

Principles of Effective Investigation of Torture and Ineffective Practices of Russian Investigative Authorities

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Abbreviations and acronyms

CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR or the European Court	European Court of Human Rights
HRC	Human Rights Committee
HRW	Human Rights Watch
IC	Investigative Committee of Russian Federation
IVS	Temporary detention facility
Istanbul Protocol	The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
NGO	non-governmental organization
RF	The Russian Federation
RFCC	The Criminal Code of Russian Federation
RFCCP	The Code of Criminal Procedure of Russian Federation
Special Rapporteur	Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
The Committee	United Nations Committee against Torture
UN CAT or the Convention	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1 INTRODUCTION

Despite the prohibition of torture on domestic level in most States, under international and regional law in peacetime, and under international law in wartime¹, it is documented that the phenomenon of torture continues to be widespread with reports exposing torture in 141 countries.²

Almost half of the world population fears torture if taken in custody by the police, according to the research by Amnesty International.³ The organization's Secretary General claimed, "more governments seek to justify torture in the name of national security".⁴

This study shall be concerned, though, with the question of torture and ill-treatment in police as part of normal or routine policing, rather than in the context of internal conflicts that may raise the question of national security, or in the situation of a civil war. Human Rights Watch (HRW) in its report studying police torture in Russia suggested that the torture and ill-treatment of detainees immediately after arrest was rampant in the country, with half of the suspects arrested being tortured. The report asserts that the torture is carried out with complete impunity even though the main investigative bodies are fully aware of the state of facts.⁵

These findings have been confirmed by a later research by several non-governmental organizations (NGOs) testifying that the number of prosecutions of torture perpetrators is extremely low in Russia compared to the widespread character of the phenomenon of ill-treatment by police. Even if the perpetrator is brought to justice, the sentence does not reflect the gravity of the offence.⁶

There is no doubt that impunity for human rights violations in general and for acts of torture in particular, is often the primary obstacle to upholding the rule of law⁷, and one of the most serious impediments to the prevention of torture and to adequate reparation.⁸ Impunity for

¹ Ingelse, *The UN Committee*, 319, 327; Rodley, Pollard, *The treatment of prisoners*, 50-60

² Amnesty International, "Stop Torture"

³ World Without Torture, "Amnesty campaign"

⁴ Ibid.

⁵ HRW, "Confessions at Any Cost"

⁶ ACAT, *The Multiple Faces*, 45

⁷ OHCHR Report, *Impunity and the Rule of Law*

⁸ REDRESS, *A Survey of Law*, 1

torture signals a state's failure to investigate violations, punish perpetrators, provide remedies to victims, prevent that violations reoccur.

Impunity for torture sends a signal to the society about corruption of public institutions. This signal, shaping the mentality of people, their expectations, destroys any trust in public institutions, which, in such contexts, are not "public" anymore. This leads to creation of alternative circles, or networks of trust. Each of these networks becomes mistrustful of the alternative ones.⁹

The so-called "consequential impunity" leads to the creation of vicious circle that makes the eradication of torture and ill-treatment particularly difficult.¹⁰

Do the Russian police enjoy immunity for brutality as a part of routine policing? Are there generally applicable processes and causes, which can explain this impunity (immunity)? Does the misconduct by the police trigger further violations? These are some of the questions that lied behind the decision to focus the present study on the routines and practices of investigation of ill-treatment and torture by Russian police.

1.1 Aim and purpose

The problem of police brutality is not uncommon in the matured democracies, let alone in non-democratic countries or in new democracies, such as the Russian Federation (RF).¹¹

The Russian Government has not acknowledged the extent of the topic of police torture in its latest submission to the Committee against Torture (UN CAT), claiming that in 2014 only in two cases police applied the force to the suspects violating the Russian legislation.¹² These allegations contradict the information constantly published in media and by NGOs.¹³ The research shows that one in five citizens of the RF at least once in their lifetime had been subject to unmotivated and illegal violence by police.¹⁴

⁹ Bielefeldt, Lecture, 13 September 2017

¹⁰ *The Implementation of the EU Guidelines on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 24

¹¹ Penzler, *Corruption and reform*, 9-10

¹² CAT/C/RUS/6, Attachment 2

¹³ Bennets "Torture and Abuse"; Rankin "Grisly death"; Pospichalova "No matter"; Valitova, "The Head of the Committee"

¹⁴ Committee Against Torture, "Sociology of violence"

The official government position is also refuted by the number of cases concerning the violation of the right to life, inhuman or degrading treatment, lack of effective investigation, that are brought to the European Court of Human Rights (ECtHR or the European Court). The RF stands out among the other countries for the number of judgements related to the violation of the prohibition of torture.¹⁵ Considering that only a small number of cases reach the ECtHR and the general trend towards the increase, the issue of investigation of and accountability for torture or ill-treatment must be addressed with urgency.

Thus, the overall aim of this research is to contribute, through the identification and critical assessment of routine practices of investigation of allegations of torture by relevant Russian public authorities, to a deepened understanding of “ineffective practices” that obstruct effective investigations, advance the sense of impunity of perpetrators and create a negative culture of corruption within the police.

Therefore, the research question guiding this study is: *to what extent the practices of domestic investigation of allegations of torture and ill-treatment in Russia are in contrast with the generally recognized principles of effective investigation?*

Specifically, the objectives of this research are to:

1. Clarify the definition and essence of standards and principles of effective investigation
2. Critically evaluate the practices of investigation endorsed in the Russian domestic context with a particular attention to those practices and patterns that might contribute to impunity of perpetrators

Formulate conclusions on the extent to which these practices differ from the generally recognized standards

1.2 Normative framework and theoretical background

The present section will first briefly explore the normative basis for criminalization and prosecution of torture and ill-treatment in Russia, comprising the State’s obligations on

¹⁵ According to ECtHR statistics “Violations by Article by State 1959 – 2017”, 58 cases in the period from 1959 to 2017 (39% of total), 312 cases pertaining ineffective investigation (41% of total in the same period)

international and regional levels, along with the relevant national norms. These provisions will be the subject of a more in-depth analysis in the following chapters.

Afterwards, I will examine a number of empirical studies and theoretical research findings in the field of police torture and misconduct that will serve as theoretical lenses for my further analysis.

1.2.1 Normative framework

A number of international instruments that guarantee the prohibition of torture have legal effect in the RF.

Russia is a State Party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT or the Convention). Yet, the country has not ratified the Optional Protocol to the Convention, which provides for supplementary institutions and mechanisms that assist states in concrete implementation of their existing obligations to prohibit and prevent torture.

As a party to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and being subject to ECtHR's jurisdiction, Russia committed to implement final judgments of the Court in cases in which the RF is a party.¹⁶

Additionally, the membership in the Council of Europe and ratification of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, provide for the periodic visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT is a non-judicial mechanism integrating the existing mechanism of the ECtHR. Its work consists in periodic country visits aimed at inspection of places of detention and assessment of detainees' treatment. After the visit, the CPT sends to the visited State a detailed report on findings, issues raised and recommendations, requesting responses from the State concerned.

A number of provisions in national legislation provides for domestic implementation of Russia's international obligations.

¹⁶ ECHR, Art.46

The Russian Constitution provides that “universally recognized principles and rules of international law and the international agreements of the RF” are “an integral part” of its legal system. Treaties ratified by the RF have direct effect.¹⁷

Article 6(3) of the Federal Constitutional Law “On the Judicial System of the Russian Federation” provides that the binding nature of decisions by international courts on the territory of the State is determined by its international treaties.¹⁸

Furthermore, the RF recognizes “ipso facto” and “without special agreement” the jurisdiction of the ECtHR and its interpretation and application of the Convention and its Protocols in cases of alleged breach by the RF of the provisions of these acts.¹⁹ The final judgements by the ECtHR in respect of the RF, are binding on all government bodies, including courts.²⁰ Moreover, the judgments of the European Court are a legal basis for the review of judicial decisions taken by national judicial authorities due to newly discovered circumstances.²¹

In the national legal order, the prohibition of torture is codified by the Constitution²², the Code of Criminal Procedure²³, the Federal Law “On police”²⁴, the Law “On Detention of Suspects and Accused Persons”²⁵ and by the Code for the Execution of Criminal Penalties.²⁶

¹⁷ RF Federal Law No.101-FZ, Art.5

¹⁸ Federal Constitutional Law of the RF, On the Judicial System of the Russian Federation, Art.6(3)

¹⁹ RF Federal Law of the No.54-FZ, Art.1

²⁰ Resolution of the Plenary of the Supreme Court of the RF, No.21, §2

²¹ Arbitration Procedural Code of the RF, Art.311(3(4))

²² Art.21(2): “No one shall be subject to torture, violence or other severe or humiliating treatment or punishment. No one may be subject to medical, scientific and other experiments without voluntary consent.”

²³ Art.9: “1. During the course of criminal court proceedings shall be prohibited the performance of actions and the adoption of decisions, degrading the honour of the participant in the criminal court proceedings, and treatment humiliating his human dignity or creating a threat to his life or health. 2. No one of the participants in criminal court proceedings shall be subjected to violence or torture or to other kinds of cruel or humiliating treatment, degrading his human dignity.”

²⁴ Art.5(3): “A police officer is prohibited from resorting to torture, violence, other cruel or degrading treatment. A police officer is obliged to prevent actions by which to a citizen are intentionally inflicted pain, physical or moral suffering”. (my translation)

²⁵ Art.4: “Detention is performed according to the principles of legality, justice, presumption of innocence, equality of all citizens before the law, humanity, respect of human dignity, according to the Constitution of the Russian Federation, the principles and rules of international law, and also international treaties of the Russian Federation and shall not be followed by the tortures, other actions aiming at causing physical or moral sufferings by the suspect and person accused of making of crimes who is held in custody[...]”

²⁶ Art.(1): “The criminal-executive legislation of the Russian Federation and the practice of its application are based on the Constitution of the Russian Federation, universally recognized principles and norms of international law and international treaties of the Russian Federation that are an integral part of the legal system of the Russian Federation, including strict observance of guarantees of protection against torture, violence and other cruel or degrading treatment of convicts.” (my translation)

Nevertheless, the concerns about the definition of torture and its criminalization are repeatedly raised during the State's periodic reviews within the UN CAT system.²⁷

1.2.2 Theoretical background

Some practices of governance suggest the existence of an operational code that accepts and, advertently or inadvertently, supports the torturer.²⁸ For instance, the use of a “non-violent psychological pressure through vigorous and extensive interrogation” or a “moderate measure of physical pressure” were institutionalized and rationalized by the “defense of necessity” in 1987 by Israel.²⁹ More recently, the so-called enhanced interrogation techniques exempted of any criminal liability if used in case of ‘necessity’ or ‘self-defense’, were sanctioned under President George W. Bush.³⁰

While these dynamics are explicit in countries where torture is made instrumental to expression of statecraft and social control³¹, there is no lack of evidence of use of torture on a daily basis in peacetime by institutions, which traditionally exercise the state monopoly on legitimized violence (e.g. police) in modern democracies.³²

The study of the effectiveness of preventive mechanisms indicates that what counts for torture prevention are not laws, but practices adopted at a police station. The safeguards during the first hours after arrest, such as the notification of the family, access to lawyer, independent medical examination have strong impact on incidence of torture.³³

Empirical research confirms that the level of human rights violations by the police depends on the leadership, police culture and perceived probability of discovery and punishment for inappropriate behavior.³⁴ One of the most comprehensive studies of police torture, held in 14 biggest cities of the United States, points out several common practices broadly accepted as a part of the established police culture.³⁵ In particular, the study outlines the existence of “code

²⁷ CAT/C/RUS/CO/5, §7

²⁸ Stohl, Lopez, *The State As Terrorist*, 43-44; Gurr, “The Political Origins”, 47-48

²⁹ State of Israel, *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, Report, Jerusalem, October 1987, §3.12, 4.7

³⁰ Memorandum from Jay S. Bybee, Asst. Attorney General, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §2340-2340A*

³¹ Nagan, *The International Law of Torture*, 91

³² HRW, *Confessions at Any Cost*

³³ Carver and Handley, *Does Torture*, 2-3

³⁴ Bennett, *Excessive Force*, 678

³⁵ HRW, *Confessions at Any Cost*

of silence”, i.e. denying all accusations, accompanied by a general police opposition to external review mechanisms. The systematic practices include inefficient work of the commissions created to investigate abuse, biased investigative procedures in favor of the officers involved, lenient or no sanctions against perpetrators.

The flourishing of the noxious police culture is hardly imaginable without the endemic corruption of all the major institutions. Returning to the study of the preventive mechanisms cited above, it is not surprising that the low level of reliance on the confessions and prosecution for torturers significantly reduce the risk of torture.³⁶ Contrarily, a misconduct may be facilitated through the attitudes, traditions and unwritten codes of practice that fuel protective solidarity creating some kind of internal police subculture.³⁷

In an attempt to determine the State’s role in and the level of responsibility for uncontrolled ill-treatment by police, I embrace the stand of Raquel Aldana-Pindell. In her analysis of the ways to curtail impunity for torture, the author points out that impunity is without doubts a result of the States’ failure to “investigate, prosecute and punish right to life and humane treatment violations”³⁸, in other words, when the investigation of the violations is subject to grave omissions or irregularities. The author argues that where corruption or ineptitude contribute to the development of the system oriented on shielding the very perpetrators of crimes, the State bears responsibility for the police impunity. The author introduces the term of “state-sponsored crimes” when the state is deficient in establishing criminal justice systems capable of fulfilling the duty to prosecute.³⁹

Meantime, it is important to take into account the ‘soviet heritage’ of the country. The decades of the legal order in which suspects were practically stripped of all rights, and torture was more a “traditional” way of policing rather than exception⁴⁰ are still alive in the memories of many. Moreover, the utmost importance attributed to the “signals” that the Soviet authorities have learned to adopt as guidelines for actions, rather than referring to departmental instructions, resolutions of plenums and courts, seem still to impact and feed the gap between formal rules and their application in practice.⁴¹

³⁶ Carver and Handley, *Does Torture Prevention Work?*, 2-3

³⁷ Prenzler, *Corruption and Reform*, 15-16

³⁸ Aldana-Pindell, *An Emerging Universality*, 607

³⁹ *Ibid.*, 608, 612

⁴⁰ Волков, ”Диктаторы и законы”, 17

⁴¹ *Ibid.*, 18

The present study will build upon these theoretical and empirical findings in order to demonstrate to what extent the Russian State indirectly implements or tolerates the strategies that immunize torturers from any significant responsibility establishing patterns that contribute to the impunity for torture or ill-treatment. Taking as a reference the arguments of the “state-sponsored crimes” by Aldana-Pindell, the research will aim at demonstrating whether the existing illicit patterns are the basis for *ipso facto* institutionalizing of the culture of torture and ill-treatment as a means of routine policing in the RF. Finally, I will make the conclusions whether the investigative practices adopted by police and other authorities can be considered as “signals” that might lead to further violations. My analysis will build upon the assumption that the State inadvertently supports the torturer when State authorities fail to guarantee the protection from human rights violations, and consequently, these violations turn to assume systematic character.

1.3 Methodology

Essentially, the research question presented above requires exploration of how the principles of international and regional human rights law translate into domestic practice. In particular, the objective of the research is to identify the flaws in the application of existing standards in a particular context.

The law does not exist in a vacuum; the gap between legal texts and development of legal practices have been in the centre of empirical studies since the early years of the last century.⁴² The knowledge of legal rules does not provide us with a comprehensive understanding of how decisions are actually made in practice.⁴³

Since the aim of the present study is not limited to the explanation of the law itself but its functioning in practice, this thesis will borrow the legal sociology concept and consider human rights norms as a part of a social process.⁴⁴ I will adopt an empirical evaluative research approach, which provides the instruments to collocate the study in a given context⁴⁵

⁴² Chakraborty, *Empirical (non-Doctrinal) Research*

⁴³ Burton, *Doing Empirical Research*, 55

⁴⁴ Andreassen, Sano, McInerney-Lankford, *Research methods*, 54

⁴⁵ McConville, Chui, *Research methods*, 32

by employing “an empirical method to draw inferences from observations of phenomena extrinsic to the researcher”.⁴⁶

Empirical legal research comprises both empirical and legal parts,⁴⁷ and requires theoretical research focusing on the relevant primary sources.⁴⁸ Since the present study is limited to the example of one State and given the multitude of instruments on various levels that define the principles of effective investigation, it is all the more important to categorize the principles applicable to the RF. This part of research was performed through the desk study of relevant provisions of the UN CAT and their interpretation, relevant norms laid down by the ECHR and their interpretation by the ECtHR, pertinent resolutions by the High Commissioner for Human Rights, reports by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (further Special Rapporteur), and reports by the CPT, as well as other documents that integrate and further specify the principles of effective investigation.

To integrate the international normative framework, the study proceeds with the analysis of domestic legislation that regulates the investigation of allegations of torture or ill-treatment.

The scope of this analysis was confined to torture as defined by Article 1 of the UN CAT, i.e. torture committed by or with the acquiescence of public officials.

The doctrinal and non-doctrinal approaches are complementary in an empirical legal research, providing internal and external perspectives on the object of study.⁴⁹ Once the internal aspect of law, i.e. standards and principles of the effective investigation, is determined, the research will proceed with the external perspective consisting in a critical evaluation of the practices of domestic investigative authorities adopted when investigating the allegations of torture or ill-treatment by police. The latter constitutes the case, or the unit, of study. The case study strategy appears to be the most suitable for the present research given the objective of the thesis that aims at examining contemporary as opposed to historical events, in addition to the circumscription of the context in which the studied phenomenon is collocated, the lack of means to influence relevant behaviors, and the inadequacy of available official statistics.⁵⁰

⁴⁶ Webley, *Stumbling Blocks*

⁴⁷ Argyrou, *Making the Case*, 96

⁴⁸ McConville, Chui, *Research methods*, 19

⁴⁹ Argyrou, *Making the Case*, 97

⁵⁰ Yin, *Case Study Research*, 7, 13

Borrowing from Bård Andreassen the notion of ‘benchmark’ as the level of a rights indicator that a State is able to achieve⁵¹, I used the categories of standards of effective investigation identified in the first chapter as ‘ideal-types’ for critical assessment of patterns in domestic investigation of torture allegations.

In selection of the legal cases that were a source of the real-life data, the four essential rules for data collection suggested by King and Epstein were adopted as reference.⁵² Particular attention was paid to identifying the court cases that would correspond to the objective of the study, collecting all feasible data possible, and avoiding the selection bias.⁵³ In such a manner, the analysis focused on the cases against the RF in which the ECtHR found the violation of the Articles 3 and 13 of the ECHR. In total, 48 cases have been examined. In all of them, the final judgements were pronounced between January 2013 and December 2017. The time-frame was determined by the reforms of Russian law enforcement agencies that resulted in shifting the authorities responsible for investigating torture allegations against public officers. The period of the last 5 years gave the possibility to analyze cases in which the investigation was carried out by all these public authorities: the prosecutor’s office, the Investigative Committee as a part of the Prosecutor’s Office, and the Investigative Committee as an independent body. Cases in which the suspects were not the law enforcement officials and cases considering incidents that occurred in the Chechen Republic were excluded from this study. The latter cases were excluded due to continued low-level guerrilla attacks when many of the incidents of torture are “justified” on grounds of anti-terrorist operations in the region, which goes beyond the aim of the present research focusing on the “routine” torture by the police in peacetime.

The analysis of domestic practices was performed by replicating the evidence through pattern matching, a technique that links several pieces of information from the same case to some theoretical proposition.⁵⁴

1.4 Thesis structure

⁵¹ Andreassen, Sano, McInerney-Lankford, *Research methods*, 103

⁵² McConville, Chui, *Research methods*, 33

⁵³ Ibid.

⁵⁴ Dunn, *Pattern Matching*, pp.11121-11127

This introductory chapter has outlined the background for this study, its main objectives. It has provided also the normative and theoretical framework of the research, the overall and individual objectives as well as the research design employed in order to achieve them and described the methodology chosen to answer the research question.

Chapter 2 meets the first individual objective, consisting in defining and detailed clarification of essence of standards and principles of effective investigation. As such, it sets out standards that ideally should be applied in order to ensure the effective investigation. Chapter 3 contributes to delineation of the framework for critical analysis by laying down national norms that apply in cases regarding allegations of torture and other ill-treatment and their investigation and eventual prosecution.

Chapter 4 corresponds to the third individual objective of this study, i.e. provides the critical analysis of the practices of investigation endorsed in the Russian domestic context. During the assessment particular attention was dedicated to tracing of possible patterns that might contribute to impunity of perpetrators, flaws in domestic legal order that facilitate the ‘justification’ of torture or ill-treatment, and/or expansion of the corrupt culture within the police and in general in the law enforcement bodies, that might favour the police misconduct, the role of State in maintaining these practices, and the signals sent as a consequence.

Finally, Chapter 5 summarizes the answer to the research question that guided this study, draws the most important conclusions as to the theory on which the research was based and identifies the limitations of the study at hand.

2 STANDARDS AND PRINCIPLES OF EFFECTIVE INVESTIGATION OF TORTURE

A criminal investigation of torture or ill-treatment is an unequivocal obligation under international law⁵⁵.

The UN CAT explicitly obliges states to “proceed to a prompt and impartial investigation” when there is an allegation of the victim of torture (Article 13), or “ex officio”, i.e. on the basis of reasonable ground to believe that the act of torture has been committed (Article 12).

At the same time, the ECHR, while explicitly prohibiting torture and “inhuman or degrading treatment or punishment” in Article 3, does not specify the duty to investigate. Within years the European Court has gradually supplemented the relatively minimalist wording of Article 3 by establishing and subsequently reaffirming them in case law. In such a manner, in Assenov v. Bulgaria (1998), the Court determined that when there are confirmed allegations of ill-treatment by the police, the State’s failure to carry out an effective official investigation into the allegations will constitute a violation of Article 3 read in conjunction with the State’s general duty under Article 1 binding the signatory parties to secure the rights under the other articles⁵⁶, and Article 13. Furthermore, in Aksoy v. Turkey (1996) the ECtHR specified that “the notion of an ‘effective remedy’ entails, in addition to 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 investigatory procedure.”

On all levels, the competent bodies have elaborated a detailed interpretation of the abovementioned provisions that together constitute guidelines for the States in order to comply with their human rights obligations.

These and other elements contributing to the State’s obligation to investigate torture and ill-treatment, as delineated in the reports and analyses by the Special Rapporteur, by European regional instruments and bodies (ECHR, CPT and the ECtHR case law) and The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or

⁵⁵ UNCAT, Artt.12, 13

Degrading Treatment or Punishment (or Istanbul Protocol), are analyzed in the present chapter.

These instruments set forth the set of standards that ideally should be applied in order to ensure the effective investigation. It is clear that not all the recommendations can be and are followed in all the cases. However, the experts stress that it is especially in difficult circumstances when it is important that the governments and authorities involved in the investigation should be held to these standards as much as possible.⁵⁷

2.1 Principles of effective investigation

As said earlier, States have a positive obligation to undertake prompt, impartial and effective investigations into allegations of torture and other ill-treatment and to prosecute and punish perpetrators.

This entails in first place that the State should ensure that “judges, prosecutors, lawyers and the personnel are fully aware of the State party’s international obligations enshrined in the Convention”.⁵⁸

The State also has to adopt “effective legislative, administrative and judicial measures to ensure that all allegations of arrest without warrants, extrajudicial killings, deaths in custody and disappearances are promptly investigated, prosecuted and perpetrators punished.”⁵⁹ In this way, the State would send a clear signal condemning torture and ill-treatment under its jurisdiction.

Any system of discretionary prosecution that might “give the State prosecutors the option of not prosecuting the perpetrators of acts of torture and ill-treatment in which police officers are implicated” is in contrast with the Convention.⁶⁰

The CPT assessed the “effectiveness of action taken when ill-treatment has occurred” as an integral part of its mandate, recognizing the implications that such actions have for the future conduct.⁶¹ In one of its reports the CPT underlines: “[i]f the emergence of information

⁵⁷ Istanbul Protocol, §239

⁵⁸ CAT/C/BIH/CO/1, §11

⁵⁹ CAT/C/NPL/CO/2, §24

⁶⁰ CAT/C/FRA/CO/3, §20

⁶¹ CPT/Inf (2004) 28, §25

indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons [...] will quickly come to believe [...] that they can do so with impunity and in this way [...] will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.”⁶²

In a broad sense, the investigation is intended to establish the facts relating to the alleged torture, aiming to identify the perpetrators and facilitate their prosecution.⁶³

More specifically, the effective investigation aims to⁶⁴:

- a) Clarify the facts and establish the acknowledgement of individual and State responsibility for victims and their families,
- b) Identify the measures to prevent recurrence of the acts of torture or ill-treatment,
- c) Facilitate the prosecution or disciplinary sanctions for those responsible and demonstration of the need for “full reparation and redress from the State”.

In the following sub-sections, I will explore the standards of the effective investigation that transpire from the pertinent legal instruments.

2.1.1 Grounds for Investigation

Human Rights Committee (HRC) reiterated in Blanco Abad v. Spain (1998) that the authorities have the obligation to proceed to an investigation ex officio, “wherever there are reasonable grounds to believe that the acts of torture or ill-treatment have been committed and whatever the origin of suspicion” even if there is no formal complaint of torture under the procedure established by national law. “The reasonable grounds” occur whenever there are complaints of ill-treatment or reports from forensic physician, allegations from witnesses, family members, lawyers, nurses, NGOs or national human rights commissions.⁶⁵

The practice of the ECtHR was different until recently, asserting in Kuznetsov v Ukraine (2003) that an effective official investigation is implied by “arguable claim” raised by an

⁶² Ibid.

⁶³ Istanbul Protocol, §77

⁶⁴ Ibid., §78

⁶⁵ Nowak, *The United Nations*, 431

individual. Yet, in the following judgement Bati and Others v. Turkey (2004) the European Court makes reference to the guidelines of the Istanbul Protocol and specifies, that “[e]ven when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used.”

Taken together, the international practice suggests that in order to initiate an investigation not only a broad spectrum of actors, in addition to the victim, may file the complaint, but also in the absence of such, the ‘sufficiently clear indications’ that the torture may have occurred are sufficient for investigation to be initiated.

2.1.2 Promptness

Prompt investigation is crucial both to protect the victim from possible reoccurrence of such acts and to prevent that the delay in investigating of torture allegations might be rendered instrumental to protect perpetrators since after physical traces of torture and ill-treatment disappear, no physical evidence can be used against perpetrators.⁶⁶ As often, there is no exact definition of the temporal dimension of the “promptness”. However, several attempts to interpret this norm were made.

Manfred Nowak, in his comments to the CAT, suggests the investigation to be initiated within the next hours or days, and as soon as there is a suspicion of a case of torture or ill-treatment.⁶⁷

The Committee against Torture (further *the Committee*) in many cases considered the delay of several months as constituting a violation of Article 12.⁶⁸ In particular, the Committee noted that the three weeks’ time between the victim’s complaint to the judge and the examination of the complaint does not satisfy “the requirement for promptness in examining complaints”.⁶⁹

While Special Rapporteur Juan Mendez recommends that all suspicions and allegations of torture should be investigated and documented within 24 hours.⁷⁰

⁶⁶ Blanco Abad v. Spain (1998), §8.2

⁶⁷ Nowak, *The United Nations*, 434

⁶⁸ See M’Barek v. Tunisia (2000), Halimi-Nedzibi v. Austria (1992), Ristic v. Yugoslavia (2001)

⁶⁹ Blanco Abad v. Spain (1998), §8.7

⁷⁰ A/69/387, §68(a)

The CPT, though reiterating that in order “to be effective, the investigation must also be conducted in a prompt and reasonably expeditious manner”⁷¹, does not specify the requirements of promptness.

Similarly, the ECtHR reiterates that a prompt response by the authorities to allegations of torture or ill-treatment is “essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts”.⁷² Yet the European Court suggests that the time must be “assessed in each case according to its specific features”.⁷³

As we can see, although the importance of the prompt investigation is generally acknowledged, there is no common accord as to the maximum time granted to initiate an investigation. Remarkably, the CAT and the European Court drew their conclusions based on the investigations held and assessing whether the delay of several days or weeks in those particular cases could be considered as violation of the international norms. On the other hand, if we consider establishing the standards to follow, the opinion that the investigation should be initiated as soon as suspicion of torture or ill-treatment arises seems to be the most reasonable one.

2.1.3 Independence and impartiality

Although the Convention’s provisions do not establish that the investigation should be pursued by an independent body, Article 12 requires the investigation to be impartial, i.e. “serious, effective and not biased”.⁷⁴ Following the interpretation of the norm, the investigation should be entrusted to an external monitoring body, independent from the unit in which the alleged act of torture took place.⁷⁵ The experts further suggest that whenever there is a suspect of a possible bias or when the level of expertise is insufficient, or due to the importance of the matter or suspect of the existence of pattern of abuse, the investigation should be entrusted to an independent commission of inquiry or similar procedure.⁷⁶

⁷¹ CPT/Inf (2004) 28, §35

⁷² *Members of the Gldani Congregation of Jehovah’s Witnesses v. Georgia* (2007), §97

⁷³ See *mutatis mutandis* *Scott v. Spain* (1996), §74

⁷⁴ Nowak, *The United Nations*, 435

⁷⁵ Nowak, *The United Nations*, p.436

⁷⁶ UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) §11; Istanbul Protocol (2004), §82

In order to ensure impartial investigation, the Committee recommended to suspend or reassign public officials accused of torture.⁷⁷ It is recommended that persons accused of torture or ill-treatment should be removed from the position of power over complainants, witnesses, their families and those, conducting investigation.⁷⁸

As observed by the CPT, it is not rare that law enforcement officials conduct the operational investigation.⁷⁹ It is indisputable that in these situations there is a high risk that the investigative procedures might be biased. Therefore, the emphasis is made on the independence and no hierarchical connections between the investigators and the suspected perpetrators or the agency they serve.⁸⁰

In other cases, the ECtHR recognized that even the supervision of the independent authority is not a sufficient safeguard to guarantee the independence of the investigation.⁸¹ Based on the reports from country visits, the CPT strongly encourages the creation of “fully-fledged independent investigative body”, entitled with power to instigate disciplinary proceedings.⁸²

The impartiality and independence of judicial authorities, as well as other experts involved, is one of the cornerstones of effective investigation.⁸³ The State bears the duty to ensure the independence of the judges as safeguards of the right not to be subjected to torture and other ill-treatment. The State has also the obligation to take measures to prevent any unlawful interference or any kind of harassment, intimidation or assaults on judges, as well as take effective measures for combating corruption in the administration of justice.⁸⁴

Furthermore, the independence of forensic personnel involved in the investigation of torture or ill-treatment is decisive for the latter to be effective.⁸⁵ By contrast, the lack of independence and impartiality of many forensic medical services and health professionals is a “key obstacle to combatting impunity for perpetrators and ensuring reparations for victims.”⁸⁶

⁷⁷ CAT/C/NPL/CO/2, §24

⁷⁸ CAT/C/CR/30/5, §7(c); *Yaman v Turkey* (2004), §55; Istanbul Protocol, §80

⁷⁹ CPT/Inf (2004) 28, §32

⁸⁰ Istanbul Protocol (2004), §79; CommDH(2009)4, §63–66; CPT/Inf (2004) 28, §32

⁸¹ *Hugh Jordan v. UK* (2001), §120; *McKerr v. UK* (2001), §128

⁸² CPT/Inf (2004) 28, §38

⁸³ CAT/C/BIH/CO/1, §11

⁸⁴ A/HRC/RES/13/19, §12

⁸⁵ CAT/C/75, §220(d); A/59/44, §213 (j); A/69/387 §34

⁸⁶ A/69/387, §62

At all times, medical experts should attain the established standards and procedures and the highest ethical standards.⁸⁷ These entail the conduct of examinations outside the presence of security agents or other government officials.⁸⁸

The medical personnel should enjoy “formal and *de facto* independence”, should be provided with specialized training and have a sufficiently broad mandate, otherwise, the system will have a reverse effect on the scope of combatting and preventing torture.⁸⁹

So, the independence and impartiality encompass the involvement in investigative process of specifically trained, unbiased experts, who enjoy independence from possible disruptive influence of those allegedly involved in violations and have a broad mandate necessary to pursue all necessary actions. Remarkably, should there be a suspect of the existence of pattern of abuse, the appointment of an independent body to investigate the allegations is recommended.

2.1.4 Competence

The investigator (investigative authority or commission of inquiry), should have a wide range of powers that permit to obtain all the necessary information, issue a public report, conduct on-site visits, receive evidence from witnesses and organizations located outside the country, and have the possibility to receive the opinion of foreign experts.⁹⁰ Persons conducting the investigation should “have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify.”⁹¹

Entrusting the investigation of torture or ill-treatment to the bodies with limited competence that are confined to determine the facts directly causative of the death or injuries and not extending the inquiry into the broader circumstances, bars the possibility to identify or prosecute the offenders.⁹²

⁸⁷ A/RES/37/194, principle 2

⁸⁸ Istanbul Protocol (2004), §83

⁸⁹ Akkoc v. Turkey(2000), §55

⁹⁰ Istanbul Protocol (2004), §107-119

⁹¹ Ibid., §80

⁹² Hugh Jordan v. UK (2001), §125-130

The CPT has criticized as unacceptable, in course of the investigation of cases of ill-treatment of detained persons, the immunity granted to the members of special and rapid intervention forces against disclosing their identity.⁹³

Given that in the course of investigation various actors might be involved to help to reveal the truth, the competence entails also expertise in particular fields, such as law, medicine and other appropriate fields that might be needed for evaluating, weighing evidence and exercising sound judgement.⁹⁴ It is claimed that a very basic level of expertise, for example, in forensic services, or their inexistence, may result in unaccountability for torture perpetrators.⁹⁵

2.1.5 Thoroughness

The investigation should be thorough and equal weight should be given to both accusation and defense during the investigation⁹⁶, any report of torture being a serious matter for thorough consideration of the merits before the allegations could be determined as defamatory.⁹⁷

As the ECtHR has concluded, an obligation to investigate is not an obligation of result, but of “means”, meaning that not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events. 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.⁹⁸ The investigative body should take all “reasonable steps” to secure all relevant evidence. Any deficiency in the investigation, which undermines the possibility to establish the cause of injuries or the identity of the persons responsible, will risk, according the Court, “falling foul of this standard.”⁹⁹

Whenever the judge or the prosecutor become aware or suspect that ill-treatment occurred, they have “the duty to act” requesting a forensic medical examination of the person concerned

⁹³ CPT/Inf (2006) 22, §44

⁹⁴ Istanbul Protocol, §3(b)

⁹⁵ A/69/387, §35

⁹⁶ M’Barek v. Tunisia (2000), §11.10

⁹⁷ CAT/C/31/D/189/2001, §7.3

⁹⁸ Barabanshchikov v. Russia (2009), §54

⁹⁹ Ibid., §54

and taking all the measures for the eventual allegation to be duly investigated.¹⁰⁰ The CPT recommends to take disciplinary actions against any prosecutor or judge who do not respect this obligation.¹⁰¹

Since the torture does not always leave visible signs, the psychological appraisal together with physical evaluation constitute a cornerstone to verifying victim's allegations of torture.¹⁰²

Recognizing that some allegations of the ill-treatment do not lead to constituting criminal proceedings, the CPT underlines the necessity of scrutiny of any evidence of ill-treatment by public officials that may emerge in the course of civil proceedings, including an independent review, when necessary.¹⁰³

In such a way, the principle of thoroughness imposes an obligation on public officials to react to the signs of torture or ill-treatment by taking positive actions. It implies that in the course of investigation, a broad spectrum of investigative actions should be performed with the aim to 'establish the cause of injuries' and 'identify the persons responsible'. Any deficiency being considered as violating the principle of effective investigation. Lastly, of extreme importance is the equal weight to be attributed during the investigation to both accusation and defense.

2.1.6 Victim's involvement and transparency

Alleged victims of torture as well as their legal representatives should be informed and have access to all the information about investigation and present other evidence¹⁰⁴ among which the progress of the investigation, key hearings and prosecution of the case.¹⁰⁵ The Special Rapporteur recommends the participation of the victim at all phases of investigation as a presupposition for the effective investigation of allegations of torture or other ill-treatment.¹⁰⁶ In the interpretation by the Committee, this obligation is imposed on States by Articles 12 and 13 of the Convention.¹⁰⁷

¹⁰⁰ CPT/Inf (2006) 22, §43

¹⁰¹ Ibid.

¹⁰² Ibid., §104

¹⁰³ CPT/Inf (2004) 28, §40

¹⁰⁴ Istanbul Protocol, §81

¹⁰⁵ Ibid., §89

¹⁰⁶ A/69/387, §68 (a)

¹⁰⁷ Danilo Dimitrijevic v. Serbia and Montenegro (2005), §7.3

The Istanbul Protocol poses interests of victims in the center of the investigative process, acknowledging the sensitiveness of this particular kind of crime and the trauma that it may cause. The document suggests series of precautions that should be taken on all stages of the investigation stressing the importance of accommodating victim's schedule and wishes, considering the context that affects the legal standards of the investigation and the necessary safeguards and precautions to assure the safety of alleged victims and witnesses.¹⁰⁸

The State also bears the responsibility for the protection of alleged victims, witnesses and their families from violence, threats of violence and intimidation.¹⁰⁹

The analysis of international standards suggests that there are some procedural impediments to the victim's effective participation in the investigative process due to the fact that the forensic examination can be carried out exclusively upon the order by an investigative or judicial authority, which, in case of a state-sponsored torture, might be very much reluctant to do so.¹¹⁰ The interpretational development of this rule further reiterated that the victim must have an unrestricted access to the forensic examination. For example, the Istanbul Protocol underlines the importance of the right of the detainees or their lawyers or relatives to request a medical evaluation to seek evidence of torture or ill-treatment.¹¹¹ Manfred Nowak recommends that the "[a]ccess to forensic expertise should not be subject to prior authorization by an investigative authority".¹¹² While Juan Mendez, adds that "the right to request an independent medical evaluation should also extend to members of the detainee's family and other bodies designated to receive complaints" as one of the implications for the effective forensic evaluation.¹¹³

As we have seen from the HRW research in the USA, the attempts of public officials to dissuade the victims to file complaint appear to be one of the most spread obstacles to the justice pursuance. The international instruments pose on the States the obligation "to ensure victim and witness protection" against possible reprisals, ill-treatment or intimidation.¹¹⁴

However, the most efficient way to do so is to demonstrate the full commitment of the State

¹⁰⁸ Istanbul Protocol, §85-96

¹⁰⁹ Nowak, *The United Nations*, 450

¹¹⁰ A/69/387, §33

¹¹¹ Istanbul Protocol (2004), §123

¹¹² A/62/221, §53(b); A/69/387, §39

¹¹³ A/69/387, §39

¹¹⁴ UNCAT, Art. 13; CPT/Inf (2004) 28, §39

authorities to combating impunity by imposing adequate sanctions on those found guilty. The importance of this method as a deterrent is considered in the following subchapter.

2.1.7 Adequate punishment

The Special Rapporteur on Torture highlighted, “torture occurs because national legal frameworks are deficient [...] Torture persists because national criminal systems lack the essential procedural safeguards to prevent its occurrence, to effectively investigate allegations and to bring perpetrators to justice.”¹¹⁵

The importance of the State’s duty to bring to justice the perpetrators of torture “as an integral part of the victims’ right to reparation” has been reiterated time and again.¹¹⁶ The independent expert of the Commission on Human Rights on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, stated that “violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations”.¹¹⁷ Special Rapporteur Manfred Nowak observed that in some countries reparations have been used as a substitute for prosecutions, i.e. the victim was granted a compensation, the case closed and no further criminal proceedings pursued.¹¹⁸ He underlined that lacking prosecutions contribute to general impunity for torture and therefore contribute to its persistence.¹¹⁹ He has also accentuated that “[v]ictims of torture are not primarily interested in monetary compensation [...] A full and impartial investigation of the truth and the recognition of the facts, together with an apology by those individuals and authorities responsible, often provide more satisfaction to the victim than the payment of money.”¹²⁰

Whilst the ECtHR has emphasized that the notion of “effective remedy” entails “in addition to the payment of compensation [...] a thorough and effective investigation.”¹²¹ When the

¹¹⁵ A/65/273, §35

¹¹⁶ A/56/156, §28

¹¹⁷ E/CN.4/2000/62, annex, §4

¹¹⁸ A/65/273, §60

¹¹⁹ Ibid., §41

¹²⁰ A/HRC/4/33, §64

¹²¹ *Bati and Others v. Turkey* (2004), §133

misconduct does not constitute a criminal case, the disciplinary proceedings provide an additional type of redress and deliver a clear message of zero tolerance on all levels.¹²²

In such a wise, a thorough and effective investigation not only serves to the purposes of restoration of the rule of law and as a deterrent to crime, but also constitutes a core component of victim's redress and effective remedy.

¹²² CPT/Inf (2004) 28, §37, 42

3 NATIONAL LEGAL FRAMEWORK

3.1 Definition of torture

Although the Constitution of the RF, accompanied by a number of other legislative acts¹²³, guarantees that “No one shall be subject to torture, violence or other severe or humiliating treatment or punishment”¹²⁴, none of the articles of the Criminal Code (RFCC) fully reflect the definition of torture given by the UN CAT.

Article 117 (Torture) of the RFCC criminalizes “The infliction of physical or mental suffering by means of systematic beating or by any other violent actions”, that is punishable by imprisonment for up to three years.¹²⁵

The footnote to Article 117 states “Torture in this Article and in other Articles of this Code shall mean the infliction of physical or mental suffering for the purpose of compelling to give evidence or to commit other actions against a person's will, as well as for the purpose of punishing, or for other purposes.”¹²⁶

Compared to the definition of torture provided by the UN CAT, there are several deficiencies in the definition of the crime of torture given in Article 117. It does not refer to the acts of torture or ill-treatment aiming at coercing a third person, or, to the involvement of a public official or person acting in an official capacity in inflicting, instigating, consenting or acquiescing to torture. This last provision being the distinctive feature and a primary purpose of the international law on prohibition of torture or ill-treatment contrarily to the national law that criminalizes crimes committed by normal citizens.

Beyond Article 117, there are two more provisions in the RFCC that address conduct that may be classified as acts of torture.

¹²³ Federal Law of RF “On police”, Art.5(3), RF Detention of Suspects and Accused Persons Act, Art.21, RF Code for the Execution of Criminal Penalties, Art.1

¹²⁴ Constitution of RF, Art.21(2)

¹²⁵ RFCC, Art.117

¹²⁶ Ibid., Art.117(Note)

One of them, more specifically applied to the crimes committed by public officials, is Article 286(2) – Exceeding official powers by a person holding a government post of the RF or a government post of a subject of the RF, or by the head of a local self-government body.¹²⁷

Another provision, Article 302(2) – Compulsion to Give Evidence, imposes the restraint or deprivation of liberty for a term up to three years or a compulsory labor for the same term in case of “Compulsion to give evidence used with regard to a subject, defendant, victim, or witness, or coercion of an expert or a specialist to make a report or to give evidence through the application of threats, blackmail, or other illegal actions, by an investigator or a person conducting inquests, as well as by another person with the knowledge or tacit consent of the investigator or the person conducting inquests.”¹²⁸

None of these provisions establishes an autonomous offence of torture, the fact, mentioned by the Committee against Torture in its concluding observations.¹²⁹ On the contrary, torture is considered only as an aggravating circumstance in all of them.

Thus, according to Article 117, the infliction of physical or mental suffering aggravated by the use of torment carries a sentence from three to seven years. If the violations enlisted in Article 286 are committed “with use of violence or with the threat of its use, with the use of arms or special means or with the infliction of grave consequences”, the punishment foreseen is the deprivation of liberty for three to ten years, “with disqualification from holding specified offices or engaging in specified activities for a term of up to three years”.¹³⁰

At last, if the crime of torture, as it is provided for by Article 302, is committed with the use of “violence, mockery, or torture”, it shall be punishable for term of two to eight years.¹³¹

The Committee mentioned in earlier occasions that considering torture only as an aggravating circumstance does not reflect the conditions established by the Article 1 of the Convention.¹³²

The concern expressed by the Committee lays in the possibility of risk that erroneous definitions, that assimilate the crime of torture to other less serious offences might result “in

¹²⁷ RFCC, Art.286

¹²⁸ Ibid., Art 302(1)

¹²⁹ CAT/C/RUS/CO/5, §7

¹³⁰ RFCC, Art.286(3)

¹³¹ RFCC, Art.302

¹³² CAT/C/COL/CO/4, §10

serious under-recording of cases of torture and entail impunity for the said crimes”.¹³³ Domestic courts in this way consider the crime of torture through the prism of other crimes that might be minor from the point of view of the international human rights law, but have found explicit definition in the RFCC. This, in turn, causes the lack of official statistics that would allow a proper assessment of the actual incidence of torture.

The official statistics of the application of articles 117, 286, 302 of the RFCC presented with the latest State Report submitted by the RF to the Committee¹³⁴, demonstrate that there is no possibility to distinguish between the number of crimes identified under these articles that would imply the accusation against public officials, or the number of public officials sentenced for the violation of the articles considered.

Likewise, erroneous definition of torture or ill-treatment might lead to a different method of investigation and punishment, which would contradict the provisions of Articles 12, 13 and 15 of the Convention.

The analysis provided by REDRESS suggests that also Article 302, extorting confessions, does only apply to police officers if they conduct investigations.¹³⁵ The data indicated in the above mentioned State Report (0 cases of alleged violation of the Article in 2016) proves that this Article is rarely used.¹³⁶

On the inquiry of the Committee regarding the absence of a separate article criminalizing torture, RF acknowledges that “the Criminal Code does not contain a separate article establishing criminal liability for acts of torture, as foreseen by the Convention” but maintains that “such acts may be captured by various articles of the Special Section of the Criminal Code, which, in turn, fully covers the notion of torture as defined in Article 1 of the Convention.”¹³⁷ Considering that the question of the adopting an article defining torture in accordance with international standards is repeatedly raised during each periodic review¹³⁸, the reluctance of the State to follow recommendations demonstrates its unwillingness to introduce any substantial changes to the definition of this crime.

¹³³ Ibid.

¹³⁴ CAT/C/RUS/6

¹³⁵ REDRESS, *A Survey of Law*, 8

¹³⁶ CAT/C/RUS/6, Attachment 1

¹³⁷ Ibid. §3

¹³⁸ CAT/C/RUS/QPR/6, §1; CAT/C/RUS/CO/5, §7; CAT/C/RUS/CO/4, §7; CAT/C/CR/28/4, §6(a)

3.2 Investigative authority

A victim of torture or ill-treatment can file a complaint against the actions (the lack of action) or communicate the crime committed by public officials to the authorized body, according to the Russian legal framework.

Up until 2007, the responsibility for the investigations of misconduct laid with the Prosecutor's Office. Among other functions, the Prosecutor's Office held the responsibility for the supervision of the execution of laws by bodies that carry out operational-search activity, inquiry and preliminary investigation, carried out independent investigation, supervision over investigation, including the investigation carried out by prosecutorial bodies, and prosecution in court.¹³⁹ In this way, prosecutorial authorities had a dual responsibility. As part of their responsibility for criminal prosecution, prosecutors were responsible for conducting an investigation into crimes attributed to their competence by the criminal procedural legislation of the RF¹⁴⁰ and act on behalf of the State as public prosecutors in court, including in cases investigated by other organs, for example police.¹⁴¹ In this way, exposing for example the use of torture or ill-treatment by the police during the investigation into case and collecting material for the trial, the prosecutor's office had to challenge the admissibility of evidence supposed to support the accusation during the trial.

After a number of denunciations¹⁴², in 2007, Russia launched a reform aimed at amendment of the preliminary inquiry process that resulted in establishment of the Investigative Committee within the Prosecutor's Office.¹⁴³ The above functions were divided between the Investigative Committee and the Prosecutor's Office. The initiation of criminal cases and direct participation in preliminary investigation were seized from the powers of the prosecutor.¹⁴⁴ The public prosecutor now had the right to give instructions about a direction of investigation of criminal cases only to the inquirer, instead of the investigator.¹⁴⁵ Prosecutors lost the authority to quash the investigator's refusal to initiate criminal proceedings¹⁴⁶ which

¹³⁹ RF Federal Law N 2202-1, Art.1

¹⁴⁰ RF Federal Law N 2202-1, red. of 20.11.2005, Art.31,; RFCCP, red. of 30.01.2005, Art.151,

¹⁴¹ RF Federal Law N 2202-1, red. of 20.11.2005, Artt.27, 31, 35; RFCCP, red. of 30.01.2005, Art 37(2-4)

¹⁴² Russian NGO Shadow 2001 to 2005, §12.43 – 12.45

¹⁴³ RF Federal Law N 2202-1, red. of 07.09.2007, Art.11,

¹⁴⁴ Ibid., Art.20.1 (1),

¹⁴⁵ RFCCP, red. of 07.07.2007, Art.37 (§2.2 – 6),

¹⁴⁶ RFCCP, red. of 30.01.2005 and 07.09.2007, Art.37 §10

led to a significant weakening of prosecutorial oversight in the investigation of cases relating especially to the excess of authority.

In 2011 the Investigative Committee (IC) began to operate as an independent public authority in the sphere of criminal justice.¹⁴⁷ At the same time, the Prosecutor's office was granted new powers to quash the investigator's refusals to initiate criminal proceedings and to require further investigative checks.¹⁴⁸ The IC became independent from the Prosecutor's Office and was presided by the President of RF.¹⁴⁹ This organ has an authority over prejudicial inquiries and inquests into allegations of crimes committed, among others, by persons with special legal status, which include law enforcement officers, judges, and other public officials.¹⁵⁰

However, the reforms had not eliminated the conflict of interests. The IC officials investigate ordinary criminal offences, such as homicide, rape, etc. as well as misconduct of the law enforcement officials, including police officers who provide operational support for the investigation of ordinary crimes. It means that in case of misconduct, the investigator of the IC has to investigate a case against a colleague.

In 2012, a separate division within the IC was established to focus exclusively on investigating offences committed by this category of offenders.¹⁵¹ According to the State Report to the Committee against Torture, the special unit employs "10 full-time staff members" that review complaints of offences and investigate criminal proceedings. Remarkably, there is no territorial limits within the RF to the conduct of investigative work by the unit.¹⁵² At the same time, the unit does not dispose of specially allocated funds, which should significantly reduce its operative capacity. The alternative report to the Committee by the Russian NGO suggests that the special department, operating in several regions, employs three persons.¹⁵³ Obviously, the capacity of such an outnumbered unit is extremely limited.

Apparently, the reform intended to lead to the establishment of the independent investigative body, as encouraged by the CPT. Although the Russian NGO prizes the expertise and

¹⁴⁷ RF Federal Law No.403-FZ

¹⁴⁸ RFCCP, Art.146 (4)

¹⁴⁹ RF Federal Law No.403-FZ, Art.1, §3

¹⁵⁰ RFCCP, Art.151(2)

¹⁵¹ Приказ Следственный Комитет Российской Федерации N.20

¹⁵² CAT/C/RUS/6, §247

¹⁵³ "Committee Against Torture", *Alternative Report 2012 – 2018*, §69

professionalism of the members of these units¹⁵⁴, the lack of financial and human resources make such an organ merely nominal.

3.3 Filing a complaint and investigation

According to the Code of Criminal Procedure of RF (RFCCP), an inquirer, inquiry body, investigator and the head of the investigative body¹⁵⁵ have the obligation to accept a report of crime, verbal or written.¹⁵⁶ The information about the crime committed should be checked and within three days the decision should be taken.¹⁵⁷

Upon justified petition, it is admissible to consider the complaint within ten days and, in case it is necessary to carry out documentary or audit inspections, the prosecutor can extend this term up to thirty days, “with an obligatory indication of the specific, factual circumstances” which constitute the grounds for such extension.¹⁵⁸

The inquiry body has at its disposal a number of actions, which include documentary checks, audits, examinations of objects, corpses, and operative search measures. The inquirer can also attract specialists to participate in such checks and examinations.¹⁵⁹

The decision of the inquiry should be communicated to the applicant¹⁶⁰ and his right to appeal should be explained to him.¹⁶¹ This may be partially or completely satisfaction of the complaint, or the refusal to satisfy it.¹⁶² The institution of the criminal case can be refused in case of absence of the event of crime or the elements of crime.¹⁶³

The refusal to institute criminal case or to terminate a criminal case, as well as other decisions, actions or inactions by the inquirer or investigator can be appealed to the

¹⁵⁴ Ibid., §68

¹⁵⁵ RFCCP, Art.144(1)

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid., Art.144(3)

¹⁵⁹ Ibid, Art.144 (1)

¹⁶⁰ Ibid., Art.144 (4)

¹⁶¹ Ibid., Art.145(2)

¹⁶² Ibid., Art.145(1)

¹⁶³ Ibid., Art.24(1)

prosecutor or to the court.¹⁶⁴ The law does not provide a time-frame within which the decision should be appealed.

When refusing to open a criminal case, the public prosecutor, the investigator or the body of inquiry “shall be obliged” to consider the question of institution of a criminal case “for a deliberately false denunciation” with respect to the applicant.¹⁶⁵

If the prosecutor declares unlawful or without ground the decision to refuse to open a criminal case, the prosecutor shall revoke the decision of refusal and institute criminal proceedings in the manner established by the legislation or return the materials for additional verification, fixing the time of verification and giving his instructions as to the actions to be performed.¹⁶⁶

In case when the decision not to open a criminal case is considered by the court, the judge, having recognized it illegal or ungrounded, shall pass the resolution, forward it for execution to the public prosecutor and notify to this effect the applicant.¹⁶⁷ Notably, the law does not provide for the inquiry into unlawful decisions not to open criminal cases.

If the complaint is upheld, a preliminary inquisition is launched. Depending on the crime under consideration, it can have the form of a preliminary investigation or an enquiry.¹⁶⁸ So, in case of alleged violation of the Article 117, an enquiry shall be carried out.¹⁶⁹ While on the crimes provided for by the Articles 286 and 302, as well as on crimes committed by public officials, a preliminary investigation should be carried out by the IC.¹⁷⁰

According to the RFCCP, “[t]he preliminary investigation on a criminal case shall be completed within two months from the day of institution of the criminal case”.¹⁷¹ This term does not include the periods when the preliminary investigation may be suspended and in some cases may be extended up to twelve months.¹⁷² Any extension of the term of investigation must be communicated to the accused and his defense counsel, to the victim and his representative.¹⁷³ The preliminary investigation should be conducted in a way to have the

¹⁶⁴ Ibid., Art.124

¹⁶⁵ Ibid, Artt.125, 148(2)

¹⁶⁶ Ibid, Art.148(6)

¹⁶⁷ Ibid, Art.148(7)

¹⁶⁸ Ibid., Art.150

¹⁶⁹ Ibid, Art.150(3)

¹⁷⁰ Ibid, Art.151(2)

¹⁷¹ Ibid., Art.162(1)

¹⁷² Ibid., Art.162 (2, 5)

¹⁷³ Ibid., Art.162 (8)

maximum possible access to the necessary information and includes a vast spectrum of investigative actions that include examination of the scene of accident and other premises, objects and documents that might reveal the traces of crime and elucidate other important circumstances¹⁷⁴; carry out external examination of the corpse, or involve a forensic medical expert or other experts if necessary¹⁷⁵; inspect the suspect, the accused and the victim¹⁷⁶; reproduce the actions and the situation or other circumstances of the event¹⁷⁷; in case of contradictions in the testimonies collected, the investigator can carry out an "identification line-up"¹⁷⁸; a person, object or corpse can be presented for an identification to the witness, to the victim, to the suspect or to the accused¹⁷⁹; any available evidence can be verified on the spot¹⁸⁰.

A preliminary investigation can be suspended if the alleged perpetrator has not been identified.¹⁸¹ In this case, the investigator shall take measures for "establishing the person to be involved in the capacity of the suspect or of the accused".¹⁸² At this stage no investigative actions are admissible.¹⁸³ A preliminary investigation can be resumed when the grounds for its suspension disappear, or the decision was declared unlawful or ill founded by the prosecutor. The refusal can also be cancelled by a chief of the investigative authority.¹⁸⁴

Should there be sufficient proof for compiling the conclusion of guilt, the investigator will notify about it all interested parties and the accused and his counsel have the right to get acquainted with the materials of the case. They cannot be restricted in the time necessary to familiarize with the materials¹⁸⁵. After, the case materials should be forwarded to the prosecutor.¹⁸⁶

¹⁷⁴ Ibid., Art.176

¹⁷⁵ Ibid., Art.178

¹⁷⁶ Ibid., Art.179

¹⁷⁷ Ibid., Art.181

¹⁷⁸ Ibid., Art.192

¹⁷⁹ Ibid., Art.193

¹⁸⁰ Ibid., Art.194

¹⁸¹ Ibid., Art.208

¹⁸² Ibid., Art.209 (2)

¹⁸³ Ibid., Art.209 (3)

¹⁸⁴ Ibid., Art. 211

¹⁸⁵ Ibid., Art.217 (3)

¹⁸⁶ Ibid., Art.220 (6)

If the preliminary investigation establishes the absence of the event of crime, or the absence of the elements of crime in the actions of the suspect, or if the deadlines for the criminal prosecution have expired, the criminal case can be terminated.¹⁸⁷

It appears that the RFCCP outlines a thorough procedure to be followed in case of crime allegation. It guarantees immediate reaction to the allegations of crime, rigorously defines time frames and actions to be performed on each stage of inquiry or investigation. It is important to notice that the inquiry, which institutes the initial stage of consideration of the information about crime and aims at checking this information, provides the inquirer with a limited spectrum of investigative actions as opposed to the investigation. The latter emerges as a more appropriate for the allegations of serious crimes such as torture or ill-treatment.

3.4 Judicial review

The victim can appeal the decision not to open criminal proceedings in the court.¹⁸⁸ The court has to decide on the complaint and check the legality and substantiation of the actions, or lack of actions, and communicate the decision within five days since the complaint was filed. The judge may recognize that the action or the decision of the competent organs is illegal or unsubstantiated and on the liability to eliminate the committed violation, or to leave a complaint without satisfaction.¹⁸⁹ The decision of the court can also be appealed against in the court of higher jurisdiction.¹⁹⁰

If, by the time of the judicial appeal of the investigator's decision, the criminal case against the applicant has been referred to the court, the judicial authority that considers the complaint under Article 125 is in a contradictory situation. The RFCCP contains the norm, according to which "The judicial proceedings shall be conducted only with respect to the defendant and only on the charge brought against him."¹⁹¹ This means that the court does not have the right to go beyond the consideration of a particular case, while the verification of allegation of ill-treatment is already a proceeding on the application concerning a different crime.

¹⁸⁷ Ibid., Art.212 (1)

¹⁸⁸ Ibid., Art.125

¹⁸⁹ Ibid.

¹⁹⁰ Ibid., Art.127

¹⁹¹ Ibid., Art.252(1)

The RF Supreme Court provides for the possibility to file a complaint in an event when the subject matter of this complaint cannot be the subject of consideration of the court in which the criminal case is considered¹⁹², i.e. in situations when the defendant claims the use of torture, since it is clear that we consider different crimes, the use of torture and the crime in which the defendant is accused. The Supreme Court specifies, that judges are advised to find out whether there is no decision to satisfy the complaint under consideration.¹⁹³ If the court finds that the prosecutor or the head of the investigative body have already satisfied the complaint with the same arguments, the court will issue a resolution refusing to accept the complaint for consideration.

When considering a criminal case, the court must also evaluate all evidence collected in the case. The court must evaluate each evidence in terms of relevance, admissibility and reliability.¹⁹⁴ If a participant in a criminal procedure claims, for example, that he gave self-incriminating statements under physical or psychological pressure, the court must verify the truth of this statement in order to assess the testimony of that participant in the process from the point of view of the admissibility of the evidence.¹⁹⁵

Remarkably, the court does not set itself the task of assessing the quality of verification that the investigating authorities conducted on the applicant's complaints about torture. It assesses the presence or absence of evidence of the use of torture, since the admissibility of certain evidence depends, in the first place, on the confession of the defendant.

3.5 The rights of the victims

Victims of crime enjoy a wide spectrum of rights, including the right to take part, with the permission of the investigator, in the investigative actions, to get acquainted with the protocols on the investigative actions and to comment on them, to get acquainted with all materials of the criminal case after preliminary investigation is completed, to make copies of the criminal case materials, to receive copies of the decision on the institution of the criminal case, on recognizing him as a victim or the refusal in this, etc.¹⁹⁶ These rights are recognized

¹⁹² Decision of the Plenum of the RF Supreme Court No.1 (2009), point9

¹⁹³ Ibid., point 8

¹⁹⁴ RFCCP, Art. 76, 88

¹⁹⁵ Ibid., Art.88(2)

¹⁹⁶ Ibid., Art.42

to the victim of the crime “by the resolution of the inquirer, investigator, prosecutor, or of the court”¹⁹⁷, which is not automatically attributed to the person who filed the complaint.

The victims, witnesses and other participants of criminal proceedings, their close relatives or near persons shall be put under protection, if there is “sufficient data” testifying that they have are under threat.¹⁹⁸ Notably, such protection may be provided only to participants of criminal proceedings. No state protection is provided during pre-investigative checks into crime reports.

The lack of victim status is not the only limitation to the right to access the materials of investigation. Materials on the cases investigated by the IC, “are provided for familiarization in cases and in order provided for by the legislation of the Russian Federation.”¹⁹⁹ Hence, an investigator was given the possibility to restrict the possibilities of a person to get familiarized with the materials of investigation on the grounds of the protection of a state secret.²⁰⁰ In this connection the RF Constitutional Court in number of rulings²⁰¹ has confirmed the right of appealing in court decisions and actions (or inaction) of public authorities and their officials, and the obligation of public authorities and their officials to provide to everyone the opportunity to get acquainted with documents and materials directly which would allow citizens to defend their interests in a dispute with any bodies and officials.²⁰²

Despite the guarantees of access to investigation enhanced by the Constitutional Court, the NGOs attribute to the prosecution bodies frequent violation of the abovementioned legal guarantees as a consequence of untimely notification about decisions taken with respect to complaints, or failure to notify them at all, depriving victims of the possibility to appeal illegal decisions, concealing the violations of the law.²⁰³

As we will see in the next Chapter, despite a complete range of provisions regulating and securing the legal basis for investigation of crimes allegations, investigators rarely institute criminal proceedings into torture cases immediately. Often, pre-investigative checks into

¹⁹⁷ Ibid., Art.42 §1

¹⁹⁸ Ibid., Art.11(3)

¹⁹⁹ RF Federal Law N. 403 – FL, red. 31.12.2017, Art.6

²⁰⁰ Decision of the RF Constitutional Court, No.27-P

²⁰¹ Decisions of the RF Constitutional Court, N. 3-P, N. 18-P, N.430-0, and No.27-P

²⁰² Decision of the RF Constitutional Court, No.27-P, §2

²⁰³ Russian NGO Shadow Report from 2001 to 2005, §13.42

complaints may take months or even years, during which victims and witnesses of torture are not entitled to any kind of state protection.

4 PRACTICES OF INVESTIGATION BY RUSSIAN DOMESTIC AUTHORITIES: CRITICAL ANALYSIS OF JUDGEMENTS BY THE ECtHR

The following assessment of the ECtHR rulings covers the period of last 5 years. It includes cases handled by three investigative bodies, which in that period had the authority to investigate the allegations of torture or ill-treatment, i.e. the Prosecutor's Office, the Investigative Committee as a department within the Prosecutor's Office, and the Investigative Committee as an independent body.

Out of 48 cases examined, in 27 the investigation was carried out by the Prosecutor's office, 6 by the Investigative Committee as a department of the Prosecutor's office, and 5 by the Investigative committee as an independent body.

As the criteria for assessment served the seven key elements for the effective investigation that were identified in Chapter 2, i.e. grounds for investigation, promptness, independence and impartiality, competence of the investigative authority, thoroughness, victim's involvement and transparency, and adequate punishment.

4.1 Grounds for investigation

In previous two Chapters, we saw that, according to international standards, the grounds for investigation in case of torture or ill-treatment would be either formal allegations, an arguable claim, or a forensic medical report. Even when there is no formal complaint, sufficiently clear indications of ill-treatment (in the ECtHR practice), or even just reasonable grounds to believe that the fact of ill-treatment took place, whatever origin of suspicions (according to the UN standards) would constitute grounds for investigation.

Russian domestic legislation establishes the standard of "written or oral" complaint.

Although the analysis shows that the domestic authorities promptly react to the allegations of ill-treatment by initiating a pre-investigative inquiry, the common practice appears to be the recurrent issuing of a refusal to open criminal proceedings after a brief check, sometimes limited to collecting the statements of the officers accused of ill-treatment. This decision

would later inevitably be set aside as unfounded, new rounds of inquiry would be ordered and new refusals to initiate criminal proceedings issued. The latter being either based on the same conclusions as the previous ones²⁰⁴, or without specifying any concrete reasons for the refusal.²⁰⁵

Only in 15 out of the 33 instances, authorities authorized instituting criminal proceedings. In other cases, the domestic authorities have not found sufficient grounds in the applicant's allegations to initiate criminal proceedings, even though in all of them the statements by the victims were confirmed either by medical records of injuries, or by an opinion of the forensic medical expert.

Just to give a few examples that could serve as a pattern for all the cases considered without exception, in Ksendz and Others v. Russia (2017), prosecutor's office carried out 14 rounds of pre-investigative inquiry, criminal proceedings being never initiated. In Leonid Petrov v. Russia (2016), the pre-investigative inquiry was resumed 23 times, some of the refusals were considered by domestic court as unlawful and lacking reasoning.²⁰⁶ Frequently the reasons for refusals are not even specified.²⁰⁷

Often even after a number of refusals to open criminal investigation are recognized unlawful and unsubstantiated, the domestic court, at the end, upholds one of such decisions. Frequently the decision upheld literally repeats the previous one, which was earlier retained to be unlawful. Despite these glaring inconsistencies, the court rules the inquiry had been comprehensive. In Leonid Petrov v. Russia (2016), even the fact that one of the investigators involved was found liable in disciplinary proceedings for stalling the inquiry, had not prompted the authorities to initiate criminal investigation.

Even the cases of death in a police custody²⁰⁸ do not elicit domestic authorities to initiate criminal proceedings. Instead, a criminal investigation can be opened into alleged abuse of power by an unidentified police officer in relation to injuries not related to the cause of death.

²⁰⁴ Olisov and Others v. Russia (2017), §20, Kovalevy v. Russia (2017), §26, Minikaev v. Russia (2016)

²⁰⁵ Annenkov and Others v. Russia (2017), §55

²⁰⁶ Mikhail Nikolaev v. Russia (2016)

²⁰⁷ Annekov and Others v. Russia (2017), §54

²⁰⁸ Fanzieva v. Russia (2015)

Sometimes the communication of the case to the Russian Government would induce the domestic authorities to either open a criminal case²⁰⁹, or triggers new rounds of investigation after the case was latent for several years.²¹⁰ The practice shows that new rounds of investigation are only used as a way to negate the applicant's version of the facts²¹¹ or the case is again suspended due to the impossibility to identify the perpetrators.²¹²

In Chapter II we saw that, according to the international standards, public authorities have the duty to react whenever they become aware or have suspects of the alleged ill-treatment. This applies to the investigator who carries out criminal investigation in which the applicant is a suspect, prosecutor, judge, medical personnel, administration of temporary detention centers, etc.

It should be noted that in some cases when a detained person is admitted to the temporary detention facility (IVS) with visible injuries and alleges that these injuries had been inflicted by the police, the personnel of the facility does not react properly.²¹³

So in Davitidze v. Russia (2013), despite the applicant's complaints to the Prosecutor's Office no inquiry was commenced into his allegations. While in response to the complaint to the domestic court by the applicant's wife, who requested the forensic examination to be carried out, the court replied that it had no jurisdiction to order forensic examination of the injuries.²¹⁴ Which is in contrast with the obligations observed in previous Chapter.

In another case, the judge refused to take note of the applicant's allegations of ill-treatment, stating that it could be examined in the course of the trial against the applicant²¹⁵, which, according to the interpretation by the Supreme Court cited earlier, would be in contrast with the provision of the RFCPP.

As a rule, the staff of the remand prison or an IVS refuses to admit applicants with visible injuries.²¹⁶ At the same time, no information in the cases studied indicates that in such event

²⁰⁹ Manzhos v. Russia (2016), Lykova v. Russia (2015)

²¹⁰ Laveykin v. Russia (2017), §18

²¹¹ Mikhail Nikolaev v. Russia (2016)

²¹² Manzhos v. Russia (2016)

²¹³ Olisov and Others v. Russia (2017); Nasakin v. Russia (2013)

²¹⁴ Davitidze v. Russia (2013), §45

²¹⁵ Shlychkov v. Russia (2016), §21

²¹⁶ Shlychkov v. Russia (2016), §23; Velikanov v. Russia (2014), §7

the authorities are being notified about possible ill-treatment. The inquiry is initiated only after an explicit complaint by the applicant or his/her counsel.

Notably, in all the cases, the medical institutions that received and examined the applicants who alleged they were tortured by the police, had duly notified the authorized bodies.²¹⁷

The European Court observed that if the domestic authority receives a “credible assertion” of ill-treatment by the police, this should be considered the requirement to the State to carry out an “effective official investigation”, which is imposed by Article 3 of the ECHR, read in conjunction with the general duty under Article 1 to “secure to everyone within their jurisdiction the rights and freedoms”.²¹⁸

In several occasions, the European Court has reiterated that the pre-investigative inquiry under the Russian domestic law is just an “initial stage” in dealing with a criminal complaint.²¹⁹ This phase has to be expedient and followed by a proper criminal investigation “in which the whole range of investigative measures are carried out”.²²⁰

Faced with numerous similar cases against Russia, the European Court has held that it “was bound to draw stronger inferences from mere fact of the investigative authority’s refusal to open a criminal investigation into credible allegations of serious ill-treatment in police custody”, since this, according to the ECtHR, was indicative of the State’s failure to carry out an effective investigation.²²¹

The cases examined evidence that victims spend years trying to get authorities to investigate, challenging repetitive and unfounded refusals to initiate investigations. Routinely the refusal of the prosecution bodies to initiate criminal cases and investigation is argued by insufficient data that would confirm the guilt of certain police agents. The situation becomes paradoxical, since this evidence is to be collected in the course of investigation which is never opened, while the complaint per se indicates only to elements of crime.

4.2 Promptness

²¹⁸ *Manzhos v. Russia* (2016), §33

²¹⁹ *Lyapin v. Russia* (2014), §129

²²⁰ *Fartushin v. Russia* (2016), §44, *Gorshchuk v. Russia* (2015), §36

²²¹ *Turbulev v. Russia* (2015), §71

As mentioned earlier, the promptness of initiation of the investigation into alleged cases of torture or ill-treatment is extremely important for an effective investigation, considering the specific characteristics of this crime.

The ECtHR, in particular, pays attention to the promptness with which the authorities were informed about the alleged ill-treatment, if there was a necessity to take any urgent actions, and if there were any objective reasons that would prevent the authorities from starting an investigation immediately.

The principle of promptness appears to be a significant challenge for Russian authorities, even though the RFCCP establishes timeframes for pre-trial investigations²²² and when courts must start hearing criminal cases²²³. In all the cases when the criminal investigation was opened, it would happen only after numerous rounds of pre-investigative inquiry and, sometimes, several years after the incident.

The initiation of criminal case does not guarantee that all the investigative actions will be carried out, or that the investigation will respect the timeframes imposed by the law.

In Manzhos v. Russia (2016) the identification parades were held 3 years after the incident. This step and the initiation of the criminal proceedings itself, were taken only after the application was communicated to the Russian Government. The first forensic examination and the onsite verification were held within the same resumed proceedings.

In another case the allegations of ill-treatment by the applicant who was detained without any visible injuries and a few hours after his arrest was treated by the ambulance doctors at the police station, were dismissed five times. Three months after the incident, criminal proceedings were instituted against “unidentified persons”.²²⁴ The applicant was granted a status of victim one month later. The criminal investigation was suspended sixteen times and was still ongoing after 10 years.

²²² RFCCP, Art.162

²²³ Ibid., Art.227

²²⁴ Smolentsev v. Russia (2017), para.24

In one of the rare cases when criminal proceedings were initiated relatively promptly (one month after the application was filed), and the applicant was granted the status of victim, the forensic examination was ordered just 2.5 months after the incident.²²⁵

As it appears, all investigative actions, should it be a preliminary inquiry or an investigation, are launched in response to a formal complaint. None of the studied cases suggests the hypothesis that the investigation might be timely initiated by the responsible authorities on their own initiative.

4.3 Independence and impartiality

Only in 6 of the cases analyzed the investigation was carried out by the Investigative Committee as an independent body, and in 5 cases by Investigative Committee of the Prosecutor's Office. All other cases had been handled by the Prosecutor's Office. In addition, since in many cases the numerous rounds of inquiry were protracted over several years, some of the cases had been transferred to newly established investigative authorities. Sometimes the analyzed documents refer to the body carrying out an inquiry, as an "investigative authority", without further specifications. In these instances, it is difficult to make any conclusions as to the level of independence of the inquirer.

Only two cases, Lykova v. Russia (2015) and Razzakov v. Russia (2015), were investigated in a period when a special division called to investigate offences committed by public officials, was established within the IC. In both cases, the request to transfer the cases to this unit was dismissed. In Lykova v. Russia (2015) the IC considered that the decision refusing to open a criminal case issued earlier had been in accordance with the law and there were no grounds to open a criminal investigation. In Razzakov v. Russia (2015) the regional IC argued the refusal of transfer by the lack of competence in taking such decisions, the latter being within the authority of the head of this division and that in any case it was not mandatory, according to the rules, to transfer cases of this kind to the new investigative divisions.

The most frequent practice that transpires from the cases examined, was returning the cases to the same investigator or prosecutor whose refusal to open criminal proceedings was quashed.

²²⁵ Mikhail Nikolav v. Russia (2016)

In all such instances this was inevitably followed by a new refusal to open criminal investigation.²²⁶

Only in one case the ECtHR drew attention to the fact that the inquiry was held by the investigator from the same police unit in charge on the investigation in the case against the applicant.²²⁷

Serious doubts as to the impartiality of the investigators arise due to the excessive and unquestionable reliance on the statements by the police officers. To cite a few examples, in Mikhail Nikolaev v. Russia (2016), despite two conclusions by a forensic medical expert confirming that the injuries could have been sustained in a way described by the applicant, the decision to terminate criminal investigation fully relied on the statements by the police officers who were accused of ill-treatment. In Minikaev v. Russia (2016) the investigator, in his decisions not to institute criminal proceedings, argued that the applicant's allegations "contradicted the statements" of the police officers.

The documents analyzed do not suggest that the police officers, interested in the outcome of inquiries, put pressure on the medical personnel. Just in one case the forensic examination was held in the presence of the police officer.²²⁸ The fact though was not taken into consideration by domestic authorities.

It is difficult to argue whether the investigative authorities enjoy complete independence while investigating allegations against police officers. Since it appears that the entire process of inquiry is designated to 'confirm' the statements by those who are accused of ill-treatment, it is transparent that they certainly are not impartial.

4.4 Competence

As mentioned above, the practice to refuse initiation of criminal proceedings (later quashed by a higher-level authority) is customary in RF.

The lack of thoroughness in performing the investigative actions could be explained either by the lack of competence of those who are called to check the allegations of ill-treatment, or by

²²⁶ Bobrov v. Russia (2014), §17; Shlychkov v. Russia (2016), §2; Davitidze v. Russia (2013), §51

²²⁷ Davitidze v. Russia (2013)

²²⁸ Minikaev v. Russia (2016), §10

a reluctance to carry out a proper inquiry and, therefore, the lack of impartiality. The latter is suggested by the fact, that often a new round of inquiry ordered would indicate deficiencies in the investigative actions and instructions about the actions to be taken the latter being largely ignored, even when ordered by the domestic court. A new refusal would be issued on the same grounds as the previous one.²²⁹

When it comes to the competence of the medical experts, in many cases forensic medical examination of the applicants was not ordered. As a result, the only documentation of the injuries available would be the one produced by a hospital medical personnel, which is often considered insufficient to prove the allegations of the victim. In some cases, the experts called to perform the examination of the case files had obviously basic level of expertise but this was not taken into account by the domestic court.²³⁰

With regards to the judicial authorities, it is notable that almost in all cases domestic courts limit themselves to reiterate the findings of the investigator without even entering into details of the inquiry or investigation.

It is legitimate to assume that the flaws in the investigation are not caused by the lack of competence of the experts involved, but is driven by a general negligence, reluctance to act effectively even when faced with the obvious procedural infringements.

4.5 Thoroughness

The position adopted by the ECtHR in all the cases examined is unambiguous: whenever the alleged victim had sustained the injuries while in police custody, “strong presumptions of fact will arise with respect of injuries occurring during such detention”.²³¹ Since the persons in custody are in a vulnerable position and it is the duty of authorities to protect them, the “burden of proof” lies on the domestic authorities that are obliged to provide a “satisfactory and reasonable” explanations, which would cast doubt on the applicant’s version of the events.²³²

²²⁹ Ryabtsev v. Russia (2014), §25; Devyatkin v. Russia (2017), §17; Sitnikov v. Russia (2017), §19

²³⁰ Shlychkov v. Russia (2016), §34, 37

²³¹ Ksenz and Others v. Russia (2018), §93

²³² Lyapin v. Russia (2014), §113

In addition, the Court specified that the thoroughness of the investigation of the alleged ill-treatment or torture means that “the authorities must take serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close investigations”.²³³

While it was noted various times that the pre-investigation inquiry is the “initial stage in dealing with a criminal complaint under Russian law”²³⁴, it is still the inquiry that usually takes place whenever the complaint of ill-treatment is filed with Russian domestic authorities.

Based on the cases examined, it is possible to categorize the flaws in thoroughness of the investigations into several groups:

4.5.1 Limited investigative actions

The stage of pre-investigative inquiry appears to be very much limiting in terms of the actions available to the inquirer to verify the allegations. Moreover, the investigators tend to refuse performing some actions, such as identification parades, questioning of the victim, forensic medical examination, arguing that these actions can only be carried out on the stage of criminal investigation. Subsequently, the applicant sometimes finds himself in a no-way-out position. For example, in Devyatkin v. Russia (2017), the applicant was deprived of the possibility to challenge allegedly false statements by the witness, on the grounds that “false explanations given in the framework of a pre-investigative inquiry [...] were not punishable as a criminal offence”. The statements of this witness, however, were taken into consideration by the investigator when issuing several times the decision not to institute criminal proceedings, and at the end, no criminal investigation into the allegations was ever initiated.

4.5.2 Statements by the police

In most of the cases, the investigative authorities based their decisions not to institute criminal proceedings exclusively on the statements by the police officers or investigators allegedly implicated in the ill-treatment.²³⁵ In the majority of cases the “explanations” of the injuries on the applicant were obvious speculations, lacked assessment of the experts, did not address

²³³ *Annenkov and Others v. Russia* (2017), §94

²³⁴ *Lyapin v. Russia* (2014), §129

²³⁵ *Annenkov and Others v. Russia* (2017), §52

obvious discrepancies between the version of the police officers and other evidence, such as statements of the medical experts or records of IVS.

Recurring is the problem that while relying completely on the statements of the alleged perpetrators²³⁶, the inquirer considers critically the allegations of the victim.

The lack of any assessment of the proportionality of the force used by the police officers is another “lapse” of the inquiry process. No investigation into the specific actions by the police, or by the applicant that would justify the use of force and the level of the necessity, is pursued. The assessment of the lawfulness is limited to the statements by the same police officers who applied the force.²³⁷ In one of the cases the investigator based his refusal on identical statements given by six police officers and concluded that the “use of force was necessary and proportionate to the nature and gravity of the offences committed [by the applicant]”.²³⁸

Obvious disagreement between the allegations by the police and statements by medical experts or contradictions between the statements of the police officers oftentimes are never the reason for further inquiry and never attempted to reconcile.²³⁹

Moreover, an opinion by a forensic medical expert, which is in contrast with the statements by the police officers, will be looked upon “critically”.²⁴⁰

4.5.3 Vulnerable position of the victim

One of frequent reasons for refusing to open a criminal investigation is the fact that the alleged victim does not complain immediately of the ill-treatment.²⁴¹ No consideration is given to the fact that the victims are in hands of the police officers who allegedly ill-treated them, having no access to a lawyer. This is especially the case when the person, a suspect of criminal offence, is officially detained for an administrative offence.²⁴²

²³⁶ Sitnikov v. Russia (2017), §15-17

²³⁷ Olisov and Others v. Russia (2017), §40

²³⁸ Markaryan v. Russia (2013), §15

²³⁹ Ksenz and Others v. Russia (2017), §103; Aleksand Konovalov v. Russia (2017), §40; Nasakin v. Russia (2013), §18

²⁴⁰ Antayev and Others v. Russia (2014), §34

²⁴¹ Aleksand Konovalov v. Russia (2017)

²⁴² Ochelkov v. Russia (2013)

If the victim initially alleges that the injuries have been caused as a result of an accident but later retracts the statement and claims that the force had been used by the police, the investigator would ignore the later statement and give the preference to the one denying the violations by the police, without taking into consideration that the earlier statement might have been given out of fear of further retaliation.²⁴³ In Nekrasov v. Russia (2016) the applicant, who underwent the hospital treatment during the criminal proceedings against him and was unable to walk without help, had not asked for medical assistance while he was held in a detention facility. This fact was never reconnected to his earlier allegations of ill-treatment and the investigator refused to open criminal proceedings against police officers or any other people for allegedly ill-treating the applicant.

The domestic courts are also reluctant to accept as credible allegations of ill-treatment made by the victim some time after the incident and do not give importance to the evidence that the applicant was in total control of alleged perpetrators.²⁴⁴ Such one-sided position of the authorities negates all the principles of the importance of victim's participation in the proceedings noted above.

4.5.4 Forensic medical examination

Often the forensic medical examination is either ordered with a significant delay or is carried out based on the medical records of the IVS facilities or of medical emergency staff, even if the authorities are promptly made aware of the alleged ill-treatment.²⁴⁵ These medical records oftentimes are incomplete and do not permit to the expert to establish the cause or the time when the injuries were inflicted.

In some cases the investigator refused ordering the forensic examination at all, arguing that “[a]t an inquiry stage a forensic medical examination to determine the time and nature of injuries cannot be conducted for the lack of any legal basis”.²⁴⁶ In another case, the forensic examination was never ordered and three years later the investigator noted that the allegations had not been confirmed by “anything except medical certificates”.²⁴⁷ Rounds of inquiries can

²⁴³ Minikaev v. Russia (2016), §13; Dzhabbarov v. Russia (2015), §18

²⁴⁴ Dzhabbarov v. Russia (2015), §19

²⁴⁵ Morgunov v. Russia (2017), §20; Nekrasov v. Russia (2016)

²⁴⁶ Dzhabbarov v. Russia (2015), §26

²⁴⁷ Bobrov v. Russia (2014), §21

be limited to interviewing alleged perpetrators, while the doctors who examined the applicant and issued medical records can never be questioned.

Often, clearly incomplete forensic examination forms the basis for the refutation of the allegations, disregarding the recommendations of further examination by the experts.²⁴⁸

Equally, forensic indications of the origins of injuries are generally not taken into consideration when they clearly indicate inconsistencies with the statements of the police. In Lyapin v. Russia (2014) the medical evidence confirming the applicant's allegations was never considered as a ground for opening a criminal investigation and the decisions not to open criminal proceedings were inconsistent with the forensic expert's opinion. More weight was given to the medical report that was carried out more than a year after the incident and based on the examination of the medical records and previous forensic reports, while the earlier reports were disregarded without any explanations.

Sometimes the investigator orders the forensic examination just to discredit the victim. In Mikhail Nikolaev v. Russia (2016), the new round of investigation reopened 11 years after the incident resulted in ordering a forensic psychological examination of the alleged victim followed by the conclusion that the applicant "had a tendency to use fantasy and invention in order to fill gaps in his memory" and in Aleksandr Novoselov v. Russia (2014) the police ordered an expert examination by a psychologist to check the applicant's "personality and propensity to lie".

4.5.5 Interviewing of witnesses

The European Court has underlined the responsibility of the authorities to secure all evidence concerning the incident, including eyewitness testimony.²⁴⁹ The failure to collect the statements of all the witnesses and the police officers who had been in contact with the applicant was noted as one of the most frequent deficiencies.

The statements by the victims are customarily considered as unreliable and questionable on the grounds of the witnesses' relationship with the applicant and not taken into consideration when assessing the possibility to open criminal proceedings.²⁵⁰ At the same time the

²⁴⁸ Minikaev v. Russia (2016)

²⁴⁹ Annenkov and Others v. Russia (2017), §94

²⁵⁰ Zelenin v. Russia (2015), §27

statements by the police officers who have obvious interest in the outcome of the inquiry are never questioned.

In some cases, the investigator refused to carry out the confrontation between the witnesses, even if specifically requested by a superior authority. The motivation behind his decision being the fact that too much time had passed since the incident and confrontations between the victims would not serve any purpose.²⁵¹

Often no attempt to reconcile contrasting statements of the witnesses is done, especially if the statements are given by the police officers accused of ill-treatment. In Keller v. Russia (2014) the statements of the investigator who had changed his submission in the course of several rounds of inquiry was not questioned.

In some cases, even the statements by two witnesses confirming the allegations of the victim would be considered insufficient to confirm that unlawful measures were used by the police²⁵², while in another case, the investigator can base his refusal on the statements by the witness who had not been present when the alleged incident occurred.²⁵³

4.5.6 The scene of incident not inspected

The failure to inspect the scene of incident is constantly recurring during the inquiry.

Remarkably, in Olisov and Others v. Russia (2017), in response to the applicants request to annul the decision refuting the initiation of criminal investigation on the grounds that the office where he allegedly had been ill-treated had never been inspected, the domestic court answered that too long time passed since the facts occurred and it would make no sense to inspect the office anymore, and upheld the refusal. Nonetheless, 9 years after the incident had occurred, the decision was annulled and additional forensic examination of the applicant was ordered.

In Shestopalov v. Russia (2017) the place of incident and identification parades were carried out two years after the incident and in Mikhail Nikolaev v. Russia (2016), for example the

²⁵¹ Keller v. Russia (2014), §47

²⁵² Nasakin v. Russia (2013), §18

²⁵³ Bobrov v. Russia (2014), §17

issue of examining the car in which the applicant was allegedly beaten, raised only 11 years after the incident.

While a prompt examination of the scene is crucial for collecting material evidence, and recording of the identities of persons present at the scene when the ill-treatment took place, even at a later stage the examination of the scene, location of the rooms, entrances, windows, doors, furniture is of cardinal importance for the correct reconstruction of the events and critical assessment of evidence and testimonies of both sides in the case.

4.5.7 Collecting of other evidence and its assessment

Some of the evidence available to the domestic authorities is either ignored or merely refused to be taken into account while the priority is given to the evidence that has no direct relation to the incident but could be manipulated to dismiss the allegations of ill-treatment.²⁵⁴

So, in the case of death in police custody, the investigator, who inspected the scene of incident immediately after it occurred, seized the gas mask. Later the investigator refused to carry out the DNA test of the mask, since the victim had not died of suffocation.²⁵⁵ Instead, the investigator concentrated her efforts on collecting vague statements by the witnesses, in an attempt to confirm the official version of facts.²⁵⁶

In some cases, even such a valuable evidence as video and audio recordings of the police drill were not examined.²⁵⁷

Opening of criminal investigation does not secure that some basic investigative actions, such as identification parades or confrontations, would be carried out, even in cases when this deficiency is clearly pointed out by a prosecutor.²⁵⁸ The identification parades are held with such a delay that it makes more difficult if not unrealistic for the applicant to identify the perpetrators. Even in cases when the applicant manages to identify some of the alleged perpetrators, this is not taken into account contending the inconsistencies between the previous description by the applicant of the alleged perpetrators and persons identified. As an

²⁵⁴ Shlychkov v. Russia (2016), §37

²⁵⁵ Lykova v. Russia (2015), §34

²⁵⁶ Ibid., §30

²⁵⁷ Aleksandr Novoselov v. Russia (2014), §79

²⁵⁸ Turbulev v. Russia (2015), §25-26

additional ground not to consider the result of the identification parade may serve the alibi of the police officers identified, even if this alibi is confirmed exclusively by their statements.²⁵⁹

Epitomic example of the ways to ‘secure’ evidence is the case Chernetskiy v. Russia (2014). In the course of the inquiry no check of the applicant’s version of facts was conducted, the medical documents attesting the injuries had never been taken into consideration in the course of several rounds of inquiry, the doctors that had issued them never questioned. No questioning of possible eyewitnesses or the applicant himself was undertaken and the premises where the applicant was questioned and allegedly ill-treated were never checked.

4.6 Victim’s involvement and transparency

The most blatant violation of the right of the victim is related to the fact that in 60 % of cases the criminal investigation was not opened. This means that the victim of the alleged ill-treatment does not receive the status of victim, and is deprived of a series of procedural rights not to mention the right to reparations or any kind of justice.

Another consequence is that the victim has often no possibility to unveil own version of facts. In some cases the applicants were completely unaware about the investigative proceedings, decisions to refuse opening criminal investigations or decisions resuming pre-investigative inquiries. In this situation the applicant, as a minimum, is neglected his right to file a complaint as established by the RFCCP.

As it appears from the analysis above, the allegations by the victim of ill-treatment are always seen with distrust, while the decisions not to institute criminal proceedings are pure conjecture. This is even more true if the victim is a suspect in a criminal case. In these cases, the allegations of the ill-treatment are always considered as an attempt to avoid criminal responsibility and as designed to discredit the law enforcement authorities.²⁶⁰

Sometimes the applicants risk falling victims of their actions, their allegations considered false and victims liable for their actions.²⁶¹ In one of the cases the appeals against decisions not to institute criminal case (later recognized as unlawful) were considered attempts to

²⁵⁹ Razzakov v. Russia (2015), §30

²⁶⁰ Sitnikov v. Russia (2017), §22; Bobrov v. Russia (2014), §19; Minikaev v. Russia (2016), §25

²⁶¹ Kovalevy v. Russia (2017), §24

“mislead the investigative authorities” and “to accuse public officials who were obliged to devote time to giving oral evidence to the investigative authorities”.²⁶²

Domestic judicial proceedings offer to the applicant a scarce or no opportunity to recount his version of facts. In Olisov and Others v. Russia (2017) the applicant’s objection that he was not given the possibility to oppose the statement of the police officers was rejected by the court and the decision refusing to open criminal investigation upheld by the regional court. Curious that the prosecutor later annulled the same decision as “unlawful and based on an incomplete inquiry”.

If the applicant complains of ill-treatment during the trial in the case against him, the court is bound to judge the admissibility of the evidence. Since all convictions in the cases analyzed were based on the self-incriminating statements, it is natural to conclude that the allegations are never upheld. Often the court limits itself to repeat the conclusions of the pre-investigative inquiry or concludes that in making accusations against the police officers the applicant attempts to pervert the course of justice.²⁶³

Sometimes the victims are at risk of being discredited in an attempt by the investigator to confirm the statements of the police officers. So, for example in Idalov v. Russia (2017) the applicant alleging ill-treatment by the police was on his turn accused of use of force against a State agent for allegedly having beaten the guard of the detention facility. As a result, the applicant was sentenced to 6 years’ imprisonment.

As it appears, the involvement of the victim in the investigative process is very limited and the more ‘active’ the applicant is, the larger is the risk of defamation by the investigator.

4.7 Practical possibility to file the complaint against torture

The Federal Law “On Investigative Committee”, the RFCCP and instructions issued by the IC provide a potentially effective mechanism enabling the oversight of compliance with

²⁶² Velikanov v. Russia (2014), §25

²⁶³ Markaryan v. Russia (2013), §21

applicable legislation in the context of acceptance, registration, and responding to reports of offences, including reports of torture.

Yet, as noted earlier, the NGOs denounce that in many cases the same victims are hesitant to file a complaint fearing the aggravation of their situation, especially (and it has been confirmed by the analyses of the cases within the present study) if the victim is a suspect in another case.

Once the criminal case against the applicants is submitted to the court, they lose the possibility to seek the institution of criminal proceedings against alleged torturers. The only possibility remaining is that the decision could be questioned within the framework of criminal proceedings against them²⁶⁴ even if such a practice is in contrast with the Supreme Court interpretation of the law (see section 3.4). This appears problematic if not impossible, since often the main evidence against the applicant is his “voluntary confession”, and its admissibility is assessed in the course of the trial against the applicant. In none of the cases examined the confession was rejected as inadmissible.

4.8 Adequate punishment

Even though there is no lack of the acknowledgement by the domestic authorities that most of the decisions not to institute criminal proceedings are unlawful, in very few of them this leads to any kind of punishment of those responsible. In Olisov and Others v. Russia (2017), for example, nine years after the incident and after more than fourteen rounds of pre-investigation inquiry, the district prosecutor noted that the investigative committee “failed to conduct a thorough and objective inquiry”, violating the rights of the applicant, which constituted “a serious disciplinary offence”.

Also in Fartushin v. Russia (2016) the domestic court declared the inactivity on the part of the head of the Investigative Committee unlawful. No information as to the disciplinary measures or other kind of punishment of those responsible is available. On the contrary, sometimes the alleged perpetrators are promoted instead of being punished.²⁶⁵

²⁶⁴ Zakharin and Others v. Russia (2015), §55

²⁶⁵ Razzakov v. Russia (2015), §41

It is notable that in those rare cases when the officers in charge of inquiry into the allegations of ill-treatment are subjected to “disciplinary measures” or “reprimand”, this does not lead to opening of criminal investigation.²⁶⁶

Sometimes paradoxical conclusions by domestic courts on one hand recognize the violation of the applicant’s right to an effective investigation by numerous refusals to open criminal proceedings, while on the other hand the court would recognize the applicant responsible for the revocation of the decisions not to institute criminal proceedings that were triggered by his complaints.²⁶⁷

4.9 Additional observations

After having analyzed the practice of the Russian authorities compared to the international standards, it is possible to make a number of further observations.

First, the frequent use of administrative detention of persons suspected to have committed criminal offences and as a means of detention and questioning without access to lawyer.²⁶⁸

Second, the overwhelming use by domestic courts of self-incriminating statements as a ground for convictions. The unfounded refusals to open criminal investigations into the alleged ill-treatment with the aim to obtain a self-incriminating statement are considered by the domestic courts irrelevant to the criminal case.²⁶⁹

Even if the applicant revokes his self-incriminating statement declaring at the trial that it was obtained through the mental and physical pressure, in none of the cases considered this would give the grounds for the domestic court to question the admissibility of the self-incriminating statement or to order any additional investigative actions to verify the allegations of ill-treatment. On the contrary, the courts usually dismiss the allegations on the grounds that they are in contrast with the statements by the police officers (accused of ill-treatment) and take the confession into account.²⁷⁰

²⁶⁶ Mostipan v. Russia (2014), §19–20

²⁶⁷ Lyapin v. Russia (2014), §92

²⁶⁸ Aleksandr Konovalov v. Russia (2017); Manzhos v. Russia (2016); Razzakov v. Russia (2015); Devyatkin v. Russia (2017), §9

²⁶⁹ Sitnikov v. Russia (2017), §27

²⁷⁰ Minikaev v. Russia (2016), §22

Three, the psychological or mental state of the applicant might be the reason to not consider his allegations as reliable. At the same time no attempt to explain the injuries on the applicant are undertaken.

Four, the applicants are often deprived of the possibility of the judicial review of the appeal against the decision of the investigator not to institute the criminal case, since in most cases these decisions are overruled just before the hearing in the court only to issue new refusals immediately afterwards.

Five, the opening of criminal proceedings and the initiation of a criminal investigation does not imply the interrogation of the suspects. On the contrary, police officers, who allegedly might have participated in the applicant's ill-treatment, are always questioned as witnesses.

And, lastly, another customary practice during the pre-investigative inquiry is deciding on the availability of the necessary data which would confirm the guilt of certain police agents while the tenor of the effective criminal procedure laws provide that the culpability of specific persons should be established in course of investigation, and the preliminary checking is limited to a preparatory inspection of the data about elements of crime, all eventual controversies and inaccuracies being verified in the course of investigation.

5 CONCLUSIONS

The examination of the principal international and regional human rights instruments has permitted me to expand the notion of effective investigations and to identify its cornerstone features. The seven common elements identified, i.e. grounds for investigation, promptness, independence and impartiality, competence of the investigative authority, thoroughness, victim's involvement and transparency, and adequate punishment, are considered as fundamental for investigation to be effective, by various binding norms, their further interpretations and non-binding guidelines. Though, full adherence to all the seven principles might be an unrealistic expectation because of practical and other limitations upon the relevant authorities, these principles are to be regarded as standards of reference especially in difficult circumstances when the governments and investigative and prosecuting authorities try to circumvent these standards.

Since the existence of such 'particular circumstances' in Russia is suggested by the overall image of the widespread 'routine' torture by the police, these criteria were used to assess the practices of Russian domestic authorities when investigating and prosecuting allegations of torture and ill-treatment. Before proceeding with the assessment of this practice an analysis of the relevant domestic norms was carried out with the aim to identify possible flaws that might be used to 'legitimize' the use of torture or ill-treatment or its non-investigation.

The analysis demonstrated that the major flaw in domestic legislation is caused by the definition of torture which does not reflect in full international standards and, as a result, fails to take into consideration the specifics of the crime.

Although progress has been made in bringing Russian legislation closer to international standards and Russian domestic law provides narrowly defined guidelines for investigating and prosecuting authorities that, potentially, might provide the essential legal framework for timely and thorough reaction on torture allegations, the necessary guidelines on the acceptance and examination of torture allegations are still unavailable in the country.

It appears that the practice of investigation and prosecution is far more different than the written domestic norms, and even more distinct when compared to the internationally recognized standards.

The first and the most common characteristic of the investigative process are constant denials to open a criminal case even in an event of death in custody. Usually these denials, in addition to delaying time limits for inquiry, investigation and the procedural deadlines, are considered as unlawful and quashed by a higher authority. Still, this almost never occurs on the initiative of the investigative authorities and requires endless applications against the decision by the victim.

Moreover, the prosecutorial power to quash the refusals to initiate criminal proceedings does not have significant impact on the quality of preliminary investigations. Reopened pre-investigative checks were as formalistic as the previous ones, and resulted in further refusals to open criminal proceedings.

Routinely specific instructions as to the actions to perform on the newly reopened inquiry are not followed, and the case can be closed on the same grounds as earlier. This brings the applicant to the starting point, having to challenge the same decision (that sometimes simply copies the one that has been previously overruled) time and again. These tactics of throwing cases back and forth can last for years, undermining the principle of promptness the importance of which has been underlined so many times. This practice is fuelled by the fact that no actions are taken to determine the reason why the unlawful decision was taken or any liability for the responsible officials.

Moreover, the inquiry, that is a preliminary stage and makes available to the investigator an extremely limited range of investigative actions, and should be followed by a criminal investigation, appears to be considered by Russian domestic authorities the main instrument of examination of torture allegations.

Even when an investigator decides to act and opens a criminal investigation,, they often concentrate their efforts on measures that are devoid of purpose, are extremely limited and new rounds of suspended and resumed actions would follow. Sometimes criminal investigation would concern the acts committed by ‘unspecified persons’ in an ‘unspecified place and time’ disregarding the version of the victim. Some imperative investigative actions, such as examining the scene of crime, would be undertaken years after the facts occurred.

Noteworthy is the imbalance of powers between the victim and alleged perpetrator. The investigator, frequently distrusting the victim, readily accepts any statements made by police

officers, even if not proved by any evidence or disregards evidence or statements that contradict the allegations of the police. This is even more true when the victim is a suspect in a criminal case. In such cases, the applicant's allegations are without exception considered as an attempt to pervert the course of justice and to evade criminal liability, while the police officers' obvious interest in exonerating themselves is never taken into consideration.

Similarly, domestic authorities take a selective approach to the evidence by disregarding the applicant's allegations or inconvenient witness statements, and base their conclusions solely on the testimonies of the implicated police officers.

The judicial review does not offer an effective remedy to the deficiencies of the investigation. The victim is either denied the possibility to argue in court the lawfulness of the decision not to open criminal investigation (because the inquiry would be readily re-opened just to be closed immediately after the court pronounces itself), or the latter merely upholds the investigator's decision to discontinue the investigation/inquiry. The latter always happens if the court is called to decide on the admissibility of evidence, in particular, of a self-incriminating statement that in all the cases examined constituted grounds for the suspect's conviction.

The victim's participation in the investigative process is quite limited. This, in first place is due to the fact that the official status of victim and all the rights that it concedes, is not recognized to the applicant unless the criminal investigation is opened.

Notable are also methods to hinder victims of abuse to file a complaint, that most frequently consist in an unlawful administrative detention or defamation of the victim attempting to file a complaint. In fact, the psychological or psychiatric forensic examination that is suggested by the Istanbul Protocol as an effective way to establish the truth, are used by Russian domestic authorities with the sole aim to discredit the applicant and reject his statements as unreliable.

The administrative detention, on the other hand, places the victim under the full control of the police. Since the IVS are located on the premises of the police unit and the police staff has access to the cells, and both units being under the jurisdiction of the same ministry, oftentimes an individual has a very limited possibility to file a complaint and avoid further repressions.

The analysis of both the European Court decisions and alternative NGO reports to the Committee against Torture, do not suggests that these failures to effectively investigate

allegations of torture can be attributed to the lack of competence of domestic authorities. It is more probable that the situation is due to a negligence in performing the investigative acts, but more frequently to unwillingness to discover the inconvenient truth. The absence of proper punishment and disciplinary actions against unlawful decisions to terminate an inquiry, or even the promotion of those whose attempts to delay investigation have been publicly recognized, fosters the general sense of impunity of the public officials.

The establishment of a special division to investigate the allegations of crimes with involvement of public officials remains, so far, a pure formality without any real positive effect on the investigative process.

The combination of the international and domestic legal norms provide a solid set of standards that, if implemented, potentially could secure high standards of effective investigation of allegations of torture in the RF. The existing discrepancies are not such as to hinder the internal application of international standards thanks to the direct application of international norms provided for by relevant domestic provisions. However, there are many factors that may act as obstacles to translating law into practice.

The similar character of violations that constantly reappear in each examined case suggests the existence of certain patterns that act as ways to perform the investigative routines which are alternative and in contrast with recognized standards. This, nourished by one-sided and unconditional acceptance of the perpetrator's version of facts and unlimited indulgencies both to the perpetrator and the investigator who repeatedly violates procedural rules, first, indicate the existence of an internal subculture of protective solidarity, and, second, signals the informal 'authorization' of similar practices that transform into conventional procedures. The overall ineffectiveness of judicial review and inadequate judicial protection suggest that a wide range of actors embraces such illicit practices.

On a State level, the overall reluctance to harmonize domestic norms with international obligations, to acknowledge, based on the evidence from the practice of the European Court, the existence and the dimension of the phenomenon of police torture and its ineffective investigation, contribute to its prospering.

Recalling the importance of the signals sent through the day-to-day routines of Russian authorities, for this practice to change, different signals, on different levels, are required.

Firstly, the institutional reforms that brought about the establishment of the special investigative unit should be carried further with the aim to provide this unit with adequate human and economic resources. The members of these investigative units should be specifically trained to investigate allegations of torture. As a basis for such training may serve modules based on cases from the European Court where a violation of principles of effective investigation was found.

Secondly, the elaboration on a domestic level of guidelines for effective investigation and methods of preliminary inquiry establishing concrete actions to be carried out on each stage of investigative process and reflecting international standards, would provide a common reference frame for all the actors involved.

Thirdly, Russian authorities must consider the introduction of strict disciplinary and other punitive measures for unlawful decisions to terminate or refuse to open a criminal investigation or noncompliance with the instructions to perform specific investigative actions. In case the decision not to institute a criminal case has been considered unlawful several times, the inquiry should be transferred to a higher authority.

Finally, given the recurrent character of the violations of the investigative process, an effective way of communicating the decisions and the main violations outlined by the European Court to the principal domestic actors of criminal investigation and prosecution should be established.

These actions should be supported by a number of developments on the external level.

Thus far, Russia has not ratified the UN CAT Optional Protocol that provides for the establishment of a national preventive mechanism. Ratification of this document would be an important step towards the establishment of a permanent independent national monitoring body as a means for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

Observing the poor quality of available data on criminal investigations of torture and the number of investigations that result in charges, Carver and Handley suggest the establishment by international treaty bodies of a standardized format for recording data on torture and ill-

treatment.²⁷¹ There is no doubt that such a standardized approach to data recording would also restrict data speculation, compel the State's recognition of the problem and embolden the actors who denounce violations and urge the State to act.

The application of decisions by the European Court that go beyond the monetary compensation, are in line with the explanation by Nowak and include “a proper investigation of the truth, an official recognition of the act of torture and an apology by the authorities responsible, the criminal prosecution and conviction of the individual perpetrators, the medical, psychological, legal and/or social rehabilitation”.²⁷² The implementation of such decisions should be monitored and reported on by Russian domestic authorities.

Finally, the systematic violations manifested through the cases considered by the European Court could become the object of consideration within the Universal Periodic Review which may result in concrete recommendations for the State in order to comply with its human rights obligations.

In summary, it may be argued that the corruption that permeates Russian domestic law enforcement authorities and the absence of political will to establish effective policing and judicial apparatus militate against effective translation of international norms in domestic practice, though the existing applicable legal framework provides an effective foundation for reforms. Rephrasing the comment of Moran²⁷³, while the international law provides the ‘normativity’, it is the domestic actors that are expected to provide the ‘machinery’.

²⁷¹ Carver and Handley, *Does Torture*, 628

²⁷² Nowak, *The United Nations*, 453

²⁷³ Moran, «An Uncivil Action», 669

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