

PROHIBITION OF TORTURE AND JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

Signed in Rome in 1950 under the auspices of the Council of Europe (CoE), the European Convention on Human Rights and Fundamental Freedoms (the Convention) is the first international instrument by which sovereign states have agreed to be legally obliged to provide a relatively broad corpus to everyone within their jurisdiction of human rights and fundamental freedoms. The Convention established a system of human rights protection with the effectiveness of which no other universal or regional system can be compared. The effectiveness of this system is based on the fact that the judgments of the European Court of Human Rights (ECHR/Court) as supranational instances have the force of an enforceable title, which is why they are fully implemented by states. The cooperation of states is the result of the realization that resistance to the Court's decisions would challenge human dignity, personal freedoms and the rule of law as fundamental values of European civilization. Judgments of the ECHR often go beyond the cases in which they were rendered, having an impact in the field of creation and application of law in the contracting states. Many CoE member states, respecting the Court's interpretations, have reformed their legislation and made it compatible with the Convention. At the same time, the process of harmonizing the practice of state bodies with the requirements of the Court is taking place, which it is constantly improving and perfecting. Accordingly, the paper analyzes in detail the Court's jurisprudence on violations of Article 3 of the Convention, which guarantees the prohibition of torture, inhuman and degrading treatment or punishment. This makes it possible to see the practical reach of the Convention and the Court in preventing and combating this global problem, which poses a serious danger to the achievements of civilized humanity.

Keywords: prohibition of torture, Council of Europe, European Court of Human Rights, purpose and principles of effective investigation

I. PROHIBITION OF TORTURE AND COUNCIL OF EUROPE STANDARDS

Torture, inhuman or degrading treatment or punishment (hereinafter: torture and other forms of ill-treatment) are not endemic but a global problem that poses a serious threat to the achievements of civilized humanity, so it is not surprising that the international community after World War II beginning of the internationalization of human rights and freedoms, pays special attention. As one of the postulates of modern society which protects the dignity and honour of man, the prohibition of torture and other forms of abuse is constituted in numerous

* Vladimir V. Veković, PhD, Full Professor, Faculty of Law, University of Priština – Kosovska Mitrovica, e-mail: vladimir.vekovic@pr.ac.rs

international documents of universal¹ and regional character. When it comes to the European continent, under the auspices of the Council of Europe (CoE), and in order to create a general climate for the protection of human rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) was first adopted.² Inspired by the Universal Declaration of Human Rights³ adopted under the auspices of the United Nations (UN), the Convention is the first international instrument by which sovereign states have agreed to be legally obliged to provide everyone within their jurisdiction with a relatively broad corpus of human rights and fundamental freedoms. Among other things, it provides in Article 3 that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The stated wording unequivocally indicates that this is an absolutely protected right. Article 3 does not provide for exceptions, and according to Article 15, paragraph 2, derogation in extraordinary circumstances is not allowed. In other words, Article 3 recognizes that every human being has an absolutely inalienable right not to be subjected to torture or inhuman or degrading treatment under any circumstances, even the most severe.⁴ By the way, the Convention established the European Court of Human Rights (ECHR/Court) as a supranational control system for ensuring compliance with the assumed obligations (founded in 1959 with its headquarters in Strasbourg). Thirty years later, in accordance with Protocol No. 11, the mechanisms for implementing the Convention have been streamlined (the European Commission for Human Rights and the quasi-judicial competence of the Committee of Ministers have been abolished), and the new ECHR (with a significantly different structure, competences and procedure) started on 1 November 1998 as a permanent authority of the Convention. The impressive results achieved by the Court have contributed to the Convention, as D. Gomien rightly states, develops into the most sophisticated and effective human rights treaty in the world.⁵ All this indicates that this system of protection, otherwise numerous protocols periodically reviewed, changed and adapted to new circumstances, is still unrivalled, so it is necessary to make well-designed and organized efforts to have the opportunity to see regional agreements in other parts of the world for the protection of human rights that would be comparable to it.

The Convention is conceived as an instrument that imposes negative obligations on a member state, ie refraining from doing so in order not to hinder the exercise of the rights guaranteed by the Convention, but ECHR jurisprudence has also developed positive obligations, ie. obligations to act where the state is required to take measures and actions to ensure respect for the rights of the Convention. Positive obligations arise from: a) Article 1 of the Convention, which provides that States shall guarantee to everyone within their jurisdiction the rights and freedoms outlined in Part I of the Convention; b) the imperative requirement that the rights under the Convention be practical and effective and not theoretical and illusory, and c) Article 13 which provides that everyone whose rights and freedoms under the Convention have been violated shall have the right to an effective remedy before the domestic authorities, whether the violation was committed by persons acting in an official capacity.

The concept of positive obligations is of particular importance for the protection of life and integrity, which are covered by the right to life (Article 2), the prohibition of torture and other

¹ Documents on the Law of UN Peace Operations (eds. B. Oswald, H. Durham and A. Bates), Oxford, 2019, p. 141.

² Signed in Rome on November 4, 1950, by the then 13 member states of the CoE. Entered into force on September 3, 1953.

³ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10th December 1948.

⁴ P. van Dijk, G. J.H. Hoof, *Teorija i praksa Evropske konvencije o ljudskim pravima*, Müller, Sarajevo, 2001, 311.

⁵ D. Gomien, *Kratak vodič kroz Evropsku konvenciju o ljudskim pravima*, Beogradski centar za ljudska prava, Beograd, 1996, 5.

ill-treatment (Article 3), the prohibition of slavery and forced labour (Article 4), the right to liberty and security (Article 5), as well as the right to respect for private and family life (Article 8). Accordingly, it should be noted that the positive procedural obligation of the state to effectively investigate serious human rights violations, which we focus on in this paper, was first established to protect the right to life, in the judgment in *Case of McCann and Others v. The United Kingdom*.⁶ On that occasion, the Court referred to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (principle 22)⁷ and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (principle 9),⁸ and the State party's obligation to respect human rights (Article 1 of the Convention) he applied to the right to life (Article 2), based on which he concluded that an effective official investigation of allegations that a civil servant had violated the right to life should be conducted. Jurisprudence on the effective investigation of the alleged violation of Article 2, the ECHR is in the judgment in *Case Assenov and Others v. Bulgaria*⁹ also applied Article 3. The Court found that the injuries suffered by Anton Assenov, the main applicant and the alleged victim of ill-treatment by the police (aged 14 at the time of the incident), reached the threshold set out in Article 3. The available evidence did not provide sufficient grounds to conclude that the police were responsible, but they indicated that there was a reasonable suspicion that it had caused the injuries. Accordingly, the ECHR unanimously concluded that there had been a violation of Article 3 based on the failure to conduct an effective official investigation into the applicant's allegations that he had been ill-treated by the police. Otherwise, the positive obligation to prevent a violation of Article 3, including an effective investigation, applies not only to the conduct of persons representing the State but also to the conduct of natural persons.

Although the positive procedural obligation of Member States to conduct an effective investigation into the alleged violation of Article 3 has been established since 1998, it is often ignored. Namely, from 2003 (when the statistics were first presented) to 2020, the Court has rendered as many as 943 convictions for violation of Article 3 due to the lack of an effective investigation.¹⁰

In addition to the evidence submitted to him by the applicant, the respondent State and third parties (invited by the President of the Court, as well as the Commissioner for Human Rights CoE), the ECHR in determining whether Article 3 had been violated, and in particular whether investigations, considers international instruments, information of bodies monitoring the implementation of international agreements, reports of non-governmental organizations and opinions of international experts on relevant issues. When it comes to universal documents, the Court most often refers to the key UN instrument in this area – the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),¹¹ which directly obliges member states to provide in their legislation for the crime of torture. in accordance with the definition given in Article 1, paragraph 1. UNCAT. Article 4 stipulates that acts of torture, including attempted torture and complicity in or participation in acts of torture, shall be considered criminal offences under domestic criminal law and that, in accordance with their gravity, appropriate penalties shall be

⁶ *McCann and Others v. The United Kingdom*, Application No. 18984/91, Judgment, 27 September 1995, paragraph 161. www.echr.coe.int, 5 October 2020.

⁷ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁸ Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.

⁹ *Assenov and Others v. Bulgaria*, Application No. 24760/94, Judgement, 28 October 1998, paragraph 102, www.echr.coe.int, 5 October 2020.

¹⁰ Source: European Court of Human Rights, Annual Reports for the period from 2003. until 2020, <https://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c>, 10. February 2021.

¹¹ Adopted by General Assembly resolution 39/46 of 10 December 1984, entered into force June 26, 1987.

provided. Under the provisions of Article 12, the competent authorities shall, as soon as possible, conduct an impartial investigation where there are reasonable grounds for believing that an act of torture has been committed in the territory under their jurisdiction. Persons claiming to have been subjected to torture in the territory under the jurisdiction of a Member State shall, as provided in Article 13, have the right to lodge a complaint with its competent authorities, which shall immediately examine the case. The same article stipulates that states will take measures to protect the complainant and witnesses from harassment or intimidation. The provisions of Article 16, paragraph 1, oblige Member States to prohibit in the territory under their jurisdiction all acts constituting cruel, inhuman or degrading treatment or punishment other than acts of torture as defined in Article 1, paragraph 1, UNCAT, in the case of when those acts are committed by an official or another person acting *ex officio*, or those acts are committed with the express or tacit persuasion or consent of those persons. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),¹² International Covenant on Civil and Political Rights,¹³ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Principles),¹⁴ Istanbul Protocol – Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol),¹⁵ as well as Code of Conduct for Law Enforcement Officials,¹⁶ from regional documents, The Court pays special attention to: European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,¹⁷ Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Standards), Guidelines Committee of Ministers of the Council of Europe on the Eradication of Impunity for Serious Human Rights Violations (Guidelines CM of the CoE)¹⁸ etc.

Interpreting the Convention as a living instrument for the effective protection of human rights, and often referring to relevant international instruments, reports and opinions, the ECHR has, over its decades of development, developed a wealth of jurisprudence on the positive obligation of Member States to effectively investigate alleged violations. Accordingly, on the following pages, we will analyze in detail the purpose and principles of an effective investigation of torture and other ill-treatment.

II. PURPOSE OF AN EFFECTIVE INVESTIGATION

The purpose of effective investigation and documentation of torture and other ill-treatment is threefold: a) clarifying the facts, establishing and acknowledging personal and state responsibility for victims and their families; b) identifying measures necessary to prevent recidivism, and c) facilitating criminal prosecution and/or, where appropriate, imposing disciplinary sanctions on those identified by the investigation as responsible, as well as pointing to the need for full compensation and compensation by the state, including fair and

¹² Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006.

¹³ Adopted and opened for signature, ratification and accession by General Assembly, resolution 2200 A (XXI) of 16 December 1966. Entry into force: 23 March 1976, in accordance with article 49.

¹⁴ Recommended by General Assembly resolution 55/89 of 4 December 2000.

¹⁵ Office of the United Nations, High Commissioner for Human Rights, Professional Training series No. 8/Rev.1, New York and Geneva, 2004.

¹⁶ Adopted by General Assembly resolution 34/169 of 17 December 1979.

¹⁷ Open for signature by CoE member states and for accession by non-member states 26 November 1987 in Strasbourg. Entered into force on 1 February 1989, after the seventh ratification.

¹⁸ Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies.

appropriate financial compensation and provision of funds for medical care and rehabilitation.¹⁹

In particular, the purpose of an effective investigation into an alleged violation of Article 3 is for the public to gain and maintain confidence that the government will respect the rule of law and prevent any occurrence of collusion or toleration of illegal acts. Without it, it is not possible to achieve the absolute nature of the prohibition of torture and other forms of ill-treatment, nor to provide a deterrent effect for future prevention.²⁰ Any prohibition of torture and other ill-treatment loses credibility if the officials who committed such acts are not held accountable for their actions. If the information that indicates abuse is not reacted to quickly and efficiently, people prone to abuse of persons deprived of their liberty will very quickly begin to believe that they can do so with impunity. All efforts made to promote human rights through strict selection in employment and vocational training will be doomed to failure. Otherwise, if the official, who issues the order, approves, does not prevent or conducts torture and ill-treatment is brought to justice for the committed act, an unequivocal message will be sent that such treatment will not be tolerated. In addition to having a strong deterrent effect, this message will show the general public that no one is above the law and will be a real satisfaction for the victims.²¹

The emergence of impunity for serious violations of human rights, including the rights guaranteed by Article 3 of the Convention, is caused in particular by the lack of adequate reaction of institutions or state bodies when such a violation occurs.²² The fight against impunity is essential to achieve justice for victims, prevent future human rights violations and support the rule of law and public confidence in the justice system.²³ Combating impunity requires that an effective investigation be conducted into cases of serious human rights violations. This obligation is of an absolute nature. Thus, it can be unequivocally concluded that a successful investigation that will result in the identification and punishment of those responsible for the abuse is essential for the prohibition of torture and inhuman or degrading treatment or punishment to have a purpose in practice.²⁴

III. PRINCIPLES OF EFFECTIVE INVESTIGATION

The investigation of alleged violations of Article 3 will be effective only if it is conducted in accordance with the principles established in the ECHR jurisprudence and the above-mentioned universal and regional documents in this field. These are: adequacy; thoroughness; independence and impartiality; timeliness; public oversight and participation of the injured party. Each of these interrelated principles consists of policy imperatives and operational imperatives and is important for strengthening institutions and their ability to successfully respond to the challenges they face in the process of preventing and combating torture and other forms of abuse.²⁵ Accordingly, these principles will be discussed in detail in the text that follows.

¹⁹ See: UN Principles, principle 1. on the Annex; Istanbul Protocol, para. 77-78.

²⁰ E. Svanidze, G. Smith, *Zabrana mučenja i nečovječnog i ponižavajućeg postupanja i kažnjavanja*, Savjet Evrope, Strazbur Cedex, September 2018, 99.

²¹ See: CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 80, paragraph 25.

²² See: Guidelines CM of the CoE

²³ E. Svanidze, G. Smith, *op. cit.* 100.

²⁴ V. Veković, *Kažnjavanje mučitelja – evropski standardi*, *Pravni život*, No. 9/2006, tematski broj *Pravo i humana budućnost*, 915.

²⁵ E. Svanidze, G. Smith, *op. cit.* 84.

1. Adequacy

The principle of adequacy refers to the overarching goal of providing and obtaining evidence. The investigation must be such as to lead to the identification and punishment of those responsible. This does not create an obligation for the state to ensure that the investigation leads to a specific result, but the authorities must take reasonable steps at their disposal to provide evidence of the dispute.²⁶

The importance of the principle of adequacy in preventing and combating torture and other ill-treatment was pointed out by the ECHR in *the Case of Cestaro v. Italy*. Having regard to all the circumstances of the case, the Court first finds that the ill-treatment suffered by the applicant by the police during the alternative anti-globalization rally in Genoa on 20 and 21 July 2001 constituted torture within the meaning of Article 3 of the Convention. With regard to the investigation into the case, the Court noted that the police officers who attacked the applicant on the premises of the *Diaz-Pertini* school, resulting in several fractures, had never been identified, had never been investigated or sanctioned. This omission can be partly explained by the difficulties encountered by the prosecution in establishing the identity of the attacker due to the lack of police cooperation. The ECHR expressed regret that the Italian police had refused to cooperate with the authorities responsible for identifying police officers who could be presumed to have taken part in the attack, for which reason there was no punishment. In addition, prior to the appellate court's decision, the criminal prosecution for criminal offences committed during the school attack became statute-barred, so that the criminal proceedings did not result in the punishment of the persons who abused the applicant.

Based on all the above, the Court concluded that the competent authorities did not respond adequately to the above events, ie. that their reaction was inconsistent with the positive procedural obligations arising from Article 3. However, the ECHR is of the opinion that the inappropriate reaction was not caused by the negligence or omissions of the prosecution or the competent courts. Namely, it turned out that the Italian criminal legislation does not effectively regulate the requirement to punish acts of torture or other ill-treatment. Accordingly, it has been established that there has been a violation of Article 3 of the Convention as a result of the ill-treatment suffered by the applicant and the conduct of an investigation which did not have a deterrent effect on the re-commission of such acts.

The positive obligations arising from Article 3 may, in the court's view, include the obligation to introduce an appropriate legal framework that includes effective criminal law provisions. More specifically, Italian law must provide for legal remedies that will provide adequate sanctions for perpetrators of torture and other ill-treatment, thus preventing those persons from enjoying benefits that are not in line with the Court's case law.²⁷

2. Thoroughness

The principle of thoroughness refers to the operational issues, the manner and means of conducting the investigation. According to him, the investigation should be comprehensive in scope and address all relevant circumstances, including any racist or other discriminatory motivations. It should make it possible to identify the systemic failures that led to the injury. This requires all reasonable steps to be taken to provide relevant evidence, such as the

²⁶ See: K. Bullock, N. Tilley, *Crime Reduction and Problem-oriented Policing*, London-New York, 2012; Guidelines CM of the CoE; Istanbul Protocol, paragraph 77; CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 82, paragraph 31.

²⁷ *Cestaro v. Italy*, Application No. 6884/11, Judgment, 7 April 2015, para. 205-217. and 225-227. www.echr.coe.int, 6 October 2020.

identification and interview of alleged victims, suspects and witnesses; on-site investigation where the alleged injury occurred in order to find material evidence, as well as the collection of forensic and medical evidence by experts. Evidence should be assessed in a thorough, consistent and objective manner.²⁸

Over its decades of work, the ECHR has identified a number of operational measures that need to be taken in order for the investigation to be assessed as thorough. Given that their detailed list would far exceed the envisaged scope of work, we list only some measures that, according to the Court, are expected at different stages of the investigation: a) it is necessary to take a complete and accurate statement from the complainant about all its circumstances;²⁹ b) the submitted complaint will be carefully and objectively evaluated;³⁰ c) all necessary measures will be taken to identify and locate witnesses in order to obtain complete and accurate statements;³¹ d) reasonable efforts must be made to provide, collect and analyze in detail all medical,³² forensically³³ and video evidence;³⁴ e) evidence must not be accepted hastily and uncritically, especially if they refute the complaint³⁵ or it is the testimony of police officers,³⁶ etc.

3. Independence and impartiality

The persons responsible for conducting the investigation must be impartial and independent of the persons involved in the disputed events. This means that the authorities involved in these events cannot conduct evidence collection or pre-trial proceedings; in particular, investigators may not be part of the same unit to which the officers under investigation belong. Under ideal conditions, the persons entrusted with the conduct of the operational part of the investigation should be completely independent of the service to which the allegations of ill-treatment are linked.³⁷ This principle applies to persons responsible for conducting the investigation, including its direction, management and implementation, making professional assessments, as well as the application of investigative expertise.³⁸

²⁸ See: Guidelines CM of the CoE; Istanbul Protocol, paragraph 80; CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 83, paragraph 33.

²⁹ *El-Masri v. "The Former Yugoslav Republic of Macedonia"*, Application No. 39630/09, Judgment, 13 December 2012, paragraph 187, www.echr.coe.int, 9 October 2020.

³⁰ *Bouyid v. Belgium*, Application No. 23380/09, Judgment, 28 September 2015, paragraph 130, www.echr.coe.int, 9 October 2020.

³¹ *El-Masri v. "The Former Yugoslav Republic of Macedonia"*, Application No. 39630/09, Judgment, 13 December 2012, paragraph 187, www.echr.coe.int, 9 October 2020.

³² *Aksoy v. Turkey*, Application No. 21987/93, Judgment, 18 December 1996, paragraph 56, www.echr.coe.int, 14 October 2020.

³³ *Tangiyev v. Russia*, Application No. 27610/05, Judgment, 11 December 2012, paragraph 53, www.echr.coe.int, 17 October 2020.

³⁴ *Ciorap v. The Republic of Moldova (No. 5)*, Application No. 7232/07, Judgment, 15 March 2016, paragraph 66, www.echr.coe.int, 17 October 2020.

³⁵ *Cobzaru v. Romania*, Application No. 48254/99, Judgment, 26 July 2007, paragraph 72, www.echr.coe.int, 17 October 2020.

³⁶ *Virabyan v. Armenia*, Application No. 40094/05, Judgment, 2 October 2012, paragraph 167, www.echr.coe.int, 17 October 2020.

³⁷ See: Guidelines CM of the CoE; Istanbul Protocol, paragraph 79; CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 83, paragraph 32; *Compendium of Key Human Rights Documents of the African Union*, (eds. Ch. Heyns and M. Killander), University of Pretoria, 2016, p. 214.

³⁸ E. Svanidze, G. Smith, *op. cit.*, 90.

The issue of the independence of the investigation into alleged torture and other forms of ill-treatment³⁹ is highly positioned in ECHR jurisprudence. The cases in which the Court found deficiencies in the independence of the investigation into the alleged violation of Article 3 of the Convention are, inter alia: a) when the entire investigation was conducted within the chain of command of the same police unit involved in the dispute;⁴⁰ b) the presence of a police officer during the applicant's medical examination, which the Court found had influenced the applicant to refrain from showing injuries for fear of further ill-treatment;⁴¹ c) ineffective judicial control of investigative bodies;⁴² d) concerns about the formal and *de facto* independence of the forensic doctor in charge of examining the applicant, in particular as regards recording the possible origin of the injuries,⁴³ etc.

Crucial to the effectiveness of investigations, the principles of independence and impartiality are the focus of strengthening institutions and their capacity across Europe, and the CoE supports police and criminal justice reform programs in several Member States.⁴⁴

4. Timeliness

The investigation must be launched in a timely manner enough to gather as much quality evidence as possible. Although there may be obstacles or difficulties in certain situations that prevent the investigation from progressing, the timely response of the authorities can generally be considered a key factor in maintaining public confidence in preserving the rule of law and preventing any collusion or tolerance of illegal activities. It must be completed within a reasonable time, and always carried out with all the necessary care.⁴⁵

This principle is especially important at the very beginning of the investigation when it is necessary to secure the scene without delay and prevent the essential evidence from being permanently destroyed. The Court found that the principle of timeliness was not met in cases of delay: a) initiating an investigation almost two years after the disputed events when the possibility of gathering evidence of alleged ill-treatment was almost illusory;⁴⁶ b) identifying, searching for the suspect and questioning him;⁴⁷ c) conducting expertise,⁴⁸ etc.

In addition to being an important operational link in an effective investigation, the principle of timeliness also serves as policy imperatives which, as we have already pointed out, relate to maintaining public confidence in the rule of law and preventing collusion or tolerating illegal actions.

³⁹ See: The United Nations and Human Rights: A Critical Appraisal (ed. F. Mégret&Ph. Alston), Oxford, 2020; A. Mukherjee, *Torture and the United Nations: Charter and Treaty-based Monitoring*, Cameron May 2008, p. 63.

⁴⁰ *Mafalani v. Croatia*, Application No. 32325/13, Judgment, 9 July 2015, paragraph 99, www.echr.coe.int, 18 October 2020.

⁴¹ *Buhaniuc v. The Republic of Moldova*, Application No. 56074/10, Judgment, 28 January 2014, paragraph 39, www.echr.coe.int, 18 October 2020.

⁴² *Sochichiu v. Moldova*, Application No. 28698/09, Judgment, 15 May 2012, paragraph 41, www.echr.coe.int, 20 October 2020.

⁴³ *Ochelkov v. Russia*, Application No. 17828/05, Judgment, 11 April 2013, paragraph 103, www.echr.coe.int, 20 October 2020.

⁴⁴ E. Svanidze, G. Smith, *op. cit.*, 92.

⁴⁵ See: Guidelines CM of the CoE; Istanbul Protocol, paragraph 79; CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 84, paragraph 36.

⁴⁶ *Preminyin v. Russia*, Application No. 44973/04, Judgment, 10 February 2011, paragraph 109, www.echr.coe.int, 21 October 2020.

⁴⁷ *Basenko v. Ukraine*, Application No. 24213/08, Judgment, 26 November 2015, paragraph 64, www.echr.coe.int, 20 October 2020.

⁴⁸ *Kirpichenko v. Ukraine*, Application No. 38833/03, Judgment, 2 April 2015, paragraph 86, www.echr.coe.int, 22 October 2020.

5. Public oversight

There must be a sufficient element of public oversight of the investigation or its results to ensure accountability, maintain public confidence that the authorities respect the rule of law and prevent any occurrence of collusion or toleration of illegal acts (policy imperatives). Public control must not jeopardize the objectives of the investigation and the fundamental rights of the parties.⁴⁹ Public oversight as a component of an effective investigation was first established in the judgment in *McCann and Others v. The United Kingdom*.⁵⁰ The verdict in the case is also important *Hugh Jordan v. The United Kingdom*, also made on the complaint of a violation of the right guaranteed by Article 2 of the Convention (right to life) during the anti-terrorist operation of the Northern Ireland security forces. On that occasion, the Court pointed out that the degree of public insight is not established automatically, but that it is decided in each specific case; this is because disclosure or publication of official documents can result in problems in protecting the interests of individuals and security operations.⁵¹ In the case *El-Masri v. "The Former Yugoslav Republic of Macedonia"* the inadequacy of the investigation into the applicant's allegations of extraordinary rendition, torture and ill-treatment was considered as part of its impact on the right to the truth. The ECHR expressed concern that the notion of "state secrets" served to prevent the search for the truth, and that the investigation in the case showed that the respondent State had effectively acted on US instructions, concealed the truth and given false testimony about the actions of national authorities and Central Intelligence Agency (CIA).⁵²

6. Participation of the injured party

The participation of the injured party is an essential element of an effective investigation into the alleged violation of Article 3, which is why he is receiving adequate attention. Accordingly: a) States should ensure that injured parties are able to participate in the investigation and proceedings to the extent necessary to protect their legitimate interests through appropriate procedures under domestic law; b) States must ensure that injured parties may, to the extent necessary to protect their legitimate interests, be informed of the progress of proceedings, the action taken on their complaints and their outcome, the progress of investigations and prosecutions, the enforcement of judgments and all measures to compensate for the damage they have suffered; c) in cases of death under suspicious circumstances or enforced disappearances, States shall, as far as possible, provide information on the fate of that person to his or her family; d) injured parties may be given the opportunity to state that they do not wish to receive such information; e) where domestic law provides for the participation of injured parties as parties to the proceedings, States should ensure that they are provided with appropriate legal assistance and advice, to the extent necessary for their participation in the proceedings; f) States should ensure that, where necessary, measures are taken at all stages of the proceedings to protect the physical and mental integrity of victims and witnesses. Also, it should be ensured that there is no

⁴⁹ See: Guidelines CM of the CoE; Istanbul Protocol, paragraph 79; CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 80, paragraph 25, 84, paragraph 35.

⁵⁰ *McCann and Others v. The United Kingdom*, Application No. 18984/91, Judgment, 27 September 1995, paragraph 161. www.echr.coe.int, 23 October 2020.

⁵¹ *Hugh Jordan v. The United Kingdom*, Application No. 24746/94, Judgment, 4 May 2001, paragraph 121, www.echr.coe.int, 23 October 2020.

⁵² *El-Masri v. "The Former Yugoslav Republic of Macedonia"*, Application No. 39630/09, Judgment, 13 December 2012, para. 191-192, www.echr.coe.int, 23 October 2020.

intimidation of injured parties and witnesses, reprisals or other deterrence from filing complaints, ie conducting proceedings on their complaints or participating in the proceedings. These measures may include special investigative means, protection and assistance before, during and after the investigation, in order to guarantee their safety and dignity.⁵³

In a number of cases, the Court noted the authorities' failure to involve victims in the investigation and criminal proceedings, such as: a) the authorities' refusal to formally recognize the applicants' status as victims;⁵⁴ b) denying access to materials;⁵⁵ c) avoiding the applicants being informed of the developments in the case without delay,⁵⁶ etc.

IV. CONCLUSION

Torture and other forms of abuse occur both in societies that are undergoing a process of transition for a shorter or longer period of time, with more or less success and in countries with a respectable democratic tradition.⁵⁷ From the rich jurisprudence of the court on this issue, we have focused our attention on judgments in which a violation of Article 3 of the Convention was found due to the lack of an effective investigation. Although the positive procedural obligation of the CoE member states to conduct an effective investigation into the alleged violation of Article 3 was established as early as 1998, they are, as it follows, often disregarded. The fact that the Court in the period 2003-2020. passed as many as 943 verdicts on violation of Article 3 due to the lack of an effective investigation, unequivocally indicates that this is an extremely serious and long-standing problem. Ignoring the principles discussed above makes it impossible to achieve the purpose of an effective investigation and, consequently, leaves far-reaching consequences: the prohibition of torture and the commitment to eradicate impunity are reduced to rhetorical decoration; the absolute nature of the prohibition of torture and other ill-treatment is compromised; the deterrent effect is meaningless; public confidence in the rule of law is progressively atrophied; there is a growing suspicion of the existence of collusion and tolerance of illegal acts; the injured are deprived of adequate satisfaction, etc.

Overcoming the identified problems requires undertaking numerous, well-designed and harmonized activities, of which the most important are: a) adoption and consistent application of new laws and regulations in line with the highest CoE standards in this area; b) reform of the police and penitentiary services while placing them under effective external and internal control and supervision, and ensuring transparency to the extent that this does not jeopardize their activities; c) proper selection, continuous professional training and motivation of employees to perform their duties professionally, developing awareness of the need to respect the dignity of all people and their rights and fundamental freedoms, eliminating racial, ethnic, religious and other prejudices, and emphasizing the importance of respecting codes of professional ethics;⁵⁸ d) creating an atmosphere in which it will be considered appropriate to report a colleague who abuses a person deprived of liberty, because the guilt for abuse, in addition to the perpetrator of such an act, is borne by any person who knows, or should know,

⁵³ See: Guidelines CM of the CoE; Istanbul Protocol, paragraph 81; CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 84, paragraph 36, 85, paragraph 39.

⁵⁴ *Begheluri and Others v. Georgia*, Application No. 28490/02, Judgment, 7 October 2014, paragraph 140, www.echr.coe.int, 24 October 2020.

⁵⁵ *Kolpak v. Russia*, Application No. 41408/04, Judgment, 13 March 2012, paragraph 68, www.echr.coe.int, 24 October 2020.

⁵⁶ *Ognyanova and Choban v. Bulgaria*, Application No. 46317/99), Judgment, 23 February 2006, paragraph 115, www.echr.coe.int, 24 October 2020.

⁵⁷ V. V. Veković, *Zabrana mučenja: instrumenti i mehanizmi Saveta Evrope*, Beograd, 2005, 12.

⁵⁸ V. Veković, *Kažnjavanje mučitelja – evropski standardi*, *op. cit.*, 926.

that a person deprived of liberty is abused, but does not prevent or do not report to the authorities.⁵⁹

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⁵⁹ See: CPT Standards, Highlights of the CPT's General Reports, IX Combating the Impunity of Torturers, Excerpt from the 14th General Report [CPT/Inf (2004) 28], CPT/Inf/E (2002) 1 - Rev. 2006, 80, paragraph 26.

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