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# Combating ill-treatment and impunity

*Rights of detainees and obligations  
of law-enforcement officials:  
11 key questions and answers*

*Eric Swanidze*

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**Rights of detainees and obligations of law-enforcement officials:  
11 key questions and answers**

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## Preface

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

The European Court of Human Rights (“**the Strasbourg Court**”), for example, continues to make a considerable number of adverse judgments in this area, despite its clear elaboration of the relevant standards over many years. Thus, in 2008, in addition to 140 substantive breaches of Article 3 of the European Convention on Human Rights,<sup>2</sup> there were 55 findings of violation in respect of

the procedural aspect of the same Article imposing the requirement for states to effectively investigate allegations and other indications of ill-treatment.<sup>3</sup> The problem has also been highlighted by the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“**CPT**”), particularly in its 14th General Report<sup>4</sup> and in many of its visit reports.

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

nia, Azerbaijan, Georgia, Moldova and Ukraine.

This brochure has been prepared within the framework of the Joint Programme. It is based on the key international human rights instruments addressing the prohibition of ill-treatment and basic rights of persons deprived of their liberty. The standards outlined in the brochure predominantly originate from the European Convention on Human Rights and an extensive and permanently developing case-law jurisdiction of its mechanism – the Strasbourg Court.<sup>5</sup> They are supplemented and further specified by the standards of the CPT, which is acting on the basis of the corresponding Convention.<sup>6</sup> In addition, international standards and requirements on the subject are based on the instruments developed

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1. Hereinafter collectively referred to as “ill-treatment”.  
2. Article 3 of the European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment.

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3. 2008 Annual report of the European Court of Human Rights (provisional edition), Council of Europe, p. 131.  
4. See its section entitled “Combating impunity”. Full references to CPT documents cited in this booklet appear under “References”, page 23.

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5. Full references to the case-law cited in the footnotes appear on page 23.  
6. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

under the auspices of the United Nations, such as the International Covenant on Civil and Political Rights, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as observations, general comments and jurisprudence of their treaty bodies. The set of particular standards and instructions known as the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Istanbul Protocol) that has been endorsed by the United Nations General Assembly is also very important in this regard.<sup>7</sup>

The brochure focuses upon ill-treatment by law-enforcement officials<sup>8</sup> and initial

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7. See UN General Assembly resolution of 4 December 2000 and the “Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (The Istanbul Principles).

stages of deprivation of liberty.<sup>9</sup> It addresses both substantial and procedural aspects of the prohibition, such as conditions of detention, medical assistance, investigation of allegations or other representations of ill-treatment. Article 3 of the European Convention on Human Rights does not exhaust the rights and standards which detainees should enjoy in hands of police. Consequently, the brochure briefly outlines the main features and standards of the legal environment in which deprivation of liberty and criminal

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8. If not specified to the contrary hereinafter, a reference to police applies to other law-enforcement agencies and *vice versa*.

9. However, many principles and standards, in particular those of procedural character, are relevant for penitentiary and other possible areas where torture or other forms of ill-treatment might occur. It should be mentioned that the obligation to investigate also expands over the ill-treatment administered by private individuals. See *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, paras. 96 and 97. However, these aspects of the prohibition fall outside the scope of the publication.

process should take place. It provides answers to eleven key questions which introduce each section of the brochure.

The publication concerns the rights of detainees<sup>10</sup> and, therefore, outlines the corollary obligations of law-enforcement officials and authorities in general. The majority of the relevant standards are envisaged and supported by national legislation of the Council of Europe member states. At the same time, the international human rights instruments and the practice of their implementation suggest that they can be directly invoked whenever a detainee or other persons concerned feel that they would benefit from it.

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10. Although the brochure predominantly operates with the term *detainee*, the procedural and some other relevant standards also apply to those subjected to or at risk of ill-treatment without being deprived of their liberty by police.

## Are there any exceptions to the prohibition of ill-treatment?

Similar to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, as well as other relevant international instruments, Article 3 of the European Convention on Human Rights clearly prescribes that:

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

No exceptions may be applicable to this provision. Article 15 of the European Convention on Human Rights expressly forbids any derogation from it even “in time of war or other public emergency threatening the life of the nation”.

Thus, any use of torture or inhuman or degrading treatment or punishment is **absolutely prohibited in all circumstances** including the challenging context of the fight against terrorism and other grave crimes. This principle has been upheld by

the Strasbourg Court, CPT and endorsed by specific international instruments.<sup>11</sup>

Consequently, **regardless of grounds for detention or crimes a detainee is suspected of he or she should not be ill-treated.**

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11. See *Zelilof v. Greece*, para. 42; *Tomasi v. France*, para. 115; *Chahal v. the United Kingdom*, para. 79; 15th General Report on the CPT’s activities, preface; Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, adopted on 11 July 2002, guideline IV; General Comment N2, CAT/C/GC/2, para.3.

## What amounts to ill-treatment?

The European Convention on Human Rights and other European instruments do not offer definitions of torture, inhuman or degrading treatment or punishment. However, there is an immediate answer to the question that is provided

by common sense and the contemporary understanding of these words. It normally allows an ordinary person to identify torture or to presume that a particular treatment is inhuman or degrading and is, therefore, unacceptable. Thus, one should

be guided by the **spirit and general meaning of the notion of ill-treatment**. It does not matter what is or what could be perceived as “usual” or “appropriate” by particular persons or groups in this respect.<sup>12</sup>

*Are there any exceptions to the prohibition of ill-treatment?*



At the same time, such answer does not delineate specific characteristics of ill-treatment. In the absence of particular criteria, it would be difficult to combat it and put the prohibition of torture and inhuman and degrading treatment into operation. These criteria are developed in the case-law of the Strasbourg Court, as well as jurisprudence of other international human rights mechanisms.

First of all, ill-treatment presupposes certain **severity of physical pain or mental suffering**. In a case of torture, its magnitude is very high. Such pain or suffering are generated by means of special methods or particular circumstances. Examples include beatings on the soles of the feet;<sup>13</sup> electric shocks, hot and cold water treatment, blows to the head and threats concerning the ill-treatment of the victim's children;<sup>14</sup> poor conditions and harsh regime of imprisonment applied with pu-

12. Owing to remaining wrong perceptions or other such reasons particular officers or even detainees might consider certain forms of ill-treatment as being normal.

13. See *Salman v. Turkey*.

nitive purposes;<sup>15</sup> repeated beating of a young female confronted for several hours with several male policemen.<sup>16</sup>

As far as inhuman and degrading components are concerned, the gravity or intensity of pain or mental suffering is also considerable but less serious than in cases of torture. The level of severity can be illustrated by distress or anguish caused by a recourse to physical force (hit in the face with a truncheon) which has not been made strictly necessary by the victim's own conduct;<sup>17</sup> obliging the male detainee to strip naked regardless of the presence of a female officer;<sup>18</sup> inadequacy of medical treatment provided to the detainee;<sup>19</sup> cumulative effect of inadequate conditions of detention including an

14. See *Akkoç v. Turkey*. The threats applied to the victim in this case are an illustration of mental suffering that can amount or contributed to torture.

15. See *Ilaşcu and others v. Moldova and Russia*.

16. See *Menesheva v. Russia*.

17. See *Mrozowski v. Poland*.

18. See *Valasinas v. Lithuania*.

19. See *Sarban v. Moldova*.

overcrowding, lack of ventilation and proper sanitary facilities.<sup>20</sup>

Even this brief and far from being exhaustive catalogue suggests that in addition to the severity factor there are some other key characteristics that specify and differentiate the elements of the prohibition of ill-treatment.<sup>21</sup> As regards torture, these features are a **deliberate infliction** of respective physical or mental pain or suffering for the **purposes of obtaining confession or information, punishing or intimidating particular persons**, or for any reason based on **discrimination**. The indicated components are key aspects of the definition of torture incorporated in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

20. See *Peers v. Greece*.

21. "Treatment" and "punishment" are different categories, but the latter in many cases, especially an imprisonment, implies or involves treatment as well. It should be noted that even the Strasbourg Court does not always distinguish between them.

The “inhuman” constituent of the prohibition points to implications of **uncivilised nature of physical or mental suffering** that result from the treatment concerned. The “degrading” element is related to very specific feelings associated with **debasement and humiliating effects** of particular ill-treatment. Unlike torture, breaches of inhuman and degrading limbs of the prohibition do not necessarily require an intention in respect of the suffering caused.

At the same time, it should be kept in mind that not all objectionable or unpleasant aspects of treatment or punishment constitute a violation of Article 3 of the European Convention on Human Rights.<sup>22</sup> The prohibition does not concern permissible sanctions and other lawful measures such as adequate detention, appropriate handcuffing, and proportionate use of force.

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22. See *Öcalan v. Turkey* [GC].

Both the common sense and the indicated characteristics of ill-treatment suggest that there are two main sets of problems that are relevant to the context of law-enforcement activities. These are:

- ♦ a recourse to physical force which has not been made strictly necessary by victim’s own conduct or abuses leading to infliction of proscribed mental suffering;
- ♦ an inadequacy of conditions of detention and medical assistance.

## Is it allowed to use force or psychological coercion against detainees?

The exhaustive list of situations when it might be necessary to use physical force, special means or weapons actually includes **resistance during an apprehension, violent behaviour or escape**.<sup>23</sup> However, it is just one of the conditions under which such actions are permissible and can be justified.

Secondly, a suspect to detain or a detainee to restrain should pose an **imminent risk to the physical inviolability or comparable values and rights of police**

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23. See *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

**officers or other persons.** In case of a use of lethal force against a person, it is a life that should be at stake due to the threat posed by him or her.<sup>24</sup>

Thirdly, there should be **no other reasonable possibility for averting the danger**

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24. *Ibid.*, principle 9. See also *Nachova v. Bulgaria*.

*Is it allowed to use force or psychological coercion against detainees?*

except of having recourse to such means. As far as lethal or potentially lethal force is concerned, the right to life protected by Article 2 of the European Convention on Human Rights requires that its use should be absolutely necessary. The test to meet is stricter than the requirement of reasonability. There should be no acknowledged alternative but using such force against the person who poses a risk to one's life.<sup>25</sup>

Even if a use of force, special means or firearms is unavoidable, law-enforcement officials shall **minimise damage and in-**

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25. See Note 24.

**jury**, ensure that an **assistance and medical aid** are rendered to any of affected persons at the earliest possible moment, and their **relatives or close friends are notified** accordingly. Besides that they are obliged **to report such incidents** to their superiors. The reports shall be dealt by the competent authorities responsible for administrative review and judicial control.<sup>26</sup>

As regards permissible methods of psychological influence, warnings of the intent to use force and reminders about

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26. See *supra* Note 24, principles 5, 6 and 22.

legitimate consequences are those that can and should be applied with sufficient time for the warning to be observed, when possible.<sup>27</sup> However, any **intimidation with deliberate ill-treatment, verbal abuse or insult, other kinds of unlawful threats** also amount to violation of the prohibition and should be excluded.<sup>28</sup>

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27. *Ibid*, principles 5 and 10.

28. See *supra* Note 15. See also *Gäfgen v. Germany*; *Selmouni v. France*; *Bekos and Koutropoulos v. Greece*.

## What conditions is a detainee entitled to?

Police custody for criminal suspects should be of a short duration. It is expected that a detention in hands of police should be limited to the period between its outset and an appearance of suspect before a judge, as provided for by Article 5§3 of the European Convention on

Human Rights. The standard length of this interval is 48 hours.<sup>29</sup>

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29. Recommendation Rec (2006) 13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, rule 14.2.

Nevertheless, **conditions of detention in police** premises must meet certain basic requirements. According to the international standards they should be clean; of a reasonable size for the number of persons they are used to accommodate; have adequate ventilation, access to natural

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light, and artificial lighting that is sufficient to read. Further, detention premises should be equipped with means of rest such as a fixed chair or bench. Persons obliged to stay overnight in custody should be provided with a clean mattress and clean blankets. Detainees should be allowed to comply with the needs of nature when necessary, in clean and decent conditions, and be offered adequate washing facilities. They should have ready access to drinking water and be given food at appropriate times, including at least one full meal (i.e. something more substantial than a sandwich)

every day. Persons held for extended periods (24 hours or more) should be provided with appropriate personal hygiene items and, as far as possible, be offered outdoor exercise every day.<sup>30</sup>

As regards facilities used for temporary detention of remand prisoners or other categories of persons deprived of their liberty (those punished for petty crimes, vagrants, etc.), where detainees spend more than a couple of days, their conditions have to comply with additional re-

30. See 6th General Report on the CPT's activities, para. 47.

quirements.<sup>31</sup> Thus, instead of one full meal per day that would be enough for a short stay, such inmates should be offered food – sufficient in quantity and quality – at normal meal times. The requirement of providing an access to outdoor exercise for at least one hour per day becomes mandatory.<sup>32</sup> **For longer stays, detainees are entitled to full-fledged prison conditions.**

31. There is an issue of running such establishments by authorities unrelated to police, but it falls outside the scope of the publication.

32. See the CPT's Report on the visit to Georgia carried out from 6 to 18 May 2001, para. 61.

## Is there an obligation to provide medical treatment during police custody?

Any deprivation of liberty leads to a lack of ability of the persons concerned to take care of their medical problems, if any. That is why the detaining authorities are under the obligation to provide

them with **adequate medical assistance**. However, the scope of that obligation is adjusted to the relatively short duration of police custody. Under the prohibition of ill-treatment and the right

to life, police authorities are accordingly obliged to address any medical emergency (threats to life, and health in general, pain, other complications) and a need for treatment of chronic or other

*Is there an obligation to provide medical treatment during police custody?*

diseases, including those requiring regular care.<sup>33</sup>

Due to the shortness of police custody, it cannot be expected that stations or other police subdivisions will maintain medical units or staff. The latter should be available at temporary detention facilities. But its limited capacities do not normally allow for providing a treatment that

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33. See *Sarban v. Moldova*, paras. 78-91.

would be sufficient for the whole range of possible medical needs of different detainees. When needed, the detaining authorities are obliged to provide for **timely involvement of public health care services, relevant specialised doctors or, if the detainee so wishes, access to his or her own doctor**. The authorities should ensure that the medically prescribed scope or type of treatment (outpatient, inpatient, provision of medication) is fully

met regardless of logistical or security implications requiring an escort, guard and other arrangements.<sup>34</sup>

In addition to the healthcare considerations, an appropriate access to medical services is one of the safeguards against ill-treatment.<sup>35</sup>

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34. *Ibid.*; see also *Boicenco v. Moldova*, paras. 112-119.

35. See below, page 13.

## What are the particular entitlements that protect from ill-treatment?

The prohibition of torture, inhuman or degrading treatment or punishment expands above and beyond a delineation of their characteristics. There is an important set of barriers that should dissuade those minded to ill-treat from doing so and prevent it in general.<sup>36</sup>

The key role is attributed in this regard to the **fundamental legal safeguards** that include the following rights:

- ♦ the right to have the fact of the detention notified to a **relative or other third party** of the detainee's choice;<sup>37</sup>

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36. 6th General Report on the CPT's activities, para. 15. See also 2nd General Report on the CPT's activities, para. 36.

- ♦ the right to **access to a lawyer**, which should include a scheme of effective legal aid for persons who are not in a position to pay for it, the right to talk to the lawyer in private and benefit from his presence at interrogations;<sup>38</sup>

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37. For foreign citizens it includes notifying consulates.

38. It should be applicable to persons required to stay with the police regardless of their status. 12th General Report on the CPT's activities, para. 41.

- ♦ the right to **access to a doctor**, which in addition to any medical examination carried out by a doctor called by the police authorities should embrace the right to be examined by a doctor of the detainee's own choice and forensic doctors; all medical examinations should be conducted out of the hearing and – unless the doctor expressly requests otherwise in a given case – out of the sight of police or other non-medical staff; their results should be properly recorded and available to the detainee and lawyer;<sup>39</sup>
- ♦ the right to have the fact of the detention **properly recorded** in a comprehensive and accurate manner with

such records being accessible for the detainee and lawyer;

- ♦ the right to be **explicitly informed about the rights** concerned in a language understood by the detainee and provided with a form setting them straightforwardly out; detainees should be asked to sign a statement attesting that they have been informed of their rights.<sup>40</sup>

These rights should apply as from the **outset of deprivation of liberty**.<sup>41</sup> Even short delays in providing access to a

39. See *Mammadov (Jalaloglu) v. Azerbaijan*, para. 74; *Mehmet Eren v. Turkey*, para. 355. See also the CPT's Report on the visit to Albania carried out from 23 May to 3 June 2005, para. 49; CPT's Report on the visit to Georgia carried out from 6 to 18 May 2001, para. 30; para. 123 of the Istanbul Protocol.

40. See 12th General Report on the CPT's activities, para. 44.

lawyer or doctor or unjustified and prolonged postponement of notification of custody can fall short of the requirements.<sup>42</sup>

41. In order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period (a number of hours) a detained person's access to a lawyer of his/her choice or to apply analogous exceptions to the right to have the fact of detention notified to a third party. Such exceptions should be clearly defined, be subject to strict limitations and be accompanied by further appropriate guarantees (e.g. any delay to be recorded in writing with the reasons therefore, and to require the approval of a senior police officer unconnected with the case, judge or prosecutor). For the same reasons, it may be necessary that the examination of persons in custody by a doctor of their own choice be carried out in the presence of the doctor appointed by the competent authority. See 12th General Report on the CPT's activities, para. 41; CPT's Report on the visit to France carried out from 14 to 26 May 2000, para. 35.

42. See *Mammadov (Jalaloglu) v. Azerbaijan*, para. 74; *Yüksel v. Turkey*, para. 27.

## What to do if subjected to ill-treatment?

The range of domestic competent authorities and procedures available for complaining about or addressing ill-treatment varies

in different countries. However, there are common requirements that any national framework has to satisfy in this regard.

International standards envisage several options for triggering the domestic

*What to do if subjected to ill-treatment?*

mechanisms. Detainees can simultaneously or selectively:

- ♦ benefit from the fundamental legal safeguards<sup>43</sup> and **notify about ill-treatment their relatives, lawyer or doctor**;
- ♦ complain **when brought before prosecutors or judges** that are under the duty to take resolute action in response to allegations or other indications of ill-treatment;<sup>44</sup>
- ♦ insist on an immediate transfer to penitentiary establishments and **alert prison officials or health services** that are obliged to record allegations of ill-treatment and injuries, if any, and transmit these accounts to the competent authorities;<sup>45</sup>

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43. See above, page 12.

44. 14th General Report on the CPT's activities, para. 28. See also *Ahmet Özkan and others v. Turkey*, para. 359.

- ♦ register and send **complaints or any written representations to the competent authorities** and designated bodies, as well as request under the right to respect for correspondence provided for by Article 8 of the European Convention on Human Rights that such mail be transmitted without undue delay in a sealed envelope or another manner excluding its censorship.<sup>46</sup>

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45. See the CPT's Report on the visit to Azerbaijan carried out from 24 November to 6 December 2002, para. 26; CPT's Report on the visit to Albania carried out from 13 to 18 July 2003, paras. 45-49; CPT's Report on the visit to Lithuania carried out from 17 to 24 February 2004, para. 96.

46. The range can be supplemented by providing an opportunity to contact the bodies by telephone and other means of communication. See Opinion of the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, concerning independent and effective determination of complaints against the police, CommDH (2009) 4, para. 46. Hereinafter – the CEHRC's Opinion.

In parallel, it is important to **secure evidence** by means of requesting forensic examination or insisting on detailed description of injuries or other medical consequences of ill-treatment by prison or other doctors involved.

There is a variety of international protection mechanisms, with the Strasbourg Court being the most relevant for pursuing claims of particular violations. However, it should be taken into account that according to Article 35§1 of the European Convention on Human Rights, this Court can deal with a matter after all available and effective domestic remedies are exhausted. That is why it is advisable to use appropriate national mechanisms first.<sup>47</sup>

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47. The Strasbourg Court can be engaged without exhausting domestic remedies, but the applicant is obliged to demonstrate their ineffectiveness or unavailability, or refer to special circumstances such as total inaction of state authorities in the face of serious allegations. See *Selmouni v. France*, para. 76; *Assenov v. Bulgaria*, para. 102.

## How should claims of ill-treatment be pursued?

Types of domestic mechanisms relevant for dealing with the claims of ill-treatment are determined by a character of violation and scope of measures required. Thus, the most typical avenue for addressing an inadequacy of conditions of detention or medical assistance and other kinds of unpremeditated ill-treatment is to **complain to superiors** within police structures or supervising **bodies and judiciary**.<sup>48</sup> The latter option includes initiation of immediate or subsequent civil

48. Occasionally such matters can constitute a subject of investigations too. See *Ramishvili and Kokhreidze v. Georgia*, para. 80.

procedures for remedying a violation and damages.

As regards physical or psychological abuse, excessive use of force and other forms of deliberate ill-treatment, the competent authorities are under the obligation to respond to such accounts by launching necessary **investigations**. Therefore, such claims can be pursued through criminal and disciplinary procedures carried out by **police complaints mechanisms, investigative or prosecuting authorities**.

Recognised or alleged **victims of ill-treatment are expected to co-operate**

with the competent authorities, testify or participate in other investigative actions and procedures. Besides that, they are supposed to **represent their legitimate interests** in the course of effective investigations or **defend them** against a failure to meet this obligation.<sup>49</sup> That is why it is important to be aware of the specific requirements and standards developed in this regard.

49. See note 3 above. On the obligation concerned see *Maslova and Nalbandov v. Russia*, para. 91; *Zelilof v. Greece*, para. 55; *Altun v. Turkey*, para. 71; *Ayder and others v. Turkey*, paras. 122-129.

## What are the requirements an investigation into ill-treatment should comply with?

In short, an investigation must **establish the facts of the case** and, if the allegations or other indications of ill-treatment

prove to be true, **identify and punish those responsible** by means of eventual proceedings. In order to be **adequate**

**and effective** an investigation into ill-treatment has to meet a set of particular criteria. For these reasons it should be:

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- ♦ **independent**, meaning that the officials responsible for the investigation, those assigned to its steps or taking substantial decisions should be neither from the same police subdivisions or otherwise closely linked (professionally interrelated, subordinated) to those implicated in the events<sup>50</sup> nor accountable for prosecuting the complainant;<sup>51</sup>
- ♦ **thorough**, i.e. include “all reasonable steps” and genuine efforts for reaching the outlined objectives; the standard inventory of evidence to be assembled<sup>52</sup> contains detailed and exhaustive testimonies of victims; their medical, preferably forensic examina-

tion; appropriate questioning and, if needed, detection of those implicated; appropriate witness statements, possibly including statements of other detainees, custodial staff, members of the public, law-enforcement officers and other officials; examination of the scene for material evidence, including implements used in ill-treatment; examination of custody records, decisions, case files and other documentation related to the incident;<sup>53</sup>

- ♦ **prompt** in terms of securing necessary evidence including those that might be lost or become weaker, as well as timely accomplishment of procedures needed for taking a final decision or punishment of those implicated;<sup>54</sup>
- ♦ **subject to scrutiny** by the victim and his or her lawyer, who should be con-

sistently informed of a progress of the investigation and principal decisions taken, entitled to request investigating actions, challenge its omissions or conclusions by means of an appropriate judicial review.<sup>55</sup>

In addition, an investigative framework should **exclude any immunity or other formal barriers** against investigations,<sup>56</sup> ensure that the **victims or witnesses benefit from protective measures** including a provisional suspension of those implicated from the service or official duties.<sup>57</sup>

50. See *Rehbock v. Slovenia*, para. 74; *Mikheev v. Russia*, para. 115.

51. See *Barabanshchikov v. Russia*, para. 48; *Toteva v. Bulgaria*, para. 63; CPT's Report on the visit to Albania carried out from 23 May to 3 June 2005, para. 50.

52. See *Khadisov and Tsechoyev v. Russia*, para. 114; *Bati and others v. Turkey*, para. 134; Istanbul Protocol, paras. 88-106; the CEHRC's Opinion (see p. 14, footnote 46), para. 69; 14th General Report on the CPT's activities, para. 33.

53. Particular investigations of ill-treatment might require some additional or specific investigative actions and procedures.

54. See *Mikheev v. Russia*, para. 109; *Yaman v. Turkey*, paras. 57, 59.

55. See *Ognyanova and Choban v. Bulgaria*, para. 115; *Chitayev and Chitayev v. Russia*, para. 165; *Hugh Jordan v. the United Kingdom*, para.132; *Khadisov and Tsechoyev v. Russia*, para. 122; *Gharibashvili v. Georgia*, para. 74; *Slimani v. France*; *Ramishvili and Kokhleidze v. Georgia*, para. 80.

56. See *Hugh Jordan v. the United Kingdom*, para.135. In this particular case the Court did not find the circumstances concerned to be significant for the purposes of investigations, however.

57. See *Yaman v. Turkey*, para. 55. See also *Bekos and Koutropoulos v. Greece*, para. 54. Istanbul protocol, para. 80.

## What would be an adequate punishment for perpetrators of ill-treatment and legal redress for victims?

It is for domestic legislation and courts to determine the sanctions for those guilty of ill-treatment. International standards do not offer any formal scales of penalties that should be applicable to a perpetrator of torture, inhuman or degrading treatment or punishment.<sup>58</sup> However, they require that ill-treatment be **appropriately classified**<sup>59</sup> and a punishment be **pro-**

**portionate to the gravity of ill-treatment.**<sup>60</sup> Any evident inadequacy of sanctions imposed on its perpetrators falls short of the obligations under the prohibition in issue.<sup>61</sup> Finally, international standards **oppose amnesties or pardons** of those punished for ill-treatment.<sup>62</sup>

In addition, a victim of ill-treatment is entitled to an **adequate compensation of pecuniary and non-pecuniary damages.** According to Article 13 of the European Convention on Human Rights, a possibility to seek such compensation through civil or administrative procedures should provide the victim with an effective remedy “notwithstanding that the violation has been committed by persons acting in an official capacity”.

58. 14th General Report on the CPT’s activities, para. 44.  
59. See *Okkali v. Turkey*, para. 73; *Bekos and Koutropoulos v. Greece*, para. 54. See also, *mutatis mutandis*, the observations of the Grand Chamber in *Oneriyildiz v. Turkey*, at para.116

60. *Ali and Ayşe Duran v. Turkey*, para. 66.

61. CPT’s Report on the visit to Albania carried out from 23 May to 3 June 2005, para. 54.

62. See *Yaman v. Turkey*, para. 55; General Comment N2, CAT/C/GC/2, para. 5.

## What other basic rights are detainees or suspects entitled to?

The prohibition of ill-treatment is a key component of the wider human rights

framework that applies to law-enforcement activities. Articles 5 and 6 of the

European Convention on Human Rights and the respective rights to liberty and

security and a fair trial aiming at the protection of detainees and those charged with criminal offences are of particular importance in this regard.<sup>63</sup> The Strasbourg Court has emphasised “the dramatic impact of the deprivation of liberty on the fundamental rights of the person concerned”.<sup>64</sup> At the same time, it stresses that this category of individuals enjoys relevant rights and entitlements endorsed in the European Convention on Human Rights.<sup>65</sup>

In fact, Article 5 of the European Convention on Human Rights establishes **the presumption in favour of liberty**.<sup>66</sup> It stipulates that **a detention can be applied only as an exceptional measure**

provided that there are prevailing reasons and specific arguments that validate it.

It contains an **exhaustive list of grounds for deprivation of liberty** that cannot be expanded domestically.<sup>67</sup> It can be applied after a conviction by a competent court; for non-compliance with its lawful order or obligations prescribed by law; as a preliminary measure in the course of criminal procedure; for the purposes of educational supervision of minors and bringing them before competent legal authority; against vagrants, persons with mental illnesses, and alcoholics, as a measure countering infectious diseases; and in the context of deportation or extradition procedures.<sup>68</sup>

In addition to an existence of at least one of these grounds, a deprivation of liberty

is allowed only if further requirements and preconditions are met. It should be **lawful and carried out in accordance with the procedure prescribed by law**.

Firstly, it means that a detention should be applied in accordance with domestic legal provisions, including those related to a length of police custody that starts from the moment of actual and not formalised apprehension.<sup>69</sup> Secondly and in addition, it should meet the guarantees against arbitrary deprivation of liberty deriving from the European Convention on Human Rights. Their list includes the ban on an unacknowledged detention.<sup>70</sup> The European Convention on Human Rights also implies that the legal framework on detention must be precise and regulations shall not be classified or otherwise unavailable for the public.<sup>71</sup> In other words, detainees and their representatives should know what to expect and plead for.

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63. The right to fair trial and Article 6 of the European Convention on Human Rights also apply to civil proceedings, which fall outside the scope of the subject-matter of the publication.

64. See *Ramishvili and Kokhreidze v. Georgia*, para. 128.

65. Persons deprived of their liberty are entitled to other rights and freedoms. See *Hirst v. the United Kingdom* [GC], para. 69. Some of them, e.g. the right to respect to family life and correspondence, are of direct relevance to the prohibition of ill-treatment. Their elements form part of the legal safeguards considered above.

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66. See Recommendation Rec (2006) 13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, rule 3.

67. On the exhaustive character of the list see *Labita v. Italy*.

68. See *Riera Blume and others v. Spain*.

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69. See *K.-F. v. Germany*.

70. See *Menesheva v. Russia*, para. 87.

71. See *Amuur v. France*; *Gusinskiy v. France*.

Article 5.2 of the European Convention on Human Rights pursues the same rationale and requires that any detainee should know the reasons for his or her deprivation of liberty. For these purposes, the person concerned **must be promptly told, in a simple, non-technical language that he or she can understand, the essential legal and factual grounds for the detention.**<sup>72</sup>

This safeguard, in its turn, is a necessary prerequisite for testing the legality of the detention. Article 5§4 of the European Convention on Human Rights envisages that any detainee can **apply to a court to challenge the lawfulness of the detention.** The right to judicial review of legality of detention is relevant to all categories of detainees. However, it does not apply automatically. These judicial proceedings have to be initiated by a detainee or by the lawyer or, if appropriate, by another authorised representative.

72. *Kerr v. the United Kingdom.*

This process should meet although not full-fledged, but at least the basic requirements of a fair trial. Among other entitlements, a detainee, if requested, should be able to benefit from an effective legal assistance, submit the claims to an appropriate court and, if not released, receive substantiated answers to the arguments in favour of liberty.<sup>73</sup>

The lawfulness of detention **shall be decided speedily.** The question of timeliness of review depends on all the circumstances of the case and there is no formal time-frame stipulated by international standards. However, it should be taken into account that in comparatively straightforward cases the period of three weeks is considered to be too long.<sup>74</sup>

Furthermore, it is required that the grounds and arguments against release, which may vary or cease to exist over the time, should be continuously present. That is why the right to judicial review en-

73. *Ibid.*; see also *E v. Norway*, para. 50.

74. See *Rehbock v. Slovenia*; *Sarban v. Moldova*.

visages that a prolonged detention can be **challenged at intervals.** Depending on the grounds and particular reasons for detention these periods differ. Nonetheless, it should be noted that for remands in custody the expected interval of such review is set at one month.<sup>75</sup>

In addition, the right to liberty and security envisages that **criminal suspects should benefit from further specific guarantees.** They are laid down in paragraphs 1 (c) and 3 of Article 5 of the European Convention on Human Rights. It is understandable since it is the most common ground for deprivation of liberty that involves different hazards, including a risk of being subjected to deliberate ill-treatment.

Suspects can be detained only upon a **reasonable suspicion of having committed an offence.**<sup>76</sup> In other words, it is

75. It can be inferred from the analysis of rules 17.2 and 19.2 of Recommendation Rec (2006) 13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

markedly stipulated that there must be facts or information that would objectively suffice for suspecting the person of a particular crime.<sup>77</sup>

Besides the judicial review under Article 5§4, detained criminal suspects enjoy a preceding automatic procedural safeguard provided for by Article 5§3 of the European Convention on Human Rights. It stipulates that they should be **promptly brought before a judge** regardless of their own motions. The expected period for fulfilling this requirement is set at 48 hours from the moment of actual apprehension.<sup>78</sup> A criminal sus-

pect should be freed unless there are substantial reasons for believing that he or she would either abscond, or commit a serious offence, or interfere with the course of justice, or the release could pose a serious threat to public order. Moreover, there should be no possibility of using alternative measures to address these concerns.<sup>79</sup> Court decisions on remanding in custody or prolonging it must substantiate the risks and reasons by reference to concrete factual circumstances and indicate the arguments for refusing bail or other alternatives to detention.<sup>80</sup>

Subject to the periodic review,<sup>81</sup> a remand in custody and all the procedures up to the eventual sentencing should be concluded **within reasonable time**.<sup>82</sup> What is reasonable depends on the particularities

of the case and international instruments do not envisage any formal periods in this respect. However, the case-law of the Strasbourg Court has established a requirement of “special diligence” meaning that a detained person is entitled to have the case given priority and conducted with particular expedition. The proceedings should be completed **without periods of substantial inactivity**.<sup>83</sup>

**The right to a fair trial** is another wide-ranging collection of requirements that are closely intertwined with the law-enforcement activities. Although certain aspects of the right, such as an independ-

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76. It should be noted that for the purposes of Articles 5 and 6 of the Convention the terms *offence* and *criminal charges* are provided with an autonomous meaning and they do not depend solely on their domestic understanding. Certain actions that domestically are not considered as criminal offences but might result in severe penalties or entail relevant procedures are falling under the terms concerned. See *Menesheva v. Russia*, paras. 90-98.

77. For a prolonged detention such suspicion should meet certain evidential requirements. See *Labita v. Italy*, paras 155-161. Besides that, a suspicion should concern a particular crime and not some undesirable conduct or prevention of crime in general. See *Jėčius v. Lithuania*.

78. See *supra*, note 29 and related comments.

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79. Recommendation Rec (2006) 13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, para. 7.

80. *Ibid*, paras. 8 and 9. See also *Trzaska v. Poland*, paras. 63-69.

81. See *supra*, note 75 and related comments.

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82. These requirements are envisaged both by Article 5§3 and Article 6§1 of the European Convention on Human Rights. The former covers the period that runs until the date of judgment of the trial (first instance) court and the latter also embraces eventual appeals procedures. The indicated essence of the special diligence standard under Article 6§1 as regards procedures concerning persons deprived of their liberty does not differ from the intensity required by Article 5§3.

83. Recommendation Rec (2006) 13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, paras. 22-24; see also *Punzelt v. the Czech Republic*, paras. 71-82.

ent and impartial tribunal, public hearings and judgment, or reasoned decision, are relevant to the court process only, the majority of other guarantees are put into effect as from the official notification of a criminal charge, detention or other measures which carry the implication of it.<sup>84</sup>

It is noteworthy that the overall principle of fair trial has a direct relevance to the prohibition of ill-treatment. It was the spirit and the concept of fairness inbuilt in Article 6§1 of the European Convention on Human Rights that provided a basis for its interpretation as including **the ban on use of evidence recovered through ill-treatment**.<sup>85</sup> Such occurrences seriously undermine fairness of procedures regardless of an impact of such evidence on their outcome against the person concerned.<sup>86</sup> The

84. On the autonomous meaning of the term see *supra*, footnote 76. Concerning the moment a person is considered as being “charged” see *Eckle v. Germany*, para. 73.

85. While the European Convention on Human Rights does not contain any express provision in this regard, the UN instruments, in particular Article 15 of the Convention against Torture, outlaw a use of evidence obtained in violation of the prohibition of ill-treatment.

86. *Harutyunyan v. Armenia*, paras. 63, 66.

same kind of general considerations **rule out any method of investigation that actively incites a crime**. This concerns actions of undercover officers instigating an offence that would not otherwise have been committed.<sup>87</sup>

There is a catalogue of specific rights applicable to those charged with a criminal offence. It is enshrined in Article 6§2 and 6§3 of the European Convention on Human Rights and starts with the **presumption of innocence**. This is a composite principle that places the burden of proof on prosecuting authorities, includes the **right to remain silent** and provides for the **privilege against self-incrimination**.<sup>88</sup> Accordingly, criminal suspects and those already accused cannot be obliged to testify or illegally compelled to provide evidence against themselves. This rule does not concern

87. See *Teixeira de Castro v. Portugal*.

88. See *Saunders v. the United Kingdom*; *Telfner v. Austria*. However, these stipulations do not exclude an inference of guilt from silence and statutory presumptions if they are applied within the framework of fair procedures. See *Philips v. the United Kingdom*.

documents acquired pursuant to a warrant, as well as breath, blood and other samples, which might be obtained from the accused through the use of lawful powers and appropriate procedures.<sup>89</sup>

This presumption also means that a person is innocent unless and until sentenced by a competent court. No one should be declared or deemed guilty in terms of premature statements by judges or other public officials.<sup>90</sup> It is also breached when those acquitted are denied compensation due to “remaining suspicion” or “questioned innocence”.<sup>91</sup>

According to Article 6§3 (a) of the European Convention on Human Rights, accused persons shall be **promptly and in a language they understand informed about the nature and causes of charges against them**. As distinct from the notification on the reasons of detention under Article 5§2, it should provide sufficient

89. See *Saunders v. the United Kingdom*, para. 69; *Jalloh v. Germany*.

90. See *Alenet de Ribemont v. France*.

91. See *Sekanina v. Austria*.

details that allow preparing an effective defence. Normally, this requirement is fulfilled by a submission of a copy of the document set up in the course of bringing charges.<sup>92</sup>

The stipulation on notification of charges introduces and actually represents an element of the wider obligation to provide those accused with an **adequate time and facilities for the preparation of a defence** as required by Article 6§3 (b). The scope of the requirements on the subject is supplemented by **the right to legal assistance**. According to Article 6§3 (c), accused persons should be provided with a possibility to defend themselves in person or through legal assistance of their own choosing and – if they have not sufficient means to pay – to be given it free. Consequently, an accused must have an opportunity to benefit from: a confidential access to a lawyer as from the early stages of investigation;<sup>93</sup> access to

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92. Though in uncomplicated cases an appropriate oral explanation could suffice. See *Kanasinski v. Austria*.

the documentation<sup>94</sup> and all the material evidence against or in favour of the accused being disclosed<sup>95</sup> with enough time and appropriate conditions to consult them and present a position.<sup>96</sup>

Under Article 6§3 (e), those who do not understand or speak the language used in the procedures should benefit from **free interpretation**.

There are specific rules that govern **examination of witnesses and securing relevant evidence** in the course of preliminary procedures and trial. An accused should be put on equal level with the prosecution in this regard. This standard includes a presentation of evidence, calling witnesses and examination of those invited by the prosecution, including anonymous ones.<sup>97</sup>

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93. See *Murray (John) v. the United Kingdom*. The requirement has been introduced for the general purposes of defence that might include arguments of ill-treatment, however. This standard is similar to the preventive safeguard developed under the prohibition of ill-treatment. See above.

94. See *Kanasinski v. Austria*.

95. See *Rowe and Davis v. the United Kingdom*.

96. See *Hadjianastassiou v. Greece*.

It should be borne in mind that even a very early and isolated failure to meet these standards may have a decisive and irreparable effect on fairness of the whole proceedings.<sup>98</sup>

While in respect of many other rights, including the prohibition of ill-treatment, the entitlement to an **enforceable compensation** is implied in an obligation to provide a victim with an effective remedy,<sup>99</sup> the rights to liberty and security and fair trial have been furnished with special provisions to this end. Victims of illegal deprivation of liberty and miscarriage of justice should be able to remedy the related damages in accordance with Article 5§5 of the European Convention on Human Rights and Article 3 of its Protocol No. 7 respectively.

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97. See *Doorson v. the Netherlands*.

98. See *Pishchalnikov v. Russia*.

99. See above, page 17, *What would be an adequate punishment for perpetrators of ill-treatment and legal redress for victims?*

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**Eric Svanidze presents key questions and answers covering the rights of detainees. Knowledge of the subject-matter will help both detainees and police officers, as well as legal professionals and the public in general, to benefit from better understanding of the prohibition of ill-treatment and some other basic human rights that are applicable in the context of law-enforcement activities.**

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