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Expert Opinion

on

Definition of torture and ill-treatment and Statute of Limitation

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Contents

Introduction 3

International Standards as to Substantial Legislative Framework on the Prohibition of Torture (Ill-Treatment) 3

Definition of Torture in the CC and related findings by international monitoring mechanisms 5

Other forms of serious (deliberate) ill-treatment..... 8

Gravity of the crime and range of sanctions 12

Statute of Limitations 13

Applicability of the statute of limitation 17

Criminalisation of ill-treatment by private individuals 18

ANNEX I Draft-amendments to the Criminal Code 20

ANNEX II Country based approach through the case-law of the European Court of Human Rights and general measures for execution of its judgments related to definition of torture and statute of limitation..... 21

Introduction

1. In a letter sent on 14 September 2018, the Ministry of Justice requested to the Council of Europe an expert opinion on possible amendments of provisions of the Macedonian Criminal Code in relation to definition of torture, ill-treatment and statute of limitation for prosecution of these crimes, aligned with the relevant international standards. This Opinion is provided within the framework of the ECM Horizontal Facility for Western Balkans and Turkey.
2. The Analysis of the international standards on criminalization of ill-treatment and comparative overview of practices from other European jurisdictions has been developed on the basis of the initial analysis, discussions and work during the mission to Skopje on 22-23 October 2018. It expands over other forms of ill-treatment (not only torture, as envisaged by the assignment), as well as addresses the specific questions and requests put forward by the stakeholders (Working Group in charge of drafting the relevant amendments to the Criminal Code “CC”) in the course of subsequent interaction with them. The Analysis is supplemented by the draft text of the relevant article(s) of the CC reviewed by the expert and attached to this paper (hereinafter ‘the most recent draft’). The most important comments, as well as recommendations are suggested in bold.

International Standards as to Substantial Legislative Framework on the Prohibition of Torture (Ill-Treatment)

3. The absolute prohibition of torture and inhuman or degrading treatment or punishment should be supported by an appropriate domestic legislative framework.¹ This corner-stone measure is the first in the list of the constituents of the obligation to prevent and combat ill-treatment spelled out in Articles 2 and 16 of the United Nations Convention against Torture (UNCAT).

The provision is further specified by the requirement of making the offence of torture punishable under criminal law in accordance with the definition set in Article 1 of the UNCAT. Under its Article 4, every State party “shall ensure that all acts of torture are offences under its criminal law”. This article is understood to oblige State parties to criminalise torture as a specific crime, separate from other types of offences found in criminal law. The principle that torture should entail measures of criminal responsibility and punishment has been consequently endorsed by the European Court of Human Rights (ECtHR) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT).²

¹ General Comment N2, CAT/C/GC/2, para. 1.

² See *Bati and Others v. Turkey*, ECtHR judgment of 3 June 2004, applications nos. 33097/96 and 57834/00, paras 145-146; *Mikheev v. Russia*, ECtHR Judgment of 26 January 2006, application no. 77617/01, paras. 120 and 135; 14th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 27.

The United Nations Committee against Torture (CAT) in Para. 8 of its General Comment N°2 specifies that States shall draft their domestic legislation “in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention”. In principle, it comprises the following key elements:

- severe mental or physical **pain or suffering of particular intensity and cruelty**;
 - **intentional character and pursuit of a specific purpose**, such as gaining information, punishment or intimidation; and
 - **involvement of a state** (its agents) ranging from immediate infliction to acquiescence.
4. As to inhuman and degrading treatment and punishment, the states are expected to explicitly criminalize and apply respective sanctions for serious physical or psychological abuses and other forms of deliberate ill-treatment by law-enforcement and other government agents.³ In general, the UNCAT in its Article 16 specifies that: ‘1. Each State Party shall undertake to prevent in any territory under its jurisdiction *other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture* as defined in article 1, when such acts are *committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.’⁴ While the UNCAT explicitly stipulates it, the European Convention for Human Rights and Fundamental Freedoms (ECHR), as read by the ECtHR, requires that states criminalise deliberate ill-treatment by its officials or committed in similar context and proceed with effective investigations and eventual judicial and further steps, when confronted with indications that ill-treatment might have occurred.⁵
5. International human rights standards highlight the importance of an explicit criminalization and classification of criminal acts comprising torture, as well as other forms of deliberate ill-treatment (inhuman or degrading treatment or punishment). It is essential for alerting everyone, including perpetrators, victims, and the public to the special seriousness of ill-treatment and need of appropriate punishment for it. This requirement aims at strengthening of the deterrent effect of the prohibition itself, enhancing the ability of responsible officials to track the specific violations and enabling the public to monitor and, when required, challenge their acts or omissions.⁶
6. There have been comparatively recent developments in the ECtHR case law that reinforced and advanced the requirements in issue. It has emphasized that the obligation to combat impunity is an indispensable prerequisite of its prevention. An appropriate

³ 4th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 27; General Comment N2, CAT/C/GC/2, para. 10.

⁴ Emphasis added.

⁵ See e.g. *Anzhelo Georgiev and Others v. Bulgaria*, ECtHR judgment of 30 September 2014, application no. 51284/09, paras. 65-78.

⁶ See General Comment N2, CAT/C/GC/2, para. 11; *Bekos and Koutropoulos v. Greece*, ECtHR judgment of 13 December 2005, application no. 15250/02, para. 54; CPT’s Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 38.

punishment in terms of both adequacy of the sanction imposed and the specific classification of the wrongdoing as ill-treatment are indispensable for combating it. The ECtHR has spelled out that the existence of relevant substantial criminal law framework and its appropriate application constitute part of the obligation to prevent ill-treatment.⁷

7. Thus, findings of serious (deliberate) ill-treatment committed by its agents or otherwise attributed to them, should be classified in accordance with the specifically enacted legislation and lead to appropriate criminal, administrative, and disciplinary penalties provided by law and which are proportionate to the gravity of the ill-treatment involved.

Definition of Torture in the CC and related findings by international monitoring mechanisms

8. The CC article concerning torture and other forms of deliberate ill-treatment attributable to the state currently are formulated as follows:

Torture and other cruel, inhuman or humiliating activities and punishments

Article 142

(1) Whosoever while performing a duty, as well as whosoever listed as official person or based on his consent, uses force, threat or any other not allowed instrument or manner with the intent to extort confession or some other statement from the convicted, the witness, the expert or other person, or whosoever causes another a severe physical or mental suffering in order to punish him for a crime committed or for a crime for which he or another person is a suspect, or to intimidate or force him to waive one of his rights, or whosoever causes such suffering due to any type of discrimination, shall be sentenced to imprisonment of three to eight years.

(2) If, the crime referred to in paragraph 1 causes the damaged party severe physical injury or other especially severe consequences, the offender shall be sentenced to imprisonment of minimum four years.

9. There are no detailed standards and have not been substantial findings of the ECtHR against Macedonia as to the definitional aspects of its criminal legislation of ill-treatment.
10. According to the CAT most recent concluding observations (issued in 2015), it remains concerned that Article 142 of the Criminal Code does not fully reflect all the elements of the definition of Article 1 of the Convention, especially with regard to instigation, consent, acquiescence and complicity for acts of torture by other persons acting in an official capacity. It has suggested that the State party should:
 - (a) Review its legislation to ensure that it includes a definition of torture in the Criminal Code that is in full conformity with the Convention and covers all the elements contained in Article 1;

⁷ *Valeriu and Nicolae Rosca v. Moldova*, ECtHR judgment of 20 October 2009, paras. 71-75.

(b) Ensure that article 142 of the Criminal Code provides for prosecution of those who attempt to commit torture, those who knowingly fail to report instances of torture and those who are complicit in torture.

11. The general provisions (Chapter 3 of the CC) could be seen as addressing some of the aspects of the complicity-related recommendations, in particular with regard to instigation.

Co-offending

Article 22

If two or more persons, by participating in an act of committing or by any other significant contribution towards the committing of the crime, jointly commit a crime, each one of them shall be sentenced with the proper sentence prescribed for such crime.

Instigation

Article 23

(1) Whosoever premeditatively instigates another to committing a crime, shall be punished as if he had perpetrated the crime himself.

(2) Whosoever premeditatively instigates another to commit a crime, for which a sentence of five years of imprisonment or a more severe sentence could be pronounced according to a law, and there is not even an attempt of this crime, shall be punished as for an attempted crime.

Assistance

Article 24

(1) Whosoever premeditatively assist in the perpetration of a crime shall be punished as if he had committed the crime himself, but he may be punished more leniently.

(2) Assistance to perpetrating a crime shall be especially considered: giving advice or instructions how to commit a crime, making available to the offender means for committing the crime, removal of obstacles for committing the crime, as well as promising in advance to cover the criminal act of the offender, of the means of committing the crime, the traces of the crime or the items obtained through a crime.

12. The level of actual compliance would depend on existence of a well-established judicial practice as to embracing the remaining specific facets of complicity. In particular, ‘consent’ and ‘acquiescence’ could be covered by *removal of obstacles for committing the crime*. However, it would be **preferable to specify them in the text of the article specifically, as it is done in the jurisdictions that opted for mirroring the definition in their legislation.**

13. In terms of attempts to commit torture, as well as failure to report it, they are addressed respectively in combination with Articles 19 of the CC Attempt (establishing a general rule in this regard) and Article 363 of the CC “*Not reporting preparation of a crime*” and Article 364 para 2 of the CC “*Not reporting a crime or an offender*”. No legislative gaps in this regard could be identified.

14. At the same time, there are other shortcomings of the definition used in Article 142 of the CC that has not been dealt with under the CAT reporting framework. In particular, the purposes ‘to punish him for a crime committed or for a crime for which he or another person is a suspect’ and ‘to intimidate or force him to waive one of his rights’ are narrower than required by Article 1 of the UNCAT. The former purpose should concern any act and not only a crime. The latter one any intimidation or coercion and not only related to a waiver of a right. **These purposes are to be expanded accordingly.**
15. Another potential shortcoming of the current construction of Article 142 is constituted by the extension of discrimination-related component over any person (by means of using ‘whoever’ without the limiting specification applied for its preceding limb). Although it covers state-linked considerations, this inexplicable inconsistency might water down the required emphasis on its officials’ or agents’ involvement. Unless this is an accepted country-specific legislative technique, it would be advisable **to maintain consistency of its scope in terms of perpetrators.**
16. At the same time, it would be more appropriate to **follow the growing trend of incorporating the international definition of torture, exact elements of its wording in national criminal codes or relevant legislative acts.** This can be illustrated by the following examples:

Croatia

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Article 104

A public official or other person who at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity inflicts on another severe pain or suffering, whether physical or mental, 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, shall be punished by imprisonment from one to ten years.

Finland

Section 7 - International offence (626/1996)

(9) torture for the purpose of obtaining a confession, assault, aggravated assault or other punishable act that is to be deemed torture referred to in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaties of Finland 60/1989),

Section 9(a) – Torture (990/2009)

(1) If a public official causes another strong physical or mental suffering (1) in order to get him or her or another person to confess or to provide information, (2) in order to punish him or her for something that he or she or some other person has done or is suspected of having done, (3) in order to frighten or coerce him or her or another person, or (4) on the basis of race, national or ethnic origin,

skin colour, language, gender, age, family relations, sexual orientation, inheritance, incapacity, state of health, religion, political opinion, political or vocational activity or other corresponding grounds, he or she shall be sentenced for torture to imprisonment for at least two and at most twelve years and in addition to removal from office.

(2) Also, a public official who explicitly or implicitly approves an act referred to in subsection 1 committed by a subordinate or by a person who otherwise is factually under his or her authority and supervision shall also be sentenced for torture. (3) An attempt is punishable. (4) The provisions in this section regarding public officials apply also to persons performing a public fiduciary function and to a person exercising public power and, with the exception of the sanction of removal from office, also to the employee of a public corporation and to a foreign public official.

Canada

Torture 269.1

(1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definitions

(2) For the purposes of this section, official means (a) a peace officer, (b) a public officer, (c) a member of the Canadian Forces, or (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c), whether the person exercises powers in Canada or outside Canada; (fonctionnaire)

torture means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) for a purpose including

- (i) obtaining from the person or from a third person information or a statement,*
- (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and*
- (iii) intimidating or coercing the person or a third person, or*
- (iv) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions. (torture)*

Other forms of serious (deliberate) ill-treatment

17. The formats for meeting the outlined international standards⁸ as to specific criminalization of serious ill-treatment, i.e. deliberate inhuman or degrading treatment immediately attributable to the state (its officials/agents) differ. In those jurisdictions that have amended their legislation in this regard they range from **incorporating them in one article with torture to specifying relevant *corpus delicti* in separate articles**. The latter option is comparatively rare and involves nuanced formulation of relevant elements of the

⁸ See paras. 2, 5, and 6 above.

crime in issue. At the same time, the former option presupposes their differentiation in practice in line with the ECtHR case law and international human rights law in general. However, in principle, both approaches do address the standards and choice depends on the preferred legislative techniques and practicalities of application of the provisions.

18. The existing modalities can be illustrated by the following examples:

Croatia

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 104

A public official or other person who at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity inflicts on another severe pain or suffering, whether physical or mental, 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, shall be punished by imprisonment from one to ten years.

Czech Republic

Section 149 Torture and other Cruel and Inhumane Treatment

(1) Whoever causes bodily or mental suffering by means of torture or some other inhuman or cruel treatment to another person in connection to exercise of powers of a public authority, a local authority, a court, or another public authority, shall be sentenced to imprisonment for from six months to five years.

(2) An offender shall be sentenced to imprisonment for two to eight years, if he/she

a) commits an act referred to in Sub-section (1) as a public official,

b) commits such act against a witness, an expert or an interpreter because of performance of their duty,

c) commits such an act on another person for their true or presupposed race, belonging to an ethnical group, nationality, political beliefs, religion or because of his/her true or presupposed lack of religious faith. commits such act with at least two other persons, or

d) commits such an act repeatedly.

(3) An offender shall be sentenced to imprisonment for five to twelve years, if he/she:

a) commits the act referred to in Sub-section (1) against a pregnant woman,
b) commits such an act against a child under fifteen years of age,

c) commits such act in an especially cruel or agonising manner, or d) causes grievous bodily harm by such an act.

(4) An offender shall be sentenced to imprisonment for eight to eighteen years if he/she causes death by the act referred to in Sub-section (1).

(5) Preparation is criminal.

Hungary

Mistreatment in Official Proceedings Section 301

(1) Any public official who physically abuses another person during his official proceedings is guilty of a felony punishable by imprisonment between one to five years.

(2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang.

(3) Any person who engages in preparations for mistreatment in official proceedings is guilty of a misdemeanor punishable by imprisonment not exceeding one year.

(4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (1) to the authorities before the indictment is filed.

Mistreatment in the Proceedings of Persons Entrusted with Public Functions Section 302

(1) Any person entrusted with public functions who physically abuses another person in the process of carrying out his public function is guilty of a felony punishable by imprisonment between one to five years. 104

(2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang.

(3) Any person who engages in preparations for mistreatment in the proceedings of persons entrusted with public functions is guilty of a misdemeanor punishable by imprisonment not exceeding one year.

(4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (2) to the authorities before the indictment is filed.

Third Degree Section 303

(1) Any public official who attempts by force or threat of force, or by other similar means, to coerce another person into giving information or making a statement, or to withhold information, is guilty of a felony punishable by imprisonment between one to five years.

(2) The penalty shall be imprisonment between two to eight years if the criminal offense defined in Subsection (1) is committed in a gang.

(3) Any person who engages in preparations for the interrogation of a person for the coercion of information by force is guilty of misdemeanor punishable by imprisonment not exceeding two years.

(4) The penalty may be reduced without limitation if the perpetrator unveils the circumstances of the criminal offense defined in Subsection (2) to the authorities before the indictment is filed.

Malta

Torture and other cruel, inhuman or degrading treatment or punishment.

Any public officer or servant or any other person acting in an official capacity who intentionally inflicts on a person severe pain or suffering, whether physical or mental –

(a) for the purpose of obtaining from him or a third person information or a confession; or

(b) for the purpose of punishing him for an act he or a third person has committed or is suspected of having committed; or

(c) for the purpose of intimidating him or a third person or of coercing him or a third person to do, or to omit to do, any act; or

(d) for any reason based on discrimination of any kind, shall, on conviction, be liable to imprisonment for a term from five to nine years:

Provided that no offence is committed where pain or suffering arises only from, or is inherent in or incidental to, lawful sanctions or measures:

Provided further that nothing in this article shall affect the applicability of other provisions of this Code or of any other law providing for a higher punishment.

Spain

Article 175

The authority or public officer, who abusing his office and outside the cases considered in the preceding Article, attacks the moral integrity of a person, shall be punished with a sentence of imprisonment of two to four years if the attack is serious and of six months to two years imprisonment if it is not.

Georgia⁹

Article 144³ – Degrading or inhuman treatment

1. Degrading or coercing a person, or exposing a person to inhuman, degrading and humiliating conditions as a result of which he/she suffers severe physical and psychological pains, -

shall be punished by restriction of liberty for up to three years or by imprisonment for a term of two to five years.

2. The same act committed:

⁹ Georgia has opted for spelling out a separate article on threats of torture.

Article 144² - Threat of torture “The threat of the creation of the conditions, or of the application of the treatment or punishment specified in Article 144 of this Law, which is carried out for the same purpose, - shall be punished by a fine or restriction of liberty for up to two years”.

a) by an official or a person holding equivalent position;

b) by abusing the official position;

c) repeatedly;

d) against two or more persons;

e) by more than one person;

f) by violating the equality of persons, or due to their race, colour, language, sex, religion, belief, political or other views, national, ethnic, social belonging, origin, place of residence, material status or title;

g) knowingly by the offender against a pregnant woman, a minor, a person detained or otherwise deprived of freedom, a helpless person or a person dependent on the offender materially or otherwise;

h) by contract;

i) for the purpose of taking a hostage,

- shall be punished by imprisonment for a term of four to six years, with or without deprivation of the right to hold an official position or to carry out a particular activity for up to five years.

Note: The period of limitation provided for by Article 71 of this Code shall not apply to the acts prescribed under Articles 144¹ -144³ of the same Code.

Gravity of the crime and range of sanctions

19. The ECtHR have read Article 3 of the ECHR, in particular the obligation to prevent ill-treatment, as comprising the requirement of providing for the appropriate (extreme and serious respectively) gravity and range of sanctions for torture and deliberate ill-treatment. In *Paduret v. Moldova* it specifically stressed its great concern with regard to “the Government's assertion that in Moldova torture was considered an “average-level crime”, to be distinguished from more serious forms of crime and thus warranting reduced sentences. ‘Such a position is absolutely incompatible with the obligations resulting from Article 3 of the Convention, given the extreme seriousness of the crime of torture. Together with the other shortcomings, this confirms the failure of the Moldovan authorities to fully denounce the practice of ill-treatment by the law-enforcement agencies and adds to the impression that the legislation adopted to prevent and punish acts of ill-treatment is not given full preventive effect. As such, the case gives the impression not of preventing any future similar violations, but of being an example of virtually total impunity for ill-treatment by the law-enforcement agencies.’¹⁰

¹⁰ ECtHR judgment of 5 January 2010, para.77.

20. Taking into account the range of sanctions envisaged by the CC articles concerning general crimes involving infliction of injuries, against physical and moral integrity it could be necessary to review **and even further increase the scaling of punishment and gravity of the crime of deliberate ill-treatment** suggested in the most recent draft.
21. As to addressing deliberate ill-treatment coupled with the aggravating circumstances similar to those envisaged for the crime of torture, as defined in the most recent draft (currently Article 143), this could be envisaged in the same way, i.e. providing for them in its further parts.

Statute of Limitations

22. Clemency or leniency measures-linked standards developed on the UN level, in particular those promoted by the CAT concern the impunity and preventive considerations.¹¹ Amnesties, pardons, other measures of clemency or impediments, including statutes of limitations, which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators, including full exemption from criminal or other responsibility due to favourable provisions of legislation on disclosure or repentance, frustrate the aims of effective investigation and combating impunity and should be avoided. The reasoning with regard to these issues is based on the absolute character of the prohibition of torture. This makes it similar to the war and other crimes concerned with international humanitarian law.
23. The key rationale maintained by the CAT in its endeavours to reinforce the standard of lifting any statutes of limitations for torture, including in the concluding observations, concerns the right to an effective redress. In particular it stressed: *“On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them.”*¹²
24. The ECtHR approaches the issue of expiration of statutes of limitation from the angle of effectiveness of investigations and compliance with the procedural limb of Article 3 of the ECHR, in particular the promptness requirement. The Court has also taken a view that: *“... [W]here a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes 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.”*¹³

¹¹ General Comment N2, CAT/C/GC/2, para.5. In terms of other UN bodies see: United Nations, Econ. & Soc. Council, Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

¹² General Comment N3, CAT/C/GC/3, para. 40.

¹³ *Abdülsamet Yaman v. Turkey*, Judgment of 2 November 2004, application no. 32446/96, para. 55.

25. As to the Council of Europe (CoE)'s Committee of Ministers (CM), as the body in charge of monitoring the execution of ECtHR judgments, it has been addressing this issue under individual measures, as well as general ones under the *measures aimed at preventing ineffective investigation into alleged torture*. In para. 7 of its most recent decision adopted at the 1288th meeting (June 2017) (DH) on *Hajrulahu v. "the former Yugoslav Republic of Macedonia"*¹⁴, the CM strongly invited them further to reflect on abrogating the statute of limitation for the crime of torture. It was substantiated by the reference to the measures introduced by other jurisdictions, in particular Moldova.
26. Currently, according to the CC provisions, according to the range of sanctions envisaged by Article 142 that correspond to s/para 1.3 of Article 107 providing for barring criminal prosecution, it amounts to 10 years. This has become a matter for concern for the CoE CM also in the set of execution-related decisions concerning *El-Masri v. "the former Yugoslav Republic of Macedonia"*.¹⁵
27. The best practices suggest that there are two key approaches as to legislative techniques used for lifting the statutes of limitations. The first comprises **specific reference** to the crime of torture as an exception to the principal rule(s) on statutes of limitations suggested **in the general parts (relevant general articles) of Criminal Codes**. Under the second one, the exception in terms of statutes of limitations (their lifting) is **provided for in the specific article establishing the crime of torture**. Both options are appropriate and which to follow depends on the legislative traditions and techniques predominantly used in the jurisdiction concerned. The specific legislative formulations can be illustrated by examples concerning war and other humanitarian law-related crimes.

28. The general provision(s)-based approach has been used in:

Moldova

Article 60 Expiration of statutes of limitation for criminal prosecution

...

8) *Prescription shall not apply to persons who committed crimes against peace and security of mankind, war crimes, or other crimes set forth in international treaties to which the Republic of Moldova is a party.*

Georgia¹⁶

Article 71 - Releasing from criminal liability due to the expiration of the period of limitation

¹⁴ <http://hudoc.exec.coe.int/eng?i=004-6454>

¹⁵ In its decision adopted at its 1243rd meeting December 2015 (DH), the Committee of Ministers noted with regret that due to the passage of time the criminal investigation into the facts of this case had become time-barred and that other measures were therefore called for to provide redress to the applicant. <http://hudoc.exec.coe.int/eng?i=004-6448>

¹⁶ The articles referred in the provisions are: 144¹ Torture; 144² Threatening by Torture; 144³ Inhuman or Degrading Treatment.

...

5¹. *The period of limitation shall not apply to acts envisaged by Articles 144¹-144³ of the current code.*

Lithuania¹⁷

Article 95. Statute of Limitations of a Judgment of Conviction

9. *The following crimes provided for in this Code shall have no statute of limitations:*

...

2) *treatment of persons prohibited under international law (Article 100);*

6) *causing bodily harm to, torture or other inhuman treatment of the persons protected under international humanitarian law or violation of protection of their property (Article 103);*

Croatia¹⁸

Statute of Limitations for Criminal Prosecution

Article 81

...

(2) *No statutory limitation shall apply to the criminal prosecution of the crime of genocide (Article 88), crime of aggression (Article 89), crimes against humanity (Article 90), war crimes (Article 91) and other offences that are not subject to the statute of limitations under the Constitution of the Republic of Croatia or the international law.*

Czech Republic¹⁹

Section 35 Exceptions from Limitation

The lapse of the period of limitation shall not cause expiration of criminal liability:

a) *for criminal offences under Chapter XIII of the Special Part of this Act, except for any criminal offences of Founding, support and promotion of a movement aimed at suppression of human rights and freedoms (Section 403), Expressing Sympathies for Movements Seeking to Suppress Human Rights and Freedoms (Section 404), Denial, Impugnation, Approval and Justification of Genocide (Section 405), including such acts committed in the past that would now meet the criteria of such criminal offences,*

b) *for criminal offences of Subversion of the Republic (Section 310), Terrorist attack (Section 311) and Terror (Section 312), if they were committed under such circumstances that they constitute war crimes or crimes against humanity as specified under regulations of international law,*

c) *for any other criminal offences committed between February 25, 1948 and December 29, 1989, where the upper limit of the sentence of imprisonment amounts to at least ten years, if, due to reasons incompatible with the fundamental principles of the legal order of a democratic State, final conviction or acquittal has not occurred, and for any criminal offences committed by public officials or in association with persecution of an individual or a group of people due to political, racial or religious reasons.*

¹⁷ Does not apply to torture as a standalone crime and it is quoted to exemplify the type of legislative techniques in issue.

¹⁸ See the preceding footnote.

¹⁹ See the preceding footnote.

Estonia²⁰

§ 81. Limitation period of offence

...

(2) Crimes of aggression, crimes of genocide, crimes against humanity, war crimes and criminal offences for which life imprisonment is prescribed do not expire.

Finland²¹

Chapter 8 - Statute of limitations

Section 1 – Time-barring of the right to bring charges (297/2003)

(1) The right to bring charges for an offence for which the most severe sentence is life imprisonment does not become time-barred. (212/2008)

29. The specific article-based option has been used for lifting the statute of limitations in the following European countries:

Denmark

Section 157A

(1) In the determination of a penalty for violation of this Act it shall be considered an aggravating circumstance that the violation has been committed by torture.

(2) A violation of this Act shall be considered to have been committed by torture if it was committed in the performance of Danish, foreign or international public service or duty by inflicting harm on the body or health of another or causing severe physical or mental pain or suffering to another

(1) For the purpose of obtaining information or a confession from another,

(2) For the purpose of punishing or frightening another or forcing another to do, suffer or omit an act or

(3) Due to the subject's political belief, gender, race, skin colour, national or ethnic origin, religious belief or sexual inclination. ”

In the situations enumerated above the statute of limitations has been abrogated.

Turkey

Torture

Article 94- *(1) A public officer who performs any act towards a person that is incompatible with human dignity, and which causes that person to suffer physically or mentally, or affects the person's capacity to perceive or his ability to act of his own will or insults them shall be sentenced to a penalty of imprisonment for a term of three to twelve years.*

(2) If the offence is committed against:

a) a child, a person who is physically or mentally incapable of defending himself or a pregnant

²⁰ See the preceding footnote.

²¹ See the preceding footnote.

woman; or

b) a public officer or an advocate on account of the performance of his duty, a penalty of imprisonment for a term of eight to fifteen years shall be imposed.

(3) If the act is conducted in the manner of sexual harassment, the offender shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years,

(4) Any other person who participates in the commission of this offence shall be sentenced in a manner equivalent to the public officer.

(5) If the offence is committed by way of omission there shall be no reduction in the sentence.

(6) (Added on 11 April 2013 – By Article 9 of the Law no. 6459) No statute of limitation shall apply to this offence.

Applicability of the statute of limitation²²

30. The difficulties with the execution of ECtHR judgments under Article 3 of the ECHR concerning the expiration of statutes of limitations for prosecuting relevant crimes and executing sentences for them involve restrictions related to retroactive application of the legislative amendments on lifting the statutes of limitation for the crime of torture (possibly other forms of serious ill-treatment). These issues are to be differentiated when it comes to identification of violations of the procedural limb of Article 3 from subsequent execution of the ECtHR judgments in terms of individual and general measures. The former has been sufficiently dealt with by the ECtHR in a number of judgments.²³ It is clear in terms linking the procedural limb of Article 3 and the obligation to prevent ill-treatment with the statutes of limitations. The Court has held that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period. Furthermore, the manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is therefore difficult to accept inflexible limitation periods admitting of no exceptions.²⁴

31. As to the execution of ECtHR judgments and remedying the passage of the prescription periods, it is to be reconciled with the principle of legal certainty and Article 7 of the ECHR.²⁵ Unlike for the war and other international law crimes,²⁶ or at least loss of life and torture committed during massive violations of rights, including in the course of

²² The issue has been raised during the discussions with the representatives of the WG. See para. 1 above.

²³ *Šilih v. Slovenia*, ECtHR [GC] judgment of 9 April 2009, application no. 71463/01, paras. 139 – 170.

²⁴ *Mocanu and Others v. Romania*, ECtHR [GC] judgment of 9 April 2009, applications nos. 10865/09, 45886/07, 32431/08, para. 326.

²⁵ See *Coeme and Others v. Belgium*, judgment of 22 June 2000, applications nos. [32492/96](#), [32547/96](#), [32548/96](#), [33209/96](#) and [33210/96](#)

²⁶ See *Kononov v. Latvia*, ECtHR [GC] judgment of 17 May 2010, application no.36376/04, para. 185.

transition from a totalitarian regime to a more democratic system,²⁷ the ECtHR case-law, as it stands, has not definitively suggested that torture in general has obtained the same status. Thus, it could be debatable whether for an individual (implicated government official/agent) it was (should be) sufficiently clear that torture had been punishable without time-limits. Therefore, proceeding with prosecution and eventual conviction and punishment for torture that is time-barred under the domestic legislation,²⁸ even if a new legislation will subsequently lift relevant statutes of limitations and, moreover, apply them retroactively, could be considered, at this stage, as contradicting the principle in issue.²⁹ The best future-oriented solution would be, therefore, **to follow the outlined practice of other jurisdictions of lifting the statute of limitations for torture and other serious ill-treatment in general, as well as apply it retroactively to cover the pending or eventual prosecutions of relevant crimes that will not be time-barred by the time of the amendment in issue.**

32. As to the relevant crimes that are (will be) time-barred by the time of lifting the statutes of limitations, it could be suggested to proceed with their investigation (without prosecuting the perpetrators) in order to comply with the standards under the right to truth.³⁰ As far as it can be ascertained from the Macedonian CPC,³¹ it does not ban initiation or continuation of investigation with regard to a crime beyond the statute of limitation. However, one could consider introducing relevant positive (explanatory) provision in the CPC. As a result, when after an effective investigation, the fact of (time barred) torture or serious ill-treatment will be considered sufficiently proven and perpetrators identified, the procedures against them are to be discontinued due to the expiration of the prescription period(s). At the same time, this could be considered as a new circumstance or the immediate ground for providing further compensation or engaging civil law remedies for the victim(s).

Criminalisation of ill-treatment by private individuals³²

33. As to torture and deliberate inhuman or degrading treatment or punishment by private individuals (not immediately attributable to the state), the ECtHR case law suggests lower

²⁷ See *Association "21 December 1989" and Others v. Romania*, ECtHR judgment of 24 May 2011, application nos. 33810/07, 18817/08, para. 144.

²⁸ Under the current CC it does not make difference in this regard whether the crime of torture was reported prior to the expiration of the prescription period or the failure to proceed with effective investigation has been identified by the ECtHR or any competent judicial body on the domestic level.

²⁹ As to lifting the limitation period with retroactive effect in relation to crimes where it has not expired at the time of the amendment, see the Venice Commission report on retroactive application of statute of limitation (Georgia) as case-study upon questions by the Constitutional Court: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)012-e)

³⁰ See, *El-Masri v. "the former Yugoslav Republic of Macedonia"*, judgment of 13 December 2012, application no.39630/09, Para. 193 of the judgment.

³¹ Article 3 of the CC addresses the substantial criminal law issues. More specifically, it cannot be read as applying to an initiation of the criminal procedure (as specified in Article 19 of the CPC).

³² The issue has been raised during the discussions with the representatives of the WG. See para. 1 above.

standards. It indicates that the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is, in principle, a matter that falls within the domestic authorities' margin of appreciation. It suffices that criminal-law mechanisms are available to the victim and there are no requirements as to a specific criminalization except that the state is liable to conduct effective investigation against any allegation of ill-treatment committed by private individual to establish the facts of the case and identify and, if appropriate, punish those responsible.³³

34. Some jurisdictions go beyond the outlined minimum (lower) standard concerning ill-treatment by private individuals and equal it to ill-treatment immediately attributable to the state (its officials/agents).³⁴ Nevertheless, this approach could be considered as weakening the preventive effect of targeted criminalization of ill-treatment committed by state officials/agents or with their immediate involvement.

³³ *Skorjanec v. Croatia*, application no25536/14, *Šečić v. Croatia*, §§ 50-54 and 66-67, 31 May 2007.

³⁴ E.g. see quoted provisions of the Georgian CC above.

ANNEX I

Draft-amendments to the Criminal Code

Statute of limitation

Article ...

The title of Article 112 “No obsolescence for the crimes of genocide and war crimes” shall be amended to “No obsolescence for the crimes of genocide, war crimes, torture and Ill-treatment in the performance of duty.

In Article 112 after words “foreseen in articles” the following words “in Articles 142 and 143” shall be added.

In article 112 one paragraph is being added “The amendment applies to crimes that have not been obsolete (time-barred) by the time of enactment of the law introducing it with respect to the crimes concerned.’

Torture

Article ...

Article 142 shall be amended, as follows:

- (1) An official person who while performing a duty or any person otherwise acting in an official capacity, or a person instigated by an official person or acting upon his express or tacit consent, intentionally uses force, threatens or has recourse to any other unlawful means or ways to inflict another person particularly severe pain or suffering, whether physical or mental, for such purposes as obtaining from him or a third person a confession or some other information, or punishing him for an act he or a third person has or presumably committed, or causes such suffering for any reason based on discrimination of any kind shall be punished with imprisonment of at least five years.
- (2) If, given the act stipulated in paragraph 1 constitutes a criminal offence, the damaged party has suffered severe bodily harm or other particularly severe consequences or if such an act has been committed due to a bias motive, the offender shall be punished with imprisonment of at least eight years.
- (3) If, given the act stipulated in paragraph 1 constitutes a criminal offence and comprises intentional death consequences to the victim, the offender shall be punished with imprisonment of at least ten years or to life imprisonment.

Ill-treatment in the performance of duty

Article ...

Article 143 shall be amended, as follows:

An official person who while performing a duty or any person otherwise acting in an official capacity, or a person instigated by an official person or acting upon his express or tacit consent, intentionally uses force, threatens or has recourse to any other unlawful means or ways to inflict another person suffering amounting to cruel, inhuman or degrading treatment or punishment, shall be punished with imprisonment of one to five years.

ANNEX II

Country based approach through the case-law of the European Court of Human Rights and general measures for execution of its judgments related to definition of torture and statute of limitation

INTRODUCTION

In a significant number of judgments, the European Court of Human Rights (hereinafter: “the Court”, “the ECtHR”) held that there was a violation of (the procedural limb) of Article 3 of the European Convention on Human Rights (hereinafter: “the Convention”, “the ECHR”). Such finding entailed undertaking of various individual and general measures. *Individual measures* aimed at providing redress to the applicant for the violation suffered, while *general measures* were needed to address more or less important structural problems in order to prevent similar violations to those found or put an end to continuing violations. They imply a change of legislation, of judicial practice or practical measures, as well as the obligation to ensure effective domestic remedies.³⁵

Many cases which concern procedural violations of Article 3 also required a new approach towards the definition of torture and the statute of limitation to be adopted and incorporated into the national criminal legislation. These cases have been placed under enhanced supervision by the Committee of Ministers (hereinafter: “the Committee”, “the CM”) of the Council of Europe, which is charged with the monitoring of the execution of the final judgments rendered by the ECtHR. The enhanced supervision procedure is focused on cases which require urgent individual measures, and most commonly, cases revealing structural and/or complex problems of major importance. It is intended to allow the CM to closely follow progress of the execution of a case, and to facilitate exchanges with the national authorities supporting execution.³⁶

This study will provide a relevant, but not exhaustive list of such cases which were considered or are still pending before the Committee of Ministers and are listed by countries.

DEFINITION OF TORTURE

Italy is the only country discussed below which lacked any definition of torture whatsoever. On the contrary, all other countries presented in the study made certain amendments to their existing definitions in response to the Court’s findings in its respective judgments.

³⁵ 11th Annual Report of the Committee of Ministers 2017, at p.54.

³⁶ 11th Annual Report of the Committee of Ministers 2017, at p.53.

ITALY

The case of *Cestaro v. Italy*³⁷ concerns the violence suffered by the applicant during an operation of the security forces at the end of the G8 summit held in Genoa in July 2001 and the ineffectiveness of the investigation and court proceedings carried out in relation to these events (substantive and procedural violations of Article 3). In the absence of a specific offence in domestic law, the police officers were prosecuted for causing simple and grievous bodily harm, which offences became time-barred. Furthermore, the police officials prosecuted benefitted from the general remission of sentence prescribed in a law of 2006.

The ECtHR noted the structural nature of the problem, specifying that such outcome could only be attributed to the Italian criminal legislation applied in the instant case, which proved both inadequate in terms of the requirement to punish the acts of torture in issue and devoid of any deterrent effect capable of preventing similar future violations of Article 3.

In its judgment, the Court suggested that legal mechanisms should be introduced in the Italian legal system capable of imposing appropriate penalties on those responsible for acts of torture and other types of ill-treatment in breach of Article 3 and preventing them from benefiting from measures incompatible with the case-law of the Court.³⁸

Following the recommendations of the United Nations Committee against Torture (hereinafter: “the UNCAT”) and in response to the Court’s findings, the **bill on the introduction of the crime of torture in the Italian legal system was adopted by the Parliament** on 5 July 2017, after it had been pending for twenty years.³⁹

MOLDOVA

The CM monitored the implementation of a group of 26 ECtHR cases against Moldova with the judgment in *Corsacov v. Moldova* as a leading case.⁴⁰ They mainly concerned ill-treatment and torture in police custody, including with a view to extracting confessions, as well as lack of effective investigations in this respect (substantive and procedural violations of Article 3). The investigation lasted for more than three years, during which period it was closed and re-opened at least twelve times.⁴¹ The Court also found a breach of Article 13, since the criminal investigation concluded that the actions of the police officers were legal and therefore, the applicant did not have an effective remedy to claim compensation.

In relation to the above violations, on 12 October 2012 the Moldovan Parliament adopted a law that amended the Criminal Code in line with the recent Court’s case-law and the UN

³⁷ *Cestaro v. Italy*, Application no. 6884/11, Judgment of 7 April 2015.

³⁸ *Cestaro v. Italy*, Application no. 6884/11, Judgment of 7 April 2015, §246.

³⁹ Its adoption was announced in the Action plan submitted to the Committee of Ministers on 11 April 2016 (DH-DD(2016)481).

⁴⁰ *Corsacov v Moldova*, Application no.18944/02, Judgment of 4 April 2006.

⁴¹ *Corsacov v Moldova*, Application no.18944/02, Judgment of 4 April 2006, §71.

requirements.⁴² These amendments **clarified the legal concept and procedures in cases of torture, degrading and inhuman treatment by establishing a clear definition for each of these concepts.** The amendments also set up severe punishments for such abuses.⁴³

ARMENIA

The Armenian authorities also amended the definition of torture inflicted by State agents laid down in the Criminal Code already in December 2016 in response to the violations found by the ECtHR in *Virabyan v. Armenia*.⁴⁴ In this case the applicant (a member of the opposition) was, while in police custody, subjected to torture (substantive violation of Article 3) and no effective investigation was carried out in that respect (procedural violation of Article 3).⁴⁵

The amendment to the definition of torture was also relevant for the execution of the Court's judgment in *Muradyan v. Armenia*.⁴⁶ The latter concerned the death of the applicant's son, an Armenian military conscript, which was caused as a result of ill-treatment by his superiors and the subsequent failure to provide him with adequate medical assistance, as well as the absence of an effective investigation (both a substantive and a procedural violation of Article 2).

The amended definition of torture envisages that the cases of torture - either committed by private actors or public officials - are subject to public criminal prosecution. Authorities are obligated to investigate into such acts regardless of assertions of reconciliation between the alleged perpetrator(s) and the victim(s), which can be considered as an additional guarantee for ensuring the initiation of criminal proceedings in each such case.⁴⁷

TURKEY

In repeated rulings the Court has identified both a pattern of failure to conduct effective investigations into the acts of torture or other forms of ill-treatment. In many cases concerning the action of Turkish security forces during anti-terrorist operations in the South East of the country (including disappearances, illegal killings, torture and ill-treatment), the CM noted progress made in a series of decisions and interim resolutions over the period 1999-2006.

⁴² Available in Moldovan at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=286230>, and in Russian at <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=286230&lang=2> (last accessed on 15 October 2018).

⁴³ 1208th meeting (23-25 September 2014) (DH), Action plan/ Communication from the Republic of Moldova concerning the *Corsacov group of cases against Republic of Moldova* (Application no. 18944/02) submitted on 19 June 2014, DH-DD(2014)836, at para.62.

⁴⁴ *Virabyan v. Armenia*, Application no. 40094/05, Judgment of 2 October 2012.

⁴⁵ 1310th meeting (March 2018) (DH), Action report (22/02/2018) Communication from Armenia concerning the case of *Virabyan v. Armenia* (Application no. 40094/05), DH-DD(2018)224, at paras. 42-48.

⁴⁶ *Muradyan v. Armenia*, Application no. 11275/07, Judgment of 24 November 2016.

⁴⁷ 1294th meeting (September 2017) (DH), Action plan/ Communication from Armenia concerning the case of *Muradyan v. Armenia* (Application no. 11275/07) submitted on 24 August 2017 (DH-DD(2017)909).

The fight against torture and ill-treatment, which are prohibited under paragraph 3 of Article 17 of the Turkish Constitution, was strengthened with **the increase of the term of penalty by the new Turkish Criminal Code** (“Law no. 5237”) which entered into force in 2005.⁴⁸

GREECE

Makaratzis group of cases concern the use of potentially lethal force by the police in the absence of an adequate legislative and administrative framework governing the use of firearms (violation of positive obligation pursuant to Article 2 to protect life); ill-treatment by police forces (violation of Article 3); treatment amounting to torture (violation of Article 3 in the case of *Zontul*); absence of effective investigations (procedural violations of Article 2); failure to investigate racist motives on the part of the police (violation of Article 14 combined with Article 3), as well as the excessive length of criminal proceedings (violation of Article 6 § 1).

With respect to the execution of these judgments, **the Greek authorities established a committee tasked with examining whether the statutory definition of torture was compatible with the definition in Article 1 of the UN Convention against Torture.**⁴⁹

ABOLITION OF THE STATUTORY TIME-LIMIT

The UNCAT has repeatedly taken the position that **there should be no statutes of limitations for the crime of torture.**⁵⁰ Furthermore, the European Court of Human Rights has frequently stated that “**where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance (...) that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.**”⁵¹

The Court has also held that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period, and amnesties and pardons should not be tolerated in such cases.⁵² Furthermore, the manner in which the limitation period is applied must be compatible with the requirements of the Convention. It is, therefore, difficult to accept inflexible limitation periods admitting of no exceptions.⁵³

⁴⁸ For more information, see <http://www.justice.gov.tr/duyurular/basinaciklamasi13aralik.pdf>.

⁴⁹ See Notes for *Makaratzis v. Greece* for the 1302nd meeting (5-7 December 2017).

⁵⁰ UNCAT, General Comment N°2, § 5.

⁵¹ See *Paduret v Moldova*, Application no. 33134/03, Judgment of 5 January 2010, §73; *Alikaj and Others v Italy*, Application no. 47357/08, Judgment of 29 March 2011, §99; *Abdidsamer Yaman v Turkey*, Application no. 32446/96, Judgment of 2 November 2004, §55; *Ali and Ayse Duran v. Turkey*, Application no. 42942/02, Judgment of 8 April 2008, §69.

⁵² See *Yeter v. Turkey*, Application no. 33750/03, Judgment of 13 January 2009, § 70; and *Association “21 December 1989” and Others v. Romania*, Applications nos. 33810/07 and 18817/08, Judgment of 28 November 2011, § 144.

⁵³ See, *mutatis mutandis*, *Röman v. Finland*, Application no. 13072/05, Judgment of 29 January 2013, § 50.

MOLDOVA

In response to violations found in *Corsacov v. Moldova*, **the Moldovan authorities have removed prescription for cases of torture and ill-treatment.**

Furthermore, certain articles of the Criminal Code were also amended having the scope to avoid impunity by excluding any possibility for suspension of punishments or applying other alleviating measures for torture and ill-treatment crimes. For example, prior to the amendments, Article 60(8) of the Criminal Code stipulated that “[t]he limitation period shall not apply to persons who commit crimes against the peace and security of humanity, war crimes, or other crimes set forth in international treaties to which the Republic of Moldova is a party.” Its scope of application was extended so as to cover the acts of torture. Also, it was laid down that the amnesties laws cannot be applied for such crimes.⁵⁴

This legislative development was welcomed by the CM, which “noted with satisfaction that the Moldovan authorities have introduced important legislative changes aimed at fighting impunity and reinforcing guarantees against ill-treatment”.⁵⁵

ITALY

The violation of the procedural limb of Article 3 in *Cestaro v. Italy* was found given the statute-barring of the offences of simple and grievous bodily harm and the partial remission of sentence applied in favor of the officers convicted. Also in *Alikaj and Others v. Italy*,⁵⁶ the Court held that “time-barring is ... unacceptable... because it has the effect of blocking conviction”.⁵⁷

At its 1280th DH meeting in March 2017, the CM regretted that fresh investigation into the acts of torture suffered by the applicant in *Cestaro v. Italy* was no longer possible due to the statutory limitations. The Committee noted that although the draft bill envisaged for the crime of torture a limitation period of twice that generally applied, it lacked provisions capable of ensuring that the rules on the statute of limitation for these acts are in compliance with the Court’s case-law and that the perpetrators of acts of torture would not benefit from measures of clemency.

TURKEY

The prescription periods in Turkey were first prolonged to prevent impunity and they have been then totally dropped for more serious crimes (i.e. torture). With Article 9 of the Law no. 6459 which was added on 11 April 2013, Article 94 of the Criminal Code of

⁵⁴ 1208th meeting (23-25 September 2014) (DH), Action plan/ Communication from the Republic of Moldova concerning the *Corsacov group of cases against Republic of Moldova* (Application no. 18944/02) submitted on 19 June 2014, DH-DD(2014)836, at para.63.

⁵⁵ 1208th meeting (23-25 September 2014) (DH), Decision on cases no. 12 (*Corsacov group against Republic of Moldova*), paragraph 5.

⁵⁶ *Alikaj and Others v. Italy*, Application no. 47357/08, Judgment of 29 March 2011, § 108.

⁵⁷ *Cestaro v. Italy*, Application no. 6884/11, Judgment of 7 April 2015, §225.

Turkey, which incriminates torture, was changed in its paragraph 6 so as to prescribe that “[no] statute of limitation shall apply to this offence.”⁵⁸

However, the CM noted that the Turkish legislation needed further reinforcement and/or effective implementation to ensure that investigations are carried out in compliance with the Convention standards. The CM urged the authorities to consider all necessary measures to ensure that suspension of sentences, postponement of pronouncement of a decision and prescription periods are not applicable to sentences imposed on members of security forces convicted on account of crimes from the *Bati and Others v. Turkey*⁵⁹ group of cases. Consequently, a working group was set up to work on the measures that could be taken in this respect, by comparing the Turkish law and practice with the law and practice of other States.⁶⁰

BULGARIA

The Bulgarian authorities did not remove prescription of torture and ill-treatment, but the obligation to automatically terminate the criminal proceedings after the expiry of a certain period of time was abolished. This was done through numerous measures taken in the execution process related to *Angelova and Iliev v. Bulgaria*⁶¹ and 7 other cases. They concerned the failure to investigate deaths, rapes or alleged ill-treatment perpetrated by private individuals (procedural violations of Articles 2 and 3). In many cases, the ineffectiveness of the investigation was due, to a large extent, to extraordinary periods of inactivity of the investigating authorities.⁶²

Given that it was impossible to reopen the proceedings due to the expiration of the statutory limitation period, the authorities envisaged a number of general measures which aimed at improving the effectiveness of criminal proceedings. They included amendments to the Judiciary Act of July 2016, as well as amendments to the Code of Criminal Procedure in 2017, which introduced a new procedure for accelerating criminal proceedings which both at the pre-trial and trial phase.⁶³ As a result, the CM adopted a Final resolution⁶⁴ thus closing the

⁵⁸ Human Rights Watch welcomed this step since it argued strongly against the application of statutes of limitations for serious human rights abuses, whose operation was identified as a key obstacle to accountability for these crimes. For more details, see *Turkey: Strengthen Law Reform Bill*, published on 25 March 2013, Available at <https://www.hrw.org/news/2013/03/25/turkey-strengthen-law-reform-bill> (last accessed on 16 October 2018).

⁵⁹ These cases mainly concern ineffectiveness of investigations and serious shortcomings in subsequent criminal and/or disciplinary proceedings initiated against members of security forces following the death of the applicants' next-of-kin or torture or ill-treatment of the applicants (violations of Articles 2, 3 and 13). The leading case in this group is *Bati and Others v. Turkey*, Applications nos. 33097/96 and 57834/00, Judgment of 3 June 2004.

⁶⁰ See Notes for the 1265th meeting (20-21 September 2016).

⁶¹ *Angelova and Iliev v. Bulgaria*, Application no. 55523/00, Judgment of 26 July 2007.

⁶² Additionally, the leading case in this group, *Angelova and Iliev* and two other cases from this group addressed the failure of the authorities to investigate a possible racist motive (violation of Article 14 in conjunction with Article 2).

⁶³ 1302nd meeting (December 2017) (DH), Action report/ Communication from Bulgaria concerning the case of *Angelova and Iliev v. Bulgaria* (Application no. 55523/00) submitted on 25 October 2017 (DH-DD(2017)1224).

⁶⁴ Resolution CM/ResDH(2017)383, Execution of the judgments of the European Court of Human Rights, Eight cases against Bulgaria, adopted by the Committee of Ministers on 22 November 2017 at the 1300th meeting of the Ministers' Deputies.

examination of this group of cases. These and other similar measures were also considered in the context of the examination of *S.Z./Kolevi* group of cases.⁶⁵

ROMANIA

*Association “21 December 1989” and Others*⁶⁶ and 12 similar cases against Romania concern significant delay in the conduct of the criminal investigations into violent crackdowns on the anti-governmental demonstrations in December 1989, after the overthrow of then Head of State, Nicolae Ceaușescu and the fall of the Communist regime. Such delays resulted in a risk of statutory limitation. As a consequence, a substantive and procedural violation of Articles 2 and 3 of the Convention were found. The Court indicated that it was for Romania to conduct “... **an effective investigation which is not terminated by application of the statutory limitation of criminal liability...**”⁶⁷

*Mocanu and Others v Romania*⁶⁸ concerned similar violations of Articles 2 and 3, which stemmed from the same historical events. In this case, the investigation was terminated in 2011 by application of the statutory limitation period, which was also commented in the majority judgment.

The above cases did not result in lifting the statute of limitation on the crime of torture in Romania, but other general measures came out of these judgments, which were of nature to prevent similar shortcomings to those identified by the Court. In their submission to the CM, the NGOs criticized the draft Amnesty Law which was proposed in 2008 in respect of the impugned acts. They further brought to the Committee’s attention that in absence of reforms, there is a risk that the pending criminal cases themselves would be terminated on account of a time-bar.⁶⁹

As to the violation of Article 2, it is worth noting that **the statutory limitation period for intentional offences against life in Romania was abolished already in 2012**, allowing the continuation of the investigations at issue in some of these cases.⁷⁰

RUSSIA

As regards many Chechen cases, the CM assessed that although the prescription was not intervened, it was a sensitive matter as investigations did not progress. This was also valid for

⁶⁵ *S.Z. v. Bulgaria*, Application no. 29263/12, Judgment of 3 March 2015; *Kolevi v. Bulgaria*, Application no. 1108/02, Judgment of 5 November 2009.

⁶⁶ *Association “21 December 1989” and Others v. Romania*, Applications nos. 33810/07 and 18817/08, Judgment of 28 November 2011.

⁶⁷ *Association “21 December 1989” and Others v. Romania*, Applications nos. 33810/07 and 18817/08, Judgment of 28 November 2011, §194.

⁶⁸ *Mocanu and Others v. Romania*, Applications nos. 10865/09, 45886/07 and 32431/08, Judgment of 17 September 2014.

⁶⁹ 1136th DH meeting (March 2012), Communication from a NGO (Open Society Justice Initiative and the Romanian Helsinki Committee (APADOR-CH)) (06/02/12)) in the case of *Association “21 December 1989” and Others* against Romania (Application No. 33810/07) and reply of the Government, DH - DD(2012)190.

⁷⁰ 11th Annual Report of the Committee of Ministers 2017, at p.136.

the *Khashiyev and Akayeva* group of cases,⁷¹ which included 221 cases concerning actions of the Russian security forces during anti-terrorist operations which took place in the Chechen Republic between 1999 and 2006. The great majority of the violations established by the Court concerned enforced disappearances, but also unjustified use of force, unacknowledged detentions, torture and ill-treatment, lack of effective investigations into the alleged abuses and absence of effective domestic remedies, unlawful search, seizure and destruction of property (violations of Articles 2, 3, 5, 6, 8 and Article 1 of Protocol No. 1 to the Convention).

The Russian authorities envisaged numerous measures for implementation of these judgments, but results reported have been recognized by the CM as insufficient. In addition, the Committee expressed its concern that as time was passing, many crimes may have become time-barred. The CM stressed that the prescription period hinges on the classification of the crime.⁷² It urged the authorities to classify disappearance as presumed premeditated murder with a long, possibly even indefinite prescription period, and not merely as presumed kidnapping with a fixed 15 year prescription period.⁷³ This was in line with the Court's findings in *Aslakhanova and Others*.⁷⁴

In its last decision of September 2018, the CM **“... stressed anew, in view of the many serious human rights violations identified, the importance of preventing impunity, and called on the competent authorities to use all possible means to reinvigorate investigations to overcome the obstacles created by the passage of time and ensure that alleged crimes are characterized so as to prevent undue prescription of criminal responsibility, in particular as regards the gravest crimes”**.⁷⁵ However, to this date there is no information whether the Russian authorities have taken any measures acting in compliance with this request of the CM.

GREECE

In response to the *Makaratzis* group of cases discussed above **the Greek authorities decided to “re-set” the prescription period in disciplinary proceedings** to the time of the Court's judgments.

STATUTE OF LIMITATION IN RELATION TO THE MACEDONIAN CASE-LAW

*El-Masri*⁷⁶

⁷¹ The leading case in this group is *Khashiyev and Akayeva v. Russia*, Applications nos. [57942/00](#) and [57945/00](#), Judgment of 24 February 2005.

⁷² 11th Annual Report of the Committee of Ministers 2017, at p.138.

⁷³ 10th Annual Report of the Committee of Ministers 2016, at p.130.

⁷⁴ 1236th meeting (24 September 2015) (DH), CM decision in the case of *Khashiyev and Akayeva v. the Russian Federation* (Application No. 57942/00).

⁷⁵ 1324th meeting (18-20 September 2018) (DH), CM Decision CM/Del/Dec(2018).

⁷⁶ *El-Masri v. “the former Yugoslav Republic of Macedonia”*, Application no. 39630/09, Grand Chamber Judgment of 13 December 2012.

In this Grand Chamber case, the Court found violations of Articles 3, 5 and 13, Article 13 in conjunction with Article 8. It concerned the secret “rendition” operation during which the applicant was arrested, held *incommunicado* in isolation, questioned and subjected to inhuman and degrading treatment in Skopje and then transferred to CIA agents who brought him to a secret detention facility in Afghanistan, where he was further ill-treated for over four months. The Court also established procedural violations of Article 3 (lack of an effective investigation into the alleged ill-treatment) and Article 5 (concerning the alleged arbitrary detention).

As regards the execution, the CM noted with regret that due to the passage of time the criminal investigation into the facts of this case had become time-barred and that other measures were therefore called for to provide redress to the applicant.⁷⁷

In response to the CM’s decisions,⁷⁸ on 26 March 2018 the Minister of Foreign Affairs issued a written apology to the applicant expressing unreserved regret for the tremendous suffering and damage inflicted on him as a result of the improper conduct of the authorities. The Minister of the Interior issued a binding instruction addressed to law enforcement and intelligence agents conveying the message of zero tolerance of ill-treatment and torture by stating that any excessive force or torture shall be punished. His message was endorsed in the public statements of the Prime Minister and the then Minister of Justice.⁷⁹ The CM noted that the apology constituted public acknowledgment of the facts, acceptance of the State’s responsibility and an avenue for providing redress to the applicant. Moreover, the authorities complied with the CPT’s recommendation⁸⁰ to deliver a formal statement of zero tolerance of torture and ill-treatment at the highest political level.⁸¹

Additionally, the Macedonian authorities undertook legislative, training and awareness-raising and a number of other general measures to ensure the proper handling of similar investigations by the prosecution authorities. They also increased the maximum term of imprisonment from five to eight years for cases of torture by law-enforcement and intelligence officials (in 2009), set a three-month deadline for the prosecutor to take a decision on a criminal complaint and introduced a right to appeal a prosecutor’s decision to a higher prosecutor (in 2010).

The authorities also took steps to develop a legislative framework for setting up a comprehensive external oversight mechanism. To this end, in early 2018 the Assembly amended the Law on Internal Affairs, the Law on the Police and the Law on the Ombudsman,

⁷⁷ 1243rd meeting (8-9 December 2015) (DH), *El-Masri v. “the former Yugoslav Republic of Macedonia”* (Application no. [39630/09](#)).

⁷⁸ 1302nd meeting (5-7 December 2017) (DH)H46-29, *El-Masri v. “the former Yugoslav Republic of Macedonia”* (Application no. [39630/09](#)), CM/Notes/1302/H46-29, at p. 6.

⁷⁹ See Notes for *El-Masri v. “the former Yugoslav Republic of Macedonia”* for the 1318th meeting (5-7 June 2018).

⁸⁰ UN Committee Against Torture, Concluding Observations on the third periodic report of the former Yugoslav Republic of Macedonia, 5 June 2015, CAT/C/MKD/CO/3, (CPT/Inf(2016)8, § 13).

⁸¹ See Notes for *El-Masri v. “the former Yugoslav Republic of Macedonia”* for the 1318th meeting (5-7 June 2018).

while the amendments to the Law on the Public Prosecution Office and to the Law on the Courts were adopted on 30 October 2018.⁸²

In its submissions to the CM, the Open Society Justice Initiative suggested that the **Macedonian domestic law should be amended so as to remove all impediments and procedural barriers to the reopening of criminal investigation, including the limitation period.** It was substantiated by reference to **Article 112 of the Criminal Code which envisages exceptions from the limitation period where offences are committed contrary to international law, such as crimes of genocide and war crimes.** It stipulates that the criminal prosecution and the execution of punishment do not become obsolete for crimes foreseen in Article 403 to 408, as well as for crimes for which no obsolescence is foreseen with ratified international convention. It was also recalled that apart from the UN Convention against Torture, the country is a party to several international instruments which provide a more than adequate basis for setting aside the limitation period and undertaking proper, effective investigations.⁸³

Hajrulahu

Another case pending before the CM under the enhanced supervision procedure is *Hajrulahu*.⁸⁴ It concerned the applicant's ill-treatment at the hands of the police special security forces during his secret *incommunicado* detention for three days in August 2005 in an extraordinary place of detention outside any judicial framework, which was covertly organized and executed by the security forces (a violation of Article 3 in its substantive limb). Such treatment was used intentionally with the aim of extracting a confession about the applicant's involvement in a bomb incident and it amounted to torture.⁸⁵ The case also concerned the unfairness of the impugned trial, due to the use of the applicant's confession, obtained under duress (violation of Article 6 § 1). In addition, the Court established a procedural violation of Article 3, given the authorities' failure to investigate the applicant's allegations of ill-treatment at the hands of the special police.

During the execution, the Macedonian authorities took a number of general measures, including those mentioned above in the context of *El-Masri*. Following the Court's judgment, the competent public prosecutor rejected the applicant's criminal complaint, on the ground that, under Article 142 (1) of the Criminal Code, the criminal prosecution had become time-barred on 19 August 2015, as the statute of limitation in respect of torture was set at ten years.

In June 2017, the CM regrettably noted that the expiration of the statute of limitation precluded reopening of the investigation into the acts of torture suffered by the applicant. The Committee furthermore recalled that, pursuant to the Court's well-established case-law, **states are under a duty to investigate acts of torture and it is therefore deplorable when an**

⁸² For more details, see the Revised action plan (DH-DD(2018)384) concerning *El-Masri v. "the former Yugoslav Republic of Macedonia"*, submitted on 11 April 2018 for the 1318th meeting (June 2018) (DH).

⁸³ 1273th meeting (6-8 December 2016) (DH), Communication/ Rule 9 Submission from a NGO (Open Society Justice Initiative) submitted on 13 September 2016) in the case of *El-Masri against "the former Yugoslav Republic of Macedonia"* (Application no. 39630/09), DH-DD(2016)1082, at p.7.

⁸⁴ *Hajrulahu v. "the former Yugoslav Republic of Macedonia"*, Application no.37537/07, Judgment of 29 October 2015.

⁸⁵ *Hajrulahu v. "the former Yugoslav Republic of Macedonia"*, Application no.37537/07, Judgment of 29 October 2015, § 102.

investigation into torture inflicted by special police forces is frustrated as a result of the statutory limitation of criminal liability. In addition, the CM strongly invited the Macedonian authorities to reflect on abrogating the statute of limitation for the crime of torture with reference to other member States which have removed the statute of limitation in respect of the crime of torture, as well as the *Corsacov v. Moldova* group of cases.⁸⁶

Other Article 3 cases in respect of “the former Yugoslav Republic of Macedonia”

Some general measures taken or envisaged with a view to the execution of the judgments in *El-Masri* and *Hajrulahu*, may also be of great relevance for the *Kitanovski* group of cases.⁸⁷ These cases concern the applicants’ inhuman and/or degrading treatment at the hands of the police during their arrest, questioning or transfer to a psychiatric hospital (violations of Article 3 in substantive aspect). The cases of *Andonovski*, *Asllani* and *Kitanovski* furthermore concern the lack of an effective investigation into the applicants’ allegations of their ill-treatment in hands of the police (violations of Article 3 in its procedural limb).

The adoption of a more flexible approach towards the statutory limitation periods might particularly affect the execution of the ECtHR judgment in *Andonovski*, where following examination of the facts, the competent public prosecutor concluded that the criminal prosecution had become time-barred on 17 September 2014.

⁸⁶ See Notes for *Hajrulahu v. “the former Yugoslav Republic of Macedonia”* for the 1288th DH meeting (6-7 June 2017).

⁸⁷ This group consists of the following four cases in respect of “the former Yugoslav Republic of Macedonia”: *Kitanovski*, Application no. [15191/12](#), Judgment of 22 January 2015; *Andonovski*, Application no. 24312/10, Judgment of 23 July 2015; *Asllani*, Application no. 24058/13, Judgment of 10 December 2015 and *Ilievska*, Application no. 20136/11, Judgment of 7 May 2015.