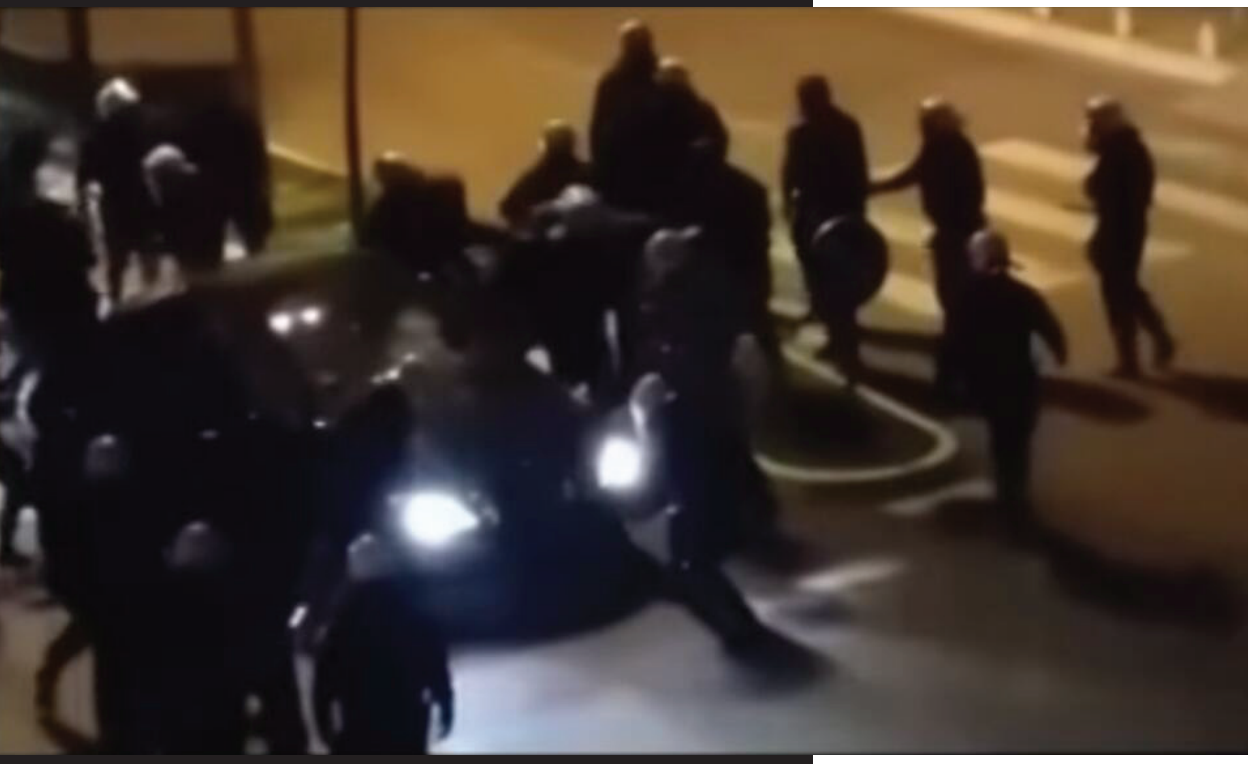
HRA MONTENEGRO HUMAN RIGHTS ACTION | AKCIJA ZA LJUDSKA PRAVA

EFFECTIVENESS OF INVESTIGATIONS IN CASES OF ILL-TREATMENT IN MONTENEGRO



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HUMAN RIGHTS ACTION MONTENEGRO
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Human Rights Action

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CONTENTS

LIST OF ABBREVIATIONS

CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CAT	Committee against Torture
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights
PD	Police Department
HRA	Human Rights Action
CC	Criminal Code of Montenegro
MIA	Ministry of Internal Affairs
NGO	Non-governmental organization
BSP	Basic State Prosecutor's Office
SAU	Special Anti-Terrorist Unit
UN	United Nations
PA	Police Administration
SSP	Supreme State Prosecutor's Office
CPC	Criminal Procedure Code
AECS	Administration for the Enforcement of Criminal Sanctions

THE PROJECT

The analysis "Evaluation of effectiveness of investigation of cases of ill-treatment" has been executed by the Human Rights Action (HRA) with the assistance of the project "Fighting ill-treatment and impunity and enhancing the application of European Court of Human Rights case-law on national level in Montenegro" co-financed by the Council of Europe and European Union, within the program Horizontal Facility for Western Balkans and Turkey.

Within this project, from 1 December 2017 until 20 February 2018, HRA has conducted research and analysed the effectiveness of investigation of reported cases of ill-treatment in Montenegro in the period of the last five years, considering the state's obligation to provide for effective investigation of cases of torture and ill-treatment (acts in violation of the Article 3 of the European Convention on Human Rights) in accordance with European standards.

With this research we continued the previous research whose results HRA published in March 2013 in the form of a report "Prosecution of torture and ill-treatment in Montenegro", thanks to the project "Monitoring respect for human rights in closed institutions in Montenegro", supported by the European union.

We are grateful to the basic state prosecutors' offices, the basic courts and the Ministry of Internal Affairs (MIA) for cooperation and swift provision of the required data. We are also grateful for comments to Ljiljana Klikovac, Head of Basic State Prosecutors Office in Podgorica, Ana Bošković, public prosecutor LL. M. Miljan Vlaović, Advisor of the Supreme State Prosecutor, Radovan Ljumović, Director of the Department for Analytics of the Police Administration (PA), and Angela Longo, Program Manager EU/CoE Horizontal Facility for the Western Balkans and Turkey and Ivona Dragutinović, Senior Project Officer of the aforementioned EU/COE program, who had the opportunity to get acquainted with the working version and draft report.

This analysis was greatly contributed to by Martina Markolović, Dalibor Tomović, Katarina Bošković and others, who wished to remain anonymous.

The text of the report is the sole responsibility of the Human Rights Action.

Tea Gorjanc-Prelević, editor

1. INTRODUCTORY REMARKS

The prohibition of torture and inhuman or degrading treatment or punishment, or, in short, the prohibition of ill-treatment, is without a doubt one of the most important and fundamental human rights. This may be observed by the inclusion of the prohibition of ill-treatment in the most important international human rights treaties - the International Covenant on Civil and Political Rights from 1966, adopted under the auspices of the United Nations, and the Convention for the Protection of Human Rights and Basic Freedoms from 1950 (known as the European Convention on Human Rights) adopted by the Council of Europe, which represent the catalogues of human rights – the prohibition of ill-treatment stands next to the right to life, the first human right guaranteed by both treaties. Together with a few other rules of international law, for example, prohibition of genocide and prohibition of slavery, the prohibition of ill-treatment is a general imperative norm of international law, meaning that it is binding even to those rare states that have not ratified a single international treaty containing that prohibition. The prohibition is of an absolute character and cannot be derogated, meaning that there are no circumstances under which ill-treatment could be allowed.

The first duty of the state originating from the prohibition of ill-treatment is the obligation that its officers, i.e. persons whose actions could be attributed to the state, refrain from torture and other form of ill-treatment, and also the obligation to take all measures necessary for limiting the possibilities that anyone could be ill-treated. Those obligations are jointly called the material aspect of the prohibition of ill-treatment.

In addition to the material aspect, there is also the procedural aspect of the prohibition of ill-treatment requiring that, in the case when the state bodies are in possession of the information suggesting that one might have been ill-treated, an effective investigation is undertaken, i.e. all relevant facts are determined and, if determined that the ill-treatment occurred, those responsible for it are adequately punished. The topic of this report is the implementation of obligations arising from the procedural aspect of the prohibition of ill-treatment. In other words, we have analysed here how the competent state bodies of Montenegro fulfil their obligation to undertake effective investigation in cases of serious complaints of ill-treatment by public officials.

As Montenegro, a state party to the European Convention on Human Rights, is bound by the standards established in the case-law of the European Court

of Human Rights, the effectiveness of investigations is judged in relation to the criteria used by that court, and those are the most elaborate standards established at the international level. One should also bear in mind that the notion of the investigation in the practice of the European Court of Human Rights is wider than the notion of investigation in Montenegrin law on criminal procedure and encompasses all measures necessary to investigate and adequately sanction those responsible, thereby providing the victim with appropriate satisfaction.

Although Article 3 of the European Convention on Human Rights, stating the prohibition of ill-treatment, obliges the state to protect people from violence not only imposed by state officers but also by persons whose acts could not be attributed to the state, and requires the state to also provide for effective investigation when there are serious reports of such violence, in this report we will consider only the situations where the alleged ill-treatment involved state officers. Also, although the European Court of Human Rights considers that in some cases, primarily considering the easiest acts of ill-treatment, the effective investigation may be undertaken in the procedure that is not criminal, but, for example, disciplinary or administrative, this report will focus only on the cases of ill-treatment that was or should have been investigated within criminal procedure. Therefore, we will be analysing here only the performance of the State prosecutors and, in relation to their actions, the Constitutional Court of Montenegro, and not the practice of other bodies that may also investigate reports on ill-treatment, such as the Protector of Human Rights and Freedoms, the Internal Control of the Police with the MIA, the Ethical Board of the MIA and the Council for the Civic Control of the Police.

The report considers decisions passed by state bodies in relation to the prosecution of ill-treatment from the beginning of 2013 until the end of 2017. It builds on the report "Prosecution of torture and ill-treatment in Montenegro", published by HRA and partner organisations in March 2013, where the state bodies' performance for the previous six years (2007-2012) had been analysed.[1]

The report is based on decisions of Montenegrin Basic courts (49), the Constitutional Court of Montenegro (3), judgments of the European Court of Human Rights (66), available data on the cases presented in Tables II and III (65), reports and opinions of the Protector of Human Rights and Freedoms of Montenegro (Ombudsman), reports of the MIA and the Department for the

1 Prosecution of torture and ill-treatment in Montenegro, Human Rights Action, Centre for Anti-discrimination EQUISTA, Centre for Civic Education, Women's Safe House, Podgorica, 2013, available at:http://www.hraction.org/2013/03/20/report-prosecution-of-torture-and-ill-treatment-in-montenegro/?lang=en

Internal Control of the Police, findings of the Council for the Civic Control of the Police, reports by NGOs and the media, reports and opinions of international bodies for human rights protection - the European Committee for Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) and Committee against Torture of the United Nations (CAT). Please note that we did not have access to of all the case files referred to in the report and the accompanying tables. In cooperation with the victims, an insight into the case files which are especially highlighted in the text of the report was examined.

The draft report was considered at the working meeting on 14 February 2018. Attended by the representatives of the State Prosecutor's Office, the Police Directorate, the Council of Europe and the Delegation of the European Union in Montenegro, and the Representative of Montenegro before European Court of Human Rights. In the meantime, additional research and consultations have been undertaken. The report also includes written comments by representatives of the State Prosecutor's Office, Ljiljana Klikovac, Ana Bošković and Miljan Vlaović.

At the end of the report are conclusions and recommendations, the implementation of which could improve the application of the European standard of investigative effectiveness in cases of ill-treatment in Montenegro.

2. RELEVANT INTERNATIONAL LEGAL STANDARDS

2.1. THE CONCEPT AND TYPES OF ILL-TREATMENT

Despite giving much importance to the prohibition of ill-treatment, the two most important international human rights treaties for European countries - the International Covenant on Civil and Political Rights of 1966 and the European Convention on Human Rights of 1950 - define neither torture nor inhuman or degrading treatment or punishment. The definition of torture was formulated internationally only in 1984, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted under the auspices of the United Nations. It reads as follows:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

According to this definition, torture has four basic elements: 1) an official person must participate in it, even if only through acquiescence; 2) it causes great physical or mental suffering to the victim; 3) the perpetrator must act with intent (torture by negligence is not possible) and must have a specific goal - to obtain information or a confession from a victim or a third person, to punish, intimidate or pressure the victim, or to discriminate; 4) the victim must be helpless or under the full control of the perpetrator, which, as a rule, means that he/she is deprived of their liberty.

Since it began operating, well before the adoption of the Convention against Torture, the European Court of Human Rights had to define torture earlier in its practice. Hence a certain discrepancy in the two definitions. According to the Convention against Torture, the element - the gravest one - distinguishing torture from other forms of ill-treatment is the aforementioned goal, or the purpose to be achieved. On the other hand, analysing the practice of

the European Court of Human Rights, it can be concluded that torture differs from other forms of ill-treatment primarily in the intensity of suffering of the victim, i.e. the cruelty of acts the victim is subjected to[2], although this court also pointed out in some of its decisions that the element of torture is a particular goal, i.e. the intention to, for example, extort information, punish or intimidate the victim.[3]

Observing the practice of the European Court of Human Rights, but also of the Committee on Human Rights and the UN Committee against Torture, it can be noted that acts such as beating, plastic bag suffocation or drowning, burning of hair or skin, electric shocks, "Palestinian hanging", shooting simulation, etc., are most commonly qualified as torture, as well as situations when officials, as a rule, police officers, members of various security services or prison guards, try to extort a confession from the victim, obtain information, punish or intimidate the victim. The European Court of Human Rights has taken the view that rape is also a form of torture, considering it discriminatory treatment which undoubtedly causes great suffering, in cases where victims are persons deprived of liberty raped by officials.[4]

None of the aforementioned international treaties provide definitions of other forms of abuse, that is, inhuman or degrading treatment or punishment, but they can be derived from decisions of the authorities that monitor their application.

First of all, in order to speak of any type of ill-treatment, it is necessary that the treatment, in which an official person or state must play a certain role, has reached a "minimum degree of cruelty". This degree is relatively low: in the recent practice of the European Court of Human Rights, ill-treatment, i.e. humiliating treatment was also found in a case where a police officer slapped a young man brought to the police station.[5] When determining whether an act was sufficiently "cruel" and caused the necessary degree of physical or psychological suffering, victim's personal characteristics - gender, age, state of

2 See, for example, the judgments of the European Court of Human Rights in the cases: *Ireland v. The United Kingdom,* application no. 5310/71, § 167; *Aksoy v. Turkey*, application no. 21987/93, § 64; *Selmouni v. France*, application no. 25803/94, § 96; *Dedovskiy and Others v. Russia*, application no. 7178/03, § 84. See also William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015), p. 174-179.

3 See, for example, the report of the European Commission on Human Rights of 5 November 1969 in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*, application no. 3321/67, 3322/67, 3323/67 and 3344/67, and the judgments in the cases of *Ilhan v. Turkey*, application no. 22277/93, § 85, and *Akkoç v. Turkey*, application no. 22947/93 and 22948/93, § 115.

4 *Aydin v. Turkey*, application no. 23178/94, § 86, *Maslova and Nalbandov v. Russia,* application no. 839/02, §§ 101, 104-106, *Memesheva v. Russia*, application no. 59261/00, § 14.

5 *Bouyid v. Belgium*, application no. 23380/09.

health, disability, etc. - must also be taken into account. The more sensitive a person, the less will be needed to hurt them enough to talk about ill-treatment.

Inhuman treatment or punishment can be defined as a treatment that causes intense physical or mental suffering.[6] The European Court of Human Rights in its decisions concluded that such suffering was caused by procedures that were pre-planned, applied incessantly for hours or caused either bodily injury or severe physical or mental pain.[7]

Degrading treatment or punishment is that which causes the feelings of fear, pain and inferiority in the victim, capable of humiliating and potentially breaking psychological or moral resistance.[8] In assessing whether a certain action is degrading, the European Court of Human Rights takes into account whether there was an intention to humiliate and degrade the person who was subjected to it, whether its consequences have negatively influenced the victim's personality in a manner incompatible with the prohibition of ill-treatment[9] and whether the victim was brought into a situation to act against their will or conscience.[10] Degrading treatment or punishment may exist even in the absence of the intention to humiliate the victim - it suffices to cause a sense of humiliation in them.[11] This means that ill-treatment is not always the result of violent acts by officials, but may also exist in situations where someone suffers physical and mental pain due to different irregularities in the work or omissions of state authorities, such as, for example, when a person deprived of liberty resides in extremely poor conditions or when he/she is denied appropriate health care[12]. It should be kept in mind that *any use of physical force in relation to any person whose freedom is restricted or a person who comes into contact with officials, which is not absolutely necessary due to the conduct of that person or is not proportionate to the purpose for which it is used - degrades human dignity and, in principle, constitutes a violation of the prohibition of ill-treatment.*[13]

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6 *Ireland v. The United Kingdom*, application no. 5310/71, § 167.

7 See, for example, the *Kudla v. Poland* judgment, application no. 30210/96.

8 *Ireland v. The United Kingdom*, application no. 5310/71, § 167.

9 See, for example, the *Raninen v. Finland* judgment, application no. 20972/92, § 55.

10 *Denmark, Norway, Sweden and the Netherlands v. Greece*, application no. 3321/67, 3322/67, 3323/67 and 3344/67. See also Philip Leach, *Taking a Case to the European Court of Human Rights, 4th Edition* (Oxford University Press, 2017), p. 258-259.

11 *V. v. The United Kingdom*, application no. 24888/94, § 71; Smith and Grady v. *The United Kingdom*, application no. 33985/96 and 33986/96, § 120.

12 See, for example, the judgments in the cases *Poltoratskiy v. Ukraine*, application no. 38812/97, *Ostrovar v. Moldova*, application no. 35207/03, *Engel v. Hungary*, application no. 46857/06, *Khudobin v. Russia*, application no. 59696/00, *Slimani v. France,* application no. 57671/00.

13 *Bouyid v. Belgium*, application no. 23380/09, § 88.

2.2. WHEN DOES THE STATE'S OBLIGATION TO CONDUCT AN EFFECTIVE INVESTIGATION ARISE

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prescribes the right of victims of abuse to appeal to state authorities who are then obliged to promptly and impartially investigate the case.[14]

The European Court of Human Rights has interpreted this duty of state authorities to conduct a proper investigation into allegations of ill-treatment on the basis of Art. 3 of the European Convention on Human Rights, which prohibits torture, and Art. 1 of the same Convention, which guarantees the application of the rights under the Convention to everyone in the territory of the States Parties to the Convention.[15] The European Court emphasized that if there were no obligation of the state to investigate allegations or other indications of ill-treatment, the prohibition of torture and inhuman or degrading treatment or punishment would be only theoretical and illusory, and not effective and practical, while the state authorities and persons acting on behalf of the state would be allowed to violate this prohibition with impunity.[16]

Thus, an obligation to conduct an effective investigation arises when the competent state authorities become aware of a convincing claim or other sufficiently clear indication that someone has been ill-treated.[17]

A convincing claim is any claim that is corroborated by something (for example, medical findings indicating injuries, witness statements, photographs, video surveillance footage or other similar evidence), but also the claim of a victim or witness of alleged ill-treatment, unsubstantiated by other evidence, if it is sufficiently convincing, i.e. if it does not seem unreasonable and implausible[18]. It is not necessary for the claim to be made in a predefined form, such as a criminal complaint or a formal complaint, or formulated as an indictment; it

14 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, op.cit., Art. 14.

15 See, for example, *Otašević v. Serbia*, 2013, § 30.

16 See, for example, the judgments of the European Court of Human Rights in the cases *Milić and Nikezić v. Montenegro*, application no. 54999/10 and 10609/11, § 91, *Siništaj and others v. Montenegro*, application no. 1451/10, 7260/10 and 7382/10, § 144, *Assenov and others v. Bulgaria*, application no. 24760/94, § 102, and Labita v. Italy, application no. 26772/95, § 131.

17 *Bati and others v. Turkey*, application no. 33096 and 57834/00, § 100. See also *General Report of the European Committee* for the Prevention of Torture (2004), § 27.

18 *97 members of the Community of Jehovah's Witnesses in Gldani and four others against Georgia*, application no. 71156/01, § 97.

is sufficient for the competent state body to have knowledge of the convincing and serious allegation that someone has been ill-treated[19]. Also, it is not necessary for the alleged victim to make a statement immediately after the abuse, as there may be fear of bringing charges against officials, especially in case of persons deprived of their liberty.

The obligation to carry out an investigation may also exist in a situation where no allegations of abuse have been made, but there are other sufficiently clear indications that someone has been ill-treated.[20] First of all, this refers to situations such as those when a person brought by the police before a public prosecutor or a judge, or to a medical examination, does not complain of anything, as a rule due to fear, but their appearance or behaviour raise doubts about ill-treatment - for example, if that person has visible injuries, is completely psychologically broken, frightened, or suddenly confesses a whole series of crimes, although there is no evidence thereof. In such cases, the competent state authorities are expected to take appropriate measures to determine whether the abuse occurred and, if so, who is responsible. The European Court of Human Rights warned of the particularly vulnerable position of victims of ill-treatment, and that people who were subjected to serious ill-treatment were less willing to press charges.[21]

Neither the relevant international treaties nor decisions by the bodies that monitor their implementation give a list of situations in which it is mandatory to carry out the investigation, but it is clear that the obligation exists in cases where there are convincing, credible allegations of physical or psychological abuse, unjustified or excessive use of coercive means or other serious forms of ill-treatment[22]. It should be noted that the European Court of Human Rights requires special attention when investigating allegations of ill-treatment in situations where there are indications that the alleged offenders had racial or other discriminatory motives.[23]

Since victims and witnesses of illegal actions by police officers, prison guards and other officials, by their very nature, can often be scared and hesitate to report incidents that have led to torture or inhuman or degrading treatment,

19 See, for example, *Hajnal v. Serbia*, application no. 36937/06, §§ 94-99.

20 *Otašević v. Serbia*, 2013, § 30.

21 Ibid.

22 See Eric Svaridze, *Effective Investigation of Ill-Treatment*: Guidelines on European Standards (Council of Europe, 2009),

23 It is not rare that in its judgments the European Court of Human Rights finds that the respondent States have not properly approached the investigation into the incidents in which the alleged victims were Roma. See, for example, the *Cobzaru v. Romania* judgment, application no. 48254/99, § 97.

the states are expected to provide them with a wide range of mechanisms, which they can use, alone or with the help of a counsel, freely and without fear of retaliation, to bring allegations of ill-treatment to competent national or international bodies.[24] These mechanisms may be complaints or reports submitted to officials superior to alleged perpetrators, to the government bodies, courts and prosecutors' offices, specialized bodies that decide on complaints of citizens, inspections and bodies that supervise the work of state authorities such as police, prisons or medical personnel.[25]

Doctors, especially those working in prisons or examining persons who were previously detained in the police, have a particularly important role to play in cases of ill-treatment. It is therefore vital to have clear regulations and protocols in place that oblige medical practitioners to carry out examinations without the presence of police officers or members of the prison staff, except in situations where this is really necessary to carry out the examination conscientiously and thoroughly, record and describe all possible injuries, state how the patient explained the cause of the injuries, and if they find it possible that the injuries were caused by ill-treatment, to inform the competent prosecutor immediately.[26]

2.3. CONCEPT OF EFFECTIVE INVESTIGATION

2.3.1. General remarks

In order to be considered effective, an investigation, in principle, should be able to lead to the establishment of facts and, if it turns out that the allegations of abuse are correct, lead to the identification and punishment of those responsible[27]. Otherwise, as the European Court of Human Rights has explained, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the state to

24 Eric Svaridze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards* (Council of Europe, 2009), p. 40-41.

25 Ibid.

26 Ibid, p. 38-40. See also *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the Visit to Montenegro in 2008*, § 20.

27 See, for example, the judgments of the European Court of Human Rights in the cases of *Milić and Nikezić v. Montenegro*, application no. 54999/10 and 10609/11, §§ 91-92, *Siništaj and others v. Montenegro*, application no. 1451/10, 7260/10 and 7382/10, §§ 144-145, *Assenov and others v. Bulgaria*, application no. 24760/94, § 102.

abuse the rights of those within their control with virtual impunity.[28]

As mentioned in the introductory remarks, the notion of investigation in this context is much wider than the notion of investigation in our criminal procedural legislation and implies not only the proper organization and action of the prosecution bodies, but also the courts, and ultimately the authorities responsible for the enforcement of criminal sanctions imposed against perpetrators of abuse. Since it is not possible to exclude the possibility that, although the competent national authorities approached the investigation thoroughly and took all available and reasonable measures to discover the perpetrators, they ultimately failed to do so, it is clear that the obligation to carry out an effective investigation is an obligation of the means, not an obligation of result.

In order to consider an investigation effective, the following criteria must be met: 1) it must be independent and impartial; 2); it must be thorough, which means comprehensive and conducted conscientiously; 3) it must be urgent, i.e. conducted in a timely manner, without unnecessary delays; 4) it must be managed by bodies that have all the competencies and powers necessary to discover and sanction the perpetrators; 5) it must include the alleged victim, in so far as it is necessary to protect their legitimate interests; 6) it must be subject to public control; 7) when those responsible for the abuse are discovered, they must be punished appropriately.

In the practice of the European Court of Human Rights, the same criteria apply to situations in which potential violations of the right to life are investigated, and their specific requirements will be explained below.

2.3.2. Independence and impartiality

An investigation may be considered independent only if the persons responsible for its implementation are completely independent of the persons whose actions are being investigated.[29] This implies the absence of any hierarchical or institutional link between the person conducting the investigation and the person whose actions are being investigated, as well as independence of the conduct, which means that the investigation must be independent both *de jure* and *de facto*.[30]

28 *Milić and Nikezić v. Montenegro*, judgment of 28 April 2015, § 91; *Siništaj and others v. Montenegro*, judgment of 24 November 2015, § 144.

29 See, for example, the *Güleç v. Turkey* judgment, application no. 21593/93, §§ 81-82, and *Yazgül Yılmaz v. Turkey*, application no. 36369/06, §§ 61-63.

30 *Ergi v. Turkey*, application no. 66/1997/850/1057.

It is required that not only the competent prosecutor be independent, but also any person who made a decision during the investigation or was in charge of certain investigative actions. For example, forensic medicine expert involved in the investigation must be independent *de jure* and *de facto*[31], as well as a police officer entrusted with a certain task[32]. It is not acceptable that the investigation is practically conducted by police officers from the organizational unit of the police (for example, the police administration) that also employs the suspected police officers[33], even when the investigators are their superiors,[34] and regardless of whether the investigation is under the control of the prosecutor who is independent.[35] Also, the European Court of Human Rights considers that investigating officers should not be subordinated to the same command chain as police officers under investigation.[36]

In a case where a journalist was beaten by police officers during the break of demonstrations in Azerbaijan, the European Court of Human Rights found that the investigation was not independent or effective because it was conducted by the same police department whose members were accused by the journalist for ill-treatment. The Court found that the state prosecutor's office, as an independent body, practically delegated "a large and important part of the investigation - the identification of the perpetrators of alleged ill-treatment - precisely to the authority whose officials had allegedly committed the criminal offence", i.e. their colleagues employed in the same body, and concluded that in such circumstances the police investigation of allegations of misconduct by its officers could not be independent.[37] Similarly, in the case *Siništaj and others v. Montenegro*, the Court concluded that the investigation of the Internal Control could not be considered independent, since it was actually carried out by the police itself and was not thorough, since the injuries and applicant's allegations that they had been inflicted by the police were completely ignored.[38]

In order to ensure the independence of investigations conducted in relation to actions of the police, certain countries, including the Netherlands and Slovenia, have established special investigative bodies to assist the prosecution instead of the police, with the same powers as the police. Employees in

31 *Barabanshchikov v. Russia*, application no. 36220/02, § 59.

32 See, for example, *Mikheyev v. Russia*, application no. 77617/01, § 116.

33 *Rehbock v. Slovenia*, application no. 29462/95.

34 *Altun v. Turkey*, application no. 24561/94, § 74.

35 R*amsahai and others v. The Netherlands*, application no. 52391/99, §§ 333-341.

36 *Đekić and others v. Serbia*, application no. 32277/07, § 35.

37 *Najafli v. Azerbaijan*, application no. 2594/07, § 52.

38 S*iništaj and others v. Montenegro*, application no. 1451/10, 7260/10 and 7382/10, § 148.

these bodies are not part of the ministry responsible for internal affairs, nor do they report to that ministry; they operate under the control of a special state prosecutor, independent from the police[39]. In principle, such a model of organization of authorities in charge of investigation and prosecution could be the best way to achieve independence, provided that such bodies have adequate human and material resources at their disposal and that they are not isolated or obstructed in their work.

Those who lead the investigation, regardless of their institutional independence, cannot rely heavily on the information received from the bodies that are not independent in the concrete case, especially information obtained from police officers who are directly or indirectly involved in the events that are the subject of the investigation; with regard to the independence and impartiality of an investigation, it is particularly problematic if the data obtained in this manner are not properly verified, but uncritically accepted as truthful.[40] In other words, the state prosecutor conducting an investigation must not show bias and lenience in relation to members of the police or security forces, with the tendency to ignore or dissuade accusations against them. Likewise, state prosecutors must not assume that those acting on behalf of the state are right and that the signs of abuse are probably the result of a lawful act, or that they were conditioned by the behaviour of the injured party[41]. Furthermore, the state prosecutor must not make decisions only on the basis of documents or information provided by the police, whose members are suspected of having participated in the abuse of the complainant, but show willingness to critically examine them by taking independent steps.[42] An investigation must go beyond mere collection of statements from suspected police officers and their colleagues, and include other available evidence, witnesses and evidentiary actions, including identification.[43]

39 Ibid, §§ 258-267. In Slovenia, the Special Department for Investigation and Prosecution of Officers with Special Authorizations, which is part of the Special State Prosecutor's Office, has exclusive jurisdiction in the cases of criminal offenses committed by: 1) the police; 2) internal police control services, with police powers; 3) military police, with police powers in the pre-trial procedure; 4) military intelligence and security services; 5) Slovenian intelligence and security agency. See Law on the State Prosecutor's Office of the Republic of Slovenia from 2011 ("the State Prosecutor's Act"), Art. 199-203.

40 *Ergi v. Turkey*, application no. 66/1997/850/1057, §§ 83-84, *Gharibashvili v. Georgia*, application no. 11830, § 73.

41 See, for example, *Aydin v. Turkey*, application no. 23178/94, § 106, and *Aksoy v. Turkey*, application no. 21987/93, § 189.

42 See *El-Masri v. FYROM*, application no. 39630/09, § 189, and *Đurđević v. Croatia*, application no. 52442/09, § 90.

43 *Bouyid v. Belgium*, application no. 23380/09, §§ 128-134. Regarding the failure to identify and confront the suspects with the injured party during the investigation, see also the *Kmetty v. Hungary* judgment, application no. 57967/00, § 41.

As a rule, impartiality is assessed by taking into consideration the way in which the investigators handled the case. However, impartiality may also be undermined by the mere fact that the investigators had a dual role - for example, if in the investigation some tasks are entrusted to a police officer who had previously acted in the case in which the alleged victim of abuse had the status of a suspected or accused person, and claims to have been abused in order to confess or provide information, or be unlawfully punished for the offence charged with.[44]

2.3.3. Thoroughness

The obligation to conduct a thorough or detailed investigation requires that the competent investigating authorities always make a serious effort to determine the facts and that they must not be satisfied with the hasty or groundless conclusions to close the investigation or to draw conclusions.[45]

An investigation should allow gathering of all the evidence necessary to determine whether the abuse in the particular case occurred and, if so, who was responsible for it. Of course, evidence to be gathered will depend on the specific circumstances of each individual case. The authorities responsible for the investigation are not to be inactive - they should take all "reasonable measures" necessary to gather evidence and to make sincere efforts to that end.[46] Any shortcoming in an investigation that diminishes the chances of determining the cause of the alleged victim's injuries or the identity of those responsible for the abuse can lead to a violation of the principle of thoroughness and conscientiousness.[47]

The European Court of Human Rights has issued a number of judgments in which it considered whether all the measures necessary to establish the relevant facts of the case were taken during the investigation into the allegations of ill-treatment. It follows that a typical investigation, *inter alia,* should include:

- a detailed, exhaustive testimony of the alleged victim, who should be examined carefully not only to obtain the necessary information, but also to avoid further trauma (good guidelines for the examination of

44 See, for example, *the Totevo v. Bulgaria* judgment, application no. 42027/98, § 63.

45 *Jasar v. FYROM*, application no. 69908/01, § 56.

46 *Bati and others v. Turkey*, application no. 33096 and 57834/00, § 134.

47 *Jasar v. FYROM,* application no. 69908/01, § 56.

easily vulnerable victims are provided in the *Istanbul Protocol*);[48]

- proper examination of possible perpetrators;[49]
- identifying and properly examining witnesses of events; in the situation in which the police conduct is investigated, witnesses should be interrogated by the prosecutor, not the police (the same applies to the interrogation of the alleged victim and alleged perpetrators);[50]
- identifying potential perpetrators by the alleged victim and other witnesses, with the use of other forensic investigative techniques to identify the perpetrators[51];
- confidential and carefully performed medical examination of the alleged victim and forensic medical examination of victim's injuries; it is very important that doctors in primary health care be trained to examine and record injuries caused by violence; forensic medical examination should be carried out by a specialist in forensic medicine, and certainly an independent and adequately trained medical staff, capable of recognizing the cause of injury and assessing whether, considering the injuries, allegations of ill-treatment are convincing;[52]
- collecting other medical evidence, such as medical documentation made during the stay of the alleged victim at the police or in prison;
- investigation of the scene, which implies proper collection of material evidence, primarily objects used for abuse, fingerprints, biological and other traces, making necessary sketches, photographing the scene, finding recordings of the event made by means of video surveillance and the like; it is extremely important to be aware of the persons involved in the event, because it is possible that traces left by the alleged perpetrator can be found on the alleged victim's clothes, and vice versa;
- collecting and analysing relevant documentation, which may include different records and reports drafted in the police or other closed institution in connection with and during the deprivation of liberty, reports on the use of coercive means and similar documents compiled by officials.[53]

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48 *Istanbul Protocol, Manual for the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Office of the United Nations High Commissioner for Human Rights,* 2004.

49 *Matko v. Slovenia*, 2006, § 90, *Otašević v. Serbia*, 2013, § 33.

50 *Zelilof v. Greece*, application no. 17060/03, § 62.

51 *Bouyid v. Belgium*, 2015, §§ 128-134.

52 See Documenting and reporting medical evidence of ill-treatment, *Extract from the 23rd General Report of the CPT, published in 2013*, CPT (https://rm.coe.int/16806ccc4d).

53 See, in more detail, in Eric Svaridze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards* (Council of Europe, 2009), p. 54-60.

The investigation shall not be considered effective if it was not comprehensive or if it did not cover all relevant aspects of the incident in question.[54] It is necessary to examine whether, for example, the police action during which the alleged ill-treatment occurred had been planned and whether this was done in an appropriate manner, and only then assess whether the specific actions of the police officers were justified, given the circumstances.[55] Furthermore, it is necessary to examine the motives of the alleged perpetrators, which is especially important if there is a suspicion that the abuse was racially or ethnically motivated or that the perpetrators acted with some other motive based on discrimination[56]. It is understood that all controversial actions of the officials and the role of all involved officials must be investigated. It is unacceptable that the investigation is unjustifiably limited only to specific incidents and officials, while disregarding other important events and relevant circumstances of the particular case.[57]

Without a justified reason, the investigation should not be hindered by the act or omission of state authorities.[58] This means that all state bodies involved in the proceedings that should lead to the establishment of relevant facts and punishment of those responsible for the ill-treatment, including the court, must act conscientiously and in accordance with the national regulations. It is impermissible that the investigation be disrupted because the evidence is collected in an unlawful manner and therefore cannot be used in the court proceedings against the alleged perpetrators.[59]

It is incompatible with the obligations arising from the prohibition of ill-treatment that the investigation be disrupted by the fact that police or other officials are allowed to perform their duty without wearing any distinctive sign to allow for their subsequent identification (wearing masks, so-called balaclavas, or clothes without proper police marks). In such cases the European Court may conclude that the state deliberately allowed impunity for the perpetrators of ill-treatment.[60] The Court considered that the procedural aspect of the prohibition of ill-treatment is also violated in situations where

54 *Zelilof v. Greece*, application no. 17060/03, § 60.

55 *Tzekov v. Bulgaria*, application no. 45500/99, §§ 69-73.

56 *Nachova and others v. Bulgaria*, application no. 43577/98 and 43579/98, § 326.

57 Eric Svaridze, *Effective Investigation of Ill-Treatment*: Guidelines on European Standards (Council of Europe, 2009), p. 62-63.

58 *Bati and others v. Turkey*, application no. 33096 and 57834/00, § 134.

59 *Maslova and Nalbandov v. Russia*, application no. 839/02, §§ 92-97.

60 *Dedovskiy v. Russia*, application no. 7178/03, § 91.

masked police officers resorted to intimidation, and were not subsequently identified.[61]

The prosecutor's office and the court should not use the collected evidence selectively or inconsistently; they are obliged to evaluate evidence consciously and objectively.[62] The statements of officials cannot *a priori* be given more weight than the statements of other witnesses, including the alleged victim, especially if these persons are directly or indirectly involved in the incident being investigated[63]. The credibility and reliability of evidence originating from the police, whether it be statements, reports or other documents, should be critically valued and examined[64]. This can be achieved through confronting the alleged victim with alleged perpetrators, examining witnesses and gathering evidence that could confirm the alleged victim's version of the event, and other measures allowing the alleged victim, in an adversarial procedure, to contest the evidence presented by the other party.[65]

2.3.4. Urgency

Investigation into cases of ill-treatment must be urgent and must not last longer than is justified in the circumstances[66]. This applies to all its stages - acts preceding criminal proceedings (inquiry), criminal proceedings and the procedure of enforcement of a criminal sanction - which means that the legal system as a whole must function effectively and enable the courts to make decisions on the substance of the matter within a reasonable time[67]. In each individual case, it must be observed whether the competent investigating authorities responded urgently - as soon as they were informed of the alleged ill-treatment, or allowed delay.[68]

The European Court of Human Rights found urgent, i.e. timely treatment of the state authorities in investigating allegations of ill-treatment to be crucial to preserving public confidence in their adherence to the rule of law and to

61 See, for example, the judgments in *Rashid v. Bulgaria*, application no. 47905/99, *Vachkovi v. Bulgaria*, application no. 2747/02, *Kučera v. Slovakia*, application no. 48666/99 and *Rachwalski and Ferenc v. Poland*, application no. 47709/99.

62 *Nadrosov v. Russia*, application no. 9297/02, § 44.

63 *Zelilof v. Greece*, application no. 17060/03, § 60.

64 See, for example, *Barabanshchikov v. Russia*, application no. 36220/02, §§ 59-64.

65 *Gharibashvili v. Georgia*, application no. 11830/03, §§ 73-76.

66 See, for example, *Selmouni v. France*, application no. 25803/94, §§ 78-79.

67 *Calvelli and Ciglio v. Italy*, application no. 32967/96, § 53.

68 *Jasar v. FYROM*, application no. 69908/01, § 57.

removing the suspicion that the authorities were covering up or tolerating illegal activities.[69]

Lack of urgency is most obvious when the investigation begins too late, when due to the unjustified delay in treatment by the competent authorities, the gathering of evidence becomes impossible or very difficult, especially in situations in which the perpetrators are thus enabled to remove evidence or harmonize statements. Therefore, allegations of ill-treatment or other indications that it has occurred must be urgently addressed - without delay, and witnesses and possible perpetrators immediately identified, separated and examined, so as to prevent collusion[70]. In one case concerning the excessive use of force, the European Court of Human Rights criticized the responsible state, among other things, for allowing fifteen and a half hours to pass from the incident until the moment of the engagement of the investigating authority, as well as for the fact that police officers involved in the incident were heard only two days after the incident, and since they had not been separated, they had the opportunity to negotiate statements, although it was not possible to conclude whether they really harmonized them.[71]

Another impermissible shortcoming in the investigation is delayed referral of the alleged victim for medical examination by a forensic specialist, as well as unjustifiably delayed conducting of important evidentiary actions such as the examination of witnesses and identification of potential perpetrators.[72]

The most drastic examples of failure to meet the criteria of urgency and timeliness are those in which the criminal proceedings are unjustifiably prolonged for years or even delayed to the extent that eventually the time-bar of prosecution or execution of the sentence occurs.[73] It must be pointed out here that the very possibility of occurrence of time-bar is incompatible with international standards stemming from the prohibition of ill-treatment (see 2.3.8. below).

2.3.5. Relevant competencies and powers

State authorities involved in the investigation must have all the competencies and powers necessary to establish the facts and identify and punish the perpetrators. This primarily means that certain categories of officials, such

69 *Bati and others v. Turkey*, application no. 33096 and 57834/00, § 136.

70 *Ramsahai and others v. The Netherlands*, application no. 52391/99, § 326.

71 Ibid, §§ 94, 107, 330, 334 and 339.

72 *Mikheyev v. Russia*, application no. 77617/01, §§ 113-114.

73 *Yeşil and Sevim v. Turkey*, application no. 34738/04, §§ 36-43.

as members of special police or military units or security services, may not, *de jure* or *de facto*, be exempted from the jurisdiction of independent bodies responsible for investigating cases of ill-treatment, which in turn must be authorized to take all the measures necessary in relation to them to conduct an effective investigation.[74] The identity of potential perpetrators must not be the reason that the powers of the authorities responsible for investigating be limited - whether by law or in practice.

The decisions of the European Court of Human Rights suggest that the authorities responsible for the investigation should have the possibility to suspend officials who are under investigation or to take other measures necessary to conduct the investigation without delay and, in particular, prevent unauthorized influence on the alleged victim or witnesses.[75] The Court also pointed out that it was important that an official convicted of torture or ill-treatment be dismissed from the service.[76]

2.3.6. Participation of the alleged victim and protection of victim's legitimate interests

In addition to the right to initiate prosecution, the alleged victim and members of their family must be allowed to participate in the proceedings to the extent necessary to protect their legitimate interests.[77]

The alleged victim must be heard.[78] He/she must have an effective access to the investigation process,[79] but not necessarily at any stage. Since disclosure of some information from ongoing investigations could cause damage to some persons or other investigations, it will sometimes be justified to allow the alleged victim access to the proceedings at a later stage.[80] The alleged victim must be informed of the prosecutor's decision not to prosecute the alleged offender or to abandoned the prosecution, and in such a situation he/she has the right to access to the investigation, i.e. court files, as this is necessary in order to exercise their right to institute proceedings to challenge such

74 Eric Svaridze, *Effective Investigation of Ill-Treatment*: Guidelines on European Standards (Council of Europe, 2009), p. 65-68.

75 *Zeynep Özcan v. Turkey*, application no. 45906/99, §§ 44-46, and *Abdülsamet Yaman v. Turkey*, application no. 32446/96, § 55.

76 Ibid.

77 *Anguelova v. Bulgaria*, application no. 38361/97, § 140.

78 *Nadrosov v. Russia*, application no. 9297/02, § 44.

79 *Bitiyeva and X. v. Russia*, application no. 57953/00 and 37392/03, § 156.

80 *McKerr v. The United Kingdom*, application no. 28883/95, § 129.

decision of the prosecutor's office.[81] If necessary for the effective protection of their interests, victims should be given access to legal aid.[82]

The prosecutor, as well as the court, should consider the version of the event put forward by the alleged victim and this should be apparent in his final decision.[83] Of course, the court does not have to accept every proposal for the presentation of evidence by the alleged victim.[84]

2.3.7. Public control (transparency)

An investigation must, to the extent appropriate, be subject to public control, i.e. be transparent.[85] This is necessary for the public to have faith that the government is committed to the rule of law and that it does not cover up or tolerate unlawful acts[86]. The extent to which the investigation must be subject to public control is assessed depending on the circumstances of the case. As a rule, the outcome of the investigation should be presented to the public in a reasoned decision, so that everyone interested in its outcome could be convinced of the existence of the rule of law.[87] In some situations, it is not necessary for the trial to be open to the public, provided that the alleged victim was able to participate in the proceedings, had access to case files and received a reasoned final decision, while publishing of that decision was not prohibited.[88] It is sufficient that the possibility for the authorities to conceal something without valid justification is reduced to only a small extent.[89]

2.3.8. Proper sanction

When responsibility for ill-treatment is established, the offenders must be imposed sanctions appropriate to the seriousness of the acts committed. In order to do so, it is necessary that the crime be appropriately qualified.[90] The European Court of Human Rights accepts that states and judges of national

81 *Ramsahai and others v. The Netherlands*, application no. 52391/99, §§ 347-350.

82 Eric Svaridze, *Effective Investigation of Ill-Treatment*: Guidelines on European Standards (Council of Europe, 2009), p. 69.

83 *Nadrosov v. Russia*, application no. 9297/02, § 44.

84 *Ramsahai and others v. The Netherlands*, application no. 52391/99, § 348.

85 Ibid, § 353.

86 Ibid, § 353.

87 *Kelly and others v. The United Kingdom*, application. no. 30054/96, § 118.

88 Ibid, § 354.

89 Ibid, § 354.

90 *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the Visit to Albania in 2005, § 54. See also Eric Svaridze, Effective Investigation of Ill-Treatment: Guidelines on European Standards* (Council of Europe, 2009), p. 76-77.

courts must have certain freedom in determining sanctions for ill-treatment, but still reserves the right to intervene in situations where the sentence imposed is evidently disproportionate to the gravity of the offense committed by the convicted person.[91] In its practice, this court generally found that minimum sentences, suspended sentences, or fines imposed on perpetrators of torture or more serious forms of abuse committed with intent were disproportionate or inappropriately mild[92]. The court was extremely critical of the national courts, who clearly abused the provisions of their criminal law to allow for eased sentences, pronouncement of suspended sentences or postponement of the enforcement of sentences, thus allowing for *de facto* impunity of the sentenced officials.[93]

The imposed sentences should be enforced, too. It is not acceptable that the sanction is not enforced due to the time-bar of execution, or amnesty or pardon.[94]

Drawing on the views of the UN Committee Against Torture, the European Court of Human Rights stressed that it was important that the officials be suspended while the proceedings were ongoing, and permanently removed from the service if eventually they were convicted. [95]

In some situations, the European Court of Human Rights criticized the states because, aside from the criminal, the perpetrators of ill-treatment did not bear any disciplinary responsibility[96]. The European Committee for the Prevention of Torture harshly criticized the lack of disciplinary measures in situations when police officers who attended the event in which the ill-treatment occurred failed to report the incident to the competent prosecutor, although they were obliged to do so[97]. Such conduct by police officers in most countries, including Montenegro, entails not only disciplinary but also criminal liability.

91 *Ali and Ayşe Duran v Turkey*, application no. 42942/02, § 66.

92 See, for example, *Okkali v. Turkey*, application no. 52067/99 and Zontul v. Greece, application no. 12294/07.

93 See, for example, the *Zeynep Özcan v. Turkey* judgment, application no. 45906/99, §§ 36-46.

94 *Abdülsamet Yaman v. Turkey*, application no. 32446/96, § 55.

95 Ibid, § 55.

96 *Okkali v. Turkey*, application no. 52067/99, § 71.

97 *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the Visit to Albania in 2005*, § 38.

3. THE MOST IMPORTANT NATIONAL REGULATIONS

3.1. CONSTITUTION OF MONTENEGRO

The Constitution of Montenegro in Article 28 guarantees the dignity of person and the inviolability of its physical and mental integrity, and accordingly prescribes that no one shall be subjected to torture or inhuman or degrading treatment.

Although the Constitution, unlike the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), does not explicitly mention inhuman or degrading punishment, it is obvious that it is also prohibited, not only because the term "behaviour" can be interpreted as to include punishment, but also noting that Article 31 guarantees respect of human personality and dignity in the criminal or other procedure, in case of deprivation or limitation of liberty and during the execution of imprisonment, and then prescribes that any form of violence, inhuman or degrading behaviour against a person deprived of liberty or whose liberty has been restricted, as well as the extortion of confessions and statement is prohibited and punishable.

Following the example of the ICCPR, the Constitution, in Article 27, paragraph 3, prohibits medical and other experiments on human beings, without their permission. Here, however, it is not specified that consent to such experiments must be given freely, but it should be understood. Otherwise, the experiment would impermissibly encroach in the physical and mental integrity of man and would constitute a violation of the prohibition of abuse.

Similar to the ICCPR and the ECHR, the Constitution does not explicitly mention the obligation to conduct an effective investigation in cases of allegations of ill-treatment, but there is no doubt that the obligations is accepted, as it is prescribed in Article 12 of the Convention against Torture (which, in accordance with Article 16 of this convention, applies not only to torture, but to other forms of abuse) and is a generally accepted rule of international law, and in Article 9 of the Constitution it is stipulated that international agreements and generally accepted rules of international law make an integral part of the internal legal order, have the supremacy over the national legislation and are directly applicable when they regulate the relations differently from the national legislation.

In short, it may be concluded that the Constitution of Montenegro undoubtedly accepts and proclaims the rules and values on which the modern international legal order is based, in which the prohibition of torture and inhuman or degrading treatment or punishment and sanctioning those responsible for any form of abuse are among the most important rules in the domain of human rights protection.

3.2. CRIMINAL CODE

3.2.1. Criminal offences

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Article 4 requires states parties to prescribe all acts of torture as offences under its criminal law, as well as an attempt to commit torture and an act by any person which constitutes complicity of participation in torture, and that each state shall make offences punishable by appropriate penalties, which take into account their grave nature. This convention in Article 16 requires each State Party to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment, but does not require such prohibition to be necessarily part of criminal law. The European Court of Human Rights has a similar approach, accepting that in certain situations, in the case of the easiest forms of abuse, appropriate sanction may be imposed in a non-criminal procedure, but, for example, disciplinary. This is quite understandable, bearing in mind that some forms of degrading treatment may exist even when an official has no intention to abuse the victim.

The Montenegrin Criminal Code (CC)[98] criminalizes torture in Article 167, defining it in a manner similar to that of the Convention against Torture, with one important difference - the perpetrator, at least when it comes to the basic form of this offence, can be anyone, not just an official. If a person acting in an official capacity during performance of his/her duties commits this criminal offense, or the offense was committed with his/her explicit or tacit consent or if the official incited another person, it will constitute a qualified form of a criminal offense, for which a prison sentence ranging from one to eight years is prescribed. Although the definition of torture, according to the UN Committee against Torture, is not fully aligned with the definition of torture

98 *Official Gazette of the Republic of Montenegro, no. 70/2003, 13/2004, 47/2006 and Official Gazette of Montenegro*, no. 40/2008, 25/2010, 32/2011, 64/2011 - other law, 40/2013, 56/2013, 14/2015 42/2015 58/2015 - other law and 44/2017.

in the Convention against Torture, it cannot be said that this is an obstacle to the prosecution of all those who resort to torture.[99]

Article 166a provides that anyone who "ill-treats another or treats another in a manner that offends human dignity" shall be punished by a prison term up to one year. If a public official acting in official capacity commits the offense, he/she shall be punished by a prison term from three months to three years. It is explicitly stipulated that he/she will also be punished for an attempt of the offense. The lack of concrete definition of ill-treatment certainly gives space for punishing its various forms. For both criminal offenses prosecution is to be undertaken by the state prosecutor *ex officio*.

Some acts that represent forms of ill-treatment, according to the views of international bodies for the protection of human rights, are falling under definitions of other crimes in the CC, such as, first of all, extortion of testimony (Article 166), serious bodily injury (Article 151), minor bodily injury (Article 152), exposure to danger (Article 155), abandonment of a helpless person (Article 156), duty to rescue (Article 157) and persecution (Article 168a), as well as acts against international law such as war crimes.

3.2.2. Prescribed punishment

The fundamental complaint that may well be referred to the CC provisions incriminating torture and other forms of ill-treatment is that the penalties prescribed are too low and do not correspond to the seriousness of those acts. This was also pointed out to Montenegro by the UN Committee against Torture.[100] If the offense is committed by an official during the performance of his or her duties, which constitutes a serious form of crime, the range of prison term for torture is from one to eight years, and for abuse from three months to three years. The extortion of testimony is punishable by a prison term from three months to five years, and a qualified form, where the extortion of testimony or statement is accompanied by severe violence, or where extremely grave consequences occur for an accused in the criminal proceedings due to extorted testimony, by a prison term from two to ten years.

It is indeed possible to impose more severe penalties if the offense is committed in conjunction with another criminal offense, especially if it is a serious bodily injury. However, on the other hand, it should not be forgotten that

99 See Concluding Observations of the Committee against Torture on the Second Periodic Report of Montenegro, 17 June 2014, CAT/C/ MNE/CO/2, Item 6, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/054/80/pdf/G1405480.pdf?OpenElement.

100 Ibid.

the application of the provisions permitting pronunciation of a suspended sentence and mitigation of sentence, which is very common case in practice of Montenegrin courts, leads to the pronouncement of significantly less sentence than prescribed. Additionally, it should be noted that in the case of the criminal offense of ill-treatment, the state prosecutor may postpone the criminal proceedings or dismiss the criminal charges for reasons of fairness, in accordance with Articles 272 and 273 of the Code of Criminal Procedure, although, according to the information we received from the Basic State Prosecutor's Office in Podgorica, these provisions have never been applied in cases of abuse.

The penal policy in Montenegro is discussed in more detail in Chapter 4.7.

3.2.3. Statute of limitation

An important deficiency of CC is that it lacks a provision explicitly prohibiting statute of limitation in cases of torture and other forms of ill-treatment. Namely, the Article 129 of CC lists criminal offenses for which prosecution and enforcement of punishment may not be subject to time bars and torture and ill-treatment are not among those. Also, the same article stipulates that prosecution and enforcement of punishment may not become time barred even for acts for which there may not be statute of limitation according to the established international treaties. Although the ICCPR, the Convention against Torture and the ECHR do not contain a provision explicitly prescribing that prosecution and enforcement of punishment for acts of torture and other forms of abuse are not subject to time bars, bodies in charge of monitoring their application and authoritative interpretation of their provisions - the Committee on Human Rights, the Committee Against Torture and the European Court of Human Rights - insist that statute of limitation for those acts should not be permitted.[101] The Committee against Torture has explicitly recommended Montenegro to ensure that these acts my not be subject to time bars[102]. Human Rights Action reminded the Minister of Justice of Montenegro about this recommendation of the Committee while the Government was working on the latest amendments to the CC in 2017, but the recommendation was not accepted. [103]

101 Ibid.

102 Ibid.

103 Human Rights Action letter to the Minister of Justice: http://www.hraction.org/2017/02/07/722017-dodatni-komentari-na-nacrt-izmjena-krivicnog-zakonika-akcije-za-ljudska-prava-tortura-da-se-kaznjava-strozije-ubistvo-i-tortura-da-ne-zastarijevaju-2/

3.2.4. Amnesty and pardon

Finally, CC allows amnesty and pardon for all offenses. On the other hand, the European Court of Human Rights considers amnesty and pardon incompatible with the prohibition of ill-treatment, and takes the following view:

"...Where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purpose of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible."[104]

The Committee against Torture takes the same position and considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.[105] Bearing this in mind, amendments to CC should be considered following the views of the above-mentioned international bodies for the protection of human rights.

3.3. CRIMINAL PROCEDURE CODE

In principle, the Criminal Procedure Code (CPC)[106] represents an adequate legal framework for the prosecution of offenders. Although it does not explicitly mention the concept of an effective investigation, principles proclaimed therein, together with specific rules of procedure, are in line with the criteria set by the European Court of Human Rights when assessing whether the investigation into the alleged ill-treatment was effective. Nevertheless, it seems that one of these criteria - the independence and impartiality of the investigation - due to deficiencies in the organization of the key state bodies in charge of investigation - the state prosecution and police, is very difficult to satisfy in practice in situations where police officers are accused or suspected for abuse.

3.3.1. Obligation to report a criminal offence

The Code explicitly stipulates that, in particular, police officers are obliged

104 *Abdülsamet Yaman v. Turkey*, Application no. 32446/96, § 55.

105 General comment of the Committee against Torture no. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C /GC /2, paragraph 5.

106 *Official Gazette of Montenegro*, no. 57/2009, 49/2010, 47/2014 - Decision of the Constitutional Court of Montenegro, 2/2015 - Decision of the Constitutional Court of Montenegro, 35/2015 and 58/2015 - other law.

to report to the state prosecutor that there are grounds for suspicion that a criminal offence that is prosecuted ex officio has been committed (Article 257, paragraph 1). Also, all state authorities, local government authorities, public companies and institutions, as well as all natural and legal persons who are granted certain public powers pursuant to law, or are professionally involved in the protection and security provisions to persons and property or in the health care of persons, as well as in jobs of minors care and education, are obliged to report criminal offences (Article 254, paragraphs 1 and 2). Persons filling a criminal charge shall indicate evidence to the best of their knowledge and take measures to preserve traces of the criminal offence, the items upon which or by means of which the criminal offence has been committed, items resulting from the commission of criminal offence as well as other evidence (Article 254, paragraph 3). In addition, it is stipulated that everyone shall report a criminal offense which is prosecuted *ex officio* and is obliged to report a criminal offense the commission of which has caused detriment to a minor (Article 255, paragraph 1). It is obvious that these provisions should enable information to the competent state prosecutor on cases of alleged ill-treatment.

3.3.2. Duties of the state prosecutor and police in conducting the investigation in the context of meeting standards of independence and impartiality

The State Prosecutor is obliged to impartially and objectively examine every criminal complaint and decide on it (Article 256a of the CPC and Article 4 of the Law on State Prosecutor's Office), which should guarantee that any "convincing claim" on abuse will be examined in accordance with the requirements arising from the procedural aspect of the prohibition of abuse.
According to positive regulations in Montenegro, the key decision-makers in the criminal procedure - the state prosecutor and judges - are independent of the officials who may be the perpetrators of some form of abuse, and the circumstances that can undermine their independence and impartiality are the basis for their recusation (Articles 38 and 43 of CPC). Moreover, it is envisaged that provisions on the recusation shall also be applied to interpreters and experts, as well as experts witnesses (Article 43, paragraph 1 of CPC) and, which is extremely important, authorized police officers who undertake evidentiary actions pursuant to the CPC (Article 43, paragraph 5 of CPC). All these provisions are keeping up with the request that in the procedure of examination of allegations of ill-treatment, persons who are in any way hierarchical or institutionally connected with the official persons whose actions are investigated, should not participate (see above, 2.2). However, if we look at other provisions of CPC, as well as the regulations on the organization and manner of work of the State Prosecutor and Police - the Law

on the State Prosecutor's Office[107] and the Law on Internal Affairs[108], as well as the Agreement on Cooperation of the State Prosecutor's Office and the MIA - Police Directorate during the reconnaissance and criminal proceedings (from 9 April 2014), one may notice that it is not specifically provided how to ensure independence and impartiality when investigating allegations of ill-treatment by police officers. Namely, although according to the law, the state prosecutor can personally question the allegations of ill-treatment, without help of the police or other administrative body[109], and thus satisfy the standard of independence and impartiality of the investigation, in practice, this will be difficult to achieve in relation to some actions, especially in the pre-investigation phase.[110]

The CPC and, in particular, the Law on Internal Affairs, do not presuppose the possibility that police officers will not act by binding orders of the state prosecutor. It is stipulated that the police, firstly, are obliged to inform competent State Prosecutor about the grounds for suspicion that a criminal offence which is subject to prosecution by virtue of office (Article 257, paragraph 1 of CPC) and then the police shall proceed upon the request of the competent State Prosecutor (Article 44, paragraph 3, Article 251, paragraph 1 of CPC), provide him with criminal-technical assistance (Article 283 of CPC) and inform him without delay regarding the measures taken (Article 271, paragraph 5 of CPC).

Failure or omission of a state prosecutor's order is prescribed by the Law on Internal Affairs as a serious violation of the official duty of police officers, which can lead to the termination of employment (Article 106 of the Law on Internal Affairs). Also, CC includes incriminating acts such as Malpractice in Office (Article 417) or Misuse of Office (Article 416) or Assistance to Perpetrator after a Commission of Criminal Offense (Article 387), which are applicable in case of refusal to cooperate in the implementation of justice. However, the European Court of Human Rights has recognized that in practice, in the ranks of the police under the same command, it is not easy to provide impartial treatment in the investigation of abuse. Therefore, the position of this court indicates that, as a support to the State Prosecutor's Office in investigations of abuse or other criminal offenses committed by public officers, a formally

107 *Official Gazette of Montenegro*, no. 11/2015 and 42/2015.

108 *Official Gazette of Montenegro*, no. 44/2012, 36/2013 and 1/2015.

109 The State Prosecutor conduct the investigation and perform urgent evidentiary actions during the preliminary investigation (Article 44, paragraph 2, item 3 of CPC, Article 276, paragraph 1 of CPC). In particular, if the perpetrator is unknown, the state prosecutor will either personally or through other authorities, gather necessary information (Article 271, paragraph 3 of CPC).

110 In the preliminary investigation directly manage the activities of the police authorities and that he undertakes only urgent evidentiary actions during the preliminary investigation (Article 44, paragraph 2, items 1 and 3).

independent body should be established with officials who have police powers and professional capacities but are institutionally and hierarchically independent from the police.

Such problems have been resolved in other countries, the Netherlands and Slovenia are interesting examples, with the establishment of a special organizational unit within the prosecutor's office where officials with competencies and professional skills are identical police, institutional and hierarchical units separated from the police or ministry system in charge of internal affairs, which assist the prosecution in investigating criminal offenses for which potential offenders are police officers (see above, 2.3).

In the absence of a similar independent authority in Montenegro, the state prosecutor should not investigate allegations of ill-treatment - -including, for example, essential actions such as the identification of perpetrators of alleged ill-treatment or the finding of witnesses – by giving an order or otherwise practically leave it to the same body to which the alleged perpetrators belong (see above, 3.2). At the same time, the strict application of provisions requiring the police to submit a criminal charge to the competent state prosecutor's office (Article 256, paragraph 3) should be insisted on strictly applying the provisions and inform the competent state prosecutor in advance of any action taken, except in the case of urgency (Article 44, paragraph 3).

The impartiality of the investigation should be ensured by the application of the principle of truth and fairness, which requires the court, state prosecutor and other public authorities participating in the criminal proceedings shall truthfully and completely establish all facts relevant to render a lawful and fair decision, as well as examine and establish with equal attention facts that incriminate the accused person and the ones in his/her favour (Article 16). The same principle, which requires both to the parties and the defense attorneys, shall be ensured with equal terms as regards the offering, accessing and presenting of evidence.

3.3.3. Urgency

The CPC also requires urgency in the conduct of the authorities involved in the investigating procedures.

Reporting of the criminal offenses Abuse, Minor bodily injuries, Extortion of a Confession (basic form), which is punishable by imprisonment of up to five years, are processed in a summary procedure, in which the state prosecutor

has a deadline of one month to decide on a criminal charge (Article 256a, §3 CPC). In other cases, the deadline is three months, and in particularly complex cases for a maximum of six months (Article 256, paragraphs 1 and 2 of CPC). Exceptionally, the deadline may be extended for a maximum month (Article 256, paragraph 3 of CPC).

The State Prosecutor can bring directly indictment and without conducting an investigation (Article 288 CPC) and if the investigation is conducted, it should be conducted within six months of the issuance of an order to carry out an investigation (Article 290, paragraph 3 of CPC).

If this does not happen, the state prosecutor is obliged to notify thereof the immediately superior prosecutor as to the reasons for not completing the investigation. The immediately superior State Prosecutor shall take such measures as may be necessary to complete the investigation (Article 290, paragraph 3 of CPC). Finally, it is stipulated that the court is obliged to conduct the proceedings without delays and to prevent all abuses of rights that are vested in participants in the proceedings (Article 15, paragraph 2 of CPC).

3.3.4. Participation of the injured parties in the investigation

Rights of the injured parties insisted on by the European Court of Human Rights are to a large extent incorporated in the -CPC, which means that they can take part in the proceedings to the extent necessary to protect its legitimate interests. The right of the injured party to initiate prosecution is denied only in the event of a statute of limitations of prosecution.

The injured party has the right to call attention to all facts and to offer evidence, to examine the defendant, witnesses and expert witnesses and to put forward remarks and explanations as regards their statements as well as to make other statements and proposals (Article 58, paragraphs 1 and 2). In addition, he has the right to inspect files and objects serving as evidence (Article 58, paragraph 3), and the right to examine case files (Article 203a), which may be limited only exceptionally (Article 203b).

The State Prosecutor is obliged to inform the injured party of the time and place of taking evidence gathering actions they are entitled to attend (hearing the defendant, witnesses and expert witnesses, inspecting, reconstructing the event and searching the apartment), unless there is a risk of delay (Article 282). The injured party may, for reasons of fairness, be appointed an attorney and has the right to legal assistance (Article 58, paragraphs 6 and 7). The injured party must be informed and may appeal against the decision

of the state prosecutor to reject the criminal charge (Article 59, paragraph 1 and Article 271a), but not to the decision to suspend the investigation (Article 290, paragraph 5). In this case, he can only take over the prosecution themselves, which he can do even if the state prosecutor reject the criminal charge (Article 59) and if he does not decide on a criminal complaint in a summary procedure within a term of one month (Article 449), although he should have given that the European Court of Human Rights considers that the criminal prosecution of the perpetrators of abuse should be dealt with by the state prosecutor rather than the injured party.[111] The injured party can appeal also to the decision to suspend the proceedings based on the control of the indictment (Article 297 in conjunction with Article 294), as well as to the verdict (Article 382).

3.3.5. Publicity of the investigation (transparency)

The publicity of the investigation in cases of abuse was provided through the rule on the openness of the investigation (Article 282 of CPC) and the public nature of the main hearing (Articles 313-316 of CPC).

3.4. LAW ON INTERNAL AFFAIRS

Police duties, according to Article 10 of the Law on Internal Affairs, among other things, includes protection of citizens safety and rights and freedom guaranteed by the Constitution, prevention of commission and detection of criminal offenses and misdemeanours, locating perpetrators of criminal offenses and misdemeanours and bringing them to the competent authorities. These activities are performed to ensure equal protection of security, rights and freedoms, to apply law and unsure rule of law (Article 12). The conduct of police affairs is based on the principles of legality, professionalism, cooperation, proportionality in the exercise of powers, efficiency, impartiality, non-discrimination and timeliness (Article 11). The Rulebook on the manner of conducting certain police duties and use powers in conducting those duties in more detail prescribes police powers and duties.[112]

In terms of police performance standards, the Law on Internal Affairs prescribes that police officers must act in accordance with the Constitution, ratified by international treaties, law and other regulations; comply with standards of police action, in particular those arising from the duties regulated by international regulations and relating to the duty of serving people, respecting

111 *Stojnšek v. Slovenia*, no. 1926/03, § 79, *Otašević v. Serbia*, no. 32198/07, § 25, *Milić and Nikezić v. Montenegro*, 2015, p. 83.

112 *Official Gazette of Montenegro*, no. 021/14 from 6 May 2014, 066/15 from 26 November 2015.

legality and combating illegality, exercising human rights, non-discrimination while policing, limitation and restraint in the use of force, prohibition of torture and inhuman and degrading treatments, providing aid to injured persons, duty to protect classified and personal data, duty to reject unlawful orders and combat any form of corruption (Article 14). It was pointed out that police officers are obliged to execute the orders of the competent state prosecutor, otherwise they are liable for serious violation of duty for which, as one of the possible sanctions, a termination of employment is envisaged (Article 106).

Drawing on the views of the UN Committee against Torture, the European Court of Human Rights has emphasized that it is important that officials who are under criminal investigation or criminal proceedings should be suspended until such proceedings are conducted and should permanently be removed from office if eventually convicted.[113] Pursuant to the Law on Internal Affairs and the Labor Law, police officers, as well as other employees, should be temporary suspended from work whenever criminal proceedings are initiated against them for a criminal offense in connection with work or if caught while committing a severe breach of duty for which a measure of termination of employment was prescribed, until completion of the disciplinary procedure.[114] However, the new Law on Civil Servants and State Employees, which will be applied from 1 July 2018, significantly relativizes said provisions and an international standard, prescribing that the removal (suspension) in case of criminal proceedings is possible, and not mandatory. The current law prescribes that the suspension is not mandatory in the case of disciplinary proceedings, while in the case of criminal offenses it is mandatory.[115] Still valid Law on Civil Servants prescribes that the suspension is not required in the case of conducting disciplinary proceedings, while it is required in the case of criminal proceedings.[116]

In relation to permanent removal from service, the legislation does not ensure that the officials, who are convicted for example for torture, necessarily came to termination of employment. This is only for the case of corruption, when a police officer is declared disciplinary responsible for serious violation of official duty with elements of corruption or is convicted for a criminal

113 Ibid, par. 55.

114 Art. 108 of the Law on Internal Affairs, *Official Gazette* no. 044/12, 036/13, 001/15; Art. 130, Labor Law, *Official Gazette* no. 049/08, 026/09, 088/09, 026/10, 059/11, 066/12, 031/14, 053/14, 004/18. The same provision is contained in the last available version of the Draft Law on Internal Affairs (Article 165) from February 2018.

115 Law on Civil Servants and State Employees, *Official Gazette of Montenegro* 39/11, 50/11, 66/12 and 34/14, article 93.

116 Law on Civil Servants and State Employees, *Official Gazette of Montenegro* 39/11, 50/11, 66/12 and 34/14, article 93.

offense with elements of corruption.[117] Otherwise, a police officer, as well as other public officer, may be permanently removed from the service only if he is unconditionally sentenced to a prison sentence of at least six months in criminal proceedings or if a disciplinary measure is imposed for termination of employment - which is in cases of abuse possible, but due to the lack of explicit formulations it is uncertain. [118] Only elected or appointed officials, i.e. high-ranking staff, shall be relieved of functions in case of conviction of unconditional imprisonment or for a criminal offense that makes them unworthy of performing duties in a state body.[119]

In some situations, the European Court of Human Rights objected to the state that, in addition to the criminal, perpetrators of abuse did not bear the disciplinary responsibility[120]. The European Committee for the Prevention of Torture harshly criticized the absence of disciplinary measures in a situation where police officers who attended the incident in which they had been abused did not report to the competent prosecutor, although they were obliged to do so.[121] Here can be noted that such behavior by police officers in most countries, including Montenegro, entails not only disciplinary but also criminal liability. In Montenegro, it is clearly stipulated that the criminal responsibility of public officials does not exclude disciplinary liability.[122] This means that the initiation of criminal proceedings against officials is not an obstacle in conducting disciplinary proceedings, and it must be ensured that the disciplinary procedure is initiated and implemented within certain deadlines in order not to get out of date.[123] In cases where a violation of a duty has features of a criminal offense, the limitation periods applicable to criminal prosecution shall apply.[124]

117 Art. 106, para. 2 and 109, paras. 2 of the Law on Internal Affairs, op. cit.

118 For example. more serious violation of his duties, according to Art. 106 of the Law on Internal Affairs do not explicitly include abuse, but in cases of abuse, those who read: "improper or out of purpose use and disposal of the entrusted means", "conduct in or out the service contrary to code of police ethics", "failure to undertake or insufficient undertaking of measures for safety of persons, property and entrusted things", "any action, or failure to act which disable, obstruct or impair execution of duties", "giving orders which, if executed, would constitute a criminal offence".

119 Law on Civil Servants and State Employees, *Official Gazette of Montenegro*, 002/18, Art. 60; Law on Civil Servants and State Employees, *Official Gazette of Montenegro*. 39/2011, 50/2011, 66/2012 and 34/2014, Art. 56.

120 *Okkali v. Turkey*, Application. no. 52067/99, § 71.

121 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on visit to Albania in 2005, para. 38.

122 Law on Civil Servants and State Employees, *Official Gazette of Montenegro*, 39/2011, 50/2011, 66/2012 and 34/2014, Art. 81, para. 3, Law on Civil Servants and State Employees, *Official Gazette of Montenegro*, 002/18 of 10.01.2018, Art. 93.

123 Law on Civil Servants and State Employees, *Official Gazette of Montenegro*, 002/18, Art. 103.

124 Law on Civil Servants and State Employees, *Official Gazette of Montenegro*, 002/18, Art. 103, para. 5.

3.5. RULES ON UNIFORMS AND DESIGNATIONS OF POLICE OFFICERS

The rules on uniforms and designations of police officers must be clear and contain guarantees that, even when masked, they will have visible individual (e.g. numerical) signs on the basis of which they can later be identified. The existing Decree on uniforms, designations and weapons of police officers[125], and the Ordinance on appearance, technical characteristics, type of material, manner of wearing and duration of uniforms of police officers for carrying out special tasks[126] do not contain such a guarantee. However, the aforementioned Ordinance, valid until the end of 2017, prescribes that certain parts of uniforms of the Special Anti-Terrorist Unit and the Special Police Unit (jackets, shirts and overalls on the chest, and on the back of their "jockey" caps) must have signs - combination of letters and/or numbers by which police officers can be identified, but does not take into account the fact that some of them may be covered by other parts of the uniform (such as a rain coat) or other equipment, such as a protective vest - "bulletproof vest", which are not required to have individual signs on them. In addition, this Ordinance prescribes that the uniform of the police officers of the Criminal Police Department includes "balaclavas", but it does not specify that their uniforms must also have individual signs to determine their identity.

Therefore, it would be good to amend current regulations so that it is clearly stipulated that all police officers who can carry out their tasks with covered faces (wearing masks or "balaclavas"), including police officers of the Special Anti-Terrorist Unit, the Special Police Unit and the Criminal Police Department, must have easily distinguishable individual signs (inscription of numbers and/or letters), by which they could be identified, on the appropriate parts of their uniform or additional equipment (such as a protective bulletproof vest, if worn over a jacket), i.e. in a visible place on the chest, the back, and on the back of the jockey cap. In order to achieve this, it is advisable to define not only parts of the uniform where these signs will be placed, but also the colour and size of the signs, which should guarantee their visibility from a distance and at night. In addition, it should be made clear to all police officers that any violation of the rules on individual signs, including tags with one's name and surname (for example, covering them or removing them from uniforms) will be sanctioned by the application of appropriate provisions on violation of official duty.

125 *Official Gazette of Montenegro*, 20/2015, 73/2017 and 7/2018.

126 *Official Gazette of Montenegro*, 77/2017.

In this way, it would be possible to avoid situations where police officers acting masked, with a face covered, or without individual signs, exceed their authority and commit criminal offenses, but remain unidentified and therefore unpunished. In addition, proposed changes to the rules could also have a preventive effect, as all police officers would now know in advance that their identification, even when carrying out tasks with a covered face, has been made much easier and that the possibility of avoiding liability for unlawful treatment has been significantly reduced.

In a letter to the Interior Minister, in March 2018 HRA suggested that the relevant rules be amended to define not only parts of the uniform where these signs will be placed, but also the size and color of the signs, which should guarantee their visibility from a distance and at night.[127]

3.6. LAW ON THE EXECUTION OF PRISON SENTENCES, FINES AND SECURITY MEASURES

The rights and duties of security officers and other employees in prisons are regulated by the Law on the Execution of Prison Sentences, Fines and Security Measures.[128] Seeing that prison employees are civil servants, same as police officers they are subject to the Law on Civil Servants and State Employees and the Labour Law in relation to all other matters not prescribed by the mentioned Law.

The fact that the employees of the AECS health-care service are officers of this institution, and not the Ministry of Health, does not systematically ensure their independence from the AECS management; this is a cause for concern bearing in mind their important role in detecting and documenting injuries in prisoners as well as their duty to report criminal offenses of ill-treatment.[129] The CPT noted in this context: "their duty to care for their patients (sick prisoners) may often enter into conflict with considerations of prison management and security. This can give rise to difficult ethical questions and choices. In order to guarantee their independence in health-care matters, the CPT considers

127 The letter is available on HRA website: http://www.hraction.org/wp-content/uploads/2018/03/Pismo.pdf.

128 *Official Gazette of Montenegro*, 036/15 of 10 July 2015.

129 Referring to the European Prison Rules and the CPT Standards, NGOs Human Rights Action and Juventas proposed that the independence of medical staff from the AECS management be ensured by having the Ministry of Health employ medical staff working in the prison (see report: Monitoring human rights of detained or sentenced persons in the Administration for Execution of Criminal Sanctions (AECS) in Montenegro for the period 2014-2015, pp. 53-54, http://www.hraction.org/wp-content/uploads/Monitoring.pdf).

it important that such personnel should be aligned as closely as possible with the mainstream of health-care provision in the community at large."[130]

Within the principle of humanity, which should prevail in the system of enforcement of criminal sanctions, it was emphasized that the prisoners should not be subjected to any form of torture, ill-treatment or humiliation, or health and scientific experiments (Art. 4).

The principle of proportionality in the application of the means of coercion is prescribed in detail (Art. 158). Immediately after the application of the means of coercion, a medical examination of the person subjected to coercion is required (Art. 159). Security officer shall, within 24 hours, submit a written report on the use of coercion to the person managing the prison, who shall report without delay to the Head of the AECS. The Head of the AECS then evaluates the justification and orderly use of the means of coercion, and if he assesses that the security officer has overstepped his authority and unlawfully applied the means of coercion, a report is drawn up and submitted without delay to the Ministry of Justice. A special record is kept of the use of coercive means; the AECS management submits a report on the use of means of coercion to the Ministry of Justice once a month (Art. 160).

In relation to documenting injuries of prisoners and detainees, the Ministry of Justice has adopted the Guidelines on the Health Care of Detained and Imprisoned Persons, which prescribe that obligation. At the AECS a special record of injuries is kept, and they have lately been recorded in the manner recommended by the CPT during the visit to Montenegro in 2013.

In relation to the suspension and disciplinary responsibility of prison officers, the same rules apply as to other civil servants (see 3.3). More serious violations of official duties are prescribed in the same manner as for police officers, with the additional violation of introducing or attempting to introduce unauthorized items (Art. 187).

Removal from service in the event of a final conviction for ill-treatment has not been explicitly prescribed, but the general rule under the Law on Civil Servants and State Employees on the termination of employment with force of law in the event of a final sentence of imprisonment for a term of at least six months is in force. However, the criterion of being worthy is also prescribed for the security officer post at the AECS, stating that a person is not worthy if "he has been convicted in a final judgment for a criminal offense motivated by gain or dishonesty; he has been sentenced for an offense against public

130 CPT Standards, § 71.

order and peace with elements of violence or another offense that makes him unworthy of carrying out work related to security"(Art. 176). This illogical wording should be specified so that an unworthy person is also considered to be a person convicted of a criminal offense with elements of violence, and that this fact be the basis for the termination of employment, too.

3.7. LAW ON HEALTH CARE

In the realization of health care, according to the Law on Health Care,[131] a citizen has the right to equality of treatment and, *inter alia*, to free choice of doctor, to receive information on all matters relating to his health; to decide (free choice); to refuse to be the subject of scientific research and research without own consent or any other examination or medical treatment that does not serve his treatment; to access medical records, etc. (Art. 11).

The competent chamber, by decision, permanently revokes the license for work in case when a healthcare worker is imposed a prison sentence in a final judgment for a serious criminal offense against human health or a criminal offense against humanity and other goods protected by international law (Art. 116).

Although the Criminal Procedure Code obliges all civil servants to report criminal offenses, including ill-treatment, the Law on Health Care prescribes the duty of a physician to inform the police only about the cause of death suspected of being violent, and not about injuries sustained through violence (Art. 163). The Law on Protection against Domestic Violence prescribes and elaborates this important duty to report violence,[132] which should be interpreted as referring to all forms of violence, regardless of the environment. Also, the guidelines on recording injuries should be specifically prescribed, similar to Guidelines adopted by the Ministry of Justice in relation to detained and imprisoned persons (see 3.5).[133]

131 *Official Gazette of Montenegro*, 003/16, 039/16, 002/17.

132 *Official Gazette of Montenegro*, 046/10 of 6 August 2010, 040/11 of 8 August 2011, Art. 9 and 39.

133 For the purposes of this report, on 11 February 2018 HRA sent a request for access to information to the Ministry of Health requesting a regulation that prescribes the manner of reporting of doctors on ill-treatment related injuries, but to date we have not received an answer.

4. THE EFFECTIVENESS OF INVESTIGATIONS IN CASES OF ILL-TREATMENT

In this chapter general conclusions on the effectiveness of investigations in cases of alleged ill-treatment are set forth, based on an analysis of all available final court decisions made from the beginning of 2013 to the end of 2017 (46 in total, Table I), and, in particular, relevant decisions of the Constitutional Court of Montenegro (3) and the European Court of Human Rights in relation to Montenegro (2). Available data on ongoing procedures, cases of alleged ill-treatment unprocessed to date that the Council for Civilian Control of Police Operations, Department for Internal Control of the Police, and Ombudsman have dealt with, as well as incidents reported by civil society organizations or the media have all been taken into account. An overview of all finalized cases is provided below in Table I, and an overview of all cases of alleged ill-treatment in which proceedings have been initiated in Table II and cases that have not yet been processed in Table III.

The effectiveness of investigations has been assessed in relation to the criteria established in the practice of the European Court of Human Rights, previously explained in section 2.3.

4.1. REPORTING ABUSE AND LAUNCHING AN INVESTIGATION

In the five-year period, from the beginning of 2013 to the end of 2017, a total of 69 officials were reported to the state prosecutor for having committed crimes of Ill-treatment and Torture, while no charges were filed for the criminal offense Extortion of Confession or Statement. Not all charges filed with the Basic State Prosecutor's Office in Podgorica have been taken into account, since we did not receive complete information on its work; we constructed the number of charges filed with that Office based on other available sources (see Table IV).[134]

Most charges were filed in 2015, 30 in total, which is understandable, as there were numerous charges related to incidents that occurred during the protests in Podgorica held in October that year. Before that, in 2013 and 2014,

134 The Basic State Prosecutor's Office in Podgorica has informed us that they do not report on the number of charges filed with regard to a particular type of criminal offense, as opposed to all other prosecutor's offices in Montenegro. We believe that this important information for monitoring the occurrence of ill-treatment and its processing should also be recorded in the Basic State Prosecutor's Office in Podgorica.

five and ten criminal charges respectively were filed against officials. During 2016, nine were filed, and during 2017 fifteen charges were filed for these criminal offenses.

Although, apart from 2015 and 2017, the number of criminal charges filed against officials for ill-treatment was not too large, it would be wrong to conclude that abuse in Montenegro is rare and exceptional. Based on the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Ombudsman and other national bodies where citizens may report abuse, as well as the media reports, one may conclude that there are more cases of ill-treatment than reported to the state prosecutor, even in the form of criminal charges. For example, the CPT in its report on the 2013 visit, which lasted only eight days, cited examples of the seven persons deprived of their liberty who in a conversation with its delegation put forward convincing, substantiated allegations of abuse in the police station at the beginning of the year, while the report indicates that the number of persons claiming to have been deliberately abused at the police premises is actually much higher.[135] According to the available data, that year only five cases were officially reported. The review of processed and unprocessed cases of alleged ill-treatment given in Tables I, II and III below suggests that abuse by police officers is unfortunately not uncommon in Montenegro and that such cases are recurrent. On the other hand, it cannot be said that torture is being applied systematically, which is also in keeping with the opinion of the Ombudsman.[136]

Based on the cases inspected and the rationales for 46 final judgments, it can be noted that cases in which a state official had a key or significant role in the detection of ill-treatment - whether it be a police officer, employee at the Administration for the Enforcement of Criminal Sanctions or doctor who examined a person who claims or is suspected of being abused - are very rare, despite the fact that all these persons are obliged to report a crime prosecuted *ex officio*. As a rule, abuse is reported exclusively by abused persons. This suggests that the procedures in which officials report on the use of coercive measures and in which the lawfulness of their enforcement is controlled are either insufficiently effective or not properly implemented, although such procedures exist within both the police and the AECS, i.e. the

135 *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the visit to Montenegro* in 2013, paragraphs 14-17.

136 Report of the Protector of Human Rights and Freedoms for 2015, Podgorica, March 2016, p. 76. "Ombudsman: There is no systematic torture of persons deprived of their liberty in Montenegro", *TV Vijesti*, 25 June 2017.

MIA and Ministry of Justice, and should be used for quick detection of illegal use of force.[137]

In certain cases, it is obvious that officials have deliberately failed to report the use of the means of coercion in a legally prescribed manner, precisely to prevent the exposure and prosecution of their colleagues, without having been held accountable in the prescribed disciplinary or criminal proceedings, although in such situations prosecution may be initiated for the criminal offense Failure to report a criminal offence and offender (Art. 386, para 2 of the Criminal Code) or Assistance to perpetrator after the commission of a criminal offence (Art. 387 of the Criminal Code).

An example of this is the case of members of the Special Anti-Terrorist Unit (SAU) during the protests held in Podgorica on 24 October 2015, who jointly compiled an inaccurate report on the use of coercive measures for the entire unit of 55 people, although each of them individually had an obligation to report on when, where, against whom and in which way means of coercion had been applied (for more detail see aforementioned decision of the Constitutional Court in the case of M. M.). Although in this case the commander of the unit in question was prosecuted for assisting the perpetrator after the commission of the criminal offense and in the end convicted, it is clear that he alone could not have prevented conduct of an effective investigation, but that the commander and his colleagues from the unit were in it together. However, none of them were held responsible, or even disciplined, despite the fact that their conduct should be regarded as a more serious breach of official duty, such as Taking or failing to take any action that prevents or hinders the work of the Service (Art. 106, para 1, item 3 of the Internal Affairs Act) or Failing to perform or negligent, improper or untimely performing of official obligations (Art. 83, item 1 of the Civil Servants Act).

Physicians, such as those working in institutions accommodating persons deprived of their liberty, as well as those in civilian institutions, can be of great importance for the detection of cases of abuse, since, by the nature of their work, they could be the first to come across information that a person who had been in contact with an official has suffered injuries resulting from the unlawful use of force. However, we are not aware of a single case in which a

137 At AECS, regulations oblige the Ministry of Justice to report on the use of coercive measures only once a month, which is insufficient for effective control. For commentary on the implementation of this reporting obligation in practice, see "Monitoring the respect for the human rights of persons in custody and serving sentences at the Administration for the Execution of Criminal Sanctions (AECS) in Montenegro 2014-2015", Human Rights Action and Juventas, p. 52-60 (http://www.hraction.org/2016/02/09/monitoring-postovanja-ljudskih-prava-osoba-u-pritvoru-i-na-izdrzavanju-kazne-u-zavodu-za-izvrsenje-krivicnih-sankcija-ziks-u-crnoj-gori/).

doctor reported torture. This did not happen even in the case of the AECS incident on January 14 and 15, 2015, although some of the abused prisoners were examined by a doctor the same evening.

Civic institutions do not have suitable protocols or instructions for doctors who detect injuries that they believe could have been caused by ill-treatment on how these injuries should be described and who to inform.

During its visit to Montenegro in 2013, the CPT recommended that special forms be introduced for the recording of traumatic injuries, with "body charts" for marking such injuries, and that prison doctors be instructed to immediately report to the competent prosecutor whenever injuries are recorded which are consistent with allegations of ill-treatment made by a patient, regardless of his wishes.[138] Meanwhile, the Ministry of Justice adopted the Guidelines on the Health Care of Detained and Imprisoned Persons, which contain such instructions and are applied at the AECS. There is no reason not to distribute these instructions to other doctors, too. Such position is fully in line with the principle stating that any serious allegation or other indication of ill-treatment should be investigated *ex officio*, regardless of the alleged victim's actions. Otherwise, there is a great chance that the cases of abuse where victims are afraid to inform the authorities be left unpunished.

When it comes to citizens, their complaints of ill-treatment also reach the Council for Civilian Control of Police Operations, the Ombudsman and Department for Internal Control of the Police. In fact, it can be noted that in a number of cases we have analysed the state prosecutor's office took action only after the alleged victim had addressed the Council for Civilian Control of Police Operations or the Ombudsman. Both are highly valuable mechanisms which contribute significantly to helping credible information on alleged cases of ill-treatment reach the authorities responsible for implementation of investigation and encourage their action. Complaints submitted by citizens to the Department for Internal Control of the Police are not uncommon, indicating that it is good for citizens to have access to a variety of mechanisms that can be used to draw attention to potential violations of human rights.

However, an overview of the cases described in Table III unfortunately indicates that sometimes not even the conclusions of the Council or the Ombudsman's opinion, or that of the Department for Internal Control of the Police, is sufficient for the state prosecutor's office to urgently launch an investigation that can be considered effective. Particularly illustrative are the cases of beating

138 *Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the Visit to Montenegro in 2013,* paragraph 25.

of fans at the basketball game in Podgorica in 2012 (No. 2); R. B. from Nikšić (No. 3), N. M. from Kolašin (No. 5), Ž. from Bar (No. 7) and cases in the context of the October 2015 protests (No. 9-33).

Judgment of the European Court of Human Rights in the *Siništaj and others v. Montenegro* case shows that both the investigating judge and the prison doctor recorded that the applicants, brought to them from the police station, had visible injuries and insisted that they had been ill-treated by the police, but neither the judges nor the prosecutor did anything to investigate their allegations until the defendants themselves filed criminal charges and later insisted on them[139].

The state prosecutor claims that in the meantime this practice has changed, emphasizing that during the investigation of the January 2015 incident in AECS, when a group of prisoners first attacked prison guards and then other guards abused prisoners in revenge, the prosecutor received prisoners' reports of abuse during their interrogation, noted their injuries, immediately ordered forensic medical examination and opened a case.[140]

We remind that CPC obliges all civil servants to report criminal offenses prosecuted *ex officio*, and the state prosecutor to ensure their effective prosecution, especially when there are convincing allegations that abuse did was caused by civil servants.

4.2. INDEPENDENCE AND IMPARTIALITY

The lack of independence of the Montenegrin authorities participating in the investigation against police officers proves to be a systemic problem, as pointed out by the European Court of Human Rights in the *Siništaj and others v. Montenegro* case, and the Constitutional Court of Montenegro in its decisions on constitutional complaints filed by M. M,[141], B. V.[142] and M. B.[143] for police abuse experienced during the protests held in Podgorica on 24 October 2015.

As noted above (see 2.3.2), the European Court of Human Rights consid-

139 *Siništaj and others v. Montenegro,* Application no. 1451/10, 7260/10 and 7382/10, paragraphs 8-26, 146-147.

140 Comments on the Draft Report on the Effectiveness of Investigations in Cases of Ill-treatment in Montenegro, Ljiljana Klikovac, Ana Bošković, Miljan Vlaović, State Prosecutor's Office representatives, February 2018.

141 Decision of 25 July 2017, case U-III no. 354/17.

142 Decision of 21 June 2017, case U-III no. 49/17.

143 Decision of 21 June 2017, case U-III no. 50/17.

ers that the investigation meets the standard of independence only if the persons responsible for its implementation are completely independent of the persons whose actions are being investigated. This applies not only to the investigation in general terms, but also to its individual aspects, such as the identification of perpetrators of the crime (the *Najafli* case). This court has already established that the investigation conducted in Montenegro by the Department for Internal Control of the Police could not be considered independent since it was carried out by the police itself, i.e. the MIA, which is in charge of the PA, whose members were suspected of abuse. The Constitutional Court of Montenegro then concluded that in the M. M., B. V. and M. B. cases, too, the investigation conducted by the PA was not independent, nor could it have been, "since it was about colleagues employed in the same state body".[144] The Constitutional Court concluded that in the above three cases, the state prosecutor's office failed to investigate abuse and torture in a manner that satisfies the standard of independence "because it continuously required the Police Administration to take measures and actions in order to identify police officers, ignoring the fact that the officers required to conduct an investigation were subordinated to the same command chain as those who were subjected to the investigation."[145]

Practice in which the state prosecutor's office in one part *de facto* entrusts the police with research into allegations of abuse also when investigating a criminal offense allegedly or reasonably suspected to have been committed by police officers - are not at all rare. On the contrary, this seems to be a common practice. Therefore, we will herein explain why we consider such practice to be inadequate.

First of all, there is no doubt that criminal prosecution is a duty of the state prosecutor and that he is responsible for carrying out the investigation and that he is obliged to carry out urgent actions in the pre-trial stage (Article 44, paragraph 2, item 3 of the CPC, Article 276, paragraph 1 of the CPC, Article 271, paragraph 3 of the CPC), while the police is obliged to assist him and act in accordance with his orders and requests (Article 44, paragraph 3, Article 251, paragraph 1 of the CPC, Article 283 of the CPC). Accordingly, from the mentioned regulations, which generally refer to the criminal reconnaissance and investigation proceedings, the prosecutor *is not obliged* to take certain evidentiary actions through or with the help of the police - all such actions, including those necessary for the identification of the perpetrators, as well as in the pre-trial stage, the state prosecutor *can* take himself, directly.

144 Decision on appeal lodged by M. M. of 25 July 2017, case U-III 354/17.

145 Ibid, p. 23; decision on appeal lodged by B. V, U-III 49/17, p. 17; decision on appeal lodged by M. B, U-III 50/17, p. 17-18.

Therefore, having in mind the described requirement that persons who are institutionally or hierarchically linked to the persons whose actions are being investigated should not participate in the investigation of cases of ill-treatment, the state prosecutor should in these cases act directly, independently, instead of delegating to the police, most often in pre-trial stage, *de facto* to investigate serious allegations of abuse. This primarily refers to the identification of the perpetrators who are police officers.

According to information we received from the state prosecutor's office, it seems that among the prosecutors there is a prevailing attitude that the identification i.e. detection of the perpetrators of criminal offenses *in any case* is the job of the police, not the prosecutor, and that the prosecutor directs actions of the administrative authority in charge of police affairs by issuing binding orders and through direct management.[146] Regarding the prosecution of perpetrators in general, such a position is not wrong, but when it is certain that the criminal offense was committed by police officers, the state prosecutor must have a more significant and more active role in the implementation of actions that should lead to the identification of the perpetrators, than in other criminal offenses. It would be wrong for the police, which in such situations cannot be considered as independent, to allow themselves to investigate whether there is evidence (such as videos) or witnesses who could help in identification of the perpetrators. This does not mean that the police have a justification for not doing anything in such investigations, but that from the very beginning it has to work closely with the prosecutor and act according to his instructions. On the other hand, the prosecutor is responsible for assessing which actions he will undertake during the pre-trial stage and investigation by himself, which in close cooperation with the police, which he will be able to leave to the police.

Of course, there are evidentiary actions, such as the examination of the scene, objects or persons, or taking of biological and other evidence, which the state prosecutor, as a rule, could not carry out alone without the help of professionals who are currently employed only by the police (forensic experts, etc.),

146 On 14 February 2018 a working meeting was held on the draft of this report, attended by the representatives of the Basic State Prosecutor's Office, chairwoman Ljiljana Klikovac and state prosecutor Ana Bošković, and the adviser to the Supreme State Prosecutor Miljan Vlaović. On that occasion, they also submitted written notes stating: "The authority identifying criminal offenses and perpetrators in Montenegro is the police, while the state prosecutor's office is a prosecution authority, pursuant to Art. 44 CPC and Art. 2 of the Law on the State Prosecutor's Office. ... please note that the identification or detection of perpetrators of criminal offenses is within the competence of the police, and the prosecutor directs the actions of the administrative authority in charge of criminal matters by issuing binding orders and by direct management. These powers and duties of the state prosecutor and the police apply to all criminal offenses, as well as to the crimes of torture and ill-treatment."

but it should be noted that in almost all cases that we had access to such evidentiary actions had not been implemented. Investigations of cases of ill-treatment usually include examination of the injured person, identification and examination of witnesses and suspects, forensic medical examination, insight into police documentation, finding photographs or video or audio recordings of the incident and similar actions that, if done urgently, can be carried out without any or at least without significant assistance from the police.

However, in order to ensure full independence of the state prosecutor's office in relation to the police in cases involving suspected or accused police officers, consideration should be given to the possibility of increasing the capacity of the state prosecutor's office by forming a separate organizational unit within it, powers and expertise identical to those of police officers (especially crime scene technicians and similar experts), which would report to the state prosecutor and be completely separated from the police system that functions under the MIA. As mentioned earlier, such models have been adopted, for example, by Slovenia and the Netherlands, precisely because of the decisions of the European Court of Human Rights that found that the existing mechanisms for investigating cases of police abuse were not independent and therefore not effective (see 2.3.2).

In the meantime, it should be insisted that the police urgently and without delay notify the state prosecutor on duty about any information indicating that someone was abused by a public officer, who then must ensure that the incident be examined in accordance with the principle of independence and impartiality, i.e. without the participation of a person whose lack of independence could compromise the investigation and lead to it not being effective. Of course, it is understood that sometimes there are actions that the police must take without delay, prior to informing the state prosecutor or receiving orders from him, in accordance with the provisions of the Rules on the manner of performing certain police affairs and exercising authority[147] to visit the crime scene (Art. 26-28). According to the CPC (Art. 44, para 3, Art 254 and 257, para 1), the police should promptly inform the state prosecutor of these actions and enable him to start investigating the event as soon as possible, keeping the leadership role in that.

In order to ensure that the state prosecutor's office and the police act in the most appropriate manner, special *instructions for dealing with cases of allegations of torture and ill-treatment* should be adopted, bearing in mind the specific nature of these acts and delicate position of the police in relation to them. The handling of cases in which police officers' actions should be investigated could also

147 *Official Gazette of Montenegro*, 021/14 of 6 May 2014, 066/15 of 26 November 2015.

be regulated by the Agreement on the joint work of the State Prosecutor's Office and the Ministry of Internal Affairs – PA during the pre-trial phase and criminal proceedings.

When it comes to impartiality and the duty to critically review evidence from the police or other state authorities, it cannot be said that state prosecutors and judges - at least in the processed cases that we have had access to - immediately place their trust in the statements of officials or ignore statements and evidence suggested by the injured party. This can also be deduced from the fact that majority of the processed cases resulted in convictions.

Moreover, it is not rare that judgments are issued, such as the one from 2014 of the Basic Court in Cetinje, in which, despite the fact that the testimonies of a number of witnesses and police documents did not support the charges, the Court found that the convincing, consistent testimony of the injured party corroborated by doctor's findings on the injuries sustained was sufficient for pronouncing the accused police officer guilty. The judge in this case had a critical approach to evaluating testimonies and other evidence from the police, and decided not to give significance to the reports on the use of physical force and means of restraint or the assessment of the justifiability of the use of coercion submitted by the superior officer, indicating that these were "based only on the police officers' account, and that no one had even heard the injured party on that occasion" (see table I, No. 33).[148]

Unfortunately, it sometimes happens - mostly at the stage when the state prosecutor should decide on a criminal complaint filed for abuse, and when the police file charges against a person claiming to have been abused for an attack on an official - that the statements of the police officers, without a valid reason, are given greater weight than testimonies of the victims and no appropriate measures are taken to obtain evidence that could confirm the version of the events described by the injured party. An illustrative example thereof is the case of B. B. In B. B. case a proceedings for his attack on officials was initiated very expeditiously, but not enough has been done to collect the evidence needed to examine his claim, corroborated by medical findings, that the police officers abused him on that occasion, that almost two and a half years later his criminal complaint is still pending. The case of B. B. is not the only such case - Table III also lists others cases: K. (No. 22), S. and others (No. 37), V. (No. 40), M. (No. 44).
In this context, it was noted that the same state prosecutor is in charge of the case in which against the alleged victim of abuse an application for an

148 The judgment of the Basic Court in Cetinje published on 31 December 2014, case number K 176/2012.

attack on an official was filled as well as for the case upon the application of the alleged victim against the public officer. In such cases, the prosecutor promptly and preferentially process the application for the attack on an officer and later, with a lower degree of promptness and thoroughness, process the application of the alleged victim of abuse (examples are given in the case of B. B, as well as the incident in the AECS in January 2015). This should be taken into account and possibly change the organization of work within the state prosecutor's office, so that the same prosecutor is not in charge of both cases which, in relation to allegations of abuse, can be perceived as a conflict of interest.

In response to this note, the state prosecution office stated that the usual manner of work of the prosecution offices is that one prosecutor acts in cases arising from the same event, as he/she is able to use evidence and knowledge from one case to work in another case, and that such organization of their work represents an advantage.[149]

4.3. THOROUGHNESS AND CONSCIENTIOUSNESS

Without access to the records of the entire proceedings, based on partial information from the judgment, indictment or findings of the Ombudsperson, Council for the Civic Control of the Police or Internal Police Control, it is difficult to assess whether all the necessary evidentiary actions have been carried out in the specific case in the preliminary inquiry and/or investigation in order to consider the investigation thorough, unless the oversights are very obvious. Thus, we will point out only the problems identified in the cases in which we were able to follow the entire course of the proceedings (case studies), as well as the problems of systemic nature that obviously occur in several cases of abuse in which, for example, perpetrators have not been identified, and which significantly impede the implementation of certain evidentiary actions, and hence the implementation of an effective investigation. We have previously presented the requirements of the thoroughness of investigation in Chapter 2.3.3.

When it comes to the procedures in which the perpetrators were identified and sanctioned, the judgments are, as a rule, based on the following evidence: consistent and detailed statements of the injured party, testimonies of witnesses who were at the scene (persons who are not civil servants, but mostly in the company of the injured or in the same place) and medical re-

149 Comments on the draft report, Lj. Klikovac and others, op. cit, February 2018.

cords, including the finding and opinion of a forensic medical expert. It can be said that the statements of defendants are usually very useful for arriving at a conclusion about their accountability, even if they were to deny guilt (which is usually the case), because it often happens that these statements are rather inconsistent and illogical, and the judges do not accept them as true and find that in a situation in which the injured and the defendants present the mutually opposing statements, advantage is given to the consistent and logical statement of the injured party. Of course, in some cases, other important evidence emerges, e.g. records from the police or video footage, which supports the conclusion that the collection of such evidence should be handled with particular conscientiousness and urgency.

4.3.1. Incidents involving unidentified civil servants

Practice of the police to entrust certain tasks to police officers who act masked or without distinctive signs on the basis of which they could later be identified - is problematic[150]; also, decisions on entrusting a specific task, plan and manner of execution of the task, are allegedly not compiled or kept, and there are no other traces (e.g. recordings of communication between police officers) of such decisions or the prosecution fails to obtain them. Together with various other forms of obstruction, which include PA ignoring the request of the state prosecutor's office to provide identities of police officers involved in a particular act, this leads to delays in investigations in a number of cases of very serious allegations of ill-treatment which therefore cannot be considered effective. It is particularly concerning that this practice has continued over the years, despite unsuccessful investigations into cases that have generated great public attention and despite timely warnings from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[151]

The first such incident in a recent history of Montenegro was reported as early as 1 September 2005, on the occasion of a major police intervention in a detention unit at the AECS in Podgorica; the second occurred during the "anti-terrorist" police action called "Eagle's flight" on 9 September 2006, in

150 For regulations that allow police officers to execute their tasks masked and without proper individual signs, see 3.5.

151 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has drawn attention to this issue in its report on the visit to Montenegro in 2008 (paragraph 27), and in its report on the visit in 2013, it reiterated the recommendation that police officers should wear name tags or identification numbers during interventions (paragraph 21).

the suburbs of Podgorica against a group of persons of Albanian descent;[152] the third incident, where the perpetrators of severe ill-treatment included unidentified police officers, took place in the days between 31 October and 2 November 2008 in the detention premises of the PA, Podgorica Police Department, when A. P. was severely beaten and injured - in this case three police officers were sentenced to three months in prison each for aiding and allowing unidentified police officers to enter these premises and commit abuse (see Tables I and III, No. 1); the fourth incident known to public is the excessive use of force by unidentified members of the PA Special Unit towards sports club fans at the *Budućnost - Partizan* basketball game in Podgorica in 2012 (Table III, No. 2); and, finally, the last known cases are in the context of the October 2015 political protests, when in the *Zlatarska Street*, Milorad Martinović and other cases (listed in a separate part of Table III) the citizens were abused by the Special Anti-Terrorist Unit members, who remain unidentified to date.

In all these situations, the perpetrators of criminal offenses were masked police officers, whose identity was not revealed by the police; at times the police also refused to deliver requested data to the prosecutor (as in the case of the 2008 beating of A. P. in Podgorica[153]), but more often claimed that they did not possess or could not obtain data which would help determine identities of the police officers who had participated in interventions during which the ill-treatment occurred.

In addition to police officers, it turned out that the identification of other civil servants involved in abuse could also represent a problem. In particular, in the case of the AECS incident, not all officers who participated in the abuse of prisoners were identified, even though they were not masked and their faces could be seen on surveillance footage. Managers at the AECS also failed to help identify all participants of abuse, and no one had any consequences for that (see 5.1).

In these situations, the state prosecutor is expected to conduct an effective investigation by:

1) independently taking urgent measures to determine whether the police or other state authority's claims are true by attempting to obtain all relevant police documentation, and, if necessary, also by requesting the search of

152 Information on both incidents and investigative actions that followed were found in the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the Visit to Montenegro in 2008, paragraphs 22-27.

153 See the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on the visit to Montenegro in 2013, paragraph 20.

persons or premises where such documents can be found (pursuant to Art. 278, para 1 CPC);[154] taking appropriate measures, which may involve expertizing, to determine the veracity of the police claims that there were no other traces that could help determine the perpetrators of the crime (here, first of all, it is necessary to check whether the devices for recording communication between police officers really did not work, as claimed in certain cases, and why not, as well as whether it was indeed not possible to determine the exact location of certain police officers using the available technology or other means); in addition, in situations where it is likely that the police uniforms or footwear had traces of biological material of the injured party on them (especially in the case of victim's bleeding), these items should be urgently collected and examined (biological expertise), since in some situations this could reveal which civil servant had been in contact with the alleged victim;

2) urgently taking measures necessary to prevent civil servants from interfering with the investigation, either by negotiating the statements or by removing or destroying evidence;
3) if the police or other state body do not cooperate to the extent necessary, trying to influence that body through its top executives, the Minister of the Interior or the Prime Minister;
4) if there are grounds to do so, prosecuting civil servants who are obstructing the investigation either by not acting or by actively acting; the proceedings against them could be instituted for criminal offenses such as assistance to the perpetrator after the commission of a criminal offense, failure to report the crime and the perpetrator, misconduct or abuse of office.

Unfortunately, the impression is that in almost all of the above cases, not all reasonable and available measures have been taken to verify claims that it was not possible to identify the perpetrators and provide necessary evidence to that end, or at least sanction civil servants who allowed that the perpetrators of abuse remain undiscovered. Specifically: it has never been ordered to collect evidence - uniforms and footwear of civil servants, and check for traces of biological material belonging to the victim (although in some cases it is obvious that the victim bled and could have left such traces); civil servants suspected of having participated in the commission of a criminal offense usually had enough opportunity to negotiate statements or to remove or destroy evidence; it seems that the claim of the state body that they did not possess or could not collect evidence to enable identification has never been verified critically and thoroughly (for example, there is no indication

154 This was also suggested by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in the Report on the Visit to Montenegro in 2013, paragraph 20.

that the alleged non-existence of traces registered by the devices for recording communication or monitoring the movement of police officers has ever been verified); also, it seems that not enough has been done to investigate and sanction actions of civil servants who interfered with the investigations. The exception here is the proceedings in which Commander of the SAU was convicted for assisting the perpetrators after the commission of crimes that had taken place during the October 2015 protest in Podgorica.

Of course, no omission of the prosecutor's office can diminish the responsibility of the executive power, i.e. the police or the Ministry of Justice in the AECS case, for the fact that these crimes have occurred and that all the perpetrators of these acts have not been detected or punished. In order to avoid similar incidents, it is necessary to ensure that all police officers or prison guards are only exceptionally masked[155], that in operations requiring them to act masked they wear distinctive individual signs, and that written and other documentation pertaining to their tasks be drawn up and kept in an orderly manner (for example, taking and storing audio recordings of conversations conducted through special means of communication, and storing data recorded by means of tracking devices). In addition, it is necessary that the police and AECS strictly apply the rules on violations of official duty and sanction any police officer who fails to comply with the rules of the service and thus obstructs the establishment of facts.

It is understood that civil servants may unlawfully hinder the collection of such evidence by their act or omission, but it should not be overlooked that the state prosecutor has at his disposal the instruments which in such situations may and should be used to protect the rule of law and let everyone know that the state is willing to enforce laws on the prosecution of perpetrators of criminal offenses; ultimately, the state prosecutor can institute proceedings for criminal offenses such as assistance to the perpetrator after the commission of the criminal offense or failure to report the criminal offense and offender, negligent performance of official duties and abuse of office, and before that he could attempt to influence the police and AECS through its top executives - the Minister of the Interior or even the Prime Minister. In any case, it is the duty of the state prosecutor - if the state administration authorities fail to identify own employees - take all possible measures to identify them and thus ensure the effective conduct of an investigation. The state prosecutor

155 The CPT, *inter alia*, in its report on the visit to Montenegro back in 2008 in paragraph 27 stated that it had strong reservations about the practice of the special forces members to wear masks when intervening in places where persons are deprived of liberty, as this makes it difficult to identify possible suspects when abuse occurs, and also pointed out that operations outside the closed-type institutions should be conducted so that the officials participating in them wear distinctive sign/identification number on the uniform, based on which they can later be identified.

must act impartially, make the public aware that torture and other forms of ill-treatment will not go unpunished and make sure that there are no grounds for creating the impression of tolerance of torture and other forms of abuse.

4.3.2. Gathering evidence from video surveillance

In several cases, there have been some difficulties with obtaining video surveillance footage, which can be crucial to shedding light on the event in question. Some of these difficulties are due to untimely acting, i.e. failure to request footage immediately after finding out about the incident, but there are also those of a different nature.

In some cases (for example Milić and Nikezić v. Montenegro decided by the European Court of Human Rights[156]), the state prosecutor is informed - usually by the police - that there is no footage because, allegedly, the cameras were not working that day, or the footage was not saved, or it turns out that the footage does not show the incident in question, and there are reasons to doubt the truthfulness of these allegations, either because they seem unconvincing and unlikely or because they are contested by the injured party with a strong argument. In such situations, the state prosecutor is not usually able to check the allegations himself, since he would need expert knowledge, which, as a rule, he does not possess. It seems that in such cases it is most appropriate to seek the help of a professional, i.e. expert witness, and ask him to answer all the questions at issue. Uncertainty about whether all available recordings of the controversial event have been obtained could seriously call into question the effectiveness of the investigation, since a conclusion could be drawn that the investigation was not thorough enough. It should be noted here that in the case *Milić* and *Nikezić v. Montenegro*, the fact that not all video recordings of the controversial event had been obtained was one of the key reasons for the European Court of Human Rights to conclude that the conducted investigation was ineffective.[157]

However, in order to ensure that all available recordings are saved and not manipulated, it would be best if the state prosecutor, immediately after finding out about the incident, went to the scene, determined whether there were recording devices nearby and immediately requested the footage. This is the best course of action to find and preserve evidence, and not only recordings, but also, for example, objects used to inflict harm, blood evidence, etc.;

156 *Milić and Nikezić v. Montenegro*, Application no. 54999/10 and 10609/11, para 24-25, 88, 96, 99.

157 Ibid, para 99.

furthermore, this may be the best way to identify possible witnesses of the event. In addition, the prosecutor who saw the scene will be able to examine more comprehensively its context and assess more accurately the credibility of witnesses' testimony. This could be specified by the guidelines on conducting preliminary inquiry and investigation in cases of abuse.

Although it is customary for prosecutors to come out to the scene only in cases of particularly serious crimes, such as murders or robberies, we believe that there are important reasons to do so in cases of serious allegations of ill-treatment as well - firstly as this is a serious violation of basic human rights , and secondly because the presence of the state prosecutor during the scene investigation should be a guarantee that this important step is not entirely left to the officials who are not independent in relation to possible perpetrators of the crime.

In commenting on the draft report, the state prosecutors explained that sometimes due to the circumstances under which the act was committed, the investigation could not be performed at all, and that the prosecutor assesses the circumstances in each case and that in practice there were cases when he/she visited the scene and collected evidence, when conditions for that were met.[158]

4.3.3. Collection, verification and evaluation of evidence

An investigation can be effective only if implemented thoroughly, i.e. if all the evidence necessary to establish all relevant facts regarding the disputed event is properly collected, verified and, finally, objectively assessed (see 2.3.3. for more detail).

4.3.3.1. Failure to carry out certain evidentiary actions

Unfortunately, in some cases, evidentiary actions that would obviously contribute to the success of the investigation are not carried out at all. An example of such omission is a decision not to conduct an identification procedure of the potential perpetrators, although the injured party claimed that he could recognize them, as was the case in the *Siništaj and others v. Montenegro*[159], or, along with the injured party, there was a witness claiming that he could do so, as in the M. M. case.[160] We wish to emphasize that the identification

158 Comments on the draft report, Lj. Klikovac and others, op. cit, February 2018.

159 *Siništaj and others v. Montenegro*, Application no. 1451/10, 7260/10 and 7382/10, para 14.

160 Decision of the Constitutional Court of Montenegro of 25 July 2017, case U-III br. 354/17, Sections 5.3 and 9.4.

procedure should not be reduced to recognizing facial features only, but also other personal characteristics, such as one's physique, voice, speech or gait, as the head of the Basic State Prosecutor's Office in Podgorica pointed out in a letter to the PA Director.[161] However, in the comments on the draft report, representatives of the state prosecutor's office emphasized that they found it meaningless to carry out the identification of masked persons.[162]

It is equally problematic when nothing is done to determine the origin of victim's injuries (also *Siništaj and others v. Montenegro*[163]). This is particularly important in cases of abuse of prisoners, which must be presumed to be under pressure - in a closed and controlled system - not to report abuse or to withdraw from the application.

Also, in the investigation of the attack on M. M. by a police officer, as well as when investigating abuse of AECS prisoners, uniforms and footwear belonging to the SAU members, which could have contained biological traces of the injured party, primarily blood (which can sometimes be detected even if the uniforms were washed), were not collected immediately after gaining knowledge of the incident. If they were, perhaps the civil servants that directly participated in the abuse could have been identified.

In the case in which allegations of ill-treatment of journalist G. R. were investigated, some of the witnesses of the event were not questioned: a cameraman who was with him on that occasion, police officers who took part in his arrest and persons present during the arrest, who could certainly be identified, as there is a photograph showing many people standing nearby. In this case, another incident in which a police officer threatened the journalist a day after the ill-treatment was not particularly investigated either - police officers that the journalist talked to on that day were not heard, although identification of the police officer who threatened him could have led to identifying the one that ill-treated him.

In the case of an investigation into the Zlatarska Street incident, the beat-

161 Head of the Basic State Prosecutor's Office in Podgorica in a letter to the director of the PA Slavko Stojanović, dated 30 March, urges the PA to identify the perpetrators of the criminal offense and states: "Upon inspecting the recording, which was uploaded to official internet portals, it could be possible to identify police officers, although they had masks on the heads because ... persons can be identified by other characteristics, such as e.g. physique, voice, movements, etc." Podgorica Basic State Prosecutor's Office, Ktn. br. 638/15, 30 March 2016.

162 "Identification of masked persons in judicial practice - our or of other countries - is not known, nor is it lawful to carry out this type of evidentiary action, while logic and common sense additionally speak of the inability to carry out this evidentiary action." Comments on the draft report, Lj. Klikovac, A. Bošković, M. Vlaović, M. Vlaovic, M., February 2018.

163 *Siništaj and others v. Montenegro*, Application no. 1451/10, 7260/10 and 7382/10, para 148.

ing of M. M. and abuse in the AECS, there was no forensic examination of a video recording of civil servants who participated in the commission of the criminal act. In response to this recommendation, the state prosecutor's office announced that such examination of the recording "could not remove masks from the police officers' faces" and that "the parameters for the height of the police officers could not be determined, precisely because they had armour and helmets that alter the appearance of one's body and preclude the exact determination of their height."[164] Given that helmets and body armour of uniform size add the same number of inches to the height and physique of those who wear them, we do not consider them to be an obstacle for determining the specific characteristics of a person and narrowing the circle of suspects in this way.

4.3.3.2. Method of examination of witnesses

In the case of incidents that occurred during the protest in Podgorica on 24 October 2015, it turned out that an investigation could be ineffective because the witnesses were not properly examined. In the case of M. M, the Constitutional Court noted that the competent state prosecutor did hear him and his friends who had witnessed the event but failed to ask them any questions; the prosecutor also failed to ask the SAU members any questions, who were possible witnesses or perpetrators, although, having taken into account the footage clearly showing what had happened during the incident, it was obvious that none of them spoke the truth. Accordingly, the Constitutional Court drew a logical conclusion that the state prosecutor was not prepared to review the police report of that event or to carry out a proper, strict verification of the version of the event offered by the police[165]. Although the state prosecutor's office acted differently in the *Zlatarska Street* case, where it is evident from the record of the hearing that the policemen who were interrogated were asked questions, there is not enough indication that the examination was intended to strictly review the version of the events presented by police officers. In this case, it is unclear why police officers have not been heard as witnesses, but as citizens.

The state prosecution's response to this comment reads: "Members of the SAU were interrogated as citizens because in this particular case a certain number of SAU members indisputably committed criminal offenses while others did not. However, as it cannot be determined which member of the SAU is the perpetrator of the criminal offense in this case, it would be illegal to give them the status of a witness or a suspect."

164 Comments on the draft report, Lj. Klikovac and others, op. cit, February 2018.

165 Decision of the Constitutional Court of Montenegro of 25 July 2017, case U-III no. 354/17, Section 9.4.

The CPC in Art. 107, para 1 prescribes that persons "likely to be able to provide information about the criminal offense, the perpetrator and other important circumstances" shall be called as witnesses, so we believe that the fact that someone is a perpetrator of the crime or not is not relevant here.

4.3.3.3. The decision not to investigate actions of all involved persons

Apart from not collecting all the necessary evidence, investigation may also be considered incomplete, i.e. not sufficiently thorough, if it fails to include all possible perpetrators, that is, if evidence indicating responsibility of the persons who have not yet been prosecuted in the specific case is either not collected or ignored. One such example is an investigation into the organized attack by prison officials on inmates at the AECS in January 2015. In this case, there were information that needed to be investigated, e.g. the role of senior officials at that institution, as they were present at the scene of the incident just before the incident, and at least some of them were very likely there during its incident, so the question arises as to whether they participated in deciding to abuse the inmates or, at least, by failing to act in accordance with their duty and prevent the abuse, they contributed to the commission of a crime. However, they were not included in the investigation and were not prosecuted (for more detail see the case study on this incident below, 5.1).

An older example is ill-treatment of A. P. in detention premises of the Podgorica Police Department in 2008, when the investigation was conducted only in relation to police officers who directly enabled unidentified policemen to access the premises in which A. P. had been held, although witness G.S., an officer at the Police Administration, testified that the abuse order had come "from above". Since, according to the media[166], the Supreme State Prosecutor ordered that the investigation in this case be continued, there is still possibility that those who ordered the abuse will be identified.

4.3.3.4. Evaluation of evidence

Finally, all bodies involved in the process of establishing facts about the alleged ill-treatment are obliged to evaluate the collected evidence carefully and objectively, which is usually the case, as mentioned above (see section 4.2), when the case has already reached the court and the main trial. However, it happens that the state prosecutor decides before that stage not to prosecute, even though there is sufficient evidence that suggests that the

166 *"Suspecion fell on the Intervention unit – officers of the Police Directorate questioned for beating of Aleksandar Sasa Pejanovic"* (Sumnja pala na interventni vod – službenici Uprave policije saslušani zbog prebijanja Aleksandra Saše Pejanovića), Dan, 12 December 2017.

abuse did occur. An example of this is the prosecutor's decision in the *Milić* and *Nikezić* case, where the European Court of Human Rights established that the decision not to incriminate the perpetrators was not based on an adequate assessment of evidence, taking into account that both the Ombudsman and the disciplinary authorities within AECS found that the use of force had been unlawful and that other inmates who witnessed the event claimed that the abuse had happened.[167]

Potentially inadequate evaluation of evidence is also indicated by the cases in which other bodies established an overstepping of official powers, but the state prosecutor decided not to initiate criminal proceedings for ill-treatment. In Table III, which presents cases of unprocessed reports of ill-treatment, two cases in particular indicate a possible inadequate assessment of the factual situation that led to the rejection of the criminal complaint.

The first case concerned the neck injury and psychological trauma caused by the SAU members during their break into the wrong apartment (Case Ž, No. 7). Albeit the mistake was acknowledged and disciplinary proceedings conducted on that occasion, the fact that unreasonable force was applied against the wrong person by a civil servant cannot justify the intention to use such force against anyone, i.e. to carry out abuse.

In the second case involving N. M. (No. 5), whose allegations of surviving police torture and apparent numerous injuries to the face and body were also published in picturesque media reports, the Department for Internal Control of the Police and Council for Civilian Control of Police found that two police officers had indeed used excessive force against him and were therefore disciplined. However, the state prosecutor dismissed the criminal charges and N. M. took over prosecution of police officers as a private prosecutor. The Basic Court in Kolašin rejected the injured party's lawsuit finding that his statement on the number of times he was struck by the police officers and areas of his body where he had injuries was not consistent with the findings of a medical expert on his injuries or with the statements of defendants, which is also why the criminal complaint was previously dismissed.[168] However, the

167 *Milić and Nikezić v. Montenegro*, Application no. 54999/10 and 10609/11, para 24-25, 88, 96, 99.

168 According to the expert's findings, N.M. sustained "contusion of the hairy part of the head which could have been caused by the action of the swinging fist or swinging baton and the like; injuries in the form bruised eyelids, bruised eyeball of the right eye and contusion under the right eye, nasal contusion, which were caused by the action of a clenched or open hand - two or three blows to the head; injuries in the form of a contusion of an upper left arm caused by a fall or dragging of that part of the arm on the floor, or by using the means of coercion; bruises on the left side of the back caused by the action of a swinging baton; and injuries of the lower left leg in the form of a scratch resulting from the pulling down of a firm pointy tool of a shallow profile." Decision of the Basic Court in Kolašin K. br. 16/15-14, of 22 April 2015."

High Court in Bijelo Polje then accepted the appeal of the injured party and concluded: *Bearing in mind the defense of the defendants, as well as the testimony of the injured party, it is not clear how the first instance court found that there is insufficient evidence that the defendants were suspected of the criminal offenses in question, especially in view of the finding and opinion of medical expert Dr B. B. The said finding and opinion indicate that the injuries sustained by the damaged party in the head area (contusion) may have been caused by a swinging clenched fist, swinging baton or similar force, as well as facial injuries (swollen eyelids, right eye contusion, contusion below the right eye, nasal contusion). In this situation, it is not clear how the first instance court came to a conclusion that the testimony of the injured party - the subsidiary prosecutor is not in agreement with the findings and opinion of the medical expert, and therefore with the defendants' statements.*[169]

In this way, the High Court also indirectly criticized the state prosecutor's decision to reject the criminal complaint. The new first-instance proceedings before the Basic Court in Kolašin was suspended because the injured party, as the subsidiary prosecutor, did not appear at the main trial, although, allegedly, he had been duly summoned.[170] Therefore, comment by the representatives of the state prosecutor's office on the draft report that in this case "the court decision confirmed the prosecutor's decision" does not stand to reason.[171] Having in mind the decision of the High Court in Bijelo Polje, as well as the European standard of effective investigation, the state prosecutor's office should critically review the decision of the Kolašin Basic Prosecutor's Office and prosecute in this case.

4.3.3.5. Proving intent and complicity

One can notice that the courts pronounced acquittals with very controversial rationales in two cases, interpreting the CC provisions in a manner that completely deviates from the spirit and meaning of the prohibition of ill-treatment, and quite certainly from the intent of the legislator, too. In these cases, the courts demanded that something completely obvious be proven, i.e. something that need not be proven in order to apply certain provisions of the Criminal Code.

In the first case, in an otherwise vague rationale, the Basic Court in Kolašin states that it found that the accused police officer did inflict minor injuries to the victim by deliberately hitting him on the head with a fist after a quarrel and some tackling, but did not find this to be sufficient to convict the police officer, since it was not proved that he had done so with the intent of abusing

169 Kž. 287/2015, of 2 June 2015.

170 K. br. 32/15-14 of 23 December 2015.

171 Comment on the draft report, Lj. Klikovac and others, op. cit, p. 7.

the injured party[172]. Obviously, this kind of reasoning is completely illogical and leads to an absurd result. A deliberate blow to the head, which is a form of obviously unjustified and improper use of force as a means of coercion, in itself shows that there is an intent and it would be unreasonable for the prosecutor to request that in such situations some additional evidence be provided to show that the offender had intentions to abuse the injured party.

In the second case, the reasoning for the verdict of acquittal pronounced by the competent Basic Court in Podgorica is also somewhat unclear and contradictory, and the interpretation of substantive criminal law in one part is very problematic. On the one hand, the reasoning states that "the factual material established by the evidence presented in the evidentiary proceedings did not contradict" the argument presented by the defendants, who all denied that they had abused the injured party. Since the defendants were undoubtedly the only police officers at the scene, this would mean that the court considered none of them to be the perpetrators of this crime. The court, however, further states in its reasoning that "after carrying out the evidentiary procedure, it could not make a clear and indisputable conclusion that the accused - as accomplices - committed the criminal offense they were charged with", "due to the inability to determine their possible individual acts of co-perpetration of the criminal offense in question", and in keeping with the *in dubio pro reo* principle, they must be acquitted. Contrary to the foregoing, this conclusion implies that the court believes that one of the accused policemen did abuse the injured party but considers that none of them can be criminally responsible, because it was not possible to determine specific actions taken by each police officer. It is precisely this restrictive interpretation of the notion of co-perpetration that is legally the most interesting and most problematic part of the reasoning of this verdict, since it is inappropriate and leads to unacceptable results in the case where officials have been accused of committing the offense of torture or ill-treatment. Namely, it must not be forgotten that officials are obliged not only to abstain from ill-treatment but also to prevent it, and by failing to fulfil this duty, they significantly contribute to the commission of the criminal offense. In other words, a person who has the status of a guarantor, and that is an official person, should be distinguished from passive participants as he may become a co-perpetrator or accomplice for failure to take due action and thus prevent a crime.[173] In addition, when assessing his subjective attitude towards a criminal offense, failure of an official to later fulfil another duty - to report the criminal offense and offender, cannot be neglected either. If one were to accept the position

172 Judgment of the Basic Court in Kolašin of 12 April 2013, Case No. K 12/2013.

173 See Z. Stojanović, *Commentary of the Criminal Code [of the Republic of Serbia]*, 4th amended edition (Belgrade, 2012), p. 169.

adopted by the Podgorica Basic Court in the mentioned case and demand that individual actions be determined in the case of co-perpetration, then in situations in which it is certain, i.e. proven that a group of officials abused or tortured someone, but for some reason, individual actions of co-perpetration cannot be established, no one would bear criminal responsibility for abuse or torture committed, which is unacceptable. Fortunately, this is an isolated example of misapplication of substantive law and other judges do not follow it, but it is the fact that this verdict has become final and is therefore an integral part of the Montenegrin legal system.

In the practice of other courts different viewpoints can be observed. For example, the Basic Court in Bar correctly states in one of its judgments that it could not be established who of the four accused police officers had hit the injured party who suffered serious bodily injury, but notes that this is irrelevant in a situation in which each of them agreed to the action of the other, and found all four of them guilty of this offense - as co-perpetrators.[174]

4.4. URGENCY

The lack of urgency in acting of the authorities tasked with conducting the proceedings in which allegations of ill-treatment are examined is identified as one of the key, systemic problems that negatively affect the effectiveness of investigations. Table I shows that some of the criminal proceedings led in cases of ill-treatment have been unacceptably long, despite the fact that they were not particularly complex. In many cases, due to the delayed reactions of state organs or their hesitation, it was not possible to carry out important evidentiary actions or such actions have failed to produce the desired result. Here we will mention the most distinctive examples of untimely actions of the authorities, though there are many, even in very serious cases of ill-treatment that attracted great public attention.

One such example is the case of beating of M. M., referred to several times already. The state prosecutor's office opened the case quickly, the day after the incident, which took place on 24 October 2015. M. M. was heard by the state prosecutor the day after the police took his statement - on October 26 while he was still in the hospital. His friends, who witnessed the event, were heard five days after the incident. The inquiry was carried out two only days after the incident. However, the most important and most obvious shortcoming was an unacceptable delay in reaction toward the SAU members, among which,

174 Judgment of the Basic Court in Bar of 28 November 2016, Case No. K 121/2016.

quite certainly, were the perpetrators of the crime committed against M. M. Reports of the use of coercive measures were requested from them only four days after the incident. The first member of that unit who was interrogated was the commander, and only one week after the incident - on 2 November. He then submitted a report to the state prosecutor on the use of the means of coercion, which was unlawfully compiled and signed by 55 members of this unit (instead, each member should have individually reported about the means of coercion he himself, and not the entire unit, had used, on which occasion, in which manner and against whom). Some members of the unit - 36 to be precise - were interrogated in the period from 4 to 11 November, that is about ten or more days after the event. The state prosecutor received the notice that the GPS system for recording communications in the TETRA system was off only on 11 November (also, there are no indications that he tried to verify the truthfulness of this claim). All this suggests that the delayed actions of the state prosecutor gave more than enough time to members of the unit involved in the abuse to agree on their statements, make a joint decision - contrary to the law - to draft a joint report on the use of coercive means and, potentially, destroy other evidence (for example, biological evidence, because it is possible that traces of blood of the injured party remained on the uniforms or footwear of the SAU members). So, had the state prosecutor responded in a timely manner, he could have possibly prevented 55 people from agreeing on a single version of the event and compiling a joint report on the use of coercion, or even discovered other valuable evidence. Let us recall here that the European Court of Human Rights, in the *Ramsahai and others v. The Netherlands* case (see above, under 2.3.4), considered that the mere fact that the suspected police officers were questioned just over two days after the incident and had by then had the opportunity to negotiate statements is sufficient to compromise the investigation to a sufficient extent that it cannot be considered effective, despite the fact that in the particular case it was not possible to clearly conclude that the suspected officers had indeed colluded with each other.

The state prosecution believes that in no way could it prevent the joint SAU report on the use of force, since the members of the SAU agreed on that report the same evening after the event and the following morning, when the state prosecutor learned about the event and formed the case. The prosecution considers that the fact that the perpetrators have not been identified is not influenced by the point in time of questioning of the SAU members, but that the key problem was that their faces were masked and that they did not have any signs on their uniforms.[175]

175 Comment on the draft report, op. cit, p. 8.

A similar lack of urgency was demonstrated in the case of beating of B. V. and M. B. in *Zlatarska Street*, also on 24 October 2015. In this case only on 4 December the state prosecutor's office requested that the police obtain recordings from certain cameras at the scene, and received an official reply that such footage no longer existed on December 30, with the note that the recordings are usually stored for 21 days. This example demonstrates once again how important it is for the prosecutor to visit the scene, determine for himself whether there are any recording devices nearby, and make sure that the available recordings be collected before they are overwritten, as we have already emphasized in the previous section of the report. Similarly, in the case of the injured party and the defendant B.B, the prosecutor did request all the recordings, and obtained them, but did not verify whether all the relevant footage was actually delivered to him in time, which is an omission that results in the same outcome as a failure to request the recordings.

Even more drastic examples of the untimely conduct of competent authorities are observed in cases that did not attract particular interest of the public. Table I below shows the duration of criminal proceedings against persons accused of various forms of ill-treatment that were finalized in the period from the beginning of 2013 to the end of 2017. In many of them, responsibility for the delay in the proceedings cannot lie solely with the competent state prosecutor, but also with the court that manages the proceedings. Here, we will single out only a couple of striking examples of conduct in the apparent contradiction with the principle of urgency.

The first example is the procedure led before the Basic Court in Podgorica against four police officers charged with the crime of ill-treatment committed in concurrence with the crime serious bodily injury, for an incident that took place back on 25 November 2007. The court in this case decided on the indictment filed on 30 September 2010, and issued the first-instance verdict rejecting the indictment only on 24 March 2017 - almost nine and a half years after the event, because the state prosecutor gave up further criminal prosecution (see Table I, No. 10).[176] There are two questions that arise here: why did the state prosecutor take almost three years to issue an indictment, and then another six and a half years to make a decision to suspend criminal prosecution, and why did the court allow the proceedings to last so long.

Another example, also from the practice of the Basic Court in Podgorica, causes even more concern. It was a case in which two police officers were accused of ill-treating and beating a homeless man on 16 April 2004, who, due to the injuries suffered, had his spleen removed two days later. The judgment of 9

176 Judgment of the Basic Court in Podgorica of 24 March 2017, case number K 306/2016.

July 2013 acquitting the police officers states that the indictment was raised on 9 December 2009. Furthermore, the reasoning of the judgment indicates that almost all crucial pieces of evidence on which this judgment is based were obtained with an impermissibly large delay. The findings and opinion of the medical expert witness were dated 16 May 2006, and updated at the end of 2011 and in October 2012. The expert witness provided explanations orally at the main trial during 2010. Almost all the testimonies that the court based its decision on are from 2010 and 2011, including the testimonies of doctors who had come in contact with the injured party about six years earlier. The ambulance doctor who saw the injured person first and recorded his injuries was not heard (it is not clear why, although it is quite possible that after all that time he was unavailable), while the doctor who apparently also signed the anamnesis and medical report establishing injuries could no longer remember whether she had examined the injured person. The doctor who operated on the injured person said that he could not remember his facial features but recalled that the patient complained about being beaten. He claimed that it was impossible that the patient had had noticeably visible injuries on the body and that he had failed to record them, insisting that, therefore, the patient could not have had such injuries (see Table I, No. 3).[177] In short, the flow of time has significantly influenced the quality and reliability of the witnesses' testimonies, while the delayed and, at least initially, incomplete expertise additionally complicated determination of the factual situation. In the end, although it is possible that the judge's conclusion that the guilt of the accused has not been proved beyond reasonable doubt is completely correct, one may also come to a conclusion that this is a consequence of an obviously ineffective investigation, and not the actual state of affairs.

The state prosecution stressed that in these cases the investigation was conducted investigative judges.[178]

When looking at the listed, but also other analysed examples of investigations in cases of ill-treatment, the conclusion is drawn that, in terms of urgency, the most common problems that render the investigation ineffective are the following:

- delayed identification and interrogation of possible perpetrators, which is at times very superficial; in principle, it can be said that the suspects, i.e. defendants in the dominant majority of the cases analysed had sufficient time and opportunity to negotiate and harmonize statements, and not so rarely to destroy or remove other evidence;

177 Judgment of the Basic Court in Podgorica of 9 July 2013, case number K 699/2012.

178 Comment on the draft report, op. cit, p. 8.

- delayed or incomplete forensic medical examination or delayed medical examination of the alleged victim;
- delayed collection of evidence that can disappear or be easily destroyed after a while (usually video footage, but also biological traces).

Bearing in mind all the above said, but also the previously described factors that make it difficult to conduct an investigation, we can once again emphasize that it is of the utmost importance that the state prosecutor responds promptly, without any delay, to the knowledge of allegations of ill-treatment, and immediately begins to carry out evidentiary actions, the lack of which greatly hinders the conduct of an investigation. Delayed reaction of the state prosecutor should not provide the opportunity to possible perpetrators to collude with each other and harmonize their statements, forge official documents, destroy evidence such as video footage and the like. With regard to this, too, urgent visit to the scene of crime or going to the police or prison premises and timely takeover of available evidence may be of great help. All this should be specified in the guidelines on conducting investigation in cases of torture and other ill-treatment.

4.5. PARTICIPATION OF AN ALLEGED VICTIM AND PROTECTION OF VICTIM'S LEGITIMATE INTERESTS

Although the CPC provisions on the openness of investigation and rights of the injured party (see 3.3.4) create a good framework for exercising the rights of the alleged victim to an effective access to the investigation, it seems that their consistent application is missing in practice. Based on the judgments we have analysed, it is not clear whether the injured persons were informed about the course of the investigation and the evidentiary actions they could have attended, but from the interviews with experienced attorneys, some of whom participated in the proceedings concerning torture and other forms of ill-treatment, we have learned that injured parties and their attorneys are seldom called to participate in evidentiary actions and that at times there is a lack of information about the progress of the investigation. This occurred, e.g., in the *Zlatarska Street* case, when the injured party was not called for the examination of witnesses who were questioned in connection with the incident of his abuse.

It is not necessary to emphasize that the CPC should be respected in its entirety, but it bears mentioning that the presence of an injured party in the conduct of some evidentiary actions in the investigation of cases of ill-treatment

could be particularly valuable, not only because they could, for example, ask the defendants, witnesses or experts useful questions, but also because it would be possible to ascertain whether the state prosecutor in the concrete case acted independently, impartially, conscientiously and with due care, and thus also eliminate any suspicion that the state authorities responsible for the investigation have something to conceal.

4.6. PUBLIC CONTROL

According to available information, in general, the principle that the investigations in cases of ill-treatment should be subject to public scrutiny, otherwise relatively poorly elaborated in the practice of the European Court of Human Rights, seems to be respected in Montenegro. Injured parties, but also the public, are not denied access to information about the stage of the proceedings, and they can also gain insight into the decisions of the state prosecutor and the court.[179] As a rule, trials are public, and final judgments are available to the public.[180] Possible deviation from the principle that the public should be aware of the reasons why a decision was made is the fact that the judgments dismissing criminal charges because the prosecutor dropped prosecution at the main trial as a rule do not specify his/her reasons for such a decision (it is sometimes stated that charges were dropped due to the lack of evidence, but more often than not there is no such explanation), since in that case the public cannot draw a conclusion from the very judgment on the specific reasons that led to termination of the procedure in this way. This is also somewhat illogical, having in mind that, on the other hand, the state prosecutor is required to provide reasons for a decision to reject criminal charges. Therefore, we believe that the prosecutor's decision on the abandonment of criminal prosecution should be adequately explained and published.

4.7. SANCTIONS IMPOSED FOR ILL-TREATMENT

In the section dealing with sanctions prescribed for criminal offenses torture and ill-treatment, we have already pointed to the fact that punishments set forth in the CC are inappropriately mild, especially when it comes to torture, and that the UN Committee against Torture has already criticized Montenegro in this regard and recommended that they be stricter (see 3.2.2). However,

179 In practice, the public is not allowed to inspect the indictments and first instance verdicts.

180 HRA is conducting an administrative proceedings against the decision of the first instance court not to deliver the requested first-instance verdict in the procedure in which the public was not excluded. We believe that the principle of the public trial, as well as the right to free access to information, require that, apart from final judgments, the first instance judgments be available on request, too.

the courts are much more lenient with the perpetrators of these criminal offenses than the legislator. In most cases minimal sentences are imposed, often suspended, which leads to a devastating conclusion that in the vast majority of cases the perpetrators go unpunished, that the abuse is practically forgiven to them, while the victims are left without proper satisfaction, to which they are entitled. Such penal policy cannot have a dissuasive effect on potential perpetrators, so it should come as no surprise that the number of reported criminal offenses of this kind is not small and that the behavioural patterns involving inhuman or degrading treatment or punishment in Montenegro are repeated.

A review of cases that ended in a final court decision from the beginning of 2013 to the end of 2017, in Table I, provides an overview of the decisions taken by the courts in each case including the sanctions imposed. Here we will show only the aggregate data.

According to the available data, from 1 January 2013 to 31 December 2017 total of 46 criminal proceedings were finalized in Montenegro, in which the accused officials (employees of the Police Directorate and the AECS) were charged with some of the crimes that can be categorized as ill-treatment, as defined by the UN Convention against Torture, the UN Covenant of Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In most cases, they were charged with crimes of ill-treatment and torture, often in concurrence with the criminal offense of serious or minor bodily harm, and, exceptionally, there were charges of other crimes, such as violent behaviour.

In these proceedings, a total of 89 persons were charged with a crime.

53 of them were found guilty, or 59.55%.

Only 6 officials, or 11.3%, received a prison sentence, specifically:

- 4 persons were sentenced to three months in prison each, all for the criminal offense of ill-treatment, of which three for aiding in ill-treatment;
- 1 person was sentenced to four months in prison, for the criminal offense of ill-treatment;
- 1 person was sentenced to five months in prison for the criminal offense of ill-treatment.

Otherwise, in the courts' practice over the past 11 years, the five-month prison

sentence was the highest sanction imposed for any form of ill-treatment.[181]

Suspended prison sentence was pronounced against 44 persons. They were imposed the following prison sentences, which are not to be enforced if, during the time determined by the court, they do not commit a new criminal offense:

- for a period of two months against 1 perpetrator;
- for a period of three months each against 16 persons;
- for a period of four months each against 4 persons;
- for a period of five months each against 8 persons;
- for a period of five months and fifteen days against 1 person;
- for a period of six months each against 6 persons;
- for a period of seven months against 1 person;
- for a period of eight months each against 3 persons;
- for a period of twelve months each against 4 persons.

Community service was imposed in relation to three convicted persons.

It is astonishing that the prison sentence was not imposed to any of the ten officers convicted of torture. Suspended sentences were imposed to nine, while the tenth was imposed to community service. Fifth of them committed the torture in concurrence with criminal offense serious bodily injury. One of them is a police officer who was imposed to community service and it is interesting that he was previously sentenced to two suspended sentences for committing a criminal offense of ill-treatment[182] (on the manner of committing the crimes for which he was convicted in more detail below).

It can be seen from the above that the penalties imposed by the courts in a large number of cases are extremely inappropriate for the seriousness of these crimes, which was the case in the previous period, before 2013, in the years covered by the previous HRA report.[183]

Let us recall that Articles 166a and 167 of the CC stipulate that an official

181 A. B, Security Officer at the AECS, received this sentence for causing serious bodily injury to a prisoner (Case 20 in Table I). Previously, this sentence was determined in two cases, because of two criminal offences - ill-treatment in concurrence with the criminal offence of minor bodily harm and for the crime of torture and ill-treatment through aid (see *Prosecution of torture and ill-treatment in Montenegro*, Human Rights Action, Center for Anti-Discrimination EQUISTA, Center for Civic Education and ANIMA, Podgorica, March 2013, conclusions, point 4, page 13).

182 See above for these judgments in Table I, cases no. 22, 25 and 31.

183 See the HRA report "Prosecution of Torture and Ill-treatment in Montenegro" on the sanctions pronounced convicted of various forms of abuse, p. 12-13. The publication is available on the HRA website: http://www.hraction.org/2013/03/20/report-prosecution-of-torture-and-ill-treatment-in-montenegro/?lang=en.

who in the discharge of his duties commits the crime of ill-treatment shall be punished with imprisonment of three months to three years, while an official person who in the discharge of his duties commits the crime of torture - with imprisonment of one to eight years. Therefore, almost all the defendants, including those who were imposed a suspended prison sentence, received minimum sentences, even when the crimes of ill-treatment and torture were committed in concurrence with the criminal offense of serious or minor bodily harm (for individual sentences, see Table I). It was noted that the second-instance court never increased the sentence imposed by the first-instance court, but either reduced or confirmed it.

Such decisions could be justified in situations in which the court establishes particularly mitigating circumstances, or if justified by the personality of the perpetrator, his earlier life, his conduct after the commission of the criminal offense, and the level of guilt. If we look at the brief descriptions of the actions of execution of each of these acts (see Table I), and especially if the complete judgments are read, it can be concluded that a significant number of cases lacked circumstances that could justify a mild prison sentence or suspended sentence. In these cases, the offense was committed with a clear intention to abuse and humiliate the victim, often helpless, and in many instances in a very brutal, cruel manner and without any motive.

For example, one community service and three suspended sentences (eight months in prison, provided that in the next two years and six months they do not commit a new criminal offense) were pronounced against four members of the Intervention Group of the Police Directorate who had committed criminal offenses of torture and serious bodily injury in Bar, by depriving two persons of liberty in front of a café then taking them to a location near the train station where they hit, kicked and beat them using batons and then detained them in police premises where they continued to beat them, on which occasion one of injured persons lost consciousness (so the abusers poured water on him) and the other one urinated uncontrollably due to the received blows while the police officers laughed at him. Severe bodily injuries were recorded in both victims – a concussion, fracture of the nasal bones, a whole range of haematomas in different parts of the body, while one of the injured persons had kidney contusion accompanied by blood in urine. The Court took their family circumstances as a mitigating circumstance - three are married and have children, and the fourth one is "indigent". For two officers a mitigating circumstance was the fact that they had not been previously convicted. In the case of the other two convicted persons, previous conviction - both were previously convicted of ill-treatment, one of them twice, for the acts that he did after this, but always imposed suspended sentences - was not sufficient

to impose a more severe sanction. None of the convicts admitted a criminal offence. Furthermore, the court proceedings were extremely lengthy - the indictment was raised in September 2008, and the first-instance verdict, which later became final, was brought only in November 2016 (for more details on this case, see Table I, case No. 25). This example shows that unacceptably lenient sanctions lead to the fact that perpetrators of ill-treatment continue to express violent behaviour, knowing that, essentially, they will not be punished for their illegal actions. As can be seen from the foregoing, one of the above-mentioned convicted police officers, after having committed the offenses of torture and serious bodily harm, committed two more offenses of ill-treatment (both times in a very insolent and cruel way, see Table I, cases Nos. 23 and 24), but in each of these proceedings a suspended sentence has been imposed! To make matters worse, he is not the only police officer who repeatedly committed the criminal act of ill-treatment and remained virtually unpunished - in two of these three cases he had the same co-perpetrator, who was also imposed suspended sentences (see Table I, cases 23 and 24)!

Since both the Law on Internal Affairs and Law on Civil Servants and State Employees foresee immediate termination of employment only in a situation where an employee has been sentenced to (non-suspended) imprisonment of at least six months, not once have the criminal sanction imposed in Montenegro in the past five years for all forms of abuse resulted in termination of employment.[184] In the vast majority of cases, the perpetrators of criminal offenses did not bear virtually any consequences, except possibly a disciplinary sanction.

To conclude, penal policy in Montenegrin courts in relation to crimes that fall under the internationally recognized definition of torture and inhuman or degrading treatment or punishment is so mild that, apart from exceptional cases, it practically leads to impunity of perpetrators of these acts. It largely overlooks the ban on all forms of ill-treatment proclaimed by the Constitution of Montenegro and the CC, leaving the victims without any satisfaction. In this way, instead of being a guarantee of the rule of law, the judicial system does exactly the opposite and shows the public that officials acting on behalf of the state can violate the law and human rights of citizens without fear of being duly sanctioned.

184 In one case, an employee of the AECS was sentenced to six months in prison in the first instance, which would be the reason for termination of employment, but the second instance court reduced the sentence to five months, which allowed him to continue to work in the security of this institution (case 20 in Table I).

5. CASE STUDY

5.1. INVESTIGATION OF THE ABUSE OF PRISONERS AT THE ADMINISTRATION FOR EXECUTION OF CRIMINAL SANCTIONS

5.1.1. Description of the event

At the Administration for Execution of Criminal Sanctions (AECS), on 14 and 15 January 2015, AECS officers abused 12 or 13 convicts, who are assumed to have previously assaulted their colleagues, security officers.

On January 14, at about 2:30 p.m. in the Correctional Unit (KPD), a specially secured part of the AECS, a number of prisoners objected to the accommodation of one prisoner in the "B" Unit. When officers informed them that this was not negotiable, a physical conflict arose in which several prisoners caused serious injury to several security officers. AECS officers applied force against convicts who took part in the incident to establish order. The State Prosecutor and the Ombudsman concluded that the force applied was justifiable. The convicts, identified by the AECS Administration as potential participants of the incident, were immediately transferred to the disciplinary unit within the KPD. The state prosecutor effectively charged nine prisoners with an attack on AECS officials and they were also very effectively sentenced to harsh prison sentences - from two years and seven months to five years in prison.

After the incident, on 14 January at around 5 p.m., representatives of the Ombudsman interviewed with convicts who were placed in the disciplinary unit and on that occasion they did not notice any injuries on them.

However, both the Ombudsman and the State Prosecutor subsequently concluded that, after the departure of the Ombudsman, in the evening on January 14, and the next day around noon, AECS officers unjustly applied coercive measures against convicts placed in the disciplinary unit in order to illegally punish them for their participation in the incident.[185] The type of injuries and the manner of inflicting them, as established by a court expert, undoubtedly led to the conclusion that prison officers were kicking, punching and hitting

185 NGO Juventas received information on the abuse of prisoners and informed the Ombudsman the next day, requesting him to return to the AECS and to examine whether this information was correct. The state prosecutor was informed about the abuse by the prisoners themselves that he was questioning about the involvement in the incident.

them with batons while they were bent forward, with handcuffs behind their backs, vulnerable and powerless to resist. It was established that one of the prisoners had 46 injuries caused by blunt force on his body, while the others had 16, 13 and fewer, causing them severe and minor bodily injuries.

The Ombudsman found that the use of coercive means to such an extent and against such a large number of persons was not justified, given that it was not necessary to overcome their possible resistance, prevent their escape, deter a physical attack on an official or another person deprived of their liberty, prevent injury to another person, self-harm or causing material damage.[186] At that time, prisoners were already under control and there was no basis for the use of coercive means.

Due to the ill-treatment of prisoners, by the end of April 2018, the competent Basic State Prosecutor's Office in Podgorica (BSP) filed three indictments. Chronologically, the first indictment[187] was raised on 4 March 2015 against officer A.B. for causing serious bodily injury to convicted person L.L. while he was escorting him to a hearing with the Basic State Prosecutor in Podgorica on 19 January 2015. The officer hit the prisoner in the chest with a closed fist, while his hands were tied to his back, thus breaking his chest bone. Although this event did not occur on January 14 and 15, when all other prisoners were abused, the abuse here was, in all likelihood, motivated by the desire to unlawfully punish the convicted person because of the alleged involvement in the attack on security officers. In the meantime, this criminal proceeding has been completed and the officer in question sentenced to five months in prison. He served the sentence and continued to work in the AECS, in the security sector.

The second indictment[188] was raised on 7 December 2015, in which ten AECS officers were charged with crimes of Torture and Serious Bodily Injury against eleven prisoners on January 14 and 15 in the KPD disciplinary unit. Officers were charged as co-perpetrators of Torture and Serious Bodily Injury, due to direct beating, but also for failing to prevent the attack, facilitating and agreeing to the attack on prisoners, which was carried out in their presence. Some prisoners sustained from 13 to as many as 46 blows with a blunt force, causing severe injuries to three prisoners. One defendant, for example, is charged with the commission of eight criminal offenses of torture against eight prisoners, the other for three criminal offenses of torture in connection

186 The Opinion, the Protector of Human Rights and Freedoms of Montenegro, no. 01-43/15-7 of 24 November 2015.

187 Indictment Kt.br. 79/15 of 4 March 2015.

188 Kt.br. 670/15 of 7 December 2015, Deputy Prosecutor M.T.

with the criminal offense of serious bodily injury, etc. In this proceeding, the first instance verdict has not yet been issued.

The third indictment[189], which was raised two and a half years later, on 29 June 2017, two security officers were charged with torturing prisoner M.K. on 15 January 2015, who on that occasion sustained six blows to his back with a baton. The officers attempted to illegally punish him for alleged involvement in the attack on the guards. In the meantime, they were sentenced to six months imprisonment by a first instance verdict.

None of the eleven AECS officers accused of ill-treatment in the second and third indictment were deprived of their liberty or suspended in the context of criminal proceedings.

In 2016, 2017 and 2018, representatives of the NGO Human Rights Action continuously monitored the trial against ten AECS officers before the Basic Court in Danilovgrad on charges of 7 December 2015. Analysis of the effectiveness of the prisoner abuse investigation, which is presented below, is based on: Opinion of the Ombudsman no. 01-43/15-7 of 24 November 2015, Ombudsman's report on work in 2017, the three indictments mentioned above, the only final verdict thus far for causing serious bodily injury to one prisoner, trial report and information on the evidence collecting actions taken by the Basic State Prosecutor's Office in order to identify the accused. In addition, information was gathered from the AECS on disciplinary sanctions and suspension of security officers.

5.1.2. Effectiveness of the investigation

5.1.2.1. Independence

In this case, there were no challenges in meeting the criteria for the independence of the investigation. In the statements of ill-treated prisoners it is noted several times that the statements were given to the police inspectors, so we assume that the police also conducted some actions in the case, consistent with the prosecutor's orders. As prison officers are not under the jurisdiction of the Police Directorate, but the AECS, i.e. the Ministry of Justice, all bodies that conducted the investigation have met the formal requirement of independence.

189 Kt. br. 738/17, Prosecutor M. T.

5.1.2.2. Efficiency

The state prosecutor was quickly involved in the investigation. During the hearing of prisoners who were accused of attacking the guards, the prosecutor was informed of the abuse and the injuries they suffered. Injured prisoners gave their first testimonies to the prosecutor on 19 and 20 January, and the prosecutor ordered forensic medical examination already on January 19; medical expert immediately examined and photographed their injuries[190]. Footage from cameras in the Disciplinary Unit from 14 and 15 January 2015 was also provided.[191]

However, an indictment against AECS security officers for the torture of prisoners was raised only eleven months after the event, in December 2015. Two weeks before the indictment was issued, the Ombudsman announced the Opinion that on 14 and 15 January 2015 security officers had undoubtedly tortured and abused 13 prisoners.

Charging prisoners with the attack on guards clearly had priority over the case that was formed as a result of guards' attack on prisoners. The same state prosecutor was in charge of both cases. The prisoners were effectively charged, within 20 days, and were effectively convicted in less than a year and a half.

Although the abuse was identified as early as 19 January 2015, identification of the AECS officers who participated in the abuse was obviously a problem, and was not carried out by April 2015, when the Ombudsman was notified[192], or even by November 24, when the Ombudsman recommended to the AECS Administration to "undertake measures, without delay, to identify and determine responsibility of all AECS officers who applied physical force and used rubber batons against prisoners on 14 and 15 January 2015 in the AECS disciplinary unit".[193]

It is unclear why it took time for the officers to be identified, since the state prosecutor immediately provided video surveillance footage, and, in addition, the official AECS records were supposed to provide an answer as to

190 The Opinion of the Protector of Human Rights and Freedoms, op.cit., p. 4, Statement of Ž.L.

191 Statement of the Basic State Prosecutor's Office Ktr.br. 48/15 of 7 April 2015 addressed to Ombudsman, quoted in the Opinion of the Protector of Human Rights and Freedoms, op.cit. p. 4.

192 The prosecutor's office then informed the Ombudsman that "they are still collecting evidence to establish the identity of AECS officials who have inflicted bodily injuries on the above-mentioned persons recorded during a physical examination by a forensic medical expert ", the Opinion of the Protector of Human Rights and Freedoms, op.cit. p. 5.

193 Ibid, p. 16.

which officers intervened in the Disciplinary Unit on those days. If the AECS Administration refused to cooperate with the state prosecutor, a separate procedure should have been initiated.[194]

The defendants had the opportunity to influence the prisoners the whole time, since they were not suspended from work[195]. So, from giving their statements to the state prosecutor in the preliminary inquiry until the testimony before the court, the injured prisoners changed their statements claiming that they no longer remembered which AECS officials had beat them.

The trial of AECS officials was extremely ineffective. It was due to begin on 22 February 2016, but it was postponed several times because the defendants repeatedly requested the exemption of prosecutors and judges, as well as for various other reasons, so the first witnesses were heard only in 2017. The trial was postponed even because of the defendants' participation in the competitions where they represented AECS. The first instance verdict has not been pronounced to date - June 2018, two and a half years of the first instance trial and three and a half years of the commission of the criminal offenses.

5.1.2.3. Thoroughness

a) Damaged parties

The indictments included a total of 12 injured prisoners, while one of them (L. L.) was a damaged party in two cases. In his Opinion the Ombudsman stated that there were 13 injured prisoners. The indictments did not include prisoner D. D. as a damaged party, although the Ombudsman found that he was ill-treated as well, that on 14 January 2015 he was in the Disciplinary Unit, that he participated in the attack on prison guards (he was convicted for this offense) and that a medical expert identified at least 4 injuries on his body

194 In his report on work for 2017, the Ombudsman noted: "The Protector in this report again notes with concern that the recommendations of the Protector from 2015 concerning the abuse case in the AECS, the so-called" "January event" in the disciplinary unit, have not yet been fully met. In this case, there was no timely reaction of the Administration - reporting to the competent authority, identification of responsible officials and establishing their disciplinary responsibility. However, the AECS Administration has not yet established disciplinary responsibility of the officers who participated in this incident, which is unacceptable. Such action/inaction of the Administration is not in accordance with the principle of prohibition of torture and other forms of abuse, since its failure to take effective measures and carry out disciplinary procedure sends message to its employees that they can act so without bearing any consequences." Report by the Protector of Human Rights and Freedoms 2017, March 2018, p. 103.

195 The Labour Act prescribes that an employee will be suspended from work if criminal proceedings are initiated against him for the criminal offense committed at work or in connection with work (Art. 130, para 1, item 3).

inflicted with blunt force.[196] D.D. is, however, the only prisoner who denied from the very beginning that he had been ill-treated, though this was unlikely, because all the other inmates in the Disciplinary Unit were. Those who did not participate in the attack on guards were also abused, unlike him who was in the meantime convicted for that attack. It is unknown whether the state prosecutor dealt with collecting evidence of ill-treatment of D. D., in accordance with the obligation to investigate abuse *ex officio* even in the absence of the criminal report of the injured party. For example, it is unknown whether V.Z. was heard in connection with the circumstances of the abuse of D.D., who in the statement given to the state prosecutor on 20 January 2015 mentioned that he had stayed with D. D. in the disciplinary unit for about 20 minutes.

The summary indictment of 7 December 2015 did not include the case of torture of one inmate at the Disciplinary Unit on January 15, however, two security officers were subsequently prosecuted on the basis of an indictment filed in June 2017, and they were sentenced by a first instance verdict to 6 months in prison.

b) Direct perpetrators of abuse

The three indictments include a total of 13 defendants – AECS employees, for the torture of 12 prisoners. All defendants are security officers at the AECS. Individual indictments for the commission of Serious Bodily Injury against L. L. and Torture of M.K. were raised against three officers, and one indictment was raised against 11 officers for the torture of 11 prisoners at the AECS Disciplinary Unit.

Based on the testimonies of the injured parties, witnesses and video footage, it was concluded that at the time of the abuse of prisoners there were more security officers at the Disciplinary Unit than subsequently indicted. The text of the indictment against 11 officers states that the defendants were in the presence of "unidentified AECS officers" who also participated in the abuse.

Not all AECS officers seen on the recordings were identified, not even those who had distinctive features, such as, for example, officer from the 15 January footage from the Disciplinary Unit who had black hair with a grey streak. Additionally, some of the identified officers accused of abuse on one day, were not charged with participating in ill-treatment on the previous/following day, although they are seen on the video recording standing, watching and not

196 Ombudsman, the Opinion, ibid, p. 6: "The following injuries were recorded in D.D.: two haematomas on the back of the right thigh; a haematoma at the front of each thigh. This person was hit with a blunt mechanical tool at least four times. Injuries are classified as minor bodily injury".

preventing abuse (these are V.D. and I.V. charged with abuse on 15 January, but not on 14 January).

Logical questions arise as to why not all officers present in the Disciplinary Unit *ex officio* at the time of the event were identified and who is responsible for that, given that they are even seen on the video? All persons present were officers of the AECS, in uniforms and with special protective equipment (helmets with visors, given to officers at AECS only in exceptional situations). There should have been an official record on who received the special equipment and upon whose approval, who and upon whose approval entered the specially secured territory of the AECS, and then the specially secured KPD, where the Disciplinary Unit is located. It was also possible to provide identification of all the persons seen clearly on the footage using appropriate expertise and AECS documentation.

In his Opinion of 24 November 2015, the Ombudsman pointed to the accountability of the AECS Administration for failure to identify all those responsible: "The Protector recalls that Article 3 of the European Convention on Human Rights guarantees the right to a thorough and effective investigation of probable allegations of ill-treatment, likely to bring about the identification and punishment of those responsible for such actions. Notwithstanding the expert's findings establishing a number of injuries sustained by the said prisoners, the Administration has not yet provided an explanation for the circumstances and manner of causing their injuries, and the practice of the European Court of Human Rights, in particular after *Tomazi v. France*[197], shifts the burden of proof from victim to the state whenever a physical injury occurred while the victim was in detention, prison or in any other way under the control of civil servants. Bearing in mind that the entire prison building, and especially the disciplinary unit, is a strictly controlled area, the Administration cannot have a justification for its failure to identify and determine the responsibility of officials who applied physical force and inflicted injuries in the disciplinary unit while on duty." In the last report for 2017, the Ombudsman also emphasized that by the end of that year "there was no timely reaction of the Administration - reporting to the competent authority, identification of responsible officials and establishing their disciplinary responsibility".[198]

However, the AECS Administration here is not responsible for conducting an effective investigation into credible allegations of torture, but rather the state prosecutor. In cooperation with the police, the state prosecutor should have ensured identification of at least all the persons seen on the recordings,

197 App. No. 12850/87.

198 Report of the Protector of Human Rights and Freedoms for 2017, Podgorica, March 2018, p. 103.

present at the time of the abuse of prisoners.[199] As this has not been done to date, it seems that the investigation was not conducted thoroughly, bearing in mind that all official information had to be available, as well as appropriate expertizing techniques. It is also noteworthy that the prosecutor has not decided to prosecute any senior officials or representative of the AECS Administration because of the lack of cooperation in the investigation, i.e. assisting the perpetrators of the criminal offense.

c) Unresolved role of prison escort officers

Apart from the security officers, when the abuse took place, according to the testimonies of the injured parties and other witnesses[200], members of the prison escort service were also present at the Disciplinary Unit[201]. Witness I.R., head of the security service, stated that most officers present at the disciplinary unit were escort officers ("there were certainly 20-30 escort officers").[202] According to the testimony of injured party V.Z., head of the escort service M.P. had also directly helped the abusers by shouting: "not the back, punch them on the head."[203] Injured prisoners said that they were ill-treated by escort officers during their transfer to the State Prosecutor's Office and to Bijelo Polje, while in one case, allegedly, a prison officer in Bijelo Polje noticed and prevented the abuse.[204]

Except for the head of the escort service M.P., who was subsequently questioned on the motion of the court, no other escort officer was heard in the court proceedings. The role of the prison escort officers in this case was not resolved, and not one of them has been prosecuted.

199 The court seems to have been more actively involved in the subsequent identification of the remaining officers than the prosecutor. The witness, injured party V. V., stated in the testimony given to the state prosecutor on 20 January 2015 that he had managed to recognize one of the officers "Č.", who beat him while removing him from the disciplinary unit. Then, at the proposal of the judge, officer Č. P. was heard at the trial, since he also looks like a person seen on the recording of January 15 from the Disciplinary Unit.

200 Statements of the injured V.Z, D.J., Ž.L, D.P., L.L. given to the state prosecutor, testimonies of witnesses G.M., Chief of the KPD, and I.R., head of the security service in the KPD, according to the indictment Kt. no. 670/15 of 7 December 2015, who stated that the escort officers were wearing helmets and bulletproof vests and that they entered the disciplinary unit together with their chief M. M., to take out seven convicted persons who were placed in police cars and taken to Bijelo Polje.

201 Prison Escort Service Department, pursuant to Article 12 of the Rulebook on Internal Organization and Systematization of the Ministry of Justice with AECS, the Ministry of Justice, Podgorica, August 2017.

202 Kt. br. 670/15 of 7 December 2015, p. 16.

203 Testimony of the injured V. Z. in the statement to the prosecutor of 20 January 2015. See Opinion of the Ombudsman, op.cit, p. 9.

204 Ibid.

d) Senior officers as potential accomplices

The indictments did not include any of the senior officers who were responsible *ex officio* for security control and who had the authority to issue binding orders. Persons who were on 14 and 15 January 2015 responsible for security at the KPD, and for actions of the officers who directly committed the abuse, include: M.P., Chief of AECS, D.B., Assistant Chief of AECS, G.M., Chief of KPD, M.P., head of the escort service, M.P., shift manager, I.R., head of the security service, Č.L., officer on duty at KPD, S.D., security service manager. All these persons were present in the AECS on 14 January 2015, at around 5 p.m., when the abuse began.[205] Pursuant to the Rulebook on Internal Organization and Systematization of the Ministry of Justice, which was in force during the period of the event, it is possible to clearly identify who was in charge of the security at the AECS.[206]

D.B., the then Assistant Chief of AECS[207], on 14 January 2015 ordered engagement of the prison escort service at the disciplinary unit.[208] He is presumed to have been at the disciplinary unit at the time of the abuse.[209] Given the competence of the Assistant Chief of AECS, he was obliged to ensure identification of all security officers involved in the event and to initiate disciplinary proceedings under the AECS, but failed to do so. The state prosecutor did not even propose that he be a witness in court proceedings against the accused officers.

205 "On 14 January 2015 at around 3:50 p.m., the Institution was informed by convicted persons, through several telephone calls, that there was an incident in the closed section of the KPD in Spuž, between convicts and security officers. On the same day around 5 p.m., the deputy and adviser of the Protector of Human Rights and Freedoms of Montenegro visited the KPD administrative building, where they found the Chief of the AECS M.P., his deputy D.B., Commander M.P. and Assistant Chief of KPD D.V. " The Protector of Human Rights and Freedoms, Opinion no. 01- 43/15 - 7, Podgorica, 24 novembar 2015, p. 1.

206 According to the Rulebook on Internal Organization and Systematization of the Ministry of Justice, July 2013.

207 According to the Rulebook on Internal Organization and Systematization of the Ministry of Justice, from July 2013, the Assistant Chief of AECS is in charge of security. Also, the Rulebook on the Manner of Performing the Security Service, Weapons and Equipment of Security Officers at the AECS in Article 7 stipulates that the Assistant Chief shall "coordinate security operations in organizational units, assess security level at the AECS and suggest to the Chief of AECS to take appropriate measures, directly supervise and control security operations in each organizational unit, issue orders to the chief of security so as to eliminate observed shortcomings, and give consent to the plan for escorting of persons deprived of their liberty".

208 See the statements of I.R., security service manager at the KPD, G.M., chief of KPD, S.R., assistant chief of the AECS, D.B., chief of remand prison according to the indictment Kt.br. 670/15 of 7 December 2015, which were repeated at the main hearings on 4 April 2017 and 4 May 2017.

209 According to information obtained by HRA, D.B. is seen on a video recording from the disciplinary unit of 14 January 2015. In the Opinion of the Ombudsman it was noted that during the visit of the officials of that institution, he was in the administrative building of the KPD.

Video surveillance footage of 14 January 2015 shows that from 5:27 p.m. to 5:28 p.m. D.B. was in solitary confinement cell no. 1 in the AECS, located one meter from the corridor where it is assumed that the prison officers beat the inmates. In the recording, D.B. is seen in the company of the shift manager, KPD officer on duty and security service manager. During their conversation, the video shows that some of them exited the solitary confinement cell for a brief time and then came back inside. The ill-treatment of prisoners was carried out from 5:20 p.m. to 5:54 p.m., so there is a suspicion that due to a very small distance from the scene of event, they could hear the noise from the corridor where the security officers beat prisoners.

Members of the AECS Administration, Chief and Assistant Chief, were at the AECS at the time of the abuse (Assistant Chief) or immediately before that (Chief). According to the Ombudsman's report, the fact that the Administration failed to cooperate with the state prosecutor to timely identify all the participants in the abuse, as well as to ensure their identification, points to the concealment of the perpetrators, i.e. providing assistance to the perpetrators of the crime.

In this sense, the question of the responsibility of I.R., head of the security service, is also being raised, who directly led the prison officers accused of torturing prisoners. At the time of the abuse, he was also in the KPD. Security service manager Ž.R., who is seen on the security camera footage from 14 January 2015 visiting at 00:55 a.m. all persons who were in the disciplinary unit, could see the inmates' injuries or learn of the abuse directly from them. Some of them (D.J., S.V., P.D. and V.Z.) had visible injuries on the head, which could not be hidden. Failure to report these injuries indicates the intention to help the perpetrators of the crime.

e) Witnesses

The indictment proposed questioning of the defendants injured parties at the main hearing, and only three witnesses who were elders in the AECS, one of whom was not at work at that time. During the trial, the prosecutor did not propose hearing of other witnesses.

The prosecutor did not propose that the persons who participated in the event or who must have had important information about the event be heard at the trial as witnesses. It is unknown whether these persons were heard

during the preliminary inquiry and, if so, what was the outcome[210]. The above-mentioned D.B., Assistant Chief of AECS, who was in the AECS at the time of the commission of criminal offenses and was responsible for security, has been omitted from the list of witnesses, as well as M.P., shift manager, and Č.L., KPD officer on duty, even though they can be seen on the video footage from the Disciplinary Unit of 14 January 2015, after 5:00 p.m., at the time when the indictment alleges that the abuse had taken place.

S.D., security service manager, did not make the list either, although video surveillance recordings show that he was in the Disciplinary Unit on both days; the same goes for M.P., head of the escort service, although the witnesses testified that he had helped the abuse (he was subsequently questioned on the judge's proposal), Ž.B., shift manager, seen on the video surveillance footage of 15 January 2015, visiting persons in the Disciplinary Unit and solitary confinement cells, J.F., a doctor, who was at the AECS in the evening of 14 January 2015, according to the official records, and examined some of the injured inmates, on which occasion she could have been the first one to notice the traces indicative of the commission of a criminal offense.

It is unknown whether D.Ć., the weapons officer at the AECS, responsible for providing arms to all AECS employees (prison police, senior officers, escort officers, etc.) has ever been questioned. Bearing in mind his competence and authority, and that he was at the AECS on 14 January 2015 from 4:10 p.m. according to the official records, it can be assumed that he had information about the identity of officers who took weapons, shields and helmets that day and on whose orders.

It is unknown whether the state prosecutor in the preliminary inquiry or in the investigation heard or attempted to hear an escort officer from Bijelo Polje prison, who, according to the injured V.Z., on 20 January 2015 stopped his abuse during the transfer to Bijelo Polje prison by saying: "That's enough people, what are you doing ?!"

f) Evidence

In the group indictment, the state prosecutor proposed that the following be presented as evidence:

- medical records of the prisoners' injuries,

210 The BSP did not specifically inform about this in the information on the evidentiary actions taken in this case in order to identify the perpetrators of the crimes, but stated that the "eyewitnesses of the event" were heard. Tu. br. 199/18, 3 April 2018.

- official note of the Basic State Prosecutor's Office in Podgorica Ktr br. 48/15 of 13 February 2015 about the description of the premises in the Disciplinary Unit,
- a letter from the Ministry of Justice - AECS no. Z-KD-30 dated 22 January 2015, containing information that three of the defendants were engaged in the Disciplinary Unit on 14 and 15 January 2015,
- photographic documentation of the Police Administration in Danilovgrad of 13 February 2015 showing what the premises in Disciplinary Unit and prisoners' injuries looked like, and
- DVD with video surveillance recordings from the KPD Disciplinary Unit in AECS.

However, the indictment does not mention specific excerpts from AECS official records, e.g. a shift schedule, records of employees entering and leaving the AECS, that is, the KPD, who and when permitted the security officers to take special equipment - helmets with visors and armour from the office of managers, etc., so it is assumed that this evidence was not even obtained.[211] Also, there was obviously no forensic expert review of video surveillance recordings nor comparison of these recordings with photographic documentation in AECS, which would indicate an effort to carry out thorough identification of all officers of the AECS involved in the commission of criminal offenses.

There is no information about the acquisition of footage from the camera that overlooks the reception room - entrance to AECS building. This could be an important source of information, since all AECS employees are obliged to sign in at the reception and take of their masks, which would enable easier identification. Also, footage from the camera overlooking the entrance to the KPD would be an important source of information.

Finally, there is no information that an expert assessment of footwear and uniforms was conducted in relation to AECS officers presumed to have participated in the abuse of prisoners.

5.1.2.4. Conclusion

Although the investigation in this case of multiple abuses of prisoners has been effectively started, and, in most cases, within eleven months[212] led to the identification of the twelve security officers of the AECS who have been

211 Ibid.

212 The first officer was indicted within two months, the other eleven were indicted 11 months later, while the last two (charged in the second indictment) were charged in the third indictment 30 months later.

charged with criminal offenses of Torture and Serious Bodily Harm against twelve prisoners, it cannot be said that it actually met the standard of effectiveness since it was not conducted thoroughly, so as to lead to the identification of all perpetrators.

Not all AECS officers directly involved in the abuse were identified, although some of them are clearly seen on the surveillance footage. Not a single escort officer was identified as a participant of the abuse, although the witnesses claimed that at least 20 of them had been in the Disciplinary Unit at the time of the abuse, while damaged parties claimed that the abuse also happened during their transfer to the prosecutor's office and to Bijelo Polje prison - allegedly witnessed by at least one person.

Not enough has been done to investigate whether the senior officers, present when the security officers entered the disciplinary unit and abused prisoners, had any role in the abuse. There is information that some of them participated directly, while others did not make a sufficient effort to prevent and subsequently punish the abuse. Bearing in mind in particular the ongoing criticism of the Ombudsman directed at the AECS Administration for failure to identify all participants of abuse, it appears that the state prosecutor's office failed to adequately investigate the responsibility of senior officers for not reporting crimes and assisting the perpetrators of these acts after their commission.

Apart from the accused, the prosecutor proposed in the indictment that only three witnesses be heard - AECS officials, one of whom was not even at work at the time of the events. Although the prosecutor immediately collected all the recordings from surveillance cameras at the Disciplinary Unit and obtained information from the Ministry of Justice – AECS that the three defendants were engaged in the Disciplinary Unit on January 14 and 15, there is no information about conducting an expert assessment of recordings, footwear or uniforms, inspecting official AECS records on work engagement or records on taking of weapons and protective equipment, records of entry into the KPD, or security camera footage from the AECS reception room, which could show all the officials that entered the AECS in the evening hours, in order to identify the remaining perpetrators. It is only known that the judge and the defendants themselves suggested that certain witnesses be heard at the trial to that end.

6. KEY CONCLUSIONS AND RECOMMENDATIONS

In the last five years (2013-2017), 99 civil servants were charged with torture or other forms of ill-treatment in 46 cases, while 53 or 59% of them were convicted. Disproportionately mild sentences were pronounced in most cases.

There are 13 criminal proceedings currently pending against 29 civil servants. Of these, in two serious and publicly well-known cases (the beating of Milorad Martinovic after the October 2015 protests in Podgorica and of prisoners at the AECS in January 2015), not all civil servants who participated in the commission of criminal offenses were charged, and the same goes for persons who helped them remain unidentified.

In 52 cases (described in Table III) no one has been prosecuted, although there are convincing allegations that ill-treatment did take place. Observed at the level of the total number of cases that have been prosecuted in addition to potential cases, this means that the perpetrators of ill-treatment were not prosecuted in at least 40% of cases.

Many cases in which it was certain that abuse had occurred, but which were not prosecuted or were inadequately prosecuted, stirred up a great deal of public attention. This is particularly true of 27 incidents that occurred in relation to the October 2015 protest, when members of the Special Anti-Terrorist Unit (SAU) ill-treated a number of citizens in Podgorica. In two cases of the above, where the victims turned to the Constitutional Court, that court had found investigations not being effectively executed (Martinovic and Zlatarska street).

Because of these obvious but non-prosecuted or inadequately prosecuted cases of ill-treatment with extremely mild sentencing policy one is under impression that there is prevailing tolerance of state authorities for police torture that is seriously threatening the rule of law. Although it cannot be said that such acts are systematically tolerated, since in the last five years 53 civil servants have been found guilty of some form of ill-treatment, symbolic mild sentences are contributing to ill-treatment reoccurring and that it is not rare.

There is a justified concern vis-à-vis data on numerous cases where police officers or prison guards committed abuse with impunity, either because their identity has never been revealed or because the evidence has not been adequately collected or evaluated. These cases involve a serious misuse of

authority by officials whose duty is to protect human rights, not violate them fragrantly. Unidentified perpetrators of abuse continue to work in the civil service, are authorized to carry weapons and apply force against citizens, which is a fact that causes concern for a reason.

Due to all above stated, in our research we specifically dealt with the reasons why ill-treatment reported in a significant number of cases has not been prosecuted at the level of the European standard of effective investigation, which implies that the investigation be independent, impartial, urgent, thorough, conducted with appropriate involvement of injured parties and including adequate punishment of those found guilty of abuse. We hope that the following conclusions and recommendations will be accepted and will prevent such cases of human rights violations from reoccurring in Montenegro.

1) With regard to **the requirement of independence** of investigating authorities in relation to suspected perpetrators, the existing organization of work of the state prosecutor's offices and the Police Administration does not provide adequate guarantees that the investigation of police officers suspected of abuse will be independent and impartial. This means that this type of criminal offense cannot be investigated in the same manner as those whose potential perpetrators are not police officers. Therefore, state prosecutors must keep in mind that they cannot uncritically entrust colleagues of suspected police officers who are in the same line of command with identification of the perpetrators and collection of evidence. Bearing in mind the existing circumstances, the state prosecution offices must try to independently deal with the identification of perpetrators and the gathering of evidence. In order to create preconditions for the independence and impartiality of the investigation required by the European Court of Human Rights, consideration should be given to the possibility of forming a special division within the state prosecution for investigation of cases where criminal offenses are committed or suspected to have been committed by members of the police, employing persons with authority identical to that of the police and professional knowledge necessary to provide assistance to the state prosecutor's offices otherwise provided by the police in the case of other criminal offenses. Such models are in place in the Netherlands and Slovenia (see Chapter 4.2 for details).

2) Regarding **the requirements of urgency and thoroughness** for the conduct of an investigation, recurrent shortcomings were observed in investigations into ill-treatment, such as untimely and not sufficiently thorough interrogation of suspects, failure to take measures necessary to prevent suspects from colluding, delaying the collection of important evidence,

or failure to carry out particular evidentiary actions, including gathering of items with possible traces that would enable the identification of perpetrators (uniforms, footwear, etc.), identification procedure, forensic analysis of video footage and other necessary expertise (more detail in Chapters 4.3, 4.4 and 5). Also, in some cases involving several perpetrators, the circle of suspects was unjustifiably narrowed (see, in particular, 5.1, and case 1 in Table I).

We believe that it would be beneficial to adopt an instruction - guidelines on the conduct of the state prosecution and the police in investigating allegations of ill-treatment, bearing in mind that an effective investigation implies the obligation to apply all reasonable steps that can lead to the identification and sanctioning of the perpetrators. The instruction should emphasize the leading and proactive role of the state prosecutor and specify the methods of independent acting of prosecutors in relation to the police in order to overcome the problems that currently exist in practice.

3) In relation to the request for **involvement of the injured party in the investigation**, the CPC provides a satisfactory framework that only needs to be applied consistently in practice and the injured person regularly invited to attend the presentation of evidence. Respect for the rights of the injured party should not only be perceived as obligation, but also opportunity to ensure better implementation of the investigation and thus prevent the impression of tolerance of investigative bodies towards the perpetrators of criminal offenses (for more detail see 4.5).

4) **The practice allowing members of the police to be disguised during their interventions and not wear visible signs based on which they could later be identified must be urgently terminated**. In order to achieve this, the relevant rules should be amended to make it clear that all police officers who may act with a covered face (wearing masks or "balaclavas"), including police officers of the Special Anti-Terrorist Unit, Special Police Unit and Criminal Police Sector, must have visible individual signs on the appropriate parts of their uniforms or additional equipment, so that it is possible to identify them. To achieve this, it is advisable to define not only parts of the uniform where these signs will be placed, but also the colour and size of the signs, which should guarantee their visibility from a distance and at night. In addition, all police officers should be made aware that any violation of these rules will be sanctioned (see 3.5 and 4.3.1).

It is advisable to introduce the same rules to AECS and prevent recurrence

of the situation in which even unmasked officers recorded with video surveillance are not later identified (see 5.1).

5) The state prosecution and the Ministry of Interior, i.e. the Police Administration, should take all available legal measures to decisively prevent and sanction every type of conduct of police officers that hinder investigation in cases of ill-treatment. This also includes both disciplinary measures (for example, due to inadequate compilation of a report on the use of coercive means) and prosecution.

6) All medical professionals should have access to explicit and detailed instructions for acting in the cases where they notice injuries that might be caused by a criminal offence, or where a patient complains of ill-treatment. Such instructions should include a template for recording injuries, which also includes the statement of the injured person on how the injury occurred, and the instruction to urgently inform the relevant state prosecutor in such situations. In addition, health care workers should be given instruction on how to handle patient's clothing, because of possible biological traces of the offender.

7) The penalties imposed by the courts in Montenegro for crimes that, according to international standards, constitute torture and inhuman or degrading treatment or punishment, are **inappropriately mild and lead to the situation where the perpetrators of these acts remain virtually unpunished**. The maximum sentence imposed in the past 11 years in Montenegro is 5 months in prison for a serious bodily injury inflicted on a prisoner by a prison security officer. It is astounding that a prison sentence was not imposed against any of the ten civil servants convicted of the criminal offense Torture. Suspended sentences were also pronounced against civil servants who had previously been convicted of abuse, even twice (see 4.7.).

In Montenegro, from the beginning of 2013 until the end of 2017, a total of 89 persons were charged with criminal offenses that fall under the concept of ill-treatment. The guilty verdict was pronounced against 53 persons or 59.55%. Of this, only six or 11.3% were incarcerated. Four of them were sentenced to three months in prison, one to four months in prison and one person to five months in prison. Suspended sentence was pronounced against 44 persons. Community service was imposed in case of three convicted persons. It has not been noted that the second instance court has ever increased the sentence imposed by the first-instance court.

Higher instance courts should strengthen their penal policy in line with the

seriousness of the crimes of torture and ill-treatment, which are among the most serious violations of human rights by civil servants.

8) Montenegrin Criminal Code is not fully aligned with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or other international standards on the prohibition of torture. To achieve compliance with international standards the Criminal Code should be amended, as recommended by the Committee Against Torture:

    a) to ensure that sentences pronounced for any act of torture and inhuman or degrading treatment or punishment, i.e. for criminal offences of ill-treatment (Art. 166a) and torture (Art. 167) are proportionate to the gravity of the offences; currently the sentences are too mild, particularly for the criminal offence of torture;
    b) to ensure that there is no statute of limitation for prosecution or enforcement of sentence for the criminal offences of ill-treatment and torture.

Some of the court proceedings in the cases related to these criminal offences were unjustifiably long - up to seven years to reach the first instance verdict. This practice is completely contrary to relevant international standards, it encourages perpetrators of crimes and does not respect the rights of victims of ill-treatment. Appropriate measures should be taken to effectively carry out all criminal proceedings for ill-treatment.

Training of judges, state prosecutors, police officers, prison staff and medical personnel in the field of human rights protection should include concrete examples of shortcomings in the conduct of effective investigations identified in the practice of Montenegro and other countries considered by the European Court of Human Rights. The role that each of these professions has in the prevention, investigation and punishment of torture and inhuman or degrading treatment or punishment should be taken into account.

It is necessary that state authorities, at different levels, send a clear message to all state bodies and the public that ill-treatment is not acceptable and that in each individual case it must be appropriately sanctioned. The best way to do this is to ensure urgent identification and processing of all civil servants responsible for ill-treatment of citizens in all cases known to the state prosecutor's office (more details in Table III and in case study).

Finally, we propose that all state prosecutor's offices record and report on the number of all claims of ill-treatment by state officers.