluations by law enforcement officials are to be consid-

38. See also the comments on Guideline II.3.4, below.

39. *Mammadov (Jalaloglu) v. Azerbaijan*, judgment of 11 January 2007, application no. 34445/04, para. 74.

40. See, for example, the CPT’s Report on the visit to Albania carried out from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 49.

ered invalid unless they are requested by written orders of a public prosecutor. Detainees themselves, their lawyers or relatives, however, have the right to request a medical evaluation to seek evidence of torture and ill-treatment.”<sup>41</sup>

**II.2.6. *The individual should be expressly and promptly informed of these fundamental safeguards and their corollary rights.***

Effective implementation of these safeguards relies upon detainees being informed of their rights. According to the CPT, it is “imperative” that this obligation is fulfilled without delay. It states that a standard form containing these rights should be given to everyone who enters custody, and that detainees should be asked to sign a form confirming that they have been informed of their rights.<sup>42</sup>

**II.3. Other arrangements**

**II.3.1. *Comprehensive custody records are essential to providing for the communication of information and evidence relating to ill-treatment.***

Comprehensive and accurate record-keeping is indispensable in securing both the right to liberty and security and the prohibition of ill-treatment. The CPT puts particular emphasis on this guarantee.

“The CPT considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's

41. Para. 123 of the Istanbul Protocol.

42. 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 44.

rights and of invoking or waiving them), the signature of the detainee should be obtained and, if necessary, the absence of a signature explained. Further, the detainee's lawyer should have access to such a custody record."<sup>43</sup>

The Court's standards on custody records have been introduced under the right to liberty and security:

"... the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention (see *Orhan v. Turkey*, no. 25656/94, § 371, 18 June 2002)."<sup>44</sup>

Nonetheless, the importance of record-keeping in terms of securing avenues for the investigation of alleged ill-treatment cannot be underestimated.<sup>45</sup>

**II.3.2. Prosecutors and judges should seek to provide for the communication of information and evidence relating to ill-treatment. They must take resolute action in response to information that ill-treatment may have been experienced by persons brought before them. They must conduct proceedings in such a manner as to ensure that the individual has a real opportunity to make an open statement about the manner in which he or she has been treated.**

Prosecutors and judges also have an important role to play in helping to secure avenues for the effective communication and investigation of allegations of ill-treatment. The CPT has observed that:

"When persons detained by law enforcement agencies are brought before prosecutorial and judicial authorities, this provides a valuable opportunity for such

43. 2nd General Report on the CPT's activities, CPT/Inf (92) 3, para. 41.

44. *Khadisov and Tsechoyev v. Russia*, judgment of 5 February 2009, application no. 21519/02, para. 148. See also *Menesheva v. Russia*, judgment of 9 March 2006, application no. 59261/00, para. 87.

45. Cf. *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, para. 44.

persons to indicate whether or not they have been ill-treated. Further, even in the absence of an express complaint, these authorities will be in a position to take action in good time if there are other indicia (e.g. visible injuries; a person's general appearance or demeanour) that ill-treatment might have occurred.<sup>46</sup>

The CPT often finds, however, that judges and prosecutors show little interest in complaints of ill-treatment, or fail to ask questions when a person appears before them with visible injuries.<sup>47</sup> The Court, too, has examined the reaction of prosecutorial and judicial authorities to allegations or other indications of ill-treatment in several Article 3 cases, such as *Aksoy*:

“Indeed, under Turkish law the prosecutor was under a duty to carry out an investigation. However, and whether or not Mr Aksoy made an explicit complaint to him, he ignored the visible evidence before him that the latter had been tortured (see paragraph 56 above) and no investigation took place. No evidence has been adduced before the Court to show that any other action was taken, despite the prosecutor’s awareness of the applicant’s injuries.

Moreover, in the Court’s view, in the circumstances of Mr Aksoy’s case, such an attitude from a State official under a duty to investigate criminal offences was tantamount to undermining the effectiveness of any other remedies that may have existed.”<sup>48</sup>

**II.3.3. Public officials (including police officers and prison staff) should be formally required to notify the competent authorities immediately upon becoming aware of allegations or other indications of ill-treatment. Where the authorities receiving these notifications are not themselves competent to deal with them, they must communicate the relevant information to the competent authorities.**

46. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 28.

47. *Ibid.*

48. *Aksoy v. Turkey*, judgment of 18 December 1996, application no. 21987/93, para. 59. For a discussion of the judicial authorities’ obligations where there is clear written evidence of serious ill-treatment, see *Ahmet Özkan and Others v. Turkey*, judgment of 6 April 2004, application no. 21689/93, para. 359.

According to the CPT:

“... the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.”<sup>49</sup>

This approach is matched by the Court, which underlines the need for the relevant information to reach the competent body.<sup>50</sup> Authorities that lack the necessary competence should therefore refrain from determining complaints, and, in particular, from classifying them as unreliable or groundless.

**II.3.4. Prison health services have a special role. Adequate and confidential medical screening is key to securing avenues for the communication of information and evidence relating to ill-treatment. Health services should adequately record any allegations made by or injuries to newly arrived prisoners and notify the competent authorities accordingly.**

Prison services are amongst the first points of contact of persons deprived of their liberty with authorities institutionally independent from law-enforcement or judicial bodies. Admission to prison is also usually the first opportunity for the detainee to undergo adequate medical screening.<sup>51</sup> Prison health services are therefore at the crux of the system for combating impunity for ill-treatment. The CPT has created a concrete set of requirements that are repeated throughout its visit reports:

“The CPT recommends that the record drawn up by a prison doctor following a medical examination of a newly arrived prisoner contain: (i) a full account of statements made by the person concerned which are relevant to the medical

49. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 27.

50. *Ahmet Özkan and Others v. Turkey*, judgment of 6 April 2004, application no. 21689/93, para. 359.

51. In countries where medical screening has been introduced in police detention establishments, the same principles apply to this kind of facilities too. However, due to their smaller scale and lack of independence, they cannot be seen as a substitution for prison health services. See the CPT’s Report on the visit to Lithuania from 2 to 17 December 2001, CPT/Inf (2003) 30, para. 40.

examination (including his description of his state of health and any allegations of ill-treatment), (ii) a full account of objective medical findings based on a thorough examination, and (iii) the doctor's conclusions in the light of (i) and (ii), indicating the degree of consistency between any allegations made and the objective medical findings. Whenever injuries are recorded which are consistent with allegations of ill-treatment made, the record should be systematically brought to the attention of the relevant authority. Further, the results of every examination, including the above-mentioned statements and the doctor's conclusions, should be made available to the detained person and his lawyer.

The CPT also wishes to stress that all medical examinations should be conducted out of the hearing and – unless the doctor concerned expressly requests otherwise in a particular case – out of the sight of law enforcement officials and other non-medical staff.”<sup>52</sup>

Medical professionals must balance their responsibilities towards their patients with those they bear to society at large. This may result in dilemmas, for example, where the victim has not requested or consented to the reporting of evidence of ill-treatment. The Istanbul Protocol acknowledges this problem. It underlines the need for a case-by-case approach. The protocol advises that allegations could be reported in a non-identifiable manner or remitted to a responsible body outside the immediate jurisdiction.”<sup>53</sup>

Equally, the Istanbul Protocol has recognised that medical personnel:

“may discover evidence of unacceptable violence, which prisoners themselves are not in a realistic position to denounce. In such situations, doctors must bear in mind the best interests of the patient and their duties of confidentiality to that person, but the moral arguments for the doctor to denounce evident maltreatment are strong, since prisoners themselves are often unable to do so effectively.

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52. CPT's Report on the visit to Azerbaijan carried out from 24 November to 6 December 2002, CPT/Inf (2004) 36, para. 26. See also the CPT's Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, paras. 45-49; the CPT's Report on the visit to Lithuania from 17 to 24 February 2004, CPT/Inf (2006) 9, para. 96.

53. See paras. 68-70, 72-73 of the Istanbul Protocol.



Where prisoners agree to disclosure, no conflict arises and the moral obligation is clear. If a prisoner refuses to allow disclosure, doctors must weigh the risk and potential danger to that individual patient against the benefits to the general prison population and the interests of society in preventing the perpetuation of abuse.”<sup>54</sup>

The CPT has refrained from putting forward solutions to these dilemmas. Its standard recommendation reads:

“...whenever injuries are recorded by a doctor which are consistent with allegations of ill-treatment made by a prisoner, the record should be immediately brought to the attention of the relevant prosecutor.”<sup>55</sup>

**II.3.5. States should ensure a wide range of avenues through which individuals or their representatives can confidentially communicate complaints of ill-treatment to the competent domestic and international authorities, including superior officers and governmental institutions, judicial and prosecutorial authorities, specialised complaints bodies and inspection and monitoring mechanisms.**

**II.3.6. Individuals must be able to exercise their rights under Article 8 of the ECHR by sending to the competent authorities/bodies uncensored written correspondence.**

The right to respect for private correspondence is also a key for ensuring that information relating to ill-treatment reaches the appropriate authorities. This is especially important given the vulnerability of detainees.

54. *Ibid*, para. 73.

55. CPT’s Report on the visit to Lithuania from 17 to 24 February, 2004 CPT/Inf (2006) 9, para. 96. However, the CPT does not shy away from highlighting the legal obligations that exist, as can be seen from the following visit report extract: “All medical staff working in prison establishments, police pre-trial detention facilities and the Military Hospital should be reminded of their obligations under Article 282 of the Criminal Procedure Code,” CPT’s Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 49.

It is difficult to think of any practical justification that could be put forward for interfering with a detainee's right to communicate with bodies such as those indicated in Guideline II.3.5. The relevant bodies are usually specified in domestic legislation, but there is also an international framework in accordance with provisions such as Article 34 of the ECHR. There is a case-law in the Strasbourg Court that deals with the right to respect of correspondence of inmates. It denounces provisions that do not draw any distinction between the different categories of persons and bodies with whom the prisoners could correspond.<sup>56</sup>

The detainee must also be able to communicate with the relevant bodies without pressure or fear of retribution:

“The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints [...]. In this context, “pressure” includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy [...].”<sup>57</sup>

The CPT's visit reports have emphasised that individuals must be able to correspond confidentially with international bodies.<sup>58</sup>

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56. *Niedbala v. Poland*, judgment of 4 July 2000, application no. 27915/95, para. 81.

57. *Popov v. Russia*, judgment of 13 July 2006, application no. 26853/04, paras. 246-247.

**II.3.7. Where requested, public authorities should be required to register all representations which could be deemed to constitute complaints. An appropriate form should be introduced for acknowledging receipt of each complaint and confirming that the matter will be pursued.**

The CPT has proposed additional safeguards to ensure that all allegations and information regarding ill-treatment reach the appropriate, competent authorities:

“Apart from the possibility for persons to lodge complaints directly with the agency, it should be mandatory for public authorities such as the police to register all representations which could constitute a complaint; to this end, appropriate forms should be introduced for acknowledging receipt of a complaint and confirming that the matter will be pursued.”<sup>59</sup>

The Guidelines require registration “where requested”. This qualification aims to reconcile this standard with the requirements of confidentiality found elsewhere in the Guidelines.

**II.3.8. Inspection and monitoring mechanisms empowered to determine representations of ill-treatment should also adhere to these Guidelines.**

58. CPT’s Report on the visit to Ukraine carried out from 9 to 21 October 2005, CPT/Inf (2007) 22, para. 151. With specific reference to police detention, the CEHRC has enumerated the different ways in which information regarding ill-treatment may be communicated, but fails to describe how these methods may be secured: “Access to the police complaints system, either by the complainant or his or her nominated representative, may be by a number of methods, including: in person at police premises, either on the occasion that gave rise to the complaint or subsequently; by telephone call to the police or IPCB; by facsimile to the police or IPCB; by letter to the police or IPCB; or electronically, by email or the World Wide Web, to the police or IPCB.” Opinion of the Council of Europe’s Commissioner for Human Rights, Thomas Hammarberg, concerning independent and effective determination of complaints against the police, ommDH(2009)4, para. 46. Hereinafter referred to as “the CEHRC’s Opinion.”

59. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 38.

The Guidelines take into account that domestic inspection and monitoring mechanisms can also be empowered to process and determine particular allegations, complaints and other indications of ill-treatment. It is logical to expect that in carrying out this role they should also adhere to the relevant standards.

***II.3.9. Individuals who come into contact with law enforcement authorities should be fully informed of their rights that counter ill-treatment and of the mechanisms and procedures available to them.***

This Guideline reflects the requirement to inform individuals about the rights corollary to the legal safeguards against ill-treatment.<sup>60</sup> The CEHRC's Opinion sets out examples of good practice in this respect:

- provision of information about complaints on police publicity materials;
- prominent display of complaints information in all police premises, particularly in custody areas;
- all persons detained in police premises to be informed in writing of how to make a complaint on their release;
- when on duty police officers to carry 'complaints information cards' that may be given to members of the public who express dissatisfaction with the police;
- display of police complaints information in public spaces controlled by criminal justice agencies, including prosecution, probation, prison and court services; and
- display of police complaints information in public spaces that do not come under the umbrella of the criminal justice system, including community, advice and welfare organisations.<sup>61</sup>

60. See Guideline II.2.6 and related comments.

### **III. The investigation: grounds and purposes**

#### **III.1. Grounds for investigation**

***III.1.1. The obligation to initiate an investigation arises when the competent authorities receive a plausible allegation or other sufficiently clear indications that serious ill-treatment might have occurred. An investigation should be undertaken in these circumstances even in the absence of an express complaint.***

Until recently, the Court required the existence of an “arguable claim” in order for the responsibility to investigate ill-treatment to be engaged.<sup>62</sup> Having been presented with wide variety of different circumstances, the Court tightened its standards under Article 3, requiring an investigation even in the absence of any articulated claim. The obligation to initiate an investigation into torture or other forms of ill-treatment now exists where there are “sufficiently clear indications” that ill-treatment “might have occurred”.<sup>63</sup> This approach is in line with the Istanbul Principles<sup>64</sup> and the CPT standards.<sup>65</sup> Enquiries must therefore be undertaken where possible ill-treatment is indicated by visible injuries, a person’s general appearance or demeanour, and other relevant indications.<sup>66</sup> The Strasbourg Court also states that investigations are required “when the competent authorities receive an allegation that is not factually implausible or other sufficiently clear indications that serious ill-treatment might have occurred”.<sup>67</sup> Accordingly, the Guidelines suggest that the wordings “plausible allegations *or other indications of ill-*

61. CEHRC’s Opinion, para. 43.

62. See *Kuznetsov v. Ukraine*, judgment of 29 April 2003, application no. 39042/97, para. 105 and *Ipek v. Turkey*, judgment of 17 February 2004, application no. 25760/94, para.

63. *Bati and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, para. 100; *97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, judgment of 3 May 2007, application no. 71156/01, para. 97.

64. Istanbul Principles, para. 2.

65. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 27.

66. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 28.

*treatment*” or “credible accounts of ill-treatment” should be used in order to help secure prospects and avenues for the initiation of investigations.

**III.1.2. It is mandatory to conduct an investigation when confronted with credible accounts of physical or psychological abuse, excessive use of force, or other forms of serious ill-treatment.**

At the initial stages of determination of relevant accounts it is difficult to decide on the definitional thresholds and differences between torture and other forms of ill-treatment.<sup>68</sup> Moreover, it is not only a high degree of physical or psychological harm that matters in this regard and engages the obligation to investigate.<sup>69</sup> That is why there exists no exhaustive list of situations and indications giving rise to this duty.<sup>70</sup> In view of the potential variables that might exist from one case to the next, the Guidelines follow the Court that operates for this purpose with the term “seriousness” of ill-treatment.

“The Court reiterates that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, that provision, read in conjunction with the state’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention’, requires by implication that there should be an effective official investigation.”<sup>71</sup>

67. See *97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, judgment of 3 May 2007, application no. 71156/01, para. 97. For the purposes of the Guidelines, this wording is interchangeable with “credible accounts”, unless otherwise stated.

68. See General Comment N2, CAT/C/GC/2, para. 3.

69. See A. Reidy, *The Prohibition of Torture. A Guide to the Implementation of Article 3 of the European Convention on Human Rights*. Human rights handbooks, No. 6, Council of Europe, 2002. Due to the specific rationale, accents and scope of the Guidelines they do not deal with the definitions and classifications of substantial violations of the prohibition. Hence, the same approach is used in the ECHRC’s Opinion.

70. See the comments on Guideline V.1.1.1, , page 70.

71. *Maslova and Nalbandov v. Russia*, judgment of 24 January 2008, application no. 839/02, para. 91.

The case law of the Court is, however, illustrative of the main scenarios that lead to the obligation to investigate. First, it arises in respect of physical or psychological abuse, assaults and other forms of intentional ill-treatment.<sup>72</sup> The level of diversity of particular circumstances that result in corresponding violations of Article 3 of the ECHR can be illustrated by the suffering caused to next of kin by the mutilation of loved ones who have been killed.<sup>73</sup>

As the material scope of the prohibition of torture and other ill-treatment widens, so too does the range of circumstances in which the obligation to investigate arises. Thus, it has been considered to flow from the intentional destruction of homes and possessions.

“Where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure (see *Menteş and Others*, cited above, pp. 2715-16, § 89).”<sup>74</sup>

By analogy to Article 2 case law, the obligation to investigate also arises in respect of alleged disproportionate uses of force in the course of law-enforcement activities or policing.<sup>75</sup>

In terms of the Court procedure, the burden of proof as to injuries of detained persons and those under their control has shifted to the authorities. This has had an effect upon domestic investigations, creating obligations upon the authorities to account for injuries caused to individuals whilst in

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72. *Maslova and Nalbandov v. Russia*, judgment of 24 January 2008, application no. 839 02, para. 91.

73. *Akkum v. Turkey*, judgment of 24 March 2005, application no. 21894/93, paras. 259, 265.

74. *Altun v. Turkey*, judgment of 1 June 2004, application no. 24561/94, para. 71. See also *Ayder and Others v. Turkey*, judgment of 8 January 2004, application no. 23656 94, paras. 122-129.

75. *Zelliof v. Greece*, judgment of 24 May 2004, application no. 17060/03, para. 55.

their control.<sup>76</sup> Accordingly, they are seen as indications of serious ill-treatment to be investigated.

**III.1.3. Particular care must be taken in probing possible racial or other discriminatory motives that may lie behind ill-treatment.**

Racism and other forms of discrimination can significantly aggravate the suffering caused to victims of ill-treatment. This realisation has led to the development of a specific standard that requires investigation where there are sufficiently clear grounds of discrimination or where there are particular problems relating to a form of discrimination within a society or state. Where such problems exist, then it must be presumed that the authorities are aware of them, and this may, in itself, create a *prima facie* obligation to investigate.<sup>77</sup> The Court's stance was summarised as follows in *Cobzaru* in relation to the Roma population in Romania:

"Undoubtedly, such incidents, as well as the policies adopted by the highest Romanian authorities in order to fight discrimination against Roma, were known to the investigating authorities in the present case, or *should have been known*, and therefore special care should have been taken in investigating possible racist motives behind the violence."<sup>78</sup>

The court went on to describe the content of this obligation, which merely requires the state to do what is reasonable to uncover a discriminatory motive. The Court also held that failure to hold an adequate investigation into

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76. *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, para. 127.

77. On standards of proof in Court procedures in such cases, see also *Bekos and Koutropoulos v. Greece*, judgment of 13 December 2005, application no. 15250/02, paras. 59-62.

78. *Cobzaru v. Romania*, judgment of 26 July 2007, application no. 48254/99, para. 97, italics added.



ill-treatment potentially involving discrimination can itself constitute a substantive violation of Article 14 of the ECHR.<sup>79</sup>

**III.1.4. Investigations into ill-treatment which do not fall into the mandatory categories must meet the same standards on effectiveness.**

The case law of the Strasbourg Court and other mechanisms suggests that not all kinds of ill-treatment prohibited by Article 3 give rise to the obligation to investigate. However, formal investigations can also be carried out into inadequate detention conditions or medical treatment or other apparently less serious violations of the prohibition of ill-treatment. Once these are initiated, they must meet the same standards as those required of mandatory investigations.

The inclusion of this Guideline is the result of the evidential value the Strasbourg Court attaches to such “non-obligatory” investigations, which is illustrated by its assessment of the adequacy of the investigation on conditions of detention referred to below:

“Most of the Government’s arguments are based on the results of the internal criminal investigation, to the effect that the first applicant’s complaints about the conditions in the punishment were untrue. However, the Court is not convinced by that conclusion. First, the investigation cannot be considered to have been effective because it was launched only four months after the first applicant complained to the prosecution authorities, thus giving the prison administration sufficient time to renovate the cell in question. Secondly, the investigation could not reasonably be considered to have been objective, in so far as it was conducted without the participation of the first applicant’s advocates, and its conclusions were mostly based on the statements of the prison administration complained of (see, amongst many others, *Gharibashvili v. Georgia*, no. 11830/03, §§ 60-63, 29 July 2008; *Barbu Anghelescu v. Romania*, no. 46430/99, § 66, 5 October 2004; *Corsacov v. Moldova*, no. 18944/02, § 70, 4 April 2006).”<sup>80</sup>

79. See also *Cobzaru v. Romania*, judgment of 26 July 2007, application no. 48254/99, paras. 96-101.

It remains to be seen whether the Court will extend the mandatory obligation to investigate to cover allegations of inadequate detention conditions.<sup>81</sup>

**III.1.5. Decisions to terminate or to refuse to initiate investigations into ill-treatment can only be taken by an independent, competent authority upon thorough and prompt consideration of all the relevant facts. Such decisions should be subject to appropriate scrutiny and challengeable by means of a public and adversarial judicial review process.**

A determination that an allegation is groundless is tantamount to a refusal to investigate and cuts the alleged victim off from the rights corollary to the obligation to investigate. Such a determination must therefore stand up to the highest degree of scrutiny.

### **III.2. Principal purposes of investigations**

**III.2.1. Effective investigation requires genuine efforts to be made to properly establish the relevant facts and, where appropriate, to identify and punish those responsible for ill-treatment.**

The Guidelines envisage two main purposes of investigation: to establish the facts and, if necessary, to punish perpetrators. They recognise that the facts may not be borne out in all cases, and that at times there will be insufficient proof to hold perpetrators responsible.<sup>82</sup>

However, the authorities must make a genuine attempt to achieve results. This Guideline reflects the standard language used by the Court in this area:

“An obligation to investigate ‘is not an obligation of result, but of means’: not every investigation should necessarily be successful or come to a conclusion

80. *Ramishvili and Kokhreidze v. Georgia*, judgment of 27 January 2009, application no. 1704/06, para. 80.

81. See *Fedotov v. Russia*, judgment of 25 October 2005, application no. 5140/02, paras. 63, 69-70.

82. See also Guidelines III.1.1 and III.1.5.

which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. Thus, the investigation of serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.<sup>83</sup>

**III.2.2. Investigating authorities could also be tasked with identifying and implementing measures to prevent recurrences of ill-treatment.**

The investigating authorities' role in implementing preventive measures is highlighted by both the Istanbul Principles<sup>84</sup> and the CEHRC.<sup>85</sup> Although this role should also be fulfilled by other mechanisms and institutions, the investigative authorities are well-placed to identify measures geared towards the prevention of future cases of ill-treatment.

**IV. Measuring effectiveness: the key criteria**

Whilst the terminology used by the Strasbourg Court and other international bodies and instruments may vary,<sup>86</sup> the relevant criteria include independ-

83. *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, para. 54.

84. Principle 1.b of the Istanbul Principles.

85. CEHRC's Opinion, para. 22.

86. See the 14th General Report on the CPT's activities, CPT/Inf (2004) 28 paras. 31-36; Istanbul Protocol, paras. 79-82; the CEHRC's Opinion, paras. 62-79.

ence and impartiality, thoroughness, promptness, adequacy of competence, victim involvement and public scrutiny.

#### **IV.1. Independence and impartiality**

##### ***IV.1.1. Officials involved in conducting investigations and all decision-makers must be independent from those implicated in the facts being investigated.***

Independence is crucial to effective investigation and to maintaining the confidence of the alleged victim and of the general public.<sup>87</sup> The case law of the Strasbourg Court is highly developed in its analysis of the independence of investigations, and the obligation of independence can cover anyone making a decision during investigations or conducting them (including those assigned to particular investigative steps,<sup>88</sup> forensic doctors,<sup>89</sup> supervising prosecutors,<sup>90</sup> and special bodies<sup>91</sup>).

The Court's findings of a lack of independence on the part of the investigating authorities has led to changes in domestic systems, of which the Dutch reforms are possibly the best example.<sup>92</sup>

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87. See the 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 32; Istanbul Protocol, para. 74; Istanbul Principles, para. 2; CEHRC's Opinion, paras. 63-66.

88. See *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, para. 116. The Court determined a lack of independence of police officer assigned with the task of finding witness.

89. Thus, the Court requires that forensic doctor must enjoy formal and de facto independence, provided with specialised training and allocated a mandate which is broad in scope. *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, paras. 62.

90. See *Ramsahai and Others v. the Netherlands*, judgment of 15 May 2007, application no. 52391/99, paras. 62-63; *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, paras. 62-63.

91. See *Ipek v. Turkey*, judgment of 17 February 2004, application no. 25760/94, para. 207.

**IV.1.2. This requires independence in practical terms, not only the absence of hierarchical or institutional connections.**

Occasionally the Court is able to determine a lack of independence from a brief analysis of the institutional hierarchies comprising investigative bodies. For example, in *Rehbock*, it noted that:

“The investigation was carried out within the Slovenj Gradec Police Administration the members of which had been involved in the applicant's arrest.”<sup>93</sup>

Yet, the analysis often has to go further and examine whether independence exists in practical terms:

“In this context, it is recalled that the Kulp District Governor appointed the Kulp District Gendarme Commander, who was the hierarchical superior of the gendarmes who were allegedly involved in the incident, as investigating officer. It is also clear from the witness testimonies that the Kulp District Gendarme Commander further delegated the Kulp Gendarme Station Commander to conduct the investigation. In view of the fact that the Kulp Gendarmerie was allegedly accused of being involved in the burning of the applicant's house, the Court finds it unacceptable that the same gendarme station was delegated to conduct an investigation into the allegations.”

The same approach is adopted by the CPT:

“Moreover, even if the prosecutors formally responsible for preliminary investigations into allegations of police ill-treatment can be said to be independent from the police officers dealing with such complaints, the same cannot be said of the police officers who actually conduct those investigations. In a number of cases examined by the delegation, the investigating criminal police officers were employed at the same police establishment as the police officers who were subject of the investigation. In the CPT's view, it is axiomatic that such investigations

92. See *Ramsahai and Others v. the Netherlands*, judgment of 15 May 2007, application no. 52391/99, paras. 258-267.

93. *Rehbock v. Slovenia*, judgment of 28 November 2000, application no. 29462/95, para. 74. See also *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, para. 115.

should at least be conducted by police officers who are not attached to the same police establishment (for example, police officers attached to a general police inspectorate or an internal affairs department).<sup>94</sup>

The relationship between different officials and bodies can therefore be complex and require detailed examination. Thus, it applies to instances when institutionally independent officials heavily rely on information provided by those implicated or investigations carried out by the subdivisions they belong to.

“However, the Court finds it conflicting with the relevant principles of an effective investigation that the TCPO [Tbilisi City Prosecutor’s Office] relied heavily on the information provided by the RDPO [Rustavi District Prosecutor’s Office] and Rustavi police officers directly or indirectly implicated in the impugned events.”<sup>95</sup>

Often, investigators may also have a close working relationship with a particular police force. This was a concern in a Strasbourg case concerning military prosecutors in Romania. The investigators were serving officers in the same military structure as the police who were being investigated.<sup>96</sup>

***IV.1.3. Officials involved in conducting investigations and all decision-makers must be impartial. In particular, they should not be involved in investigations or decisions regarding the alleged victims of the case in question.***

The international instruments do not elaborate in detail upon the obvious requirement of impartiality of investigators, but it is clear from the jurisprudence of the Strasbourg Court.<sup>97</sup> Moreover, investigators have often been found to have a dual role in dealing with cases against the alleged victims while also being responsible for investigating their alleged ill-treatment:

94. CPT’s Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 40.

95. *Gharibashvili v. Georgia*, judgment of 29 July 2008, application no. 11830/03, para. 73.

96. See *Barbu Anghelescu v. Romania*, judgment of 5 October 2004, application no. 46430/99, para. 67.

97. See *97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, judgment of 3 May 2007, application no. 71156/01, para. 117.

“[The Court] is struck by the fact that the expert examination on 9 August 2001 was ordered by the same police investigator, Ms Z., who had questioned the applicant after his arrest and could have witnessed the alleged beatings . . .”<sup>98</sup>

The CPT has similarly highlighted that “a conflict of interest may occur when an investigation into suspected ill-treatment is dealt with in the framework of the same criminal investigation of the person alleging ill-treatment.”<sup>99</sup>

## **IV.2. Thoroughness**

### **IV.2.1. Investigations on ill-treatment should include all reasonable steps to secure evidence concerning the relevant incident(s).**

Creating an exhaustive list of investigative steps needed for meeting the criterion of thoroughness is not possible. However, the Strasbourg Court has developed a general requirement of taking “all reasonable steps” or making genuine efforts. In its judgments, it often sets out an illustrative and non-exhaustive inventory of measures expected to be carried out:

“The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard.”<sup>100</sup>

98. *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, para. 48. See also *Toteva v. Bulgaria*, judgment of 19 May 2004, application no. 42027/98, para. 63.

99. CPT’s Report on the visit to Albania carried out from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 50.

100. *Bati and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, para. 134.

Other international instruments comment generally on the measures that are usually expected.<sup>101</sup>

**IV.2.2. The typical inventory of required investigative measures and evidence includes:**

The list of basic investigative measures set out in the Guidelines is illustrative. It is based on typical examples contained in the case law of the Strasbourg Court and CPT's visit reports.

**– detailed and exhaustive statements of alleged victims obtained with an appropriate degree of sensitivity;**

In many cases, the testimony of victims is either not obtained at all or the authorities fail to seek clarification on certain points that are crucial in the circumstances. Such failures have led to criticism by the Strasbourg Court:

“It is also noteworthy that the applicant himself was never questioned about the origin of his bruises, either when allegations were made that it was Crinel M. who had beaten him up, or after he had complained to the prosecutor that it was the police who had beaten him up. Similarly, none of the police officers who had declared that the applicant had bruises upon his arrival at the police station was asked to explain why he had not been questioned about the origin of his bruises either on his arrival at the police station on 4 July 1997 or later, when they learned that he had been admitted to hospital. No explanation was provided by the authorities as to why no steps had been taken to investigate his alleged beating by Crinel M.”<sup>102</sup>

101. Istanbul Protocol, paras. 88-106; the CEHRC's Opinion, para. 69; 14th General Report on the CPT's activities, CPT/Inf (2004) 28 para. 33.

102. *Cobzaru v. Romania*, judgment of 26 July 2007, application no. 48254/99, para. 71.



The vulnerability of victims of psychological ill-treatment in particular necessitates that they are questioned with specific care. The Istanbul Protocol sets out detailed considerations in this regard.<sup>103</sup>

***– appropriate questioning and, where necessary, the use of identification parades and other special investigative measures designed to identify those responsible;***

Genuine efforts to identify and question the alleged perpetrators are other indispensable elements of all investigations on ill-treatment. In its case law, the Strasbourg Court has identified many shortcomings in this regard:

“The Court finds it particularly striking that although the applicant repeated on 9 March 1995 that he would be able to recognise the warders concerned if he could see them in person, nothing was done to enable him to do so and, just nine days later, the public prosecutor’s office sought and was granted an order for the case to be filed away on the ground not that there was no basis to the allegations but that those responsible had not been identified.”<sup>104</sup>

***– confidential and accurate medical (preferably forensic) physical and psychological examinations of alleged victims. These should be carried out by independent and adequately trained personnel capable of identifying the causes of injuries and their consistency with the allegations;***

***– other medical evidence, including records from places of detention and health care services;***

The Istanbul Protocol emphasises the importance of physical and psychological examination of alleged victims, diagnostic tests, and uniform documentation:<sup>105</sup>

103. Istanbul Protocol, paras 120-160. As to additional measures for victims’ protection see Guidelines IV.4.3, IV.4.4 and related comments below, , page 66.

104. *Labita v. Italy*, judgment of 6 April 2000, application no. 26772/95, para. 72. See also *Bati and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, para. 142; *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, para. 44.

“A medical examination should be undertaken regardless of the length of time since the torture, but if it is alleged to have happened within the past six weeks, such an examination should be arranged urgently before acute signs fade. The examination should include an assessment of the need for treatment of injuries and illnesses, psychological help, advice and follow-up (see chapter V for a description of the physical examination and forensic evaluation). A psychological appraisal of the alleged torture victim is always necessary and may be part of the physical examination, or where there are no physical signs, may be performed by itself (see chapter VI for a description of the psychological evaluation).”<sup>106</sup>

In a similar vein, the judgments of the Strasbourg Court and the findings of CPT visit reports illuminate the requirements of those bodies:

“The Court further reiterates that proper medical examinations are an essential safeguard against ill-treatment. The forensic doctor must enjoy formal and *de facto* independence, have been provided with specialised training and been allocated a mandate which is broad in scope (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 55 and § 118, ECHR 2000-X). When the doctor writes a report after the medical examination of a person who alleges having been ill-treated, it is extremely important that the doctor states the degree of consistency with the history of ill-treatment.”<sup>107</sup>

“Reference might also be made to a more recent preliminary inquiry, instigated on 2 June 2006 in respect of ‘B’. This prisoner was transferred to SIZO No. 1 on 23 May 2006 and the medical examination upon arrival revealed multiple bodily injuries which he alleged were the result of beatings by ORB-2 officers. A decision of refusal to initiate a criminal case was taken on the basis of the medical register of the IVS and the feldsher’s explanations to the effect that ‘B’ had, on his

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105. See the Istanbul Protocol, at chapters V-VI, annexes II-IV.

106. The Istanbul Protocol, para. 104.

107. *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, para. 59.

arrival at the IVS on 13 May 2006, displayed injuries received at the time of apprehension; no forensic examination was ever requested.”<sup>108</sup>

**– appropriate witness statements, possibly including statements of other detainees, custodial staff, members of the public, law enforcement officers and other officials;**

Ill-treatment usually takes place out of sight. Nonetheless, investigations should involve genuine efforts to gather evidence from persons who may have witnessed the incident in question or be able to shed light on the circumstances surrounding it. This is reflected in the Istanbul Protocol, which requires that:

“Information must be obtained from anyone present on the premises or in the area under investigation to determine whether they were witness to the incidents of alleged torture.”<sup>109</sup>

Equally, the Court has often identified failures to question the appropriate persons:

“The investigator did not try to find and question individuals who had been detained with the applicant in Bogorodsk and Leninskiy police stations between 10 and 19 September 1998 and who could have possessed useful information about the applicant’s behaviour before the attempted suicide; and it is unclear whether V, one of the applicant’s ward-mates, was ever questioned by the investigator.”<sup>110</sup>

**– examination of the scene for material evidence, including implements used in ill-treatment, fingerprints, body fluids and fibres. Examination should involve the use of forensic and other specialists able to secure and examine the evidence, create appropriate sketches, and/or reconstruct the relevant events; and**

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108. Appendix I to the CPT’s Public Statement of 13 March 2007 concerning the Chechen Republic of the Russian Federation, CPT/Inf (2007) 17, para. 48.

109. Istanbul Protocol, para.103.

Scene of crime evidence plays a crucial role in establishing the circumstances surrounding any incident and is of particular importance in cases of ill-treatment, as underlined by the Strasbourg Court<sup>111</sup> and the CPT.<sup>112</sup> The Guideline relating to the evidence of crime scenes also draws upon the (non-exhaustive) provisions of the Istanbul Protocol:

“All evidence must be properly collected, handled, packaged, labelled and placed in safekeeping to prevent contamination, tampering or loss of evidence. If the torture has allegedly taken place recently enough for such evidence to be relevant, any samples found of body fluids (such as blood or semen), hair, fibres and threads should be collected, labelled and properly preserved. Any implements that could be used to inflict torture, whether they be destined for that purpose or used circumstantially, should be taken and preserved. If recent enough to be relevant, any fingerprints located must be lifted and preserved. A labelled sketch of the premises or place where torture has allegedly taken place must be made to scale, showing all relevant details, such as the location of the floors in a building, rooms, entrances, windows, furniture and surrounding terrain. Colour photographs must also be taken to record the same. A record of the identity of all persons at the alleged torture scene must be made, including complete names, addresses and telephone numbers or other contact information. If torture is recent enough for it to be relevant, an inventory of the clothing of the person alleging torture should be taken and tested at a laboratory, if available, for bodily fluids and other physical evidence.”<sup>113</sup>

**– examination of custody records, decisions, case files and other documentation related to the relevant incident.**

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110. *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, para. 112. See also *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, para. 62.
111. *Altun v. Turkey*, judgment of 1 June 2004, application no. 24561/94, para. 73. See also *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, para. 112.
112. Appendix I to the CPT's Public Statement of 13 March 2007 concerning the Chechen Republic of the Russian Federation, CPT/Inf (2007) 17, para. 49.
113. Istanbul Protocol, para. 103.

The duty to maintain custodial records, case files and other documentation related to the detention, use of force or other actions is accompanied by the need to use such material during an investigation.<sup>114</sup> Accordingly, the Istanbul Protocol provides that:

“Any relevant papers, records or documents should be saved for evidential use and handwriting analysis.”<sup>115</sup>

**IV.2.3. Evidence should be assembled and investigations conducted in conformity with domestic procedural rules. Procedural failures that contribute to the collapse of subsequent legal proceedings constitute failures to take all reasonable steps to secure evidence concerning the incident.**

Given the aim to punish persons responsible for ill-treatment, procedural failures in the course of the investigation that render the evidence against those persons useless amount to a failure to meet the standards of effective investigation. This Guideline reflects the jurisprudence of the Strasbourg Court.<sup>116</sup>

**IV.2.4. Information and evidence relating to ill-treatment must be assessed in a thorough, consistent and objective manner.**

Investigations must be carried out in a thorough, consistent and coherent manner from their outset. As the CPT points out “hasty or ill-founded conclusions”<sup>117</sup> must be avoided:

“Adequately assessing allegations of ill-treatment will often be a far from straightforward matter. Certain types of ill-treatment (such as asphyxiation or electric shocks) do not leave obvious marks, or will not, if carried out with a

114. See also Guideline II.3.1 and comments, , page 35.

115. Istanbul Protocol, para. 103.

116. *Maslova and Nalbandov v. Russia, Mikheev v. Russia*, judgment of 24 January 2008, application no. 839/02, para. 95.

117. See the quotation with footnote 83, , page 49.

degree of proficiency. Similarly, making persons stand, kneel or crouch in an uncomfortable position for hours on end, or depriving them of sleep, is unlikely to leave clearly identifiable traces. Even blows to the body may leave only slight physical marks, difficult to observe and quick to fade. Consequently, when allegations of such forms of ill-treatment come to the notice of prosecutorial or judicial authorities, they should be especially careful not to accord undue importance to the absence of physical marks. The same applies *a fortiori* when the ill-treatment alleged is predominantly of a psychological nature (sexual humiliation, threats to the life or physical integrity of the person detained and/or his family, etc.). Adequately assessing the veracity of allegations of ill-treatment may well require taking evidence from all persons concerned and arranging in good time for on-site inspections and/or specialist medical examinations.”<sup>118</sup>

The European Court’s approach to “thoroughness” can be observed in the following judgment:

“[...] The investigator did accept the police officers’ testimonies as credible, despite the fact that their statements could have constituted defence tactics and have been aimed at damaging the applicant’s credibility. In the Court’s view, the prosecution inquiry applied different standards when assessing the testimonies, as that given by the applicant was deemed to be subjective but not those given by the police officers. The credibility of the latter testimonies should also have been questioned, as the prosecution investigation was supposed to establish whether the officers were liable on the basis of disciplinary or criminal charges (see *Ognyanova and Choban v. Bulgaria*, no. 46317/99, § 99, 23 February 2006).”<sup>119</sup>

This approach is clearly in line with the CEHRC Opinion, which outlines the obligations of the authorities in:

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118. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28 para. 29.

119. *Barabanshchikov v. Russia*, judgment of 8 January 2009, application no. 36220/02, paras. 46, 59, 61.

“pursuing lines of inquiry on grounds of reasonable suspicion and not disregarding evidence in support of a complaint or uncritically accepting evidence, particularly police testimonies, against a complaint.”<sup>120</sup>

#### **IV.2.5. Investigations should be comprehensive in scope.**

Investigations must be comprehensive, particularly where they involve more than one incident or a complex set of interrelated facts. This reflects the content of the CPT’s visit reports:

“The investigation must also be conducted in a *comprehensive* manner. The CPT has come across cases when, in spite of numerous alleged incidents and facts related to possible ill-treatment, the scope of the investigation was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded.”<sup>121</sup>

An example of such a set of facts is where ill-treatment occurs during a pre-planned police operation involving the use of force. Investigators must establish that the operation was planned and carried out with a proper risk assessment and precautions against excessive use of force, and then examine whether the action was proportionate in terms of the overall aim pursued.<sup>122</sup> Other examples include situations featuring potentially discriminatory motives or destruction of property.<sup>123</sup>

Moreover, when defining the scope of the investigation, the authorities must take into account the various factors contributing to the severity of ill-treatment and carefully examine each one in turn. This approach is consistent with the Court’s *relative approach* to assessing severity of suffering:

120. CEHRC’s Opinion, para. 69.

121. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28 para. 33. See also the CPT’s Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 30.

122. See *Tzekov v. Bulgaria*, Court’s judgment of 23 February 2006, application no. 45500/99 and *Nachova v. Bulgaria*, judgment of 26 February 2004, application nos. 43577/98 and 43579/98 with further references.

123. See Guidelines III.1.2 and III.1.3 and related comments, , page 45 and , page 47.

“[I]t depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”<sup>124</sup>

The non-exhaustive inventory set out in the Guideline points to two types of causes that contribute to levels of suffering: objective factors, such as duration, inflicted injuries and subjective factors, which relate to personal characteristics of the victim.<sup>125</sup>

### **IV.3. Promptness**

#### **IV.3.1. Investigations and eventual legal proceedings must be conducted in a prompt and reasonably expeditious manner.**

Guideline IV.3.1 acknowledges that evidence may lose its value or become impossible to recover after a period of time, as is echoed in all the relevant international instruments, CPT guidance,<sup>126</sup> the Istanbul Protocol<sup>127</sup> and the CEHRC Opinion.<sup>128</sup> The most detailed guidance on this issue, however, can be found in the Court’s jurisprudence:

“...[T]he investigation must be expedient. In cases under Articles 2 and 3 of the Convention, where the effectiveness of the official investigation was at issue, the Court often assessed whether the authorities reacted promptly to the complaints at the relevant time (see *Labita v. Italy* [GC], no. 26772/95, § 133 et seq., ECHR 2000-IV). Consideration was given to the starting of investigations, delays in taking statements (see *Timurtaş v. Turkey*, no. 23531/94, § 89, ECHR 2000-VI; and *Tekin v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, § 67), and the

124. *Selmouni v. France*, Court’s judgment of 28 July 1999, application no. 25803/94, para. 100.

125. In *Aydin v. Turkey*, the Court took into account the gender and youth of the applicant. It found in another case that the unlawfulness of the individual’s detention, despite its relatively short duration, had exacerbated his mental anguish and suffering whilst he was detained in unacceptable conditions: *Trepashkin v. Russia*, Court’s judgment of 19 July 2007, application no. 36898/03, para. 94.

126. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28 para. 35.

127. See paras. 14, 83, 179.

128. CEHRC’s Opinion, paras. 70-73.



length of time taken during the initial investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001).<sup>129</sup>

Timeliness is essential to the effectiveness of medical examinations<sup>130</sup> and to the usefulness and reliability of witness testimony, as is repeatedly underlined by the Court:

“Thirdly, a number of investigative measures were taken very belatedly. The report on the forensic medical examination of the applicant, for instance, was dated 26 October 1998, that is, more than five weeks after the alleged ill-treatment. The police officers suspected of ill-treatment were brought before the applicant for identification only about two years after the incident. The applicant’s mother was questioned only in 2000, and Dr M from Hospital no. 33 not until 2001, despite having been among the first witnesses to see the applicant after the accident. The investigator did not question personnel and patients in Hospital no. 39 until January 2000 (with the exception of B and Dr K, who had been questioned during the initial investigation). Finally, the applicant’s psychiatric examination was carried out only in 2001, despite the fact that his mental condition was advanced by the authorities as the main explanation for his attempted suicide, and as the basis for the discontinuation of the proceedings.”<sup>131</sup>

The Guideline also implies the need for promptness during the period from the initial investigation to any eventual legal proceedings. It does not prescribe time limits, but the standards followed should reflect the Court’s approach under Article 5(3) of the ECHR, whereby the Court interprets the concept of “reasonable time” as requiring “special diligence” and “particular expedition”.<sup>132</sup> The assessment will rely to a large extent upon the circumstances of the case.<sup>133</sup>

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129. *Mikheev v. Russia*, Court’s judgment of 26 January 2006, application no. 77617/01, para. 109.

130. See para. 104 of the Istanbul Protocol.

131. *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, para. 113. See also para. 114.

132. See *mutatis mutandis Wemhoff v. Germany*, judgment of 27 June 1968, application no. 2122/64, para. 17.

### **IV.3.2. Promptness is a key to maintaining public confidence.**

The Strasbourg Court has regularly linked the need for promptness to the need to maintain the confidence and support of the public. This was made clear in its judgment in *Bati and Others*:

“136. It is beyond doubt that a requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, among other authorities, *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001, and *Özgür Kılıç v. Turkey* (dec.), no. 42591/98, 24 September 2002).”

## **IV.4. Competence**

**IV.4.1. Investigative bodies must have full competence to establish the facts of the case and to identify and punish those responsible where necessary.**

**IV.4.2. No legal or practical obstacles should impede investigations.**

The Court has established that certain investigative bodies are incapable, due to lack of competence, of playing an effective role in the identification or prosecution of those responsible for ill-treatment. Death inquests have often fallen into this category, especially their forms that are restricted to ascertaining the identity of the deceased and the date, place and cause of death and do not compel those suspected of causing the death to testify.<sup>134</sup>

The Court has also criticised as unacceptable special provisions that prevent the investigation of particular groups of law enforcement officials.<sup>135</sup> The CPT has been equally critical for such arrangements. For example, it has come

133. See *mutatis mutandi Scott v. Spain*, judgment of 18 December 1996, application no. 21335/93, para. 17.

134. See *Hugh Jordan v. the United Kingdom*, judgment of 4 May 2001, application no. 24746/94, paras. 125-130.

across certain legal provisions preventing the identification of members of special forces even for the purposes of investigations into allegations of ill-treatment against them. It has responded as follows:

“44. The practice of not disclosing the identity of members of special and rapid intervention forces suspected of having ill-treated detained persons in the context of criminal investigations is unacceptable. If such a state of affairs were to persist it would be tantamount to granting members of special and rapid intervention forces absolute immunity from criminal liability in relation to their actions while on duty [...].”<sup>136</sup>

The CPT is equally critical of informal barriers to effective investigation, such as the wearing of masks by police or prison officers. These have the same practical effect as formal legal obstacles:

“34. [...] This practice should be strictly controlled and only used in exceptional cases which are duly justified; it will rarely, if ever, be justified in a prison context.”<sup>137</sup>

**IV.4.3. Investigative bodies should have the power to suspend from service or from particular duties persons under investigation.**

**IV.4.4. Investigative bodies should be able to apply protective measures to ensure that alleged victims and other persons involved in the investigation are not intimidated or otherwise dissuaded from participating in investigations.**

135. *Ibid*, at para. 135. In this particular case, the Court found that the public interest immunity certificates in question had not, on the facts, been fatal to effective investigation.

136. CPT’s Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 44.

137. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 34. The CPT also criticised the blindfolding of detainees, another measure that can prevent the identification of those responsible for ill-treatment.

The Guidelines do not call for those suspected of ill-treatment to be placed in custody, but investigative bodies should at least be entitled to suspend them and apply other measures during the investigation. The failure to suspend suspects has been criticised by the Court:

“The Court also underlines the importance of the suspension from duty of the agent under investigation or on trial as well as *his dismissal* if he is convicted (see Conclusions and Recommendations of the United Nations Committee against Torture: Turkey, 27 May 2003, CAT/C/CR/30/5).”<sup>138</sup>

The Istanbul Protocol provides that such measures should protect those involved and those carrying out the investigation:

“Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.”<sup>139</sup>

The Protocol also aims to protect them “from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation.”<sup>140</sup> In addition, it suggests detailed outline of other elements of the relevant framework and supporting strategies.<sup>141</sup>

The CPT guidelines in this area are more general, requiring only that persons who may have been the victims of ill-treatment by public officials are not dissuaded from lodging or pursuing a complaint.<sup>142</sup> The CPT also requires that investigative activities concerning such complaints should be carried out in a safe environment. Alleged victims should under no circumstances be returned to the custody of those alleged to have mistreated them during the investigation.<sup>143</sup>

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138. *Yaman v. Turkey*, judgment of 2 November 2004, application no. 32446/96, para. 55. See also *Bekos and Koutropoulos v. Greece*, judgment of 13 December 2005, application no. 15250/02, para. 54.

139. Istanbul protocol, para. 80.

140. *Ibid*, paras. 80, 88, 95, 99, 112, 113.

141. *Ibid*, paras. 89-97.

142. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 39.

143. CPT’s Report on the visit to Albania from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 52. See also Appendix I to the CPT’s Public Statement of 13 March 2007 concerning the Chechen Republic of the Russian Federation, CPT/Inf (2007) 17, para. 53.

The Court is also attentive to indications that victims have been compelled to withdraw their complaints or otherwise dissuaded from pursuing them. Thus, it maintains that a withdrawal of allegations does not necessarily mean that an investigation should not still be carried out. The withdrawal must be taken together with all other relevant circumstances and evidence.<sup>144</sup>

#### **IV.5. Victim involvement and public scrutiny**

The relevant international standards emphasise the need for victim involvement, particularly from the standpoint of the public scrutiny requirement. Thus, the CPT has endorsed the case law of the Court<sup>145</sup> in stating that:

“36. In addition to the above-mentioned criteria for an effective investigation, there should be a sufficient element of *public scrutiny* of the investigation or its results, to secure accountability in practice as well as in theory. The degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”<sup>146</sup>

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144. *Chitayev and Chitayev v. Russia*, judgment of 18 January 2007, application no. 59334/00, para. 164.

145. See *Bati and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, para. 137.

***IV.5.1. Alleged victims of ill-treatment or their representatives must be involved in investigative procedures to the extent necessary to safeguard their legitimate interests. Victims should be entitled to request specific steps to be taken and to participate in specific investigative actions, where appropriate. They should be regularly informed as to the progress of investigations and all relevant decisions made. They should be provided with legal aid, if necessary, and be able to challenge actions or omissions of investigating authorities by means of a public and adversarial judicial review procedure.***

The involvement of the victim is not officially a fair trial guarantee under Article 6 ECHR or even under the more limited Article 5(4). However, it is required by the Guidelines to “the extent necessary to safeguard legitimate interests”. This is in line with a number of the Strasbourg Court’s judgments, including the following:

“Finally, as regards involvement of the next of kin in the investigation, it is noteworthy that the applicants were not consistently kept abreast of its progress, despite their lawyer’s requests for information [...]”<sup>147</sup>

“It further does not appear that either the applicants or their representatives were granted access to the materials of the investigation, or even provided with a copy of the decision of 7 January 2002.”<sup>148</sup>

146. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 36.

147. *Ognyanova and Choban v. Bulgaria*, judgment of 23 February 2006, application no. 46317/99, para. 115.

148. *Chitayev and Chitayev v. Russia*, judgment of 18 January 2007, application no. 59334/00, para. 165. See also *Khadisov and Tsechoyev v. Russia*, judgment of 5 February 2009, application no. 21519/02, para. 122. See also *Gharibashvili v. Georgia*, judgment of 29 July 2008, application no. 11830/03, para. 74.

The Guideline also states that victims ought to have standing to request investigative steps. This is a right derived from several judgments of the Court.<sup>149</sup>

**IV.5.2. *In particularly serious cases, a public inquiry may be required in order to satisfy this requirement.***

Guideline IV.5.2 envisages serious cases of significant public interest, and reflects the position of the CPT.<sup>150</sup>

**V. Forms of investigation and punishment**

**V.1. Procedural forms of investigation**

**V.1.1. *The appropriate investigative procedures will depend upon the facts of each case, but may include criminal, disciplinary and/or administrative procedures.***

Guideline V.1.1 incorporates the general wording used by the Court when dealing with the adequacy of official investigations.<sup>151</sup> The appropriate procedures inevitably vary from country to country and are therefore largely left to each state's "margin of appreciation". The Strasbourg Court requires only that the procedures adopted be "effective".<sup>152</sup>

Some states limit the extent to which certain investigative procedures can be carried out in the absence of a particular procedural framework. For example, until a preliminary criminal investigation is initiated, forensic examinations and identification parades might be precluded.

Forms of investigation can also depend on the type of punishment considered to be adequate in light of the degree of gravity of the alleged ill-treatment. Thus, the Court does not suggest a formal scale of adequacy of sanctions in relation to particular types of ill-treatment. However, it is a well-established norm under international human rights law that torture should lead to criminal responsibility and punishment.<sup>153</sup> This is stated unequivocal-

149. See *Slimani v. France*, judgment of 24 July 2004, application no. 57671/00, para. 49.

150. See footnote 146.

151. *İpek v. Turkey*, judgment of 17 February 2004, application no. 25760/94, para. 169.

152. See section IV and related comments, , page 50.

ly in Article 4 of UNCAT and is followed in Europe. Under regional instruments, it can be implied that states are expected to criminalise and apply criminal sanctions in response to physical or psychological abuse and other serious forms of inhuman or degrading treatment or punishment that are attributable to state agents. The following passage sets out the Strasbourg Court's position in this respect:

"In this connection, the Court notes that the fact of the applicant's beating by police officers was unequivocally established in the course of the proceedings for compensation under the State Responsibility for Damage Act. The only fact which remained to be ascertained was the identity of the police officers who had perpetrated the beating, with a view to bringing criminal proceedings against them."<sup>154</sup>

The CPT also supports criminal sanctions for many Article 3 breaches:

"27. In many States visited by the CPT, torture and acts such as ill-treatment in the performance of a duty, coercion to obtain a statement, abuse of authority, etc. constitute specific criminal offences which are prosecuted *ex officio*. The CPT welcomes the existence of legal provisions of this kind."<sup>155</sup>

Investigations into torture must therefore comply with the domestic legal framework governing criminal procedure.

Other less serious violations should at least lead to disciplinary, administrative or civil responsibility in accordance with domestic law and procedure, and no ill-treatment should go unpunished.<sup>156</sup> The CPT emphasises the important role of disciplinary procedures in the investigative system:

"37. Disciplinary proceedings provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Disciplinary

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153. See *Bati and Others v. Turkey*, judgment of 3 June 2004, application nos. 33097/96 and 57834/00, paras. 145-146; *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, paras. 120 and 135.

154. *Krastanov v. Bulgaria*, judgment of 30 September 2004, application no. 50222/99, para. 59. The same conclusion can be derived from other cases. See also *Okkali v. Turkey*, judgment of 16 October 2006, application no. 52067/99, paras. 71-78.

155. 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27.

156. See for example the Court's judgment in *Zelilof v. Greece*, judgment of 24 May 2004, application no. 17060/03, para. 58; see also *Menesheva v. Russia*, judgment of 9 March 2006, application no. 59261/00, para. 68.



culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence. The CPT has recommended a number of procedural safeguards to be followed in this context; for example, adjudication panels for police disciplinary proceedings should include at least one independent member.<sup>157</sup>

**V.1.2. *Alleged victims may also benefit from a standing to initiate judicial procedures without waiting for the competent authorities to do so.***

In certain jurisdictions, alleged victims of ill-treatment are entitled to initiate judicial processes by lodging criminal complaints. The Court has expressed reservations as to whether such processes can be relied upon in order to discharge Article 3 obligations where no *ex officio* investigation has been launched by the authorities:

“Finally, as regards the judicial proceedings instituted after the applicant had lodged his criminal complaint against the police officers, the Court observes firstly that the judicial investigation was not launched *ex officio* by the competent authorities but only after the applicant had lodged a criminal complaint.”<sup>158</sup>

Where judicial procedures result only in the payment of compensation and not in the punishment of those responsible for ill-treatment, they cannot be considered part of a system for the effective investigation of ill-treatment.<sup>159</sup>

**V.2. Investigative systems**

**V.2.1. *The various forms of investigation should be incorporated into a coherent and interactive system.***

157. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 27; see also Guideline V.2.1., , page 72.

158. *Zelilof v. Greece*, judgment of 24 May 2004, application no. 17060/03, para. 62.

159. *Krastanov v. Bulgaria*, judgment of 30 September 2004, application no. 50222/99, para. 60.

In most jurisdictions, criminal, disciplinary and administrative proceedings are carried out under different legal frameworks and by separate authorities. The complexity of ill-treatment cases often demands a consolidated or parallel approach that involves significant interaction between these frameworks. The Strasbourg Court underlines the need for such parallel action:

“The Court notes that neither pending the criminal investigation nor when the results of the criminal proceedings were known were any disciplinary measures taken in respect of the police officers (to compare with *Fazil Ahmet Tamer and Others v. Turkey*, no. 19028/02, § 97, 24 July 2007).”<sup>160</sup>

The CPT has also stressed the importance of an interaction between the criminal, administrative and disciplinary areas.<sup>161</sup>

As the Court highlights, preliminary inquiries or other forms of determination of grounds for initiation of fully fledged investigations must also be viewed as part of the overall investigation and must therefore attain the relevant standards of effectiveness:

“ In the light of the above observations, the Court considers that the enquiries which had been relied on by the competent authorities to refuse to initiate criminal proceedings concerning the applicant’s alleged ill-treatment in custody, manifestly lacked the required independence and thoroughness.”<sup>162</sup>

**V.2.2. An independent and effective police complaints body should be set up with powers to investigate allegations of ill-treatment.**

160. *Ali and Ayşe Duran v. Turkey*, judgment of 8 April 2008, application no. 42942/02, para. 70. See also *Okkali v. Turkey*, judgment of 16 October 2006, application no. 52067/99, para. 71.
161. CPT’s Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 38. This resulted in the recommendation that “disciplinary culpability of law enforcement officials involved in instances of ill-treatment should be systematically examined, irrespective of whether the misconduct of the officers concerned constitutes a criminal offence” *Ibid*, para. 41. See also para. 27 of the 14th General Report on the CPT’s activities.
162. *Gharibashvili v. Georgia*, judgment of 29 July 2008, application no. 11830/03, paras. 70-71.

Whilst the Strasbourg Court has not gone as far as to support the creation of special and independent investigative bodies into police conduct, several international instruments have done so. An example is the Istanbul Protocol:

“85. In cases where involvement in torture by public officials is suspected, including possible orders for the use of torture by ministers, ministerial aides, officers acting with the knowledge of ministers, senior officers in State ministries, senior military leaders or tolerance of torture by such individuals, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise or the impartiality of the investigators is called into question.”<sup>163</sup>

Such bodies are expected to be independent and equipped with adequate technical and administrative personnel. They should also have access to impartial legal advice to ensure that the investigation produces admissible evidence that can be used in criminal proceedings. The full range of the Member State’s resources and authority must therefore be extended to such bodies, which must also be able to seek assistance from international legal and medical experts.<sup>164</sup>

Independent commissions can help ensure that investigations are effective from the start. They are also well-placed to ensure that disciplinary, administrative and/or criminal measures are initiated on the basis of their findings, if appropriate.<sup>165</sup> Moreover, the CEHRC’s Opinion suggests extending to these bodies powers to bring charges:

“This type of independent police prosecution system could be adapted to a police complaints system which functions under the auspices of an IPCB. Following the example of certain European ombudsman institutions which possess powers to bring charges before the court on their own authority, the IPCB could be granted similar powers to press criminal charges after completion of its complaints investigations. Naturally, the constitutional and legal system prevailing in each member state would play an important part in gauging the feasibility of such an arrangement. Particular consideration would also need to be given to

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163. Istanbul Protocol, para. 85.

164. *Ibid*, para. 87.

165. *Ibid*, para. 119. See also CEHRC’s Opinion, para. 83.

the availability of safeguards and protecting the rights of police officers as defendants in criminal proceedings.”<sup>166</sup>

Such an arrangement receives some support from the CPT, which has stated that:

“[I]n the interests of bolstering public confidence, it might also be thought appropriate that such a body be invested with the power to remit a case directly to the CPS [Crown Prosecution Service] for consideration of whether or not criminal proceedings should be brought.”<sup>167</sup>

### **V.3. Form of punishment**

#### **V.3.1. Findings of ill-treatment should lead to appropriate administrative, disciplinary and/or criminal penalties provided by law and that are proportionate to the gravity of the ill-treatment involved.**

In order to deter state authorities from mistreating those in their control, there must be serious consequences for perpetrators. Again, the international standards are not overly-prescriptive and do not contain any formal scales of appropriate punishments. The CPT’s view is as follows:

“41. It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the **sanctions imposed for ill-treatment** are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity.

Of course, judicial authorities are independent, and hence free to fix, within the parameters set by law, the sentence in any given case. However, via those parameters, the intent of the legislator must be clear: that the criminal justice system should adopt a firm attitude with regard to torture and other forms of ill-treat-

166. CEHRC’s Opinion, para. 22.

167. The CPT’s report on the visit to the United Kingdom and the Isle of Man from 8 to 17 September 1999, CPT/Inf (2001) 6, para. 55.

ment. Similarly, sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case.”<sup>168</sup>

The CPT’s approach is based on the findings contained in its visit reports:

54. Information gathered during the visit shows that in the very low number of cases that *have* resulted in convictions, the *sentences imposed* were mostly fines or, in exceptional cases, a very short term of imprisonment [...]

The CPT recommends that the Albanian authorities take the necessary steps to ensure that at all levels of the criminal justice system – including at the sentencing stage – a firm attitude is adopted with regard to torture and other forms of ill-treatment. In the Committee’s opinion, this result can be achieved without undermining the independence of the judiciary, for example by including in initial and continuous judicial professional curricula, practical training on the role of the judiciary in the fight against impunity for ill-treatment by the police.”<sup>169</sup>

Similarly, the Strasbourg Court has held that:

“... the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents. However, it must still exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.”<sup>170</sup>

Due largely to the need to deter the would-be perpetrators of ill-treatment, the Court and the CPT underscore the importance not only of adequate levels of punishment but also of legal certainty in terms of how ill-treatment will be punished and under what provisions:

“As to the severity of the sentences pronounced, it can only be said that in sentencing the police officers to the minimum penalties the courts overlooked a number of factors – such as the particular nature of the offence and the gravity

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168. 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 44.

169. CPT’s Report on the visit to Albania from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 54.

170. *Ali and Ayşe Duran v. Turkey*, judgment of 8 April 2008, application no. 42942/02, para. 66.

of the damage done – which they should have taken into account under Turkish law.”<sup>171</sup>

“53. It is also essential that the *appropriate charge* be brought against persons suspected of ill-treatment. The information gathered during the visit indicated that, when action *is* taken by prosecutors, they usually bring a case under Article 250 of the Criminal Code, for ‘arbitrary acts’, the sentence for which can be, and often *is* a fine. Case 3 is but one example of where this was done, although the circumstances described in the indictment appear to suggest the requisite elements of Article 314, proscribing the use of violence during an investigation in order to force a statement, testimony or confession.”<sup>172</sup>

The Strasbourg Court also assesses the adequacy of the range of punishments in relation to the types of culpability involved, particularly where a combination of criminal and disciplinary sanctions is expected to follow:

“Even assuming that they were suspended, it remains the fact that no disciplinary proceedings were ever taken against the officers or disciplinary penalties imposed on them, although the sentences pronounced against them comprised not only imprisonment but also disciplinary measures of suspension from duty.”<sup>173</sup>

The CPT also strongly criticises failures to punish by means of disciplinary measures:

“Despite the fact that the alleged ill-treatment was confirmed by the prosecutor, no disciplinary measures were taken to assess the role of the police officers present during the incident (for example, none of the police officers present had reported the ill-treatment to the competent prosecutor, although they had been under a legal obligation to do so).”<sup>174</sup>

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171. *Okkali v. Turkey*, judgment of 16 October 2006, application no. 52067/99, para. 73.

172. CPT’s Report on the visit to Albania from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 54.

173. *Okkali v. Turkey*, judgment of 16 October 2006, application no. 52067/99, para. 71.

**V.3.2. *Amnesties or pardons frustrate the aims of effective investigation and adequate punishment and should be avoided.***

The Strasbourg Court takes a dim view of amnesties and pardons for those responsible for ill-treatment:

“... [W]here a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.”<sup>175</sup>

Moreover, the CAT has gone as far as stating that amnesties and pardons “violate the principle of non-derogability.”<sup>176</sup>

**VI. *Guaranteeing effectiveness***

**VI.1.1. *Investigative systems should be provided with adequate financial and technical resources and appropriately trained legal, medical and other specialists.***

The need for investigative systems to be adequately funded and resourced is stressed both in the Istanbul Protocol and in the CEHRC’s Opinion.<sup>177</sup> The Protocol emphasises that:

“The persons conducting the investigation must have at their disposal all the necessary budgetary and technical resources for effective investigation.”<sup>178</sup>

Members of investigation teams and the experts who assist them must be adequately trained and be proficient in their respective fields. The Istanbul Protocol therefore points to the need for “specific essential training”.<sup>179</sup> The

174. CPT’s Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 38.

175. *Yaman v. Turkey*, judgment of 2 November 2004, application no. 32446/96, para. 55.

176. General Comment N2, CAT/C/GC/2, para.5.

177. CEHRC’s Opinion, para. 28.

178. Istanbul Protocol, para.80.

179. *Ibid*, paras. 89, 90, 131, 162, 305.

CPT has also stressed the importance of adequate training and expertise in its visit reports:

“The CPT calls upon the Russian authorities to provide the Offices of the Prosecutor of the Chechen Republic and the Military Prosecutor of the Allied Group of Forces for the conduct of ‘anti-terrorist operations’ in the North Caucasian region with the staff, resources and facilities necessary for the effective investigation of cases involving allegations of ill-treatment, illegal detention and disappearances.

In this connection, the need to substantially reinforce the forensic medical services in the Chechen Republic must be highlighted. At the present time they are not able to provide the support required by the criminal justice system to deal with the problems referred to above. The Forensic Medical Bureau of the Chechen Republic faces enormous limitations in terms of resources, equipment and staff, and there are still no possibilities to perform full autopsies on the territory of the Republic. The CPT calls upon the Russian authorities to take the necessary steps, as a matter of priority, to enable the Forensic Medical Bureau of the Chechen Republic to function adequately.”<sup>180</sup>

Meanwhile, the Court has pointed to the importance of appropriate training of the specialists involved in investigations, such as forensic doctors.<sup>181</sup>

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180. Public statement concerning the Chechen Republic of the Russian Federation of 10 July 2003.



**VI.1.2. *Ill-treatment investigations should be evaluated by a coherent, uniform, nationwide system based on accurate statistical data relating to the complaints made, investigations performed, judicial procedures held and punishments administered.***

**VI.1.3. *The competent authorities should continually keep the public and law enforcement personnel informed with regard to ill-treatment investigations that are taking place, the levels of ill-treatment being detected, and the action taken as a result.***

In order to be effective, investigative systems must be continually evaluated. The CPT has therefore pointed to the need for a coherent system of statistical data with which to monitor the effectiveness of investigations into ill-treatment:

“The variance in the above-quoted information makes it difficult to obtain a clear picture of the situation. The compilation of statistical information is not an end in itself; if properly collected and analysed, it can provide signals about trends and assist in the taking of policy decisions. Increased co-ordination between the Ministry of Internal Affairs and the Prosecutor’s Office is clearly needed in this respect. The CPT invites the Bulgarian authorities to introduce a uniform nationwide system for the compilation of statistical information on complaints, disciplinary sanctions, and criminal proceedings/sanctions against police officers.”<sup>182</sup>

Awareness-building efforts are also important in order to build public support for the prevention of ill-treatment.

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181. See *Barabanshchikov v. Russia* at para. 59 quoted in footnote 45, , page 36.

182. CPT’s Report on the visit to Bulgaria from 17 to 26 April 2002, CPT/Inf (2004) 21, para. 24.

## **Appendix 1: Combating impunity<sup>1</sup>**

25. The *raison d'être* of the CPT is the “prevention” of torture and inhuman or degrading treatment or punishment; it has its eyes on the future rather than the past. However, assessing the effectiveness of action taken when ill-treatment has occurred constitutes an integral part of the Committee’s preventive mandate, given the implications that such action has for future conduct. The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.

Conversely, when officials who order, authorise, condone or perpetrate torture and ill-treatment are brought to justice for their acts or omissions, an unequivocal message is delivered that such conduct will not be tolerated. Apart from its considerable deterrent value, this message will reassure the general public that no one is above the law, not even those responsible for upholding it. The knowledge that those responsible for ill-treatment have been brought to justice will also have a beneficial effect for the victims.

26. Combating impunity must start at home, that is within the agency (police or prison service, military authority, etc.) concerned. Too often the es-

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1. Extract from the CPT’s 14th General Report, CPT/Inf (2006) 28.

*prit de corps* leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues. Positive action is required, through training and by example, to promote a culture where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and professionally rewarding to belong to a team which abstains from such acts.

An atmosphere must be created in which the right thing to do is to report ill-treatment by colleagues; there must be a clear understanding that culpability for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to act to prevent or report it. This implies the existence of a clear reporting line as well as the adoption of whistle-blower protective measures.

27. In many States visited by the CPT, torture and acts such as ill-treatment in the performance of a duty, coercion to obtain a statement, abuse of authority, etc. constitute specific criminal offences which are prosecuted *ex officio*. The CPT welcomes the existence of legal provisions of this kind. Nevertheless, the CPT has found that, in certain countries, prosecutorial authorities have considerable discretion with regard to the opening of a preliminary investigation when information related to possible ill-treatment of persons deprived of their liberty comes to light. In the Committee's view, even in the absence of a formal complaint, such authorities should be under a **legal obligation to undertake an investigation** whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred. In this connection, the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.

28. The existence of a suitable legal framework is not of itself sufficient to guarantee that appropriate action will be taken in respect of cases of possible ill-treatment. Due attention must be given to **sensitising the relevant authorities** to the important obligations which are incumbent upon them. When persons detained by law enforcement agencies are brought before prosecutorial and judicial authorities, this provides a valuable opportunity for such persons to indicate whether or not they have been ill-treated. Further, even in the absence of an express complaint, these authorities will be in

a position to take action in good time if there are other indicia (e.g. visible injuries; a person's general appearance or demeanour) that ill-treatment might have occurred.

However, in the course of its visits, the CPT frequently meets persons who allege that they had complained of ill-treatment to prosecutors and/or judges, but that their interlocutors had shown little interest in the matter, even when they had displayed injuries on visible parts of the body. The existence of such a scenario has on occasion been borne out by the CPT's findings. By way of example, the Committee recently examined a judicial case file which, in addition to recording allegations of ill-treatment, also took note of various bruises and swellings on the face, legs and back of the person concerned. Despite the fact that the information recorded in the file could be said to amount to *prima-facie* evidence of ill-treatment, the relevant authorities did not institute an investigation and were not able to give a plausible explanation for their inaction.

It is also not uncommon for persons to allege that they had been frightened to complain about ill-treatment, because of the presence at the hearing with the prosecutor or judge of the very same law enforcement officials who had interrogated them, or that they had been expressly discouraged from doing so, on the grounds that it would not be in their best interests.

It is imperative that prosecutorial and judicial authorities take resolute action when any information indicative of ill-treatment emerges. Similarly, they must conduct the proceedings in such a way that the persons concerned have a real opportunity to make a statement about the manner in which they have been treated.

29. **Adequately assessing allegations of ill-treatment** will often be a far from straightforward matter. Certain types of ill-treatment (such as asphyxiation or electric shocks) do not leave obvious marks, or will not, if carried out with a degree of proficiency. Similarly, making persons stand, kneel or crouch in an uncomfortable position for hours on end, or depriving them of sleep, is unlikely to leave clearly identifiable traces. Even blows to the body may leave only slight physical marks, difficult to observe and quick to fade. Consequently, when allegations of such forms of ill-treatment come to the notice of prosecutorial or judicial authorities, they should be especially careful not to accord undue importance to the absence of physical marks. The same applies *a fortiori* when the ill-treatment alleged is predominantly of a psychological nature (sexual humiliation, threats to the life or physical integ-

rity of the person detained and/or his family, etc.). Adequately assessing the veracity of allegations of ill-treatment may well require taking evidence from all persons concerned and arranging in good time for on-site inspections and/or specialist medical examinations.

Whenever criminal suspects brought before prosecutorial or judicial authorities allege ill-treatment, those allegations should be recorded in writing, a forensic medical examination (including, if appropriate, by a forensic psychiatrist) should be immediately ordered, and the necessary steps taken to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Even in the absence of an express allegation of ill-treatment, a forensic medical examination should be requested whenever there are other grounds to believe that a person could have been the victim of ill-treatment.

30. It is also important that no barriers should be placed between persons who allege ill-treatment (who may well have been released without being brought before a prosecutor or judge) and doctors who can provide forensic reports recognised by the prosecutorial and judicial authorities. For example, access to such a doctor should not be made subject to prior authorisation by an investigating authority.

31. The CPT has had occasion, in a number of its visit reports, to assess the activities of the authorities empowered to conduct official investigations and bring criminal or disciplinary charges in cases involving allegations of ill-treatment. In so doing, the Committee takes account of the case law of the European Court of Human Rights as well as the standards contained in a panoply of international instruments. It is now a well established principle that **effective investigations**, capable of leading to the identification and punishment of those responsible for ill-treatment, are essential to give practical meaning to the prohibition of torture and inhuman or degrading treatment or punishment.

Complying with this principle implies that the authorities responsible for investigations are provided with all the necessary resources, both human and material. Further, investigations must meet certain basic criteria.

32. For an investigation into possible ill-treatment to be effective, it is essential that the persons responsible for carrying it out are independent from those implicated in the events. In certain jurisdictions, all complaints of ill-treatment against the police or other public officials must be submitted to a prosecutor, and it is the latter – not the police – who determines whether a

preliminary investigation should be opened into a complaint; the CPT welcomes such an approach. However, it is not unusual for the day-to-day responsibility for the operational conduct of an investigation to revert to serving law enforcement officials. The involvement of the prosecutor is then limited to instructing those officials to carry out inquiries, acknowledging receipt of the result, and deciding whether or not criminal charges should be brought. It is important to ensure that the officials concerned are not from the same service as those who are the subject of the investigation. Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated. Further, prosecutorial authorities must exercise close and effective supervision of the operational conduct of an investigation into possible ill-treatment by public officials. They should be provided with clear guidance as to the manner in which they are expected to supervise such investigations.

33. An investigation into possible ill-treatment by public officials must comply with the criterion of *thoroughness*. It must be capable of leading to a determination of whether force or other methods used were or were not justified under the circumstances, and to the identification and, if appropriate, the punishment of those concerned. This is not an obligation of result, but of means. It requires that all reasonable steps be taken to secure evidence concerning the incident, including, *inter alia*, to identify and interview the alleged victims, suspects and eyewitnesses (e.g. police officers on duty, other detainees), to seize instruments which may have been used in ill-treatment, and to gather forensic evidence. Where applicable, there should be an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.

The investigation must also be conducted in a *comprehensive* manner. The CPT has come across cases when, in spite of numerous alleged incidents and facts related to possible ill-treatment, the scope of the investigation was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded.

34. In this context, the CPT wishes to make clear that it has strong misgivings regarding the practice observed in many countries of law enforcement officials or prison officers wearing masks or balaclavas when performing arrests, carrying out interrogations, or dealing with prison disturbances; this will clearly hamper the identification of potential suspects if and when allegations of ill-treatment arise. This practice should be strictly con-

trolled and only used in exceptional cases which are duly justified; it will rarely, if ever, be justified in a prison context.

35. Similarly, the practice found in certain countries of blindfolding persons in police custody should be expressly prohibited; it can severely hamper the bringing of criminal proceedings against those who torture or ill-treat, and has done so in some cases known to the CPT.

36. In addition to the above-mentioned criteria for an effective investigation, there should be a sufficient element of *public scrutiny* of the investigation or its results, to secure accountability in practice as well as in theory. The degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

37. **Disciplinary proceedings** provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Disciplinary culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence. The CPT has recommended a number of procedural safeguards to be followed in this context; for example, adjudication panels for police disciplinary proceedings should include at least one independent member.

38. Inquiries into possible disciplinary offences by public officials may be performed by a separate internal investigations department within the structures of the agencies concerned. Nevertheless, the CPT strongly encourages the creation of a fully-fledged independent investigation body. Such a body should have the power to direct that disciplinary proceedings be instigated.

Regardless of the formal structure of the investigation agency, the CPT considers that its functions should be properly publicised. Apart from the possibility for persons to lodge complaints directly with the agency, it should be mandatory for public authorities such as the police to register all representations which could constitute a complaint; to this end, appropriate forms should be introduced for acknowledging receipt of a complaint and confirming that the matter will be pursued.

If, in a given case, it is found that the conduct of the officials concerned may

be criminal in nature, the investigation agency should always notify directly – without delay – the competent prosecutorial authorities.

39. Great care should be taken to ensure that persons who may have been the victims of ill-treatment by public officials are not dissuaded from lodging a complaint. For example, the potential negative effects of a possibility for such officials to bring proceedings for defamation against a person who wrongly accuses them of ill-treatment should be kept under review. The balance between competing legitimate interests must be evenly established. Reference should also be made in this context to certain points already made in paragraph 28.

40. Any evidence of ill-treatment by public officials which emerges during **civil proceedings** also merits close scrutiny. For example, in cases in which there have been successful claims for damages or out-of-court settlements on grounds including assault by police officers, the CPT has recommended that an independent review be carried out. Such a review should seek to identify whether, having regard to the nature and gravity of the allegations against the police officers concerned, the question of criminal and/or disciplinary proceedings should be (re)considered.

41. It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the **sanctions imposed for ill-treatment** are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity. Of course, judicial authorities are independent, and hence free to fix, within the parameters set by law, the sentence in any given case. However, via those parameters, the intent of the legislator must be clear: that the criminal justice system should adopt a firm attitude with regard to torture and other forms of ill-treatment. Similarly, sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case.

42. Finally, no one must be left in any doubt concerning the **commitment of the State authorities** to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be “zero tolerance” of torture and other forms of ill-treatment.





# **Appendix 2: Independent and effective determination of complaints against the police<sup>1</sup>**

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## **Acknowledgements**

The Commissioner would like to express his gratitude to Dr Graham Smith, external consultant, for his assistance in preparing this Opinion.

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1. Opinion of the Commissioner for Human Rights, CommDH (2009) 4.

## Executive summary

An independent and effective police complaints system is of fundamental importance for the operation of a democratic and accountable police service.

Independent and effective determination of complaints enhances public trust and confidence in the police and ensures that there is no impunity for misconduct or ill-treatment.

A complaints system must be capable of dealing appropriately and proportionately with a broad range of allegations against the police in accordance with the seriousness of the complainant's grievance and the implications for the officer complained against.

A police complaints system should be understandable, open and accessible, and have positive regard to and understanding of issues of gender, race, ethnicity, religion, belief, sexual orientation, gender identity, disability and age. It should be efficient and properly resourced, and contribute to the development of a caring culture in the delivery of policing services.

The European Court of Human Rights has developed five principles for the effective investigation of complaints against the police that engage Article 2 or 3 of the European Convention on Human Rights:

- **Independence:** there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence;
- **Adequacy:** the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible;
- **Promptness:** the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;
- **Public scrutiny:** procedures and decision-making should be open and transparent in order to ensure accountability; and
- **Victim involvement:** the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.

These five principles must be adhered to for the investigation of a death or serious injury in police custody or as a consequence of police practice. They also provide a useful framework for determining all complaints. Best practice is served by the operation of an Independent Police Complaints Body working in partnership with the police.

These five principles must be adhered to for the investigation of a death or serious injury in police custody or as a consequence of police practice. They also provide a useful framework for determining all complaints. Best practice is served by the operation of an Independent Police Complaints Body working in partnership with the police.

The Independent Police Complaints Body should have oversight of the police complaints system and share responsibility with the police for:

- visibility and oversight of the system;
- procedures for the notification, recording and allocation of complaints;
- mediation of complaints that are not investigated;
- investigation of complaints; and
- resolution of complaints and review.

The expectation that criminal or disciplinary proceedings will be brought against a police officer against whom there is evidence of misconduct is an important protection against impunity and essential for public confidence in the police complaints system. The prosecution authority, police and Independent Police Complaints Body should give reasons for their decisions relating to criminal and disciplinary proceedings for which they are responsible.

## **1. Introduction**

1. In recent years the European Court of Human Rights, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Commissioner for Human Rights have identified problems with the way complaints against the police are handled. The jurisprudence of the European Court of Human Rights is quickly evolving on police misconduct and the absence of effective investigations and remedies. The CPT has found it necessary to make recommendations on combating police impunity for ill-treatment and misconduct following visits to various member states. Similarly, the Commissioner has reported allegations of police misconduct and impunity and made recommendations in support of independent police complaints mechanisms in some member states.

2. In order to develop greater understanding of police complaints the Commissioner organised two workshops in May 2008 regarding the independence and effectiveness of complaints mechanisms and the manner national human rights structures handle complaints against the police.<sup>2</sup>

3. In accordance with the mandate of the Commissioner for Human Rights to promote the awareness of and effective observance and full enjoyment of human rights in Council of Europe member states as well as to provide advice and information on the protection of human rights (Articles 3 and 8 of Resolution (99) 50 of the Committee of Ministers), the Commissioner issues this Opinion concerning independent and effective determination of complaints against the police.

## 2. Definitions

In this Opinion the following definitions apply.

4. **Police** refers to traditional police forces or services and other publicly authorised and/or controlled services granted responsibility by a State, in full adherence to the rule of law, for the delivery of policing services. While private institutions, a private security company for example, may also provide policing services, this Opinion is not intended to apply to such organisations.

5. **Policing services** refers to the responsibilities and duties performed by the police to protect the public, including:

- preserving the peace;
- enforcing the law;
- preventing and detecting crime;
- protecting human rights.

Such services should be delivered in accordance with principles of fairness, equality and respect for human rights.

6. **Complaint** refers to a grievance about a police service or the conduct of a police officer that has been made known to the appropriate authority, which may be the police service concerned or an independent police complaints body. This Opinion principally applies to complaints made about the conduct of police officers. Complaints made about policing standards, oper-

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2. Expert Workshop "Police complaints mechanisms: ensuring independence and effectiveness", Strasbourg, 26-27 May 2008, and Workshop "Complaints against the police – their handling by the national human rights structures", St. Petersburg, 20-21 May 2008. The latter workshop was organised under the framework of the Joint European Union – Council of Europe Programme "Setting up an active network of independent non judicial human rights structures", referred to as "The Peer-to-Peer Project".

ational instructions or the policy of a police service will be referred to in this Opinion as “service complaints” in order to distinguish them from conduct complaints. In recognition of the importance attached to service complaints, particularly with regard to the expectation that all complaints will be taken seriously, handled appropriately and for the purpose of lesson-learning, reference will be made in this Opinion to service complaints where relevant to the maintenance of public trust and confidence in the police complaints system.

7. In the event that Article 2 of the ECHR, the right to life, or Article 3, the prohibition of torture, inhuman or degrading treatment or punishment, is engaged, the jurisprudence of the European Court of Human Rights requires that an investigation will be carried out irrespective of whether or not a complaint is made against the police. In this Opinion a serious incident of this type will be referred to as a complaint that must be investigated in accordance with the five ECHR principles of effective police complaints investigation.

8. **Five ECHR principles of effective police complaints investigation** – independence, adequacy, promptness, public scrutiny and victim involvement – refers to requirements developed in the jurisprudence of the European Court of Human Rights for the investigation of serious incidents involving the police that engage Article 2 or 3 of the ECHR (see below, paragraph 30).

9. **Complainant** refers to a person who has made a complaint against the police or a person who did not make a complaint but was a victim, or in the case of death, the bereaved, in a serious incident following which the police or independent police complaints body conducted an investigation as if a complaint had been made.

10. **Independent Police Complaints Body (IPCB)** refers to a public organisation that has responsibilities for handling complaints against the police and is unconnected to and separate from the police.

11. **Police complaints system** refers to the operational framework for handling complaints against the police in all of the stages of the complaints process:

- visibility and accessibility of the system: concerning the promotion of public awareness and ease with which a complaint may be made;

- notification, recording and allocation: concerning the way in which complainants are received, complaints recorded and determination of the appropriate procedure for handling different types of complaint;
- mediation process: concerning the way in which complaints that are not investigated are handled;
- investigation process: concerning the way in which complaints that are investigated are handled;
- resolution: concerning the outcome of a complaint as the result of an investigation; and
- review procedures: concerning the complainant's right to challenge the way in which their complaint was handled or the outcome of their complaint.

12. **Determination of a complaint** refers to the progress of a complaint through all administrative non-judicial proceedings, culminating with any recommendation made to a criminal prosecuting authority or police service. This Opinion does not apply to the holding of any judicial or fact-finding tribunal in connection with criminal or disciplinary proceedings against a police officer that may arise as a consequence of a complaint.

### 3. Delivery of policing services: general principles

13. There is broad international agreement on the administration of the police and the delivery of policing services.<sup>3</sup>

14. Several factors contribute to the position of the police as a high profile and respected public institution:

- delivery of core public services;
- high frequency of interactions with the public;
- intensive crime prevention, public safety and criminal investigation information campaigns and appeals for public support and assistance;
- network of local police stations/premises; and

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3. See, for example, Council of Europe, *European Code of Police Ethics*; Council of Europe Committee for the Prevention of Torture, *The CPT Standards*, Chapter IX. Combating Impunity; United Nations, *Code of Conduct for Law Enforcement Officials*; Council of Europe Joint Informal Group on Police and Human Rights, *Policing in a Democratic Society; Is your police service a human rights champion?*; Organization for Security and Co-operation in Europe, *Guidebook on Democratic Policing*; United Nations International Police Task Force, *Commissioner's Guidance for Democratic Policing in the Federation of Bosnia-Herzegovina*.

- maintenance of close connections with local communities.

15. In the interest of independent, impartial and effective delivery of policing services, and to protect against political interference, the police are granted a wide degree of discretion in the performance of their duties.

16. For the purpose of performing their duties, the law provides the police with coercive powers and the police may use reasonable force when lawfully exercising their powers.

17. As society has become more complex in recent decades, and as scientific and technological knowledge have advanced, the special powers available to the police for the purpose of performing their duties, and their capacity to intrude in people's lives and interfere with individual human rights, have increased.

18. Adherence to the rule of law applies to the police in the same way that it applies to every member of the public. There may be no attempt to conceal, excuse or justify the unlawful exercise of coercive or intrusive powers by a police officer by reference to his or her lawful recourse to coercive and intrusive powers. Police ethics and adherence to professional standards serve to ensure that the delivery of police services is of the highest quality. There can be no police impunity for ill-treatment or misconduct.

19. As police powers have increased so too has the expectation that police services will conform to principles of democracy, accountability and respect for human rights; namely, as written in the Preamble to the United Nations *Code of Conduct for Law Enforcement Officials* "every law enforcement agency should be representative of and responsive and accountable to the community as a whole".

20. A network of administrative, political, legal and fiscal regulatory mechanisms operates in the interest of achieving a democratic, accountable and human rights compliant police service. A fair and effective police complaints system is an essential component of such a regulatory network, and statutory IPCBs have been established in a number of jurisdictions around the globe in recent years to oversee the administration of the complaints process.



#### **4. The purpose and nature of a police complaints system**

21. Policing services are closely associated with disputes between individuals and groups of people and their resolution. Police practice is, therefore, liable to error and misunderstanding. Reflective police practice, including a willingness to address grievances and acknowledge mistakes at the earliest opportunity and learn the lessons from complaints, enhances police effectiveness and public trust and confidence in the police. A responsive and accountable police service that is demonstrably willing to tackle public concerns will also be better placed to secure public trust and confidence in its ability and commitment to prevent crimes and abuses of power committed by police officers.

22. The principal purposes of a police complaints system are to:

- address the grievances of complainants;
- identify police misconduct and, where appropriate, provide evidence in support of
- criminal proceedings,
- disciplinary proceedings, or
- other management measures;
- provide the police with feedback from members of the public who have direct experience of police practice;
- facilitate access to the right to an effective remedy for a breach of an ECHR right as required under Article 13 of the ECHR;
- prevent police ill-treatment and misconduct;
- in association with the police and other regulatory bodies, set, monitor and enforce policing standards; and
- learn lessons about police policy and practice.

23. All complaints, including service complaints, provide police services with opportunities to learn lessons directly from the public and serve as important indicators of police responsiveness and accountability to the community.

24. For the prevention of police ill-treatment and misconduct to be effective all grievances against the police, including service complaints, need to be handled by appropriate means. Complaints, and the way in which they are handled, need to be differentiated according to the seriousness of the allegation and the potential consequences for the officer complained against.

25. The police complaints system should operate in addition to, and not as an alternative to criminal, public and private legal remedies for police misconduct.

26. There are four principal types of complaint against the conduct of a police officer concerning allegations of:

- misconduct from which issues of criminal culpability arise;
- violation of a fundamental human right or freedom;
- misconduct from which issues of disciplinary culpability arise; and
- poor or inadequate work performance.

27. Procedures for less serious complaints should not be so bureaucratic that a potential complainant may be deterred from making a complaint. If criminal proceedings or disciplinary action arise as a consequence of a complaint there must be sufficient safeguards in order to protect the rights of the police officer complained against.

28. A police complaints system should be understandable, open and accessible, and have positive regard to and understanding of issues of gender, race, ethnicity, religion, belief, sexual orientation, gender identity, disability and age. It should be efficient and properly resourced, and contribute to the development of a caring culture in the delivery of policing services.

## 5. Independent Police Complaints Body

29. An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as a fundamental protection against ill-treatment and misconduct. An independent police complaints body (IPCB) should form a pivotal part of such a system.

30. Five principles of effective police complaints investigation have been developed in the jurisprudence of the European Court of Human Rights on Articles 2 and 3 of the ECHR:

- **Independence:** there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence;<sup>4</sup>

- **Adequacy:** the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible;<sup>5</sup>
- **Promptness:** the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;<sup>6</sup>
- **Public scrutiny:** procedures and decision-making should be open and transparent in order to ensure accountability;<sup>7</sup> and
- **Victim involvement:** the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.<sup>8</sup>

31. Articles 2 and 3 of the ECHR are fundamental provisions and enshrine basic values of the democratic societies making up the Council of Europe.<sup>9</sup> There are two principal purposes of the five ECHR effective police complaints investigation principles. On the one hand, they have been developed to ensure that an individual has an effective remedy for an alleged violation of Article 2 or 3 of the ECHR.<sup>10</sup> On the other hand, the principles are intended to protect against violation of these fundamental rights by providing for an investigative framework that is effective and capable of bringing offenders to justice.<sup>11</sup>

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4. See, for example, *Ramsahai v. The Netherlands* (application no. 52391/99), judgment of 15 May 2007; *Bati v. Turkey* (application nos. 33097/96 and 57834/00), judgment of 3 June 2004.
  5. See, for example, *Nachova v. Bulgaria* (application nos. 43577/98 and 43579/98), judgment of 6 July 2005; *Aksoy v. Turkey* (100/1995/606/694), judgment of 18 December 1996.
  6. See, for example, *Isayeva v. Russia* (application nos. 5794/00, 57948/00 and 57949/00), judgment of 24 February 2005; *Aydin v. Turkey* (57/1996/676/866), judgment of 25 September 1997.
  7. See, for example, *Ognyanova v. Bulgaria* (application no. 46317/99), judgment of 23 February 2006; *Chitayev v. Russia* (application no. 59334/00), judgment of 18 January 2007.
  8. See, for example, *McKerr v. the United Kingdom* (application no. 28883/95), judgment of 4 May 2001.
  9. See, for example, *McCann v. the United Kingdom* (17/1994/464/545), judgment of 20 February 1995; *Selmouni v. France* (application no. 25803/94), judgment of 2 July 1999.
  10. See, for example, *Salman v. Turkey* (application no. 21986/93), judgment of 27 June 2000, § 123.
  11. See, for example, *Nachova v. Bulgaria* (application nos. 43577/98 and 43579/98), judgment of 6 July 2005, § 110.

32. The minimum requirement is that a member state must ensure arrangements are in place to comply with the five principles in the event that Article 2 or 3 of the ECHR is engaged. In furtherance of this aim the CPT has strongly encouraged the creation of a fully-fledged independent investigative body.<sup>12</sup>

33. More broadly, the five principles also serve as helpful guidelines for the handling of all complaints. The existence of an independent police complaints body (IPCB) with comprehensive responsibilities for oversight of the entire police complaints system will reinforce the independence principle. Practices are suggested in this Opinion in support of a human rights compliant police complaints system which will allow for appropriate and proportionate responses to all complaints.

34. Primary legislation should provide for the operation of an IPCB with general responsibilities for oversight of the police complaints system and express responsibility for investigating Article 2 and 3 complaints in accordance with the ECHR independence principle. Arrangements in the form of, for instance, secondary legislation, regulations, statutory guidance and protocols, will be required to enable the police and IPCB to work together in partnership and ensure that all complaints are handled fairly, independently and effectively.

35. The institutional design of IPCBs established in a number of jurisdictions in Europe in recent years has taken the form of specialised ombudsman institutions or, alternatively, standing commission structures. The appointment of a Police Ombudsman or a Police Complaints Commission, comprising a number of commissioners co-ordinated by a Chairman, are each capable of overseeing a fair, independent and effective complaints system. The United Nations *Principles relating to the status and functioning of national institutions for protection and promotion of human rights* (Paris Principles) are also relevant in gauging the independence and functioning of IPCBs. Naturally, the constitutional arrangements and policing systems, along with historical, political and cultural influences, prevailing in each member state will play a major part in determining the institutional arrangements for an IPCB.

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12. The CPT Standards, Chapter IX, § 38.

36. The IPCB must be transparent in its operations and accountable. Each Police Ombudsman or Police Complaints Commissioner should be appointed by and answerable to a legislative assembly or a committee of elected representatives that does not have express responsibilities for the delivery of policing services.<sup>13</sup>

37. Sufficient public funds must be available to the IPCB to enable it to perform its investigative and oversight functions. IPCB investigators must be provided with the full range of police powers to enable them to conduct fair, independent and effective investigations.

38. The IPCB should be representative of a diverse population and make arrangements to consult all concerned in the police complaints system. These include complainants and their representatives, police services and representative staff associations, central and local government departments with policing responsibilities, prosecutors, community organisations and NGOs with an interest in policing.

39. The IPCB should respect police operational independence and support the head of police as the disciplinary authority for the police service. There should be adherence to a clear division of responsibility between the IPCB and the police with full co-operation from the police, which will help maintain high standards of conduct and improve police performance.

40. The IPCB should have responsibility for the investigation of complaints in which:

- Article 2 or 3 of the ECHR is engaged; or
- an issue of criminal or disciplinary culpability arises.

In addition, the police may voluntarily refer complaints to the IPCB; the member of Government with responsibility for policing may require the IPCB to conduct an investigation into a policing matter where it is considered to be in the public interest to do so; or the IPCB may call in for investigation any policing matter where it is considered to be in the public interest to do so.<sup>14</sup>

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13. See, for example, *Khan v. the United Kingdom* (application no. 35394/97), judgment of 27 June 2000, § 46.

14. See, for example, *Acar v. Turkey* (application no. 26307/95), judgment of 8 April 2004, § 221

41. The police should have responsibility for the investigation of complaints in which:

- Article 2 or 3 of the ECHR is not engaged;
- no issue of criminal or disciplinary culpability arises; or
- the IPCB refers responsibility for the handling of a complaint to the police.

## **6. Operation of the police complaints system**

### **6.1. Visibility and accessibility**

42. The police and IPCB should share responsibility for the visibility and accessibility of the police complaints system. The police service's high profile and frequent interactions with the public place it in the ideal position to promote public awareness of the complaints system, as overseen by the IPCB.

43. Examples of good practice include:

- provision of information about complaints on police publicity materials;
- prominent display of complaints information in all police premises, particularly in custody areas;
- all persons detained in police premises to be informed in writing of how to make a complaint on their release;
- when on duty police officers to carry "complaints information cards" that may be given to members of the public who express dissatisfaction with the police;
- display of police complaints information in public spaces controlled by criminal justice agencies, including prosecution, probation, prison and court services; and
- display of police complaints information in public spaces that do not come under the umbrella of the criminal justice system, including community, advice and welfare organisations.

44. In the performance of their duties police officers come into frequent contact with people from all types of background and the status of a potential complainant may have a bearing on whether or not they have the confidence to engage with the complaints system. Access to the system should be through the police or IPCB. A range of methods should be available which facilitate access for the confident complainant who is fully aware of their

right to complain and wishes to deal immediately and directly with the police. The complainant who lacks confidence and would prefer to seek advice and not have direct dealings with the police should also have full and complete access to the complaints system.

45. Complainants should be able to nominate a legal representative, agent or third party of their choice to act on their behalf in all aspects of their complaint. In order to safeguard his or her legitimate interests, financial assistance for legal advice and representation should be available to the complainant.

46. Access to the police complaints system, either by the complainant or his or her nominated representative, may be by a number of methods, including:

- in person at police premises, either on the occasion that gave rise to the complaint or subsequently;
- by telephone call to the police or IPCB;
- by facsimile to the police or IPCB;
- by letter to the police or IPCB; or
- electronically, by email or the World Wide Web, to the police or IPCB.

47. Police personnel, who deal with general enquiries from members of the public in the reception area in police premises or on the telephone, should receive training and be able to give basic advice on the complaints system.

## **6.2 Notification, recording and allocation**

48. All deaths and serious injuries suffered in police custody or in connection with the delivery of policing services must be referred as soon as possible to the IPCB to record.<sup>15</sup>

49. The IPCB must have powers to immediately proceed with an investigation into an incident involving death or serious injury in the absence of a complaint or the consent of the victim or, in the case of death, the bereaved.<sup>16</sup>

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15. See, for example, *Ramsahai v. the Netherlands* (application no. 52391/99), judgment of 15 May 2007, § 339.

50. Potential complainants and their nominated representative who choose to make their complaint in person or by telephone should be treated with respect and welcomed by the police and IPCB as citizens performing a civic duty.

51. Notification of a complaint may be to the police or the IPCB.

52. All complaints should be recorded by the IPCB. All complaints made to the police should be forwarded to the IPCB to be recorded.

53. Allegations of ill-treatment or misconduct made to a judicial officer should be recorded and referred to the IPCB to record.<sup>17</sup> The same applies where credible evidence is available to a judicial officer.

54. Where allegations have been made of ill-treatment or misconduct, or credible evidence is available, to a criminal justice practitioner<sup>18</sup> or a medical professional, he or she should be encouraged to refer the matter to the IPCB to record.

55. The police should be able to deal with complaints on notification, pending recording by the IPCB, which:

- are of a category that the police have responsibility for handling; and
- the complainant wishes the police to handle without the involvement of the IPCB.

56. The IPCB should be responsible for categorising complaints and determining the procedure for handling them. Examples of allocation decisions when recording a complaint include:

- take no further action on grounds that the complainant did not have just cause to complain;
- take no further action on the instruction of the complainant;
- define the complaint as a service complaint and refer to the appropriate authority;

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16. See, for example, *Ramsahai v. the Netherlands* (application no. 52391/99), judgment of 15 May 2007, § 339.

17. See, for example, *The CPT Standards*, Chapter IX., § 28.

18. See, for example, *Aksoy v. Turkey* (100/1995/606/694), judgment of 18 December 1996, §§ 56 and 99.



- confirm the police decision to deal with the complaint pending referral to the IPCB;
- if made in connection with outstanding criminal proceedings, consult with the investigating authority responsible and determine whether the allocation decision should await the conclusion of those proceedings;
- refer to the police for mediation;
- refer to the police for investigation; or
- refer to an IPCB investigator.

### **6.3 Mediation process**

57. A grievance that a practitioner may consider to be trivial may cause distress to a member of the public. The way in which such complaints are dealt with is likely to influence public trust and confidence in the police complaints system and the police.

58. Police officers routinely address grievances during their encounters with the public without the need for a complaint to be made. This may be by way of an explanation, acknowledgement of a different point of view or an apology. Where a relatively uncomplicated misunderstanding or breakdown in communication between a police officer and member of the public gives rise to a complaint it may not be necessary for the police or IPCB to undertake a lengthy and expensive investigation. Moreover, investigation is unlikely to meet the complainant's expectation that their uncomplicated complaint will be quickly resolved in a simple and straightforward manner. Provision should be made for such complaints to be resolved through mediation or a less formal mechanism.

59. The police officer with responsibility for handling a complaint determined appropriate for mediation will need to make arrangements to gather information about the complaint and how the complainant and officer complained against wish to proceed, and, if required, appoint a mediator.

60. Examples of how a mediated complaint may be satisfactorily resolved in a timely fashion with the agreement of the complainant and the officer complained against include:

- by letter to the complainant by a senior police officer providing an account for the action complained of and, if appropriate, an apology;

- by meeting between the complainant, with nominated representative present, and a senior police officer;
- by offer of an *ex gratia* payment; or
- by arrangement of a meeting between the complainant and the officer complained against, with representatives present if requested, convened by a senior police officer or an independent mediator.

61. A complainant should have the right to challenge the way in which his or her mediated complaint was handled or resolved by the police by way of appeal to the IPCB.

## **6.4 Investigation process**

62. In addition to the requirement that Article 2 and 3 complaints must be investigated in accordance with the five ECHR effective police complaints investigation principles, the jurisprudence of the European Court of Human Rights also provides useful guidelines for all of the stages of the police complaints process.

### **Independence**

63. The existence of an IPCB with comprehensive responsibilities for oversight of the entire police complaints system makes an important contribution to the independence principle. IPCB responsibility for recording and allocation of the procedure for handling a complaint is fully compliant with the expectation that in addition to practical independence there should be a lack of institutional or hierarchical connection between investigators and the officer complained against.<sup>19</sup> Established criteria will be required to determine who is to be responsible for the investigation of a complaint and who is to carry it out.

64. The seriousness of a complaint, in terms of the complainant's experience, the consequences for the officer complained against and the public interest, play an important part in determining who should have responsibility for an investigation.

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19. See, for example, *Ramsahai v. the Netherlands* (application no. 52391/99), judgment of 15 May 2007, § 325.

65. Resources will be a factor in determining which organisation, the police or IPCB, should carry out the investigation and bear most of the costs.
66. Examples of arrangements for IPCB and police co-operation in accordance with the independence principle, seriousness of the complaint and resource management implications, include:
- IPCB to have responsibility for the investigation of a complaint carried out by IPCB investigators in which Article 2 or 3 of the ECHR is engaged;<sup>20</sup>
  - IPCB to have responsibility for the investigation of a complaint that may be carried out by IPCB or police investigators in which an issue of criminal culpability arises;
  - IPCB or police may have responsibility for the investigation of a complaint that may be carried out by IPCB or police investigators in which an ECHR right or freedom, except Articles 2 and 3, is engaged or an issue of disciplinary culpability arises;
  - a complaint alleging poor or inadequate police performance, if appropriate for investigation, to be the responsibility of the police and carried out by police investigators;
  - IPCB to have responsibility for the investigation of an incident, recorded in the absence of a complaint, which may be carried out by IPCB or police investigators.

### **Adequacy**

67. The adequacy principle has been developed to ensure that police complaints investigations are effective and capable of bringing offenders to justice.
68. Adherence to the rule of law requires that a complaints investigation into the conduct of an officer must be carried out in accordance with the same procedures, including safeguards for the officer complained against, that apply for a member of the public suspected of wrongdoing.
69. Requirements of a thorough and comprehensive police complaints investigation include:

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20. See, for example, *Ramsahai v. the Netherlands* (application no. 52391/99), judgment of 15 May 2007, §§ 337 - 340.

- taking a full and accurate statement from the complainant covering all of the circumstances of their complaint;<sup>21</sup>
- making reasonable efforts to trace witnesses, including members of the public<sup>22</sup> and police officers,<sup>23</sup> for the purpose of obtaining full and accurate statements;<sup>24</sup>
- where issues of criminal culpability may arise, interviewing police officers accused or suspected of wrongdoing as a suspect entitled to due process safeguards,<sup>25</sup> and not allowing them to confer with colleagues before providing an account;
- making reasonable efforts to secure, gather and analyse all of the forensic<sup>26</sup> and medical evidence;<sup>27</sup>
- pursuing lines of inquiry on grounds of reasonable suspicion and not disregarding evidence in support of a complaint<sup>28</sup> or uncritically accepting evidence, particularly police testimonies,<sup>29</sup> against a complaint;<sup>30</sup>
- investigating complaints of police discrimination or police conduct on grounds of race,<sup>31</sup> ethnicity, religion, belief, gender identity, sexual orientation, disability, age or any other grounds; and

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21. See, for example, *Cobzaru v. Romania* (application no. 48254/99), judgment of 26 July 2007, § 71.
  22. See, for example, *Ognyanova v. Bulgaria* (application no. 46317/99), judgment of 23 February 2006, § 110.
  23. See, for example, *Velikova v. Bulgaria* (application no. 41488/98), judgment of 18 May 2000, § 79.
  24. See, for example, *Assenov v. Bulgaria* (90/1997/874/1086), judgment of 28 October 1998, § 103..
  25. See, for example, *Ramsahai v. the Netherlands* (application no. 52391/99), judgment of 15 May 2007, § 330.
  26. See, for example, *Ramsahai v. the Netherlands* (application no. 52391/99), judgment of 15 May 2007, § 329.
  27. See, for example, *Aksoy v. Turkey* (100/1995/606/694), judgment of 18 December 1996, § 56.
  28. See, for example, *Aydin v. Turkey* (57/1996/676/866), judgment of 25 September 1997§ 98.
  29. See, for example, *Kaya v. Turkey* (158/1996/777/978), judgment of 19 February 1998, § 89.
  30. See, for example, *Cobzaru v. Romania* (application no. 48254/99), judgment of 26 July 2007, § 72.
  31. See, for example, *Nachova v. Bulgaria* (application nos. 43577/98 and 43579/98), judgment of 6 July 2005, §§ 162-168; and recommendation by the European Commission Against Racism and Intolerance concerning complaints alleging racial discrimination, *General Policy Recommendation No. 11, On Combating Racism and Racial Discrimination in Policing*, § 51.

- in recognition of the difficulties involved in proving discrimination investigators have an additional duty to thoroughly examine all of the facts to uncover any possible discriminatory motives.<sup>32</sup>

### **Promptness**

70. The promptness principle stresses the need for timeliness and that fair and effective complaints investigations must be undertaken promptly and expeditiously.<sup>33</sup> Delay may result in the loss of crucial evidence and failure to conduct an adequate investigation.<sup>34</sup>

71. Failure to conduct a complaints investigation in a prompt and reasonably expeditious manner may give the appearance that there is a reluctance to investigate or of collusion between investigators and officers complained against to conceal wrongdoing.<sup>35</sup> Delay may be unfair to the officer complained against and amount to an abuse of process, which may result in failure to bring an offender to justice despite the existence of incontrovertible evidence against him or her.<sup>36</sup>

72. The promptness principle plays a crucial part in preserving trust and confidence in the rule of law and upholding the core policing principle that police officers are accountable to and protected by the law throughout the police complaints process.

73. Adherence to the promptness principle is served by:

- timely implementation of notification, recording and allocation procedures;
- full police co-operation with the IPCB in the investigation of complaints, particularly to preserve the evidence following serious inci-

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32. See, for example, *Nachova v. Bulgaria* (application nos. 43577/98 and 43579/98), judgment of 6 July 2005, §§ 160-164.

33. See, for example, *Ognyanova v. Bulgaria* (application no. 46317/99), judgment of 23 February 2006, § 114.

34. See, for example, *Aydin v. Turkey* (57/1996/676/866), judgment of 25 September 1997 § 108.

35. See, for example, *Ramsahai v. The Netherlands* (application no. 52391/99), judgment of 15 May 2007, § 330.

36. See, for example, *Bati v. Turkey* (application nos. 33097/96 and 57834/00), judgment of 3 June 2004, § 147.

- dents and when police officers are on the scene before IPCB investigators;<sup>37</sup> and
- timeliness in the conduct of a thorough and comprehensive investigation and the determination of a complaint.

### **Public scrutiny**

74. The purpose of the public scrutiny principle is to achieve accountability in practice as well as theory. The confidential and sensitive nature of police complaints investigations needs to be taken into consideration and the degree of public scrutiny that is required may vary from case to case.<sup>38</sup>

75. The public scrutiny and victim involvement principles are closely connected. There should be a presumption that reports and other documents will be disclosed, particularly to the complainant. Disclosure of documents which explain the reasons for a decision may help dispel any concern that there is impunity for police wrongdoing.<sup>39</sup> In some cases, following death or serious injury in custody for example, it may be necessary to hold a public inquiry before a judicial officer,<sup>40</sup> or hold a police disciplinary hearing in public.

76. Without access to reports and documents after completion of the complaints process complainants may be denied the opportunity to challenge the way in which their complaint was handled or resolved.<sup>41</sup>

### **Victim involvement**

77. The victim involvement principle, by ensuring the complainant's participation in the investigation, serves to safeguard his or her legitimate interests in the complaints system.<sup>42</sup> In order to facilitate the involvement of a complainant, without prejudicing the interests of an officer complained

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37. See, for example, *Ramsahai v. The Netherlands* (application no. 52391/99), judgment of 15 May 2007, § 338.

38. See, for example, *Isayeva v. Russia* (application nos. 5794/00, 57948/00 and 57949/00), judgment of 24 February 2005, § 213.

39. See, for example, *McKerr v. the United Kingdom* (application no. 28883/95), judgment of 4 May 2001, § 338.

40. See, for example, *Edwards v. the United Kingdom* (application no. 46477/99) judgment of 14 March 2002, § 84.

41. See, for example, *Oğur v. Turkey* (application no. 21594/93), judgment of 20 May 1999, § 92.

against, the IPCB or police officer responsible for handling a complaint should arrange to liaise with the complainant. The complainant should be consulted and kept informed of developments throughout the determination of his or her complaint.<sup>43</sup>

78. It is important that the victim involvement principle is meaningful and effectively applied and not empty and rhetorical. The interests of the complainant, who may have been traumatised by their experience, lacks confidence or does not understand how the police complaints system works, are not safeguarded if he or she has difficulty communicating with the police or IPCB about his or her complaint. Victim support and counselling should be available to help traumatised complainants cope with their ordeal throughout the determination of their complaint. Legal advice and representation should be available to complainants to ensure that his or her interests are effectively safeguarded.<sup>44</sup>

79. Adherence to the victim involvement principle, particularly when legal representation is available, will provide a complainant with the opportunity to scrutinise proceedings and challenge unfair and ineffective practices. It will also enhance independence by ensuring that the complainant's interests are not marginalised by the interests of a powerful police service.

## **6.5 Resolution and review**

80. In completion of the investigation report the IPCB or police investigators responsible must exercise independent and impartial judgment in resolving the complaint and determining whether or not it has been upheld on the evidence. If the complainant challenges the way in which his or her complaint was handled or the outcome there should be a right of appeal to

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42. See, for example, *Güleç v. Turkey* (54/1997/838/1044), judgment of 27 July 1998, § 82.

43. See, for example, *Edwards v. the United Kingdom* (application no. 46477/99) judgment of 14 March 2002, § 84.

44. See, for example, recommendation by the European Commission Against Racism and Intolerance concerning complaints alleging racial discrimination, *General Policy Recommendation No. 11, On Combating Racism and Racial Discrimination in Policing*, § 51.

the IPCB if investigated by the police, and by way of judicial review if investigated by the IPCB.

81. After resolution of a complaint five principal courses of action may follow:

- no further action;
- criminal proceedings may be brought against a police officer;
- disciplinary proceedings may be brought against a police officer;
- police management may take informal action against an officer; or
- changes may be made to policing practice in consideration of the lessons learned.

The complainant should be informed in writing and orally of the resolution of his or her complaint.

82. The expectation that criminal or disciplinary proceedings will be brought against a police officer against whom there is evidence of misconduct is an important protection against police impunity,<sup>45</sup> and essential for public trust and confidence in the police complaints system.<sup>46</sup> Police officers are liable in criminal and disciplinary proceedings independently of complaints investigations and the rights and safeguards available to them are beyond the scope of this Opinion. This is based on the assumption that officers are subject to standard criminal justice procedures, including due process safeguards, and that discipline is a police service responsibility.

83. One model for the conduct of criminal and disciplinary proceedings against police officers arising from complaints is for them to be handled by standard criminal justice or police disciplinary processes. Where there is evidence that may give rise to proceedings the IPCB should forward its investigation report to the criminal prosecution authority to decide whether to bring criminal proceedings, and to the police to decide whether to bring disciplinary proceedings.

84. The prosecution authority and police should have regard to the recommendations contained in the complaints investigator's report when determining whether or not to bring criminal or disciplinary proceedings. The

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45. The CPT Standards, Chapter IX., § 31.

46. See, for example, *Guja v. Moldova* (application no. 14277/04), judgment of 12 February 2008, § 88.



prosecution authority, police and IPCB should give reasons for all decisions relating to criminal and disciplinary proceedings for which they are responsible.<sup>47</sup>

85. In some member states there is concern that the close working relationship between the police and prosecution authority in standard criminal proceedings may undermine independence and impartiality in prosecution practice. A major cause of concern is that co-operation between police investigators and prosecution lawyers may tarnish the independence of prosecutors when working on cases against police officers. In an attempt to deal with this problem specialist criminal prosecution authorities with their own investigators have been established in some jurisdictions to investigate complaints against police officers and conduct criminal proceedings.

86. This type of independent police prosecution system could be adapted to a police complaints system which functions under the auspices of an IPCB. Following the example of certain European ombudsman institutions which possess powers to bring charges before the court on their own authority, the IPCB could be granted similar powers to press criminal charges after completion of its complaints investigations. Naturally, the constitutional and legal system prevailing in each member state would play an important part in gauging the feasibility of such an arrangement. Particular consideration would also need to be given to the availability of safeguards and protecting the rights of police officers as defendants in criminal proceedings.

87. There are lessons to be learned from all complaints. Even when it has been determined that a complainant did not have just cause to complain, it will be possible to learn something about the condition of police community relations. Statistical and empirical research and analysis of complaints is of fundamental importance to democratic and accountable policing. An IPCB will be ideally placed at points where police operations and community experiences intersect and, therefore, able to provide the police and public with informed advice on how to improve the effectiveness of policing services and police community relations. If, following the conclusion of a complaint or after research and analysis, either the police or the IPCB consider it appro-

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47. See, for example, *McKerr v. the United Kingdom* (application no. 28883/95), judgment of 4 May 2001, § 157.

priate to put into effect any lessons learned this should be after consultation with the other party.

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## **Appendix 3: Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment<sup>1</sup>**

1. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter “torture or other ill-treatment”) include the following:
  - a. Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;
  - b. Identification of measures needed to prevent recurrence;
  - c. Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.
2. States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.

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1. Annex to the United Nations General Assembly Resolution 55/89. Torture and other cruel, inhuman or degrading treatment or punishment [on the report of the Third Committee (A/55/602/Add.1)] of 4 December 2000.

3.(a) The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry.<sup>2</sup> The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.

3.(b) Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.

4. Alleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence.

5.(a) In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.<sup>10</sup>

5.(b) A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. Upon completion, the report shall be made public. It shall

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2. Under certain circumstances, professional ethics may require information to be kept confidential. These requirements should be respected.

also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

6.(a) Medical experts involved in the investigation of torture or ill-treatment shall behave at all times in conformity with the highest ethical standards and, in particular, shall obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.

6.(b) The medical expert shall promptly prepare an accurate written report, which shall include at least the following:

- i. Circumstances of the interview: name of the subject and name and affiliation of those present at the examination; exact time and date; location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic or house); circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner or threatening statements to the examiner); and any other relevant factors;
- ii. History: detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;
- iii. Physical and psychological examination: record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
- iv. Opinion: interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination shall be given;

- v. Authorship: the report shall clearly identify those carrying out the examination and shall be signed.
- 6.(c) The report shall be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process shall be solicited and recorded in the report. It shall also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that it is delivered securely to these persons. The report shall not be made available to any other person, except with the consent of the subject or on the authorization of a court empowered to enforce such a transfer.

## **Appendix 4: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>1</sup>**

### **General comment No. 2**

#### **I. Implementation of article 2 by States parties**

1. This general comment addresses the three parts of article 2, each of which identifies distinct interrelated and essential principles that undergird the Convention's absolute prohibition against torture. Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3 to 16, in response to evolving threats, issues, and practices.

2. Article 2, paragraph 1, obliges each State party to take actions that will reinforce the prohibition against torture through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it. To ensure that measures are in fact taken that are known to prevent or punish any acts of torture, the Convention outlines in subsequent articles obligations for the State party to take measures specified therein.

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1. United Nations Committee Against Torture, General Comment No. 2 on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/GC/2, 24 January 2008.



3. The obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter “ill-treatment”) under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes “*in particular*” the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14. In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.

4. States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee’s concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted. Likewise, the Committee’s understanding of and recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment.

## **II. Absolute prohibition**

5. Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances a state of war or threat thereof, internal political instability or any

other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. Similarly, it rejects any religious or traditional justification that would violate this absolute prohibition. The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.

6. The Committee reminds all States parties to the Convention of the non-derogable nature of the obligations undertaken by them in ratifying the Convention. In the aftermath of the attacks of 11 September 2001, the Committee specified that the obligations in articles 2 (whereby “no exceptional circumstances whatsoever... may be invoked as a justification of torture”), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that “must be observed in all circumstances”<sup>2</sup>. The Committee considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment. The Committee recognizes that States parties may choose the measures through which they fulfill these obligations, so long as they are effective and consistent with the object and purpose of the Convention.

7. The Committee also understands that the concept of “any territory under its jurisdiction,” linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State’s obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party. It is a matter of urgency that each State party should closely monitor its officials and those acting on its behalf and should identify and report to the

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2. On 22 November 2001, the Committee adopted a statement in connection with the events of 11 September which was sent to each State party to the Convention (A/57/44, paras. 17-18).

Committee any incidents of torture or ill-treatment as a consequence of anti-terrorism measures, among others, and the measures taken to investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.

### **III. Content of the obligation to take effective measures to prevent torture**

8. States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4.

9. Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum. In particular, the Committee emphasizes that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s).

10. The Committee recognizes that most States parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.

11. By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention's overarching aim of preventing torture and ill-treatment. Naming and defining this crime will promote the Convention's aim, *inter alia*, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also (a) emphasize the need for appropriate punishment that takes into account the gravity of the offence, (b) strengthen the deterrent effect of the prohibition itself, (c) enhance the ability of responsible officials to track the specific crime of torture and (d) enable and empower the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention.

12. Through review of successive reports from States parties, the examination of individual communications, and monitoring of developments, the Committee has, in its concluding observations, articulated its understanding of what constitute effective measures, highlights of which we set forth here. In terms of both the principles of general application of article 2 and developments that build upon specific articles of the Convention, the Committee has recommended specific actions designed to enhance each State party's ability swiftly and effectively to implement measures necessary and appropriate to prevent acts of torture and ill-treatment and thereby assist States parties in bringing their law and practice into full compliance with the Convention.

13. Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon States parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, *inter alia*, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.

14. Experience since the Convention came into force has enhanced the Committee's understanding of the scope and nature of the prohibition against torture, of the methodologies of torture, of the contexts and consequences in which it occurs, as well as of evolving effective measures to prevent it in different contexts. For example, the Committee has emphasized the importance of having same sex guards when privacy is involved. As new methods of prevention (e.g. videotaping all interrogations, utilizing investigative procedures such as the Istanbul Protocol of 1999<sup>3</sup>, or new approaches to public education or the protection of minors) are discovered, tested and found effective, article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture.

#### **IV. Scope of State obligations and responsibility**

15. The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm. The Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.

16. Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also "in any territory under its jurisdiction." The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2,

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3. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction “when the alleged offender is a national of the State.” The Committee considers that the scope of “territory” under article 2 must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention.

17. The Committee observes that States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention. Thus, States parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture. The Committee has concluded that States parties are in violation of the Convention when they fail to fulfil these obligations. For example, where detention centres are privately owned or run, the Committee considers that personnel are acting in an official capacity on account of their responsibility for carrying out the State function without derogation of the obligation of State officials to monitor and take all effective measures to prevent torture and ill-treatment.

18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a

form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

19. Additionally, if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State's obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3.

#### **V. Protection for individuals and groups made vulnerable by discrimination or marginalization**

20. The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. Non-discrimination is included within the definition of torture itself in article 1, paragraph 1, of the Convention, which explicitly prohibits specified acts when carried out for "*any reason based on discrimination of any kind...*". The Committee emphasizes that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.

21. The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by

fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.

22. State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.

23. Continual evaluation is therefore a crucial component of effective measures. The Committee has consistently recommended that States parties provide data disaggregated by age, gender and other key factors in their reports to enable the Committee to adequately evaluate the implementation of the Convention. Disaggregated data permits the States parties and the Committee to identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed. States parties are requested to describe, as far as possible, factors affecting the incidence and prevention of torture or ill-treatment, as well as the difficulties experienced in preventing torture or ill-treatment against specific relevant sectors of the population, such as minorities, victims of torture, children and women, taking into account the general and particular forms that such torture and ill-treatment may take.

24. Eliminating employment discrimination and conducting ongoing sensitization training in contexts where torture or ill-treatment is likely to be committed is also key to preventing such violations and building a culture of respect for women and minorities. States are encouraged to promote the hir-



ing of persons belonging to minority groups and women, particularly in the medical, educational, prison/detention, law enforcement, judicial and legal fields, within State institutions as well as the private sector. States parties should include in their reports information on their progress in these matters, disaggregated by gender, race, national origin, and other relevant status.

## **VI. Other preventive measures required by the Convention**

25. Articles 3 to 15 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment, particularly in custody or detention. The Committee emphasizes that the obligation to take effective preventive measures transcends the items enumerated specifically in the Convention or the demands of this general comment. For example, it is important that the general population be educated on the history, scope, and necessity of the non-derogable prohibition of torture and ill-treatment, as well as that law enforcement and other personnel receive education on recognizing and preventing torture and ill-treatment. Similarly, in light of its long experience in reviewing and assessing State reports on officially inflicted or sanctioned torture or ill-treatment, the Committee acknowledges the importance of adapting the concept of monitoring conditions to prevent torture and ill-treatment to situations where violence is inflicted privately. States parties should specifically include in their reports to the Committee detailed information on their implementation of preventive measures, disaggregated by relevant status.

## **VII. Superior orders**

26. The non-derogability of the prohibition of torture is underscored by the long-standing principle embodied in article 2, paragraph 3, that an order of a superior or public authority can never be invoked as a justification of torture. Thus, subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The Committee considers it essen-

tial that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities. Persons who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials, should be protected against retaliation of any kind.

27. The Committee reiterates that this general comment has to be considered without prejudice to any higher degree of protection contained in any international instrument or national law, as long as they contain, as a minimum, the standards of the Convention.

**Directorate General  
of Human Rights and Legal Affairs  
Council of Europe  
F-67075 Strasbourg Cedex  
[www.coe.int/justice](http://www.coe.int/justice)**