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LEGAL NOTE ON THE STANDARDS OF EFFECTIVE INVESTIGATION OF TORTURE AND OTHER ILL-TREATMENT

IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE UN TREATY BODIES

Vadym Chovgan, Elna Søndergaard & Akashdip Sahota

DIGNITY PUBLICATION SERIES ON TORTURE AND ORGANISED VIOLENCE

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PRAXIS PAPER

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CONTENTS

INTRODUCTION	6
ECTHR	7
1. STANDARDS OF EFFECTIVE INVESTIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION	7
A) POSITIVE OBLIGATION TO INVESTIGATE TORTURE AND OTHER ILL-TREATMENT UNDER ARTICLE 3	7
B) GENERAL REQUIREMENTS TO INVESTIGATIONS UNDER ARTICLE 3 AS INTERPRETED BY THE ECTHR	9
C) SPECIFIC REQUIREMENTS TO INVESTIGATIONS UNDER ARTICLE 3 AS INTERPRETED BY THE ECTHR	11
2. RIGHT TO AN EFFECTIVE REMEDY UNDER ARTICLE 13 OF THE EUROPEAN CONVENTION AND EFFECTIVE INVESTIGATIONS	17
3. ADMISSIBILITY OF COMPLAINTS SUBMITTED TO THE EUROPEAN COURT OF HUMAN RIGHTS	20
A) PROCEDURAL REQUIREMENTS	20
4. BEST-PRACTICE FOR BUILDING A CASE ON INEFFECTIVE INVESTIGATION AT THE ECTHR	24
A) LENGTH OF INVESTIGATION	24
B) THOROUGHNESS OF INVESTIGATION	25
C) EXHAUSTION OF DOMESTIC REMEDIES	25
D) EVIDENCE OF TORTURE/ILL-TREATMENT	26
E) GENERAL COMMENT FROM THE INTERVIEWEES	26

UN	27
5. EFFECTIVE INVESTIGATION IN THE JURISPRUDENCE OF THE UN TREATY BODIES	27
A) COMMITTEE AGAINST TORTURE (CAT)	27
B) HUMAN RIGHTS COMMITTEE (HRC)	31
6. ADMISSIBILITY BY THE UN CAT AND HRC	34
A) SPECIFICS OF CAT	36
B) SPECIFICS OF HRC	36
7. FINAL CONSIDERATIONS: CHOOSING BETWEEN COMPLAINING TO THE ECTHR OR UN CAT OR HRC	38
LIST OF JURISPRUDENCE	40
ECTHR	40
UN CAT	42
UN HRC	43
BIBLIOGRAPHY	44

INTRODUCTION

This paper explores the international jurisprudence related to effective investigation of torture and other forms of ill-treatment. Effective investigation is a positive obligation that states have towards victims of human rights violations. Failing to fulfil it means denying protection to the victims, which impairs their right to obtain redress. However, investigating torture and ill-treatment is not an obligation of results, but of means – the state must take all necessary and reasonable steps that **may** lead to identifying the perpetrator and establishing the relevant facts. For the investigation to be regarded as effective, it should in principle **be capable of** leading to identification of those responsible and to the establishment of the facts.

The paper covers the standards of the European Court of Human Rights (ECtHR) and the UN treaty bodies: the Committee against Torture (CAT) and the Human Rights Committee (HRC). It contains selected highlights of the jurisprudence on effective investigations developed by these bodies.

In addition, this note also briefly describes the admissibility criteria for individual complaints on torture and other ill-treatment submitted to the ECtHR and the UN treaty bodies. It contains practical recommendations on how to raise the chances to get a complaint on ineffective investigation of torture admitted by the ECtHR. These recommendations were collected through personal interviews with lawyers practicing before the ECtHR.

The purpose of this publication is to provide a summary of key international standards on effective investigation of torture and ill-treatment from a practical point of view. To this end, it provides specific examples of what shortcomings in investigations would be considered in violation of the standard of effective investigation. These examples can be used by lawyers and civil society activists to build cases in the international jurisdictions that consider complaints on torture and ill-treatment, in particular the UN and European Court of Human Rights.

The paper was inspired by the discussions on key challenges in building successful litigations on effective investigation of torture and other ill-treatment faced by DIGNITY's civil society partners working in Ukraine. However, it is may also be relevant for the use in other countries under the jurisdiction of the ECtHR and/or the UN Committee Against Torture and the UN Human Rights Committee.

ECTHR

1. STANDARDS OF EFFECTIVE INVESTIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION

A) POSITIVE OBLIGATION TO INVESTIGATE TORTURE AND OTHER ILL-TREATMENT UNDER ARTICLE 3

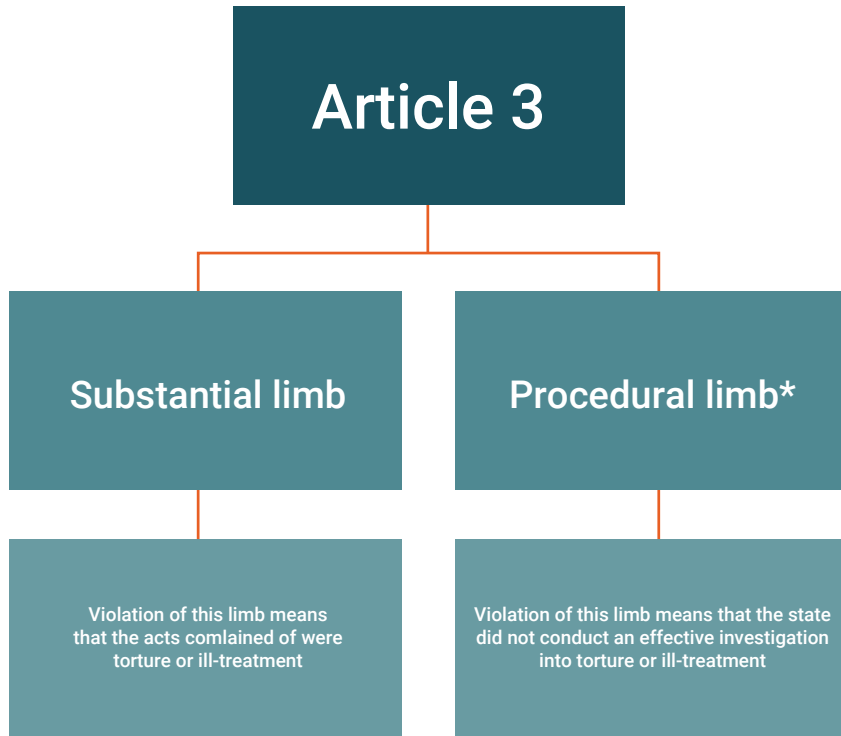
Article 3 of the European Convention on Human Rights reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

This article enshrines one of the most fundamental values of democratic societies. The prohibition of torture and inhuman or degrading treatment or punishment is set out in ‘absolute terms’, making ‘no provision for exceptions’. In this respect, Article 3 differs from other articles of the Convention, where exceptions and derogation are allowed (Shabas 2015, p. 168).

Neither Article 3, nor other articles of the Convention contain an explicit requirement to conduct an effective investigation of the acts prohibited by Article 3. However, these requirements have been developed by the ECtHR in its judgements interpreting the Convention. According to the Court’s interpretation, Article 3 contains both substantial (‘negative’) and procedural (‘positive’) obligations of the state to protect people from torture or inhuman or degrading treatment or punishment.

The positive and negative aspects of Article 3 can be considered independently. This means that it is **not** necessary for the Court to find a substantive violation of Article 3 before it can examine whether the procedural obligations have been complied with by the State (Erdal et Bakirci 2006, p. 222). In fact, sometimes the Court is unable to find a substantive violation precisely because the Government has violated the procedural obligation by not conducting an effective investigation (Ibid). Thus, if there was no violation of the substantive aspect of Article 3, a violation of the procedural aspect can still be found.

The procedural obligation in Article 3 requires conducting an ‘official investigation’, which is ‘capable of leading to the identification and punishment of those responsible’. The obligation to investigate arises when there is a complaint about torture or other ill-treatment or, in absence of a complaint, it must be launched *ex officio*, if there are sufficiently clear indications that torture or other ill-treatment has occurred. The procedural obligation requires that, where the facts warrant this, the investigation leads to effective criminal, disciplinary, or other appropriate proceedings for the enforcement of the law against those responsible of the ill-treatment (Harris et al. 2014, p. 277).



***This paper covers only the procedural limb.**

B) GENERAL REQUIREMENTS TO INVESTIGATIONS UNDER ARTICLE 3 AS INTERPRETED BY THE ECtHR

The ECtHR has a complex understanding of effective investigations. On the one hand, it considers that any deficiency in the investigation which undermines establishing the cause of injury or the person responsible will risk falling foul of the standard of effective investigation¹. On the other, 'it is not the Court's task to call into question the lines of inquiry pursued by the investigators, or the findings of fact made by them, unless they manifestly fail to take into account relevant elements or are arbitrary'².

Thereby, while the state is allowed a discretion in deciding how to investigate torture, any deficiency of an investigation can be considered by the Court as a sign of ineffectiveness, for example if the lines of inquiry manifestly failed to consider relevant elements.

The requirements of an effective investigation set out in the Court's jurisprudence have been identified by the Court on a case-by-case basis, and the list is by no means exhaustive. The shortcomings of the investigation may be both due to legislative defects or to authorities' reluctance/negligence to investigate the allegations (Harris et al. 2014, p. 225).

An effective investigation is not an obligation of results, but of means³. In other words, in the absence of tangible omissions in the process of investigation, the ultimate inability to punish the perpetrator does not in itself render an investigation deficient⁴. Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events⁵.

For the investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and – if appropriate – punishment of those responsible⁶.

Nevertheless, the outcome of the investigations and of the ensuing criminal proceedings, including the sanction imposed as well as disciplinary measures taken, has been considered decisive. It is vital in ensuring that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the prohibition of ill-treatment are not undermined⁷.

1 [Bati and Others v. Turkey](#), § 134; [Boyd v. Belgium](#), § 120

2 [Y. v. Bulgaria](#), § 82

3 [Boyd v. Belgium](#), § 120

4 [Y. v. Bulgaria](#), § 82

5 [Mikheyev v. Russia](#), § 107

6 [Aghdgomelashvili and Japaridze v. Georgia](#), § 37

7 [Gäfgen v. Germany](#), § 121

Some of the standards are clear indicators of the ineffectiveness of investigation. By way of example, an investigation would violate Article 3 in cases where:

- A An investigation is conducted by the same law enforcement body whose agent committed torture. The investigating body would equally be considered not independent in case of hierarchical or institutional connections between the investigating authority and the alleged perpetrator⁸.
- B The victim or key witnesses were not questioned at all or were questioned too late.
- C The investigator ignored the arguments of the victim and relied purely on the statements of the alleged perpetrator.

Some of the standards of the ECtHR are less rigid as to the effectiveness of investigation. For example, the ECtHR has not established a measurable standard regarding the length of investigation. There is no clear indication on how long an investigation may continue before it becomes ineffective. It depends on a number of factors such as the complexity of a case. Similarly, there is no inventory of 'all reasonable steps' that need to take place to secure evidence of torture, which is required by the ECHR.

C) SPECIFIC REQUIREMENTS TO INVESTIGATIONS UNDER ARTICLE 3 AS INTERPRETED BY THE ECTHR

Note, these requirements are cumulative – if an investigation does not satisfy even one of them, the investigation would violate Article 3. The requirements are considered in detail below.

<h3 style="margin: 0;">Article 3 requires that the investigation be:</h3>	<ul style="list-style-type: none"> • Independent and impartial • Prompt • Adequate / thorough • Subject to public scrutiny / involving the victim
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1. Independence and impartiality

Independence and impartiality are distinct, but closely related concepts. Independence is usually associated with certain institutional guarantees or safeguards that allow adjudicators to free themselves to some extent from external pressures when making their decisions. Impartiality, in contrast, is usually associated with the objectivity of the decisions or the absence of prejudice toward one or other of the parties (Papayannis 2016, p. 28).

Thus, independence presupposes that officials involved in conducting investigations and all decision-makers cannot be part of the same public authority as the officials who are the subject of the investigation and must be independent from those implicated in the facts being investigated (Svanidze 2014, p. 44). The obligation of independence covers anyone making decisions during investigations, including those assigned to particular investigative steps, e.g. forensic doctors, supervising prosecutors, and special bodies (Ibid).

The standard of independence consists of a few elements such as:

a) Absence of hierarchical or institutional connections. This requirement would not be observed if 'the investigation of alleged misconduct potentially engaging the responsibility of a public authority and its officers was carried out by those agents' colleagues, employed by the same public authority'⁹.

b) Independence in practical terms, not only absence of hierarchical or institutional connections¹⁰. This requirement would be violated when an investigator and the alleged perpetrator shared a similar status in their past positions¹¹.

As to impartiality, this requirement may be doubted because of characteristics of the investigator/the victim leading to a conflict of interest. For example, this would be the case when the investigator was of a different faith than the victim, which could have undermined his impartiality¹².

2. Promptness

For an investigation to be effective, it needs to be undertaken promptly and expeditiously. The very passage of time is liable not only to undermine an investigation, but also to compromise definitively its chances of being completed. The requirement of promptness concerns both the initiation of the investigation and its conduct.

While there may be difficulties which prevent progress of investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts¹³.

Even where there is no evidence that the perpetrators colluded with each other because of a delay of three days in their questioning, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in investigation¹⁴.

To be prompt, an investigation must be promptly instituted and carried out¹⁵. Regardless of the outcome of the proceedings, the protection machinery provided for in domestic law must operate in practice within a reasonable time such as to conclude the examination on the merits of specific cases submitted to the authorities¹⁶.

The Court has not set specific time-limits for various investigative actions and each time it assesses the promptness based on the circumstances of the case. Here are some examples of delays that the Court considered as rendering an investigation ineffective:

The suspects were interviewed more than a month after the events. That delay had given the suspects and their colleagues ample time to coordinate their statements¹⁷.

10 [Bouyid v. Belgium](#), § 118

11 [Anghelescu v. Romania](#), § 67

12 [97 members of the Gidani Congregation of Jehovah's Witnesses and 4 Others v. Georgia](#), § 117

13 [Boyid v. Belgium](#), § 120

14 [Ramsahai and Others v. The Netherlands](#), § 330

15 [X and Others v. Bulgaria](#), § 185

16 [V.C. v. Italy](#), § 95

17 [Mihhailov v. Estonia](#), § 91

- The suspects were interviewed more than nine months after the investigation had been opened¹⁸.
- The eye-witnesses relatives of the victim were questioned for the first time six weeks after the incident¹⁹.
- The report on the forensic medical examination of the victim was made more than five weeks after the alleged ill-treatment²⁰.
- No 'meaningful action' was taken in order to establish and assess all the circumstances pertinent to the applicants' alleged ill-treatment for more than a year²¹.
- The police officers suspected of ill-treatment were brought before the applicant for identification only about two years after the incident²².
- The victim was recognized as a victim two and a half years after the institution of criminal proceedings. It resulted in the victim's inability to exercise the procedural rights attaching to that status, such as the right to lodge applications or put questions to the experts²³.
- As a result of the delays and omissions, some suspects and possible offenders who might have been responsible fled the country and were consequently out of the authorities' reach²⁴.
- In the context of an armed conflict, the Court recognizes that obstacles are placed in the way of investigators causing an investigation to be delayed. Nonetheless, it is still a requirement that all reasonable measures are adopted to ensure the conduct of an effective and independent investigation²⁵.

18 [Belajevs v. Latvia](#), § 103

19 [Khadzhaliyev and Others v. Russia](#), § 106

20 [Mikheyev v. Russia](#), § 113

21 [Shmorgunov and Others v. Ukraine](#), § 408

22 [Mikheyev v. Russia](#), § 113

23 [Vasilyev v. Russia](#), § 157

24 [Shmorgunov and Others v. Ukraine](#), § 388

25 [Kavaklıoğlu and Others v. Turkey](#), § 236

3. Thoroughness / adequacy

To be effective, the investigation must be sufficiently thorough. Thoroughness includes many aspects of investigation ranging from specific requirements to secure evidence such as eye-witness testimony and forensic evidence to a more general requirement of making 'a serious attempt' to find out what happened to the victim. A thorough investigation presupposes a genuine effort on the side of the state to establish the relevant facts of the case.

According to the ECtHR, the authorities must take reasonable measures available to them to obtain evidence relating to the offence in question²⁶. They must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation²⁷.

A failure to pursue an obvious line of inquiry can decisively undermine the investigation's ability to establish the circumstances of the case and the identity of those responsible²⁸.

The investigation's conclusions, meanwhile, must be based on thorough, objective and impartial analysis of all relevant elements²⁹. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed based on all relevant facts and with regard to the practical realities of investigation work³⁰.

For an investigation to be effective there needs to be a serious effort on the side of the state to determine the relevant facts³¹. The reluctance of the authorities to ensure a prompt and thorough investigation of ill-treatment complaints lodged against police authorities may constitute a systemic problem for the purposes of Article 46 of the Convention, which leads to a simplified procedure in finding a violation of Article 3 in case of ineffective investigation³².

In practical terms, it is difficult for the Court to establish an exhaustive list of measures that need to take place in an effective investigation. However, it sometimes indicates certain measures:

The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries³³.

26 [X and Others v. Bulgaria](#), § 185

27 [El-Masri v. 'The former Yugoslav Republic of Macedonia'](#), § 183

28 [M.N. v. Bulgaria](#), § 48, [Kolevi v. Bulgaria](#), § 201

29 [A and B v. Croatia](#), § 108

30 [Armani Da Silva v. the United Kingdom](#), § 234

31 [Makarenko and Others v. Ukraine](#), § 12

32 [Alizada v. Ukraine](#), § 15, [Lutayenko and Others v. Ukraine](#), § 11

33 [Bati and Others v. Turkey](#), § 134

The procedural obligation under Article 3 of the Convention requires authorities to investigate both those with command responsibility and those who are direct perpetrators³⁴.

The authorities' duty to investigate the existence of a possible link between racist attitudes (or other discriminatory motives) and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention. It may be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 3³⁵.

Examples when an investigation was not considered thorough:

- The applicant repeated that he would be able to recognize the perpetrators concerned if he could see them in person, but nothing was done to enable him to do so³⁶.
- Independence of the forensic doctor was questionable and the forensic report was not of a proper quality (no indication as to the degree of consistency of allegations and injuries, no conclusion indicating the degree of support to the allegations of ill-treatment based on a discussion of possible differential diagnoses, incl. ill-treatment or self-inflicted injuries)³⁷.
- Disregard to hyperextension injury because it was not confirmed by visible bodily injuries³⁸.
- Potential witnesses who could have possessed useful information as to the incident were questioned³⁹.
- Not proceeding with inspection of the scene of the incident⁴⁰, including taking photographs, finding bullets, inspection of instruments of crime etc⁴¹.
- Domestic rules of criminal procedure were not complied with during investigations, which rendered the principal body of evidence inadmissible⁴².
- Inconsistent approach to the assessment of evidence by the national prosecuting authorities in dealing with the allegations of ill-treatment. Notably, when the prosecution based its conclusions on the statements given by the perpetrators and discounted the testimony by the victim's parents and the victim personally⁴³.

34 [Jelić v. Croatia](#), § 94

35 [Lutsenko and Verbytsky v. Ukraine](#), § 60

36 [Labita v. Italy](#), § 134

37 [Barabanshchikov v. Russia](#), § 59

38 [Grimailovs v. Latvia](#), § 115

39 [Grimailovs v. Latvia](#), § 115

40 [Chitayev v. Russia](#), § 165

41 [Gül v. Turkey](#), § 89

42 [Maslova and Nalbandov v. Russia](#), §§ 52, 95

43 [Stevan Petrović v. Serbia](#), §§ 111, 123, 131

4. Victim's involvement

1. Recognition of the status

The delay in recognition of victim's status may lead to inability to exercise the procedural rights attached to that status, which may render an investigation ineffective⁴⁴.

2. Participation in the proceedings

The victim should be able to participate effectively in the investigation⁴⁵.

The victims should be informed about significant developments of the proceedings. They should be 'consistently kept abreast' of the proceedings. Otherwise, the authorities fail to safeguard the interests of the victim in the proceedings⁴⁶.

The investigation must be accessible to the victim to the extent necessary to safeguard his or her legitimate interests⁴⁷. This should be so even through the degree of the element of public scrutiny, which is required for an investigation to be effective, may vary⁴⁸.

Victims' participation in the proceedings should involve not only being kept abreast of its progress, but also access to the materials of the investigation⁴⁹. Victims should also be informed in case of closing the case⁵⁰.

In case of death, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests, which includes informing the victim about the developments of the proceedings⁵¹. The relatives of the deceased person should be able to put questions to the witnesses, whether through their own counsel or, for example, through the inquiry panel⁵².

3. Redress

Victims of ill-treatment are entitled to full redress under Article 3 of the Convention. Thus, providing compensation without establishment of all the relevant circumstances of ill-treatment is not sufficient for the state to fulfil its obligation to conduct an effective investigation. It is equally so in case where the compensation was paid without acknowledging that injuries had been inflicted on the victim in violation of the guarantees protecting against ill-treatment⁵³.

44 [Vasilyev v. Russia](#), § 157

45 [Stevan Petrović v. Serbia](#), § 122

46 [Khadzhaliyev and Others v. Russia](#), § 106, [Ognyanova and Choban v. Bulgaria](#), § 115

47 [X and Others v. Bulgaria](#), § 189

48 [Ognyanova and Choban v. Bulgaria](#), § 107

49 [Chitayev v. Russia](#), § 165

50 [Güleç v. Turkey](#), § 82

51 [Mocanu and Others v. Romania](#), § 324, § 350

52 [Paul and Audrey Edwards v. the United Kingdom](#), § 84

53 [Lutsenko and Verbytsky v. Ukraine](#), § 49-50

2. RIGHT TO AN EFFECTIVE REMEDY UNDER ARTICLE 13 OF THE EUROPEAN CONVENTION AND EFFECTIVE INVESTIGATIONS

Article 13 (right to an effective remedy) stipulates that:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In case of an alleged breach of the procedural limb of the positive obligations under Articles 2 or 3, there is an overlapping relationship between such procedural obligation and the effectiveness requirement under Article 13 (Barkheusen & Emmerik 2021, p. 1048).

If complaints under Articles 2 and 3 are declared admissible and well-founded, the Court does not engage in detailed examinations of the complaint under Article 13, declaring it admissible for the same reason (Barkheusen & Emmerik 2021, p. 1048). The Court would reiterate its findings concerning the lack of effective investigations under Article 2 or 3 to justify its separate finding of a breach of Article 13. When a violation of the obligation to effective investigation is found under Article 2, this may mean automatic, without any further separate examination, translation into finding of a violation of Article 13. However, the policy remains obscure between obligations to conduct an effective investigation under Article 3 and Article 13 (Ibid, p. 1050).

According to the Court, the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes an obligation on State Parties to carry out a thorough and effective investigation of incidents of torture⁵⁴.

Article 13 requires not only compensation of victims of torture, but also an effective investigation that has to be initiated by the state:

(...) where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment, which imposes a duty to proceed to a ‘prompt and impartial’ investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court’s view, such a requirement is implicit in the notion of an ‘effective remedy’ under Article 13⁵⁵.

When examining an allegation under Article 13, the Court stated that the requirements of that Article are ‘broader’ than the effective investigation duties arising under Articles 2 and 3, e.g. includes the requirement of compensation⁵⁶. If the applicant failed to prove beyond reasonable doubt the state’s implication in violation of Article 2 or 3, this does not detract from the arguable nature of the complaint in relation to these substantive provisions for the purposes of Article 13⁵⁷. This is because the standard beyond reasonable doubt is much more onerous than the more ‘lax’ notion of arguability⁵⁸.

However, the Court’s general approach is that it **will not** examine Article 13 separately once it has examined the procedural aspects of Articles 2 and/or 3⁵⁹. The policy is that the Article 13 claim will be addressed in addition to violation of procedural limb of article 2 (or 3) if the possibility of the victim to obtain a civil compensation was undermined by the failure of the investigation⁶⁰.

In *Ilhan v. Turkey*, the Court decided not to find a separate violation of the procedural aspect of Article 3 and, instead, went on deciding that Article 13 was violated because no effective remedy was provided, and thereby access to any other available remedies, including a claim for compensation. The Court considers that the requirement under Article 13 of the Convention that a person with an arguable claim of a violation of Article 3 should be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by state officials. Whether it is appropriate or necessary to find a procedural breach of Article 3 ‘will therefore depend on the circumstances of the particular case’⁶¹. However, in the *Ilhan* case, the Court provided ‘neither clear guidelines nor rationales for obliterating the need for separate appraisal and findings of a violation of the procedural / investigative limb of Article 3, in conjunction with Article 13’⁶².

Later the Court departed from this position and established both violation of Article 3 and 13. For example, in case of *Menesheva v. Russia*, the Court established violations of both articles because of lack of effective investigation. It seems that an additional finding of a violation of Article 13 was linked to the fact that the violation of Article 3 deprived the applicant of the prospect of redress:

[N]o effective criminal investigation can be considered to have been carried out. Consequently, any other remedy available to the applicant, including the claim for damages, had limited chances of success. While

55 [Aksoy v. Turkey](#), § 98

56 [Salman v. Turkey](#), § 123

57 For further references see: Barkhuysen and Emmerik 2021, p. 1049.

58 *Ibid*

59 [Ramsahai and Others v. Netherlands](#), § 362-363

60 [Musayev and Others v. Russia](#), § 175

61 [Ilhan v. Turkey](#), §92, 103

62 T Barkhuysen, M van Emmerik M, *Ibid* 1052

the civil courts have capacity to make an independent assessment of the facts, in practice the weight attached to a preceding criminal inquiry is so important that even the most convincing evidence to the contrary furnished by a plaintiff would often be discarded as “irrelevant”⁶³.

In sum, the Court’s approach to finding violations of Article 3 in combination with Article 13 remains unclear. However, it generally deals with ineffective investigations under the procedural limb of Article 3.

3. ADMISSIBILITY OF COMPLAINTS SUBMITTED TO THE EUROPEAN COURT OF HUMAN RIGHTS⁶⁴

A) PROCEDURAL REQUIREMENTS

1. Exhaustion of domestic remedies

In order to submit a complaint to the ECHR, domestic remedies must be exhausted. Only effective remedies need to be exhausted.

The remedies must be sufficiently certain not only in theory but also in practice. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case. To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospects of success.

However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress.

As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement.

In a number of cases where the complaints concerned alleged unlawful use of force by state agents, the Court has held that civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, are not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Article 3 of the Convention.

Individuals bear the responsibility of cooperating with procedures flowing from the lodging of their complaints, assisting in clarifying any factual issues where such lie within their knowledge, and maintaining and supporting their complaints and applications. In particular, the duty of diligence incumbent on applicants contains two distinct but closely linked aspects.

On the one hand, the applicants must contact the domestic authorities promptly concerning progress in the investigation – which implies the need to apply to them with diligence, since any delay risks compromising the effectiveness of the investigation.

On the other, they must lodge their application promptly with the Court as soon as they become aware or should have become aware that the investigation is not effective. With regard to the second aspect – that is, the duty on the applicant to lodge an application with the Court as soon as he or she realises, or ought to have realised, that the investigation is not effective – the Court has stated that the issue of identifying the exact point in time that this stage occurs necessarily depends on the circumstances of the case and that it is difficult to determine it with precision.

- 1 Compliance with the six-month time-limit (will change to 4 months on 1 February 2022)
- 2 No anonymous applications
- 3 Not the same case

Substantially the same means such a case that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

- 4 No abuse of right of application

Abuse of right of application is the harmful exercise of a right for purposes other than those for which it is designed.

2. Court's jurisdiction

- 1 Compatibility *ratione personae*

Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it.

- 2 Compatibility *ratione loci*

Compatibility *ratione loci* requires the alleged violation of the Convention to have taken place within the jurisdiction of the respondent State Party or in territory effectively controlled by it.

- 3 Compatibility *ratione temporis*

The provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party.

- 4 Compatibility *ratione materiae*

For a complaint to be compatible *ratione materiae* with the Convention, the right relied on by the applicant must be protected by the Convention and the Protocols thereto that have come into force.

3. Admissibility based on the merits

Manifestly ill-founded

'Fourth instance'

ECtHR is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them, nor can it re-examine cases in the same way as a Supreme Court.

Clear or apparent absence of a violation

The complaint does not disclose any appearance of a violation of the rights guaranteed by the Convention. In such cases, the Court's approach will consist in examining the merits of the complaint, concluding that there is no appearance of a violation and declaring the complaint inadmissible without having to proceed further.

No appearance of arbitrariness or unfairness

The Court may declare manifestly ill-founded a complaint which was examined in substance by the competent national courts in the course of proceedings which fulfilled, a priori, the following conditions:

- the proceedings were conducted before bodies empowered for that purpose by the provisions of domestic law;
- the proceedings were conducted in accordance with the procedural requirements of domestic law;
- the interested party had the opportunity of adducing his or her arguments and evidence, which were duly heard by the authority in question;
- the competent bodies examined and took into consideration all the factual and legal elements which, viewed objectively, were relevant to the fair resolution of the case;
- the proceedings resulted in a decision for which sufficient reasons were given.

No appearance of a lack of proportionality between the aims and the means

If the Court is satisfied that the conditions of proportionality have been met (interference was in accordance with the law, pursued legitimate objective and was proportionate) and there is no clear lack of proportion between the aims pursued by the State's interference and the means employed, it will declare the complaint in question inadmissible as being manifestly ill-founded.

Other relatively straightforward substantive issues

- Where there is settled and abundant case-law of the Court in identical or similar cases, on the basis of which it can conclude that there has been no violation of the Convention in the case before it;
- Where, although there are no previous rulings dealing directly and specifically with the issue, the Court can conclude on the basis of the existing case-law that there is no appearance of a violation of the Convention.

2. Unsubstantiated complaints: lack of evidence

The applicant provided little or not enough evidence that a violation had taken place.⁶⁵

3. Confused or far-fetched complaints

The Court will reject as manifestly ill-founded complaints which are so confused that it is objectively impossible for it to make sense of the facts complained of by the applicant and the grievances he or she wishes to submit to the Court. The same applies to far-fetched complaints, that is, complaints concerning facts which are objectively impossible, have clearly been invented or are manifestly contrary to common sense.

4. No significant disadvantage

The Court may declare inadmissible any individual application where the applicant has suffered no significant disadvantage.

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NB: Shortcomings in the effectiveness of investigation may be identified based on the reports of international and domestic organisations ([Shmorgunov and Others v. Ukraine](#), § 301).

4. BEST-PRACTICE FOR BUILDING A CASE ON INEFFECTIVE INVESTIGATION AT THE ECtHR

The following section is based on interviews with two Ukrainian lawyers from among top-ranked national lawyers practicing at ECtHR, who have won numerous cases on ineffective investigation of torture. The information obtained through the interviews are summarized below according to the key points that were emphasised by these lawyers as essential for a successful complaint on ineffective investigation to the ECtHR.

A) LENGTH OF INVESTIGATION

In practice, there is no clear time, after which an investigation becomes ineffective. This depends on the circumstances of the case. However, what matters is whether the state bodies demonstrate the willingness to investigate. If there are no or little efforts to investigate, the time limit after which it is advisable to apply to the ECtHR gets shorter.

The length of an investigation is not decisive in complaining on ineffective investigations to the ECtHR. The most important is to prove that further waiting for an effective investigation makes no sense given the circumstances of a particular case.

The reasonableness of the length of investigation should be assessed also in the context of a particular investigative action. For example, if an expertise has not been ordered by an investigator promptly and the signs of torture may disappear, it is a good ground to apply to the ECtHR without waiting for long time. Thus, the time that an applicant needs to wait before applying to the ECtHR depends also on the nature of investigative steps and time needed to conduct them.

The complaint can be submitted even after 2 weeks following an initiation of investigation, if some crucial investigative steps were omitted, which would render further investigation ineffective.

However, according to one interviewee, 1-1.5 years is an average time that could be enough for applying to the Court. According to the other, 1-2 years of inactive investigation would often suffice to prove to the ECtHR that a given investigation is not moving forward.

The shorter the time that has elapsed, the more evidence is needed to prove that further investigation will be ineffective and vice versa.

B) THOROUGHNESS OF INVESTIGATION

It is important to prove that the state has not done everything depending on it to conduct an effective investigation. The Court needs to be provided with the evidence of lacking investigative steps that could have been conducted.

If you consider that a certain investigative step is necessary, request it from the investigator. If the investigation has lasted for too long, there is often no point in requesting additional steps. However, the applicant should be well-informed of the materials of the case in order to prove omissions on the side of the state.

The victim can also strengthen the future case if he/she complains to the investigator or other responsible body about a lack of certain investigative actions that are needed. In case of non-opening of an investigation or opening and fast closing it, it makes sense to try to challenge such actions in the court a few times to show that it makes no sense to continue at the national level.

It is worth complaining to the ECtHR on the ineffectiveness of investigation even if certain investigative steps take place, but they are not sufficient. However, the insufficiency should be proven by the applicant. This can be done, for instance, by proving that conducting a certain investigative step was crucial for the outcomes of the investigation (e.g. questioning a terminally-ill witness, solicitation of expertise, timely arrest of suspects who could flee from justice etc).

C) EXHAUSTION OF DOMESTIC REMEDIES

There is no need to wait for too long before applying to the ECtHR. If the Court does not accept the application, it can be submitted later when a longer time elapses, which would generate additional proof that an investigation has not been of a reasonable length.

In some cases, waiting for too long may be used by the Government who can invoke that the applicant waited for too long, although he/she knew that the investigation was ineffective or that it was a systemic problem in a particular country.

If the Court did not admit the case because of non-exhaustion of the remedies, it can be submitted again later.

In certain CoE states, like Ukraine, the Court has established that a lack of effective investigation of torture is a systemic problem. This means that the Court would often not require exhaustion of domestic remedies, e.g. complaining on ineffectiveness of investigation.

However, it is still advisable to make some effort to show that an investigating body is not doing its work. This can be done through:

- 1 requests to conduct certain investigative steps and proving that nothing or not much happened as a result;
- 2 inquiry on the status of an investigation to prove that not much is happening;
- 3 complaints to the investigating judge or other competent body asking to oblige investigators to conduct certain investigative steps.

If there are no answers to such requests or dismissal of complaints, it is a straightforward ground to apply to the ECtHR.

D) EVIDENCE OF TORTURE/ILL-TREATMENT

It is important that there are proves that torture/ill-treatment has taken place. An independent expertise may come handy. The ECtHR would especially value an expertise relating to the Istanbul Protocol – this is a good additional argument for building a case.

If the signs of torture were not recorded by a state body, the lawyer should take all possible steps to do so. In case of impossibility to collect evidence (e.g. in prison), even photos will be better than nothing.

E) GENERAL COMMENT FROM THE INTERVIEWEES

According to the interviewees, getting a complaint on ineffective investigation under Article 3 admitted sometimes resembles 'a lottery'. Sometimes, even experienced lawyers fail in getting a case admitted without clearly understanding of what went wrong. The relevant practice of the ECtHR seems to be at times inconsistent, and it remains volatile. It makes it difficult to be sure about the type of complaints that will surely be admitted or dismissed.

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5. EFFECTIVE INVESTIGATION IN THE JURISPRUDENCE OF THE UN TREATY BODIES

A) COMMITTEE AGAINST TORTURE (CAT)

1. General observations on the duty to investigate

The duty to investigate torture and ill-treatment is enshrined in Article 12 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The article reads as follows:

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

In addition to Article 12, Article 13 of the Convention requires that each State Party ensures that any individual who alleges he has been subjected to torture has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Further, according to Article 13, steps should be taken to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of his/her complaint or any evidence given.

According to some authors, Article 12 requires a State Party to investigate when there are reasonable grounds to believe that torture occurred (*ex officio*), and Article 13 requires it to investigate complaints of persons alleging torture (Hall 2018, p. 924). However, in the jurisprudence of the Committee,

(...) decisions on Articles 12 and 13 usually go hand in hand. The Committee does not clearly differentiate between the two articles in a way to only apply Article 13 to cases where a complaint was made and Article 12 to cases in which an investigation was undertaken *ex officio* (Nowak et al. 2019, p. 358).

The Committee has rarely considered a violation of Article 13 separately from Article 12 (*Ibid*, p. 365).

Unlike Articles 5 to 9 of the Convention that require State Parties to bring to justice perpetrators of torture, Articles 12 and 13 require a conduct of an effective investigation to both torture and CIDTP (*Ibid*, p. 338).

The CAT has on numerous occasions established a violation of Article 13 subsequently to the violation of Article 12. By failing to meet the obligation under Article 12 the State Party also fails 'in its responsibility under article 13 of the Convention to ensure the right of the complainant to lodge a complaint, which presupposes that the authorities will provide a satisfactory response to such a complaint by launching a prompt and impartial investigation'⁶⁶.

The CAT in its General Comment No. 3 underscored this relation between the articles, as well as the link of effective investigation with the right to obtain redress under Article 14. In Para 23 they write:

The Committee (...) underscores the important relationship between States parties' fulfilment of their obligations under article 12 and 13, and their obligation under article 14. According to article 12, States parties shall undertake prompt, effective and impartial investigations, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction as the result of its actions or omissions ... Full redress cannot be obtained if the obligations under articles 12 and 13 are not guaranteed.

And in Para 25:

Securing the victim's right to redress requires that a State party's competent authorities promptly, effectively and impartially investigate and examine the case of any individual who alleges that she or he has been subjected to torture or ill-treatment.

According to the Committee's interpretation, under article 12 of the Convention, the authorities have the obligation to proceed to an investigation *ex officio*, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion⁶⁷. Thus, initiation of the proceeding should be 'automatic'⁶⁸. The 'reasonable grounds to believe' appear primarily when a person shows signs of abuse. The proof 'beyond a reasonable doubt' is not required to establish the duty to investigate (Nowak et al. 2019, p. 342-343).

Article 13 does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence. It is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated⁶⁹.

However, Article 12 does not oblige State Parties to prosecute an individual accused of torture in circumstances where there is insufficient evidence for a prosecution to succeed. The article 12 obligation imposes a duty on a State Party to investigate torture when it has reasonable grounds to do so⁷⁰. On the other hand, a breach of the Convention may occur even if the original allegation of torture was unfounded (Bayefsky 2003, p. 85).

66 Déogratias Niyonzima v. Burundi (CAT/C/53/D/514/2012), para. 8.5

67 Blanco Abad v. Spain (CAT/C/20/D/59/1996), para. 8.2

68 Déogratias Niyonzima v. Burundi (CAT/C/53/D/514/2012), para. 8.4

69 Bouabdallah Ltaief v. Tunisia (CAT/C/31/D/189/2001), para. 10.6

70 Paul Zentveld v. New Zealand (CAT/C/68/D/852/2017), para 4.20

An investigation in itself is not sufficient to demonstrate the State Party's conformity with its obligations under article 12 of the Convention⁷¹. A criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of the persons who may have been involved. An investigation should be prompt, impartial and effective⁷².

2. Independence and impartiality

An investigation would not be sufficient to demonstrate the State Party's conformity with its obligations under article 12 of the Convention if it can be shown not to have been conducted impartially⁷³.

The CAT has not clarified its standard of impartiality, although it criticized the situation when the investigation is entrusted to the same body under whose responsibility torture was alleged to have taken place⁷⁴. If such an investigation was followed by prosecutor's offices, the CAT may find no violation of the requirement of impartiality⁷⁵. Thus, a lack of independent investigation does not lead to automatic violation of Article 12 (Nowak et al., *Ibid*, p. 354).

Unlike the ECtHR, the CAT only finds a violation of the standard of independence on the basis of the conduct of the investigation (how it was carried out), but not merely because of a lack of hierarchical independence of an investigative body. At the same time, the Committee regularly criticizes the lack of independence of investigation mechanisms in its Concluding Observations (Nowak et al., *Ibid*, p. 349), i.e. not in cases of individual complaints.

3. Promptness

The need to conduct a prompt investigation is essential to ensure that the victim does not continue to be subjected to torture and CIDTP, and because the physical traces of torture, and especially of CIDTP, soon disappear⁷⁶.

For an investigation to be prompt and effective, it must be initiated immediately or without any delay, within hours or, at the most, few days after the suspicion of torture or ill-treatment has arisen⁷⁷.

However, the CAT does not have a rigid standard on the acceptable delays for initiating an investigation into allegations of torture. Examples of delays that the Committee found to be in violation of Article 12 (sometimes in combination with Article 13) differ depending on the circumstances of the case.

71 E.L.G. v. Spain (CAT/C/68/D/818/2017), para. 8.5

72 Rached Jaïdane v. Tunisia (CAT/C/61/D/654/2015), para. 7.10

73 Ashim Rakishev and Dmitry Rakishev v. Kazakhstan (CAT/C/61/D/661/2015), para. 8.7

74 See (with further references) Inglese 2001, p. 354.

75 N.Z. v. Kazakhstan (CAT/C/53/D/495/2012), para. 13.3-13.5

76 Blanco Abad v. Spain (CAT/C/20/D/59/1996), para. 8.2

77 Nowak et al., 2019, p. 346. The UN Special Rapporteur on Torture has recommended that torture and other ill-treatment be investigated and documented within twenty-four hours (UN Special Rapporteur on Torture 2014, Report, A/69/387).

For example, the CAT considered too long a delay of 18 days before the investigation commenced⁷⁸. It also considered that delays of three weeks on the part of the competent authorities in reacting to allegations of torture to be excessive⁷⁹. The State's failure to investigate an allegation of torture for 15 months was considered a violation of Article 12⁸⁰.

In some cases, the CAT found a violation of Article 12 if the investigation has not taken place for years after the events, e.g. 6 years⁸¹, 9 years⁸² or even 11 years⁸³.

Delays in investigation and the lack of progress in the investigation cannot be put down to a lack of cooperation on the part of the complainant or his lawyer⁸⁴.

4. Victim's involvement

The CAT found a violation of Article 12 and 13 when the victim has not been properly informed about the progress of the investigation. For example, a violation was found in the cases where:

- The prosecutor *never* informed the complainant's lawyer, or the complainant, whether an inquiry was under way or had been carried out following the filing of the complaint, which precluded the victim from initiating civil proceedings⁸⁵.
- The prosecutor failed to inform the victim whether an inquiry was under way or had been carried out in the three years following submission of the complaint about torture⁸⁶. The State failed to inform the complainant for almost six years by, *inter alia*, not providing him with a relevant report, nor with names of the persons who caused bodily injury to the complainant, which prevented him from assuming 'private prosecution' of his case prior to the expiry of the absolute statute of limitations for criminal prosecution⁸⁷.

The CAT would consider an investigation violating Article 12 and/or 13 in case of 'inexcusable' or other omissions of investigation when:

- No steps were taken to identify the perpetrator⁸⁸.
- The judge refused to allow the submission of evidence additional to that of the medical experts, i.e., the hearing of witnesses as well as the possible perpetrators of the ill-treatment⁸⁹.

78 Blanco Abad v. Spain (CAT/C/20/D/59/1996)

79 Faisal Baraket v. Tunisia (CAT/C/23/D/60/1996), para. 11.5

80 Qani Halimi-Nedzibi v. Austria (CAT/C/11/D/8/1991), para. 13.5

81 Ennaâma Asfari v. Morocco (CAT/C/59/D/606/2014)

82 Jean Ndagijimana v. Burundi, CAT/C/62/D/496/2012

83 Damien Ndarisigaranye v. Burundi (CAT/C/62/D/493/2012)

84 Abdulrahman Kabura v. Burundi (CAT/C/59/D/549/2013)

85 Saadia Ali v. Tunisia (CAT/C/41/D/291/2006), para. 15.7

86 Ali Ben Salem v. Tunisia (CAT/C/39/D/269/2005), para. 16.7

87 Besim Osmani v. Republic of Serbia (CAT/C/42/D/261/2005), para. 10.7

88 Blanco Abad v. Spain (CAT/C/20/D/59/1996), para. 8.8

89 Blanco Abad v. Spain (CAT/C/20/D/59/1996), para. 8

- The victim was not questioned in person at any point, in particular when the statements were written in detention and under the control of the police officers who allegedly inflicted the said injury⁹⁰.
- The allegations were not investigated and the police accepted at face value the explanation that the complainant had hurt himself⁹¹.
- The investigative bodies relied on the testimony of the alleged perpetrators while the victims' account of events was attached little or no weight⁹².

In order to be effective, any genuine investigating body must be competent, i.e. entrusted with full investigative powers, such as summoning witnesses, interrogating the accused officials, inspecting official documents, and carrying out forensic examinations (Nowak et al. 2019, p. 347).

Lack of qualifications of the expert to conduct a forensic expertise (autopsy) may also be considered a violation of the requirement of effective investigation⁹³. More generally, the CAT considers that an investigation in the sense of Article 12 should include an independent physical and psychological expertise according to the Istanbul Protocol⁹⁴.

In case where the victim is detained, it is important that the content of an expertise report is not known for the person responsible for the police custody and the expertise should take place outside the place of detention. The examination by a doctor of choice should also be available⁹⁵.

A violation of Article 13 would also be found if the State did not protect the victim or his/her relatives from threats following their complaint⁹⁶.

B) HUMAN RIGHTS COMMITTEE (HRC)

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) reads as follows:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The State's obligation to investigate allegations of torture and CIDTP has been interpreted in light of Article 2 (3a) of the ICCPR, which states that each State Party undertakes:

90 Danil Gabdulkhakov v. Russian Federation CAT/C/63/D/637/2014), para. 9.5

91 F.K. v. Denmark (CAT/C/56/D/580/2014), para. 7.7

92 Oleg Evloev v. Kazakhstan (CAT/C/51/D/441/2010), para. 9.5; Bairamov v. Kazakhstan (CAT/C/52/D/497/2012), para. 8.7

93 Radivoje Ristic v. Yugoslavia (CAT/C/26/D/113/1998), paras. 9.5-9.6

94 UN Committee Against Torture (CAT), General comment no. 3, 2012, para. 25

95 For further references see: Nowak et al. 2019, p. 351.

96 Ennaâma Asfari v. Morocco (CAT/C/59/D/606/2014), Alexander Gerasimov v. Kazakhstan (CAT/C/48/D/433/2010), paras. 12.6-12.7, Déogratias Niyonzima v. Burundi (CAT/C/53/D/514/2012, para. 8.5

'To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'

In its General Comment No. 20 the HRC explained this link between the substantive obligation under Article 7 and the procedural obligation under Article 2: 'Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant'.

In this General Comment, the Committee also briefly explained its investigation-related standards in the context of torture: complaints must be investigated a) promptly, b) impartially and c) by competent authorities so as to make the remedy effective.

According to the HRC, a failure by a State Party to investigate allegations of violations 'could in and of itself give rise to a separate breach of the Covenant'. Cessation of an ongoing violation is an essential element of the right to an effective remedy.⁹⁷

The obligation to investigate torture and CIDTP has also been mentioned by the Committee in its General Comment General No. 31 (para. 8):

(...) There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm [...] States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3(...)

Further to that, the HRC has interpreted that Article 2, Paragraph 3, requires the States investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy (General Comment General No. 31 (para. 15). The State is under obligation to investigate torture even if it was committed 'by a prior regime'.⁹⁸

Initially, the HRC was reluctant to call for the punishment of the perpetrators of torture, since individuals did not, it maintained, have a right to require that a state prosecutes another person (Nowak 2005).

However, in 1994, in *Rodriguez v. Uruguay*, it edged from this position and declared that the applicant, a torture victim, was entitled to an effective remedy. The Committee found that the responsibility for investigations fall under the State Party's obligation to grant an effective remedy⁹⁹.

97 UN Human Rights Committee (HRC), General comment no. 31, para. 15-16

98 *Hugo Rodriguez v. Uruguay* (CCPR/C/51/D/322/1988), para. 12.3

99 *Rodriguez v. Uruguay* (CCPR/C/51/D/322/1988), para. 12.3

Later, in 1995, the HRC moved even further away from its reluctance to call for prosecution of particular individuals adopting a number of decisions requiring investigation into cases of torture¹⁰⁰. For example, in *Bautista de Arellana v. Colombia*, the Committee urged Colombia to ‘expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista [the victim]. The State party is further under an obligation to ensure that similar events do not occur in the future’¹⁰¹.

The Committee also interpreted that under Article 2, Paragraph 3 of the ICCPR, the effective remedy should include compensation for loss and injury¹⁰².

While the State is under a duty to investigate thoroughly alleged violations of human rights, and to prosecute and punish those held responsible for such violations¹⁰³, a conduct of disciplinary or administrative inquiries is not sufficient to satisfy the requirement of Article 2 of the ICCPR in case of torture and other serious human rights violations such as the right to life or liberty (Ochoa 2013, p. 42).

In case where the State has allegedly committed torture and where these allegations have been substantiated by the complainant, it bears a duty to provide counterarguments to refute such allegations. In the absence of the counterarguments the HRC would find that a person was a victim of violation of article 7 of the Covenant¹⁰⁴.

The Committee may find a violation of the procedural obligation to investigate torture without separate examination of whether there was a violation of the substantive obligation¹⁰⁵.

According to the General Comment 31 of the Human Rights Committee ‘Article 2, paragraph 3 [of the ICCPR], requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. ... the Committee considers that the Covenant generally entails appropriate compensation. ... where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations’¹⁰⁶.

100 For the respective references, see: Rodley & Pollard 2009, p. 152.

101 *Bautista de Arellana v. Colombia* (CCPR/C/55/D/563/1993), para. 10

102 *Arhuacos v. Colombia* (CCPR/C/60/D/612/1995), para. 10

103 *Sundara Arachchige Lalith Rajapakse v. Sri Lanka* (CCPR/C/87/D/1250/2004), para. 9.3

104 *Marcel Mulezi v. Democratic Republic of the Congo* (CCPR/C/81/D/962/2001), para. 5.3

105 *Sundara Arachchige Lalith Rajapakse v. Sri Lanka* (CCPR/C/87/D/1250/2004), para. 9.5

106 UN Human Rights Committee (HRC), General comment no. 31, para. 16

6. ADMISSIBILITY BY THE UN CAT AND HRC¹⁰⁷

Before complaining to the UN CAT or HRC, it is important to make sure that the respective state has agreed that allegations on human rights violations against it can be considered by these UN bodies. In case of the UN CAT, no complaint shall be received by the Committee if it concerns a State Party which has not made a declaration that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals (article 22 of the CAT). In case of the HRC, it may consider individual complaints that allege a violation of an individual's rights under the ICCPR if the state is a party to the First Optional Protocol to the ICCPR, which establishes the complaints mechanism.

- **Victim's status**

It has to be shown that the alleged victim is personally and directly affected by the law, policy, practice, act or omission of the State Party which constitute the object of the complaint. It is not sufficient simply to challenge a law or state policy or practice in the abstract (a so-called *actio popularis*) without demonstrating how the alleged victim is individually affected.

- **Ratione materiae**

The alleged violation must relate to a right actually protected by the treaty.

- **Ratione temporis**

If the complaint relates to events that occurred after the entry into force of the complaint mechanism for the State Party concerned, as a rule, a Committee does not examine such complaints. If this is the case, the complaint would be regarded as inadmissible *ratione temporis*. There are, however, exceptions to this rule, for instance in cases where the effects of the event in question result in a continuous violation of the treaty.

- **Not fourth instance**

The Committees are competent to consider possible violations of the rights guaranteed by the treaties concerned, but are not competent to act as an appellate instance with respect to national courts and tribunals. Thus, the Committees cannot in principle examine the determination of administrative, civil or criminal liability of individuals, nor can they review the question of innocence or guilt.

107

Below are the excerpts from the UN webpage 'Human Rights Treaty Bodies - Individual Communications: 23 FAQ about Treaty Body complaints procedures': <<https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx>> accessed 16 December 2021

- **Sufficient substantiation**

If the relevant Committee considers, in the light of the information before it, that the complainant has not sufficiently presented/ described the facts and arguments for a violation of the Covenant, it may reject the case as insufficiently substantiated.

- **The matter has been submitted to another international body**

If it has been submitted to another treaty body or to a regional mechanism such as the European Court of Human Rights, the Committees cannot examine the complaint.

- **Exhaustion of all domestic remedies**

A cardinal principle governing the admissibility of a complaint is that the complainant must have exhausted all relevant remedies that are available in the State Party before bringing a claim to a Committee. This usually includes pursuing the claim through the local court system. The *mere* doubts about the effectiveness of a remedy do not dispense with the obligation to exhaust it.

There are, however, exceptions to this rule, when proceedings at the national level have been *unreasonably prolonged, or the remedies are unavailable or would plainly be ineffective*. The complainant should, however, give detailed reasons why the general rule should not apply. On the issue of exhaustion of domestic remedies, the complainant should describe in his/her initial submission the efforts he/she has made to exhaust local remedies, specifying the claims advanced before the national authorities and the dates and outcome of the proceedings, or alternatively stating why any exception should apply.

- **Abuse of procedure**

In some cases, the Committees may consider the claims to be frivolous, vexatious or otherwise inappropriate use of the complaint procedure and reject them as inadmissible, for example if the same individual brings repeated claims to the Committee on the same issue when the previous identical ones have already been dismissed.

- **Fee**

Neither of the Committees charges a fee for processing of complaints.

A) SPECIFICS OF CAT

- The Committee's rules of procedure state that a complaint may be rejected as inadmissible if the time elapsed since the exhaustion of domestic remedies is so *unreasonably prolonged* as to render consideration of the complaint by the Committee or the State Party unduly difficult.
- A complaint will be declared inadmissible not only if it is under examination by another procedure of international investigation or settlement but also if the same matter has been the subject of a decision *in the past* under such procedure (article 22, paragraph 4(a) of the Convention against Torture). This is limitation applies whenever a procedure of international investigation has been invoked, even if that procedure has been concluded.

B) SPECIFICS OF HRC

- Under the Optional Protocol, there is *no time limit* to submit complaints to the Committee. However, the Committee introduced a rule according to which the complaint may be considered inadmissible when it is submitted after **five years** from the exhaustion of domestic remedies or, where applicable, after **three years** from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay considering all the circumstances of the case.
- The HRC cannot examine a complaint if the same matter is at the same time being examined by another mechanism of international investigation or settlement. The Committee considers that the Human Rights Council Complaint Procedure (previously known as 1503 procedure) and complaints submitted to special rapporteurs or working groups of the Human Rights Council do not constitute such a mechanism. Accordingly, a complaint to the Human Rights Committee will not be declared inadmissible if it has been submitted to these mechanisms.
- Once a procedure of international investigation or settlement has fully ended, there is, in theory, nothing to prevent an individual communication being brought about the same matter.
- As to what constitutes 'the same matter', the Committee understands it as relating to the same author, the same facts and the same substantive rights. Facts that have been submitted to another international mechanism can be brought before the Committee if the Covenant provides for a broader protection. Furthermore, complaints dismissed by other international mechanisms on procedural grounds are not considered to have been substantively examined; the same facts may therefore be brought before the Committee.
- The HRC has developed some exceptions to the rule that it cannot examine facts occurred before the entry into force of the Optional Protocol for the State Party concerned. Thus, it is usually a sufficient ground for the Committee to

examine the complaint if, after the date of entry into force of the Optional Protocol, there has been a court decision or some other state act validating the facts preceding that date which constitute the purpose of the complaint.

- The Human Rights Committee, however, allows the same petitioner to bring the same facts to different bodies if the treaty provisions are different. For instance, a petitioner may bring a freedom of association issue before the European Court of Human Rights and a discrimination claim arising out of the same facts before the Human Rights Committee.

NB1: The admissibility criteria under the ICCPR and the CAT are **almost identical**. The large majority of the case law on admissibility issues arises from the case law of the HRC. It seems likely that the CAT Committee will, if given the opportunity, follow the HRC's decisions on admissibility¹⁰⁸.

NB2: Under Article 22(5)(1) of CAT, the CAT Committee may not consider any complaint that has been or is being examined by another procedure of international investigation or settlement. Unlike the ICCPR, this ground of inadmissibility is not limited to situations where a complaint is being simultaneously considered by another international body: the CAT Committee is also precluded from examining complaints that have been considered under an analogous procedure, even if that process is complete. Therefore, the CAT is stricter than the ICCPR in this regard (Ibid).

7. FINAL CONSIDERATIONS: CHOOSING BETWEEN COMPLAINING TO THE ECTHR OR UN CAT OR HRC

Relevant considerations, in choosing a regional forum, such as ECtHR, over a UN forum, are summarized as follows from www.bayefsky.com¹⁰⁹:

- the likelihood of obtaining a favorable decision
- the substantive reach and content of the treaty
- the competence of the particular body to deal with the substantive issue
- the past practice of the body in dealing with similar cases
- the likelihood that the State Party will implement the decision of the particular forum
- the likelihood of obtaining injunctive relief in the form of requests for interim measures in the context of emergencies
- the speed of the process
- the cost of the procedure
- the availability of legal aid
- the availability of oral hearings

109 'How to Complain about Human Rights Treaty Violations, Choosing a Forum' at <http://www.bayefsky.com/complain/44_forum.php> accessed 16 December 2021

These considerations are contrasted below in practical terms.

International body	Advantages	Disadvantages
ECtHR	<p>Comprehensive and detailed standards on effective investigation</p> <p>Availability of compensation</p> <p>Clear status of judgements at the national level</p>	<p>Jurisdiction limited to the Council of Europe's states</p> <p>Short time limit to submit a complaint (6 months (4 months as of 2022))</p>
UN CAT and HRC	<p>Wider reach outside the Council of Europe</p> <p>No rigid time limits</p> <p>Possibility to apply if the complaint was declared inadmissible by the ECtHR</p> <p>Possibility to apply in case of a negative decision by the ECtHR (HRC only)</p> <p>Provides reasons for non-admissibility and allows to correct the complaint</p>	<p>No compensation awarded</p> <p>Lack of a proper enforcement mechanism</p> <p>May have unclear status at the national level</p>

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