



**INVESTIGATION INTO  
ALLEGED ILL-TREATMENT  
CONTRARY TO ARTICLE 3  
OF THE EUROPEAN  
CONVENTION ON  
HUMAN RIGHTS  
IN UKRAINE**

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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# ABBREVIATIONS

**Agent's office**

Secretariat of the Government Agent in Charge of the Cases at the European Court of Human Rights at the Ministry of Justice of Ukraine

**CPC**

Criminal Procedure Code

**European Convention**

European Convention on Human Rights

**European Court**

European Court of Human Rights

**OPG**

Office of the Prosecutor General of Ukraine

**Procedural Oversight Department**

Department for Combating Human Rights Violations in the Law Enforcement and Penitentiary of the Office of the Prosecutor General of Ukraine

**SBI Law**

Law of Ukraine "On the State Bureau of Investigation"

**The Strategy**

Counter-Torture in the Sphere of Criminal Justice Strategy

**URPI**

Unified Register of Pre-trial Investigations

**SBI**

State Bureau of Investigation

**CM**

Committee of Ministers

## EXECUTIVE SUMMARY

This Report is based on research into how well legal provisions, policies and organisational arrangements of relevance for investigations into alleged ill-treatment by law enforcement officers in Ukraine are being put into practice. As such, it is thus concerned with the implementation by Ukraine of the obligation to conduct an effective investigation into alleged ill-treatment contrary to Article 3 of the European Convention on Human Rights, where such ill-treatment is claimed to have been inflicted by law enforcement officers.

The Report first explains the methodology used, which was based on a combination of desk and field research, with the latter seeking to establish the experience and perspectives of those who play, or should play, a part in the conduct of investigations into ill-treatment, as well as those who have an interest in the way in which investigations are conducted.

It then outlines the legal and organisational framework relating to the prohibition of ill-treatment, the requirement to conduct an investigation into it, and the bodies responsible for conducting such an investigation, before setting out the findings of the research.

The research found that there were some signs both of a decrease in the occurrence of ill-treatment contrary to Article 3 and of more instances in which allegations of this having occurred being sent to the courts.

Nonetheless, it also found that not only are there attempts to evade the inadmissibility, under the CPC, of evidence obtained through ill-treatment by resorting to different strategies involving psychological pressure, but it is also clear that there are still instances where confessions are sought using force, and when excessive force is used to apprehend suspects.

Furthermore, there are shortcomings with respect to the legal and institutional framework, notably as regards: coverage by offences in the Criminal Code of all aspects of prohibition of ill-treatment in Article 3; the delay in making a permanent appointment to the position of Director of the State Bureau of Investigation; delays in conducting investigations; evidence being concealed, damaged and destroyed; insufficient focus on cases of alleged ill-treatment by, and insufficient specialisation of investigators; inadequate cooperation in the relationship between investigators and prosecutors; failure to substantiate decisions to close investigations and to prosecute, and insufficient understanding by investigators and prosecutors of the effect of ill-treatment on those who have been subjected to it.

In the light of these shortcomings identified and the concern expressed by the Committee of Ministers about the execution of judgments in which violations of Article 3 have been found by the European Court, the Report sets out a series of measures with respect to law, practice and training that need to be taken as a matter of urgency.

## A. INTRODUCTION

1. This Report is based on research into how well legal provisions, policies and organisational arrangements of relevance for investigations into alleged ill-treatment by law enforcement officers in Ukraine are being put into practice.
2. It is thus concerned with the implementation by Ukraine of the obligation to conduct an effective investigation into alleged ill-treatment contrary to Article 3 of the European Convention on Human Rights (“the European Convention”), where such ill-treatment is claimed to have been inflicted by law enforcement officers.
3. Whenever an individual raises an arguable claim that s/he has suffered treatment infringing Article 3 at the hands of such officers or other agents of the State, this obligation requires that there should be an investigation that is capable of leading to the identification and punishment of those responsible.
4. Such an investigation will only be regarded by the European Court of Human Rights (“the European Court”) as effective for this purpose where those conducting it are independent and impartial, the investigation itself is promptly undertaken, thorough and competent, it involves the alleged victim(s) in the relevant proceedings and it is subject to public scrutiny<sup>1</sup>. Moreover, even in the absence of an express complaint, such an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred<sup>2</sup>.
5. The violation of the requirements for an effective investigation will not be dependent upon there actually having been any infliction of ill-treatment as the obligation under Article 3 arises once an arguable claim of ill-treatment has been made or there are sufficiently clear indications that serious ill-treatment might have occurred<sup>3</sup>.
6. Most problems in fulfilling these requirements relate to the steps taken (or not taken) by law enforcement officers and prosecutors but they can also arise in the course of proceedings in the courts, either the ones in respect of the alleged victim(s) or the alleged perpetrator(s).
7. The issue of the full implementation of the general measures required for the execution of the judgments against Ukraine in which the European Court has found that there had not been an effective investigation into alleged ill-treatment by state agents remains pending before the Committee of Ministers of the Council of Europe<sup>4</sup>.
8. The Report first explains the methodology used in the research.
9. It then outlines the legal and organisational framework relating to the prohibition of ill-treatment, the requirement to conduct an investigation into it, and the bodies responsible for conducting such an investigation.
10. Thereafter the Report sets out the findings of the research, before drawing conclusions from them and making recommendations.
11. The Report has been prepared by international consultant Jeremy McBride<sup>5</sup> at the request of the Council of Europe pursuant to the latter’s projects “Human Rights Compliant Criminal Justice System in Ukraine” and “Supporting Institutions to Combat Ill-Treatment in Ukraine”.

<sup>1</sup> See, e.g., *El-Masri v. “the former Yugoslav Republic of Macedonia”* [GC], no. 39630/09, 13 December 2012, at paras. 183-185 and *Mocanu and Others v. Romania* [GC], no. 10865/09, 17 September 2014, at paras. 318-326.

<sup>2</sup> *7 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia*, no. 71156/01, 3 May 2007, at para. 97.

<sup>3</sup> In order to keep the text simple, “alleged ill-treatment” should be understood – unless the contrary is indicated – to cover both situations in which an arguable claim of ill-treatment has been made or there are sufficiently clear indications that such ill-treatment might have occurred.

<sup>4</sup> See the latest update on implementation at <https://hudoc.exec.coe.int/eng#%7B%22EXECCollection%22:%5B%22CEC%22%22%22EXECTitle%22:%5B%22kaverzin%22%22%22EXEClntifier%22:%5B%22004-31569%22%22%7D>.

<sup>5</sup> Barrister, Monckton Chambers, London.

## B. METHODOLOGY

12. The research was conducted from October 2020 to September 2021 and involved two phases, one based on desk research and the other taking the form of field research, supplemented by statistical analysis and case studies.
13. The desk research comprised: an analysis of all the judgments by the European Court finding that there had not been an effective investigation into alleged ill-treatment by police and other law enforcement officers in Ukraine; a review of the relevant legislation for investigation into alleged ill-treatment; an examination of the recent practice of the courts and of the statistical data prepared for both the courts and the Office of the Prosecutor General of Ukraine, and assessed existing policy and practice relevant to investigation of ill-treatment.
14. The field research has sought, through interviews and focus group meetings, to establish the experience and perspectives of those who play, or should play, a part in the conduct of investigations into ill-treatment, as well as those who have an interest in the way in which investigations are conducted.
15. In particular, it sought to gather an appreciation of: (a) the perspective of the different actors and stakeholders concerned as to the efficacy of what has been done; (b) the challenges that they face in fulfilling the requirements for conducting effective investigations in respect of alleged ill-treatment and (c) any tendencies that there might be as regards the significance of gender in respect of both the infliction of ill-treatment and the actors responsible for fulfilling the effective investigation requirement (i.e., investigators, judges and prosecutors). At the same time, it sought to establish whether there was now actually less ill-treatment committed by law enforcement officers or allegations in respect of them are simply not being made or registered.
16. The interviews and focus group meetings were with several persons for each set of actors/stakeholders (namely, 8 investigators of the State Bureau of Investigation (“the SBI”), 4 heads of SBI investigative units, 13 prosecutors carrying out procedural-oversight in torture cases on regional and local levels, 3 prosecutors working in the Department for Combating Human Rights Violations in the Law Enforcement and Penitentiary (“the Procedural Oversight Department”), 11 defence lawyers, 13 forensic doctors working with the criminal justice system, 11 judges<sup>6</sup>, and 5 representatives of non-governmental organisations who work on ill-treatment cases) working in Kyiv and at least four other regions. Their selection was mainly done by their respective institutions<sup>7</sup> - after explaining to them the purpose of the interviews - but, in the case of some judges and lawyers, the selection was by the national experts by reference to a mixture of availability, professional acquaintance and random selection.
17. In addition, there were interviews with the Deputy Head of the SBI, the Deputy Prosecutor General in charge of ill-treatment cases, the Head of the Procedural Oversight Department, the Head of the Main Investigative Division of the SBI and staff in the Agent’s office at the Ministry of Justice on the execution of judgments of the European Court (“the Agent’s office”).
18. The regions concerned were Donetsk, Kharkiv, Dnipro and Lviv. In choosing them, account was taken both of the need for geographical diversity, as well as of the existence of significant problems in conducting effective investigations, which was based on the ratio of cases of alleged ill-treatment per head of population rather than their mere volume.
19. In respect of the interviews with investigators and prosecutors, those with managers and those being managed were conducted separately, in order to avoid any undue influence in the response of the latter.
20. The interviews with judges were not expected to afford a representative picture of the entire judiciary but the answers given by them can give some perspective on the answers given by investigators and prosecutors.
21. For each set of actors/stakeholders there were separate sets of questions that took into account their different roles and responsibilities. In addition, these questions were open-ended, allowing for a qualitative assessment of the responses and they included provision for cross-checking information provided.

<sup>6</sup> One was from an appellate court and the others were all first instance judges.

<sup>7</sup> e.g., the SBI for investigators, the National School of Judges of Ukraine for most judges, the Coordination Centre for Legal Aid Provision for most lawyers, the OPG for prosecutors and the Main Forensic Bureau of Ukraine for forensic doctors.



22. The interviews and focus group meetings with each set of actors/stakeholders were conducted by the Council of Europe national consultants Markiyana Bem, Andriy Sliusar, Vyacheslav Svirets and Yevhen Kravchuk. The other interviews were conducted by the author of the Report with, in some cases, Yevhen Kravchuk.
23. In addition, in order to give some context to the responses given in the interviews and focus groups, four studies were made of the progress of certain cases involving alleged ill-treatment in the regions concerned, namely two closed cases<sup>8</sup> and two cases pending before courts<sup>9</sup>, as well as an analysis of the available and relevant statistical data for them. The cases for the studies were recent ones selected and provided by the OPG, in the light of the considerations seen as indicated as important for their analysis<sup>10</sup>.
24. None of the conclusions drawn from the case studies should, however, be seen as entailing any assessment of the effectiveness of the investigations that had been undertaken in the cases concerned.

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<sup>8</sup> One from Mykolaiv region and the other from Zaporizhzhia region. The former case concerned an incident in December 2019, with the investigation beginning that month and the case being closed in November 2020. The latter case concerned an incident in August 2019, with the investigation starting in November 2019 and the case being closed in December 2020. Both cases were closed by the SBI.

<sup>9</sup> The pending ones are Case A (which concerned an incident in February 2018 in Odesa region, with the investigation commencing that month and an indictment being sent to the court in December 2020) and Case B (which concerned an incident in May 2020 in Kyiv region, with the investigation commencing that month and an indictment being sent to the court in December 2020).

<sup>10</sup> Thus, the aim of the studies was to track the progress from start to finish of the investigation of allegations of ill-treatment, with the following details seem particularly pertinent: the nature of the events alleged to involve ill-treatment, the place where they occurred and the alleged perpetrator(s); how the case was brought to the attention of the authorities; the delay between the alleged event and both (a) the recording of the allegation in the register and (b) the first investigative actions taken; the different investigative actions that were taken and the extent to which these produced results (whether supportive of the allegation or otherwise); the noting in the record of any difficulties in the conduct of the investigation and whether these could be resolved; the interval between the commencement of the investigation and the taking of a decision either to discontinue it or to bring a prosecution; the reasoning of the decision either to discontinue the prosecution or to bring a prosecution; the outcome of any prosecution brought in terms of (a) the offence concerned, (b) a conviction or acquittal and (c) any penalty imposed; the interval between the decision to prosecute and the conclusion of the first instance proceedings; the extent to which there was any evolution in the course of the whole process as to the manner in which the alleged ill-treatment was characterised as an offence under the Criminal Code; whether there was any appeal in the event of a conviction; and the extent to which it is possible to establish the involvement of the alleged victim in the proceedings and whether s/he was assisted by a lawyer or anyone else.

## C. LEGAL AND ORGANISATIONAL FRAMEWORK

25. The legal and organisational framework relevant for the investigation of alleged ill-treatment contrary to Article 3 of the European Convention is founded on certain provisions in the Criminal Code and the Criminal Procedure Code (“the CPC”), the Law of Ukraine “On the State Bureau of Investigation” (“the SBI Law”) and the establishment within the OPG of the Procedural Oversight Department<sup>11</sup>.

### 1. Criminal law and procedure

26. The crimes in the Criminal Code that have been the focus of investigations into alleged ill-treatment are: the infliction of torture contrary to Article 127 and excess of authority or official powers by law enforcement officers contrary to Article 365.

27. Paragraph 1 of Article 127 defines “torture” as:

wilfully causing severe physical pain or physical or mental suffering by way of battery, martyrizing or other violent actions for the purpose of forcing the victim or any other person to commit involuntary actions, including obtaining there from or any other individual information or confession, punishing him or any other person for acts he or such other person committed or for acts of which he or such other person is suspected, as well as for the purpose of intimidating or discriminating him or others.

This definition –is not sufficient to cover all forms of inhuman and degrading treatment proscribed by Article 3 of the European Convention.

28. Moreover, the definition is not fully compliant with the formulation in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>12</sup>. In particular, it omits one of the motives for the act, “coercing him ... or for any reason based on discrimination of any kind” and also omits an element of the official involvement in the acts concerned, namely, “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

29. The offence in Article 127.1 is punishable by imprisonment for a term of two to five years.

30. There is also an aggravated form of torture in the second paragraph of Article 127, namely, where the actions concerned are “repeated or committed by a group of persons upon prior conspiracy, or based on racial, national or religious intolerance”, which, to some extent, overlaps with an aggravated form of intentional infliction of grievous bodily harm in Article 121(2) which is directed to the:

intentional grievous bodily harm caused by a method characterized by significant torture, or by a group of persons, and also for the purpose of intimidating the victim or other persons, or based on racial, national and religious intolerance, or committed as a contracted offense, or which caused death of the victim<sup>13</sup>.

<sup>11</sup> [https://old.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=259760&fp=310](https://old.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=259760&fp=310) . It was formally reflected in the structure of the OPG in December 2019; Prosecutor General’s order of 21.12.2019 № 99-шц.

<sup>12</sup> For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction.

<sup>13</sup> The offences in Articles 121(2) and 127(2) both carry a higher penalty than that under the offence in Article 127(1); imprisonment for 7 to 10 years rather than for 2 to 5 years. In addition, Article 126(2) provides that intended blows, battery or other violent acts which caused physical pain but no bodily injury, “which have features of torturing, committed by a group of persons or with the purpose to intimidate the victim or the victim’s relatives or on the grounds of racial, national or religious intolerance, shall be punishable by restraint of liberty for a term up to five years, or imprisonment for the same term”.

31. The concept of “significant torture” referred to in Article 121(2) does not appear in the cases determined by the European Court.
32. The offence of excess of authority or official powers in paragraph 1 of Article 365 provides that:
- deliberate commitment by an official of the law enforcement authority of actions that clearly exceeds the limits of accorded rights or powers, where such actions caused substantial damage to the protected by law rights or interests of individual citizens, or state or community interests, or interests of legal entities,— shall be punishable by restriction of freedom for a term of up to five years or imprisonment for a term of two to five years, with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years.
33. However, an aggravated form in the second paragraph of Article 365 relates to such actions if accompanied either by various forms of violence or threats or if accompanied by “actions that offend personal dignity of the victim, provided that there are no signs of torture”.
34. This roundabout formulation could possibly mean that psychological harm amounting to inhuman treatment would be an offence, punishable by imprisonment for a term of three to eight years, with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years.
35. In addition, paragraph 3 provides that:
- actions provided for by paragraph 1 or 2 of this Article, if caused grave consequences, shall be punishable by imprisonment for a term of seven to ten years, with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years.
36. There are a number of other crimes in the Criminal Code<sup>14</sup> that could potentially be invoked where it is not established that the relevant conduct has reached the necessary threshold of suffering and/or purpose required for torture by the case law of the European Court but still amounts to inhuman and degrading treatment contrary to Article 3, as well as another offence concerned more generally with the abuse of official power or position<sup>15</sup>.
37. The most pertinent of these is probably the offence of “compelling to testify” in Article 373, which provides that:
1. Compelling to testify during an interview by means of unlawful actions of a person who conducts the interview or pretrial investigation, shall be punishable by restraint of liberty for a term up to three years, or imprisonment for the same term.
  2. The same actions accompanied with violence or insult in regard to a person in the absence of signs of torture, shall be punishable by imprisonment for a term of three to eight years.
38. There are also a number of crimes that could be relevant where there has been conduct that could or does impede or otherwise undermine the conduct of an investigation into ill-treatment<sup>16</sup>.
39. The provisions in Articles 49(5), 86 and 87 that preclude the application of limitation periods and the granting of an amnesty do not apply to any of the crimes discussed above.
40. The conduct of investigations into these crimes is governed by provisions in the Criminal Procedure Code.

<sup>14</sup> Particularly Articles 115 (intentional homicide), 120 (incitement to suicide), 121 (intentional grievous bodily harm), 122 (intentional moderate bodily harm), 124 (intentional grievous bodily harm), 125 (intentional minor bodily harm), 126(1) (battery and torment), 129 (threat to kill), 142 (illegal human subject research), 152 (rape), 153 (violent unnatural gratification of sexual desire), 154 (compulsion to sexual intercourse), 194 (wilful destruction or damaging of property) and 195 (threat to destroy property), 371 (knowingly unlawful apprehension, compulsory attendance, house arrest or pre-trial detention), and 373 (compelling to testify).

<sup>15</sup> Abuse of authority or office contrary to Article 364.

<sup>16</sup> These include: Articles 140 (improper performance of professional duty by a member of medical or pharmaceutical profession), 367 (neglect of official duty), 373 (compelling to testify), 374 (violation of the right for defence), 376 (interference with activity of judicial authorities) and 384 (knowingly false testimony).

41. In particular, an inquirer, investigator or prosecutor is required immediately, but in any case no later than within 24 hours after submission of a report, information on a criminal offence that has been committed or after s/he has learned on his own from any source, about circumstances which are likely to indicate that a criminal offence has been committed, to enter the information concerned in the Unified Registry of Pre-Trial Investigation and to initiate investigation from that moment<sup>17</sup>.
42. Subsequent to this entry, the following provisions are especially relevant for the conduct of investigation in the event of alleged ill-treatment:
- The duty to make a proper recording of the time of detention of all suspects and to allow timely notification of this to their relatives of the person since this may be of significance where they later allege that they have been subjected to ill-treatment<sup>18</sup>;
  - The requirement for prosecutors and investigators, within the scope of their respective competencies, to initiate one in every instance when elements of a criminal offence have been directly revealed (save for the cases where criminal proceedings may be instituted upon a victim's request) or based on the report (information) on a criminal offence and take all statutory measures to establish the occurrence of crime and perpetrator thereof<sup>19</sup>;
  - The duty for prosecutors and investigating judges to ensure that pre-trial investigations are conducted within a reasonable time<sup>20</sup>;
  - The right of prosecutors to start pre-trial investigations, to have full access to materials, documents, and other details related to them, to assign the conduct within a time limit procedural actions, to overturn illegitimate and ungrounded rulings of investigators and initiate with the head of the pre-trial investigative agency the issue of suspending the investigator from pre-trial investigation and the appointment of another investigator if grounds specified in the present Code are present for his disqualification or in case of inefficient pre-trial investigation<sup>21</sup>;
  - The right of the head of the pre-trial investigation to suspend an investigator from the conduct of pre-trial investigation on the initiative of a public prosecutor, or at his discretion followed by notification of a public prosecutor, and appoint another investigator where there are grounds specified by the present Code for challenging the investigator concerned or in the case of ineffective pre-trial investigation and to take measures to eliminate violations of legislation requirements on the part of investigators<sup>22</sup>;
  - The right of the victim, throughout the entire criminal proceedings, to be advised in his rights and duties as set forth in the present Code, to know the substance of suspicion and charges, be informed on imposition, change or revocation of measures taken in respect of the suspect, accused to make criminal proceedings possible and pre-trial investigation terminated, to challenge decisions, acts, and omission by the investigator, public prosecutor, investigating judge, court, to have an authorized representative, to examine parties' materials directly related to the criminal offence, to take part in investigatory (search) and other procedural actions, to participate in trial conducted by court of any instance and to participate in direct examination of evidence<sup>23</sup>;
  - The possibility of compelled appearance<sup>24</sup>;
  - The power of the investigating judge to suspend a person from her or his office<sup>25</sup>;
  - The power of an investigator or prosecutor to carry out visual inspection of the area, premises, items and documents to find and record the information relating to the commission of a criminal offence<sup>26</sup>;

<sup>17</sup> Article 214(1) and (2).

<sup>18</sup> Articles 12(3), 42.2(7), 104 and 213.

<sup>19</sup> Article 25.

<sup>20</sup> Article 28(2).

<sup>21</sup> Article 36(2), (5) and (6).

<sup>22</sup> Article 39(2).

<sup>23</sup> Articles 56, 221 and 303-311.

<sup>24</sup> Articles 140-143.

<sup>25</sup> Articles 154-158.

<sup>26</sup> Article 237.

- The power of inspection, including forensic medical examination, of an individual<sup>27</sup>;
  - The possibility of obtaining provisional access to objects and documents<sup>28</sup>;
  - The existence of time-limits for the completion of pre-trial investigation<sup>29</sup>; and
  - The completion of pre-trial investigation and extension of time limits for pre-trial investigation<sup>30</sup>.
43. Also relevant for the conduct of such investigations is the requirement for an investigating judge, whenever, at any trial, a person states that he has been subjected to violence during apprehension or custody in the competent public authority concerned, state institution (public authority, state institution empowered to keep in custody), to record such statement or accept a written statement from such person, ensure prompt forensic medical examination of this person, assign investigation of the facts, provided in such a statement of this person to the appropriate investigative agency and take necessary measures to ensure protection of the person concerned in accordance with law<sup>31</sup>.
44. Furthermore, such a duty to act also arises, whatever the person's statement is, if the appearance or state, or any other information known to the investigating judge gives grounds for the investigating judge to reasonably suspect that law requirements were infringed in time of apprehension or while kept in custody in the competent public authority or state institution<sup>32</sup>.
45. In addition, it is important to note that evidence obtained through significant violation of human rights and fundamental freedoms guaranteed by the Constitution of Ukraine and international treaties the Verkhovna Rada of Ukraine has given its consent to be bound by, as well as any other evidence resulting from the information obtained through significant violation of human rights and fundamental freedoms is inadmissible. Courts are required to find significant violations of human rights and fundamental freedoms, in particular as regards obtaining evidence subjecting a person to torture and inhuman or degrading treatment or threats to apply such treatment<sup>33</sup>.
46. Thus, albeit that it may happen at a late stage after ill-treatment contrary to Article 3 occurred, there is a clear responsibility for trial and appellate courts to address such a possibility and, to the extent that this is established, to make an explicit ruling to that effect.

## 2. Organisational framework

47. The SBI Law has assigned to the SBI the tasks of preventing, detecting, stopping, solving and investigating crimes committed by staff members of law-enforcement agencies<sup>34</sup>.
48. As a result, it is required, in particular, to stop and solve such crimes, carry out search and detective operations and pre-trial investigation of them under the procedure provided for by the law<sup>35</sup>.
49. Furthermore, the SBI and its authorized officials, with a view to perform their tasks, shall, upon requests of the SBI Director, his/her authorized Deputy, and directors of regional departments of the SBI or their authorized deputies, receive on a free-of-charge basis and under the procedure set forth by the CPC, information necessary for criminal cases under its jurisdiction<sup>36</sup>.

<sup>27</sup> Article 241.

<sup>28</sup> Articles 160-166.

<sup>29</sup> Articles 219, 283, 284, 294 and 295.

<sup>30</sup> Chapter 24.

<sup>31</sup> Article 206(6).

<sup>32</sup> Article 206(7). There is, however, no requirement to take such actions under this or the preceding provisions if public prosecutor proves that such actions has been already or are being conducted; Article 206(8).

<sup>33</sup> Article 87.

<sup>34</sup> Article 5(1). The SBI officially commenced its work on 27 November 2018.

<sup>35</sup> Article 6(1).

<sup>36</sup> Article 7(1).

50. Moreover, staff members of the SBI performing their activities within the framework of detective or investigative groups also have the rights and duties provided for by the CPC and the Law of Ukraine On Detective Operations<sup>37</sup>.
51. The relevant files concerning offences of ill-treatment were transferred from the OPG to the SBI in 2019, which now has sole responsibility for investigating such offences committed by law enforcement officers<sup>38</sup>.
52. The SBI thus has the necessary legal powers to undertake investigations into ill-treatment.
53. The OPG continues, pursuant to the CPC, to have the competence to supervise pre-trial investigations conducted by the SBI through giving it procedural guidance. Its Procedural Oversight Department supervises investigations on alleged in cases of torture and other human rights violations by law enforcement officers.

## D. FINDINGS

54. The findings from both the desk and field research relate to the legal framework, the incidence and nature of ill-treatment alleged, those affected by it, the attitude to and rationale for complaints, the understanding of standards, the investigative process, notification of suspicion and charging, the outcome of cases and the position of the alleged victim.

### 1. Legal framework

55. It is clear that the provisions in the Criminal Code previously referred to could be invoked in respect of treatment inflicted contrary to Article 3 of the European Convention, as well as in respect of possible attempts to obstruct investigations into allegations about this having occurred.
56. These offences are not generally deficient in either their scope or the level of penalties that could be imposed in the event of a conviction.
57. However, some aspects of the offences are not entirely compatible with the procedural obligation arising from Article 3 as: they are not broad enough to cover instances of psychological suffering caused by ill-treatment; the introduction of a notion of “significant torture” in Article 121(2) could lead to an inappropriate approach to charging in some instances; and prosecutions in respect of all the offences can be blocked through the application of the limitation periods prescribed.
58. There was support in the interviews and focus group meetings for current proposals to revise the definition of torture in Article 127<sup>39</sup>.
59. However, the focus in them was essentially on just improving the definition of torture.
60. Thus, the need to remove the application of the limitation periods was not generally mentioned and not much attention was given to the gaps or uncertainty in the provisions of the Criminal Code regarding the applicability of limitation periods to crimes that could be relevant where ill-treatment not amounting to torture has been inflicted. Only the Procedural Oversight Department recognised that the latter could be a real problem.
61. On the other hand, the provisions regarding the conduct of investigations and the obligation of investigating judges to require forensic examinations seem, in principle, sufficient to ensure that an effective investigation into alleged ill-treatment can be carried out. Certainly, there are no judgments finding violations of Article 3 of the European Convention which point to any lacuna in the available legislative powers that could constitute an impediment to the conduct of an effective investigation.

<sup>37</sup> Article 7(2). The SBI was re-designated as a “state law-enforcement body” by Law No. 305-IX of 3 December 2019.

<sup>38</sup> The prosecution finally lost its pre-trial investigation functions on 20 November 2019.

<sup>39</sup> In Draft Law ‘On Amendments to the Criminal Code of Ukraine Concerning Criminal Liability for Torture’ (Draft Law 5336). For an assessment of the draft law, see <https://www.coe.int/en/web/kyiv/-/council-of-europe-provided-expert-comments-to-draft-law-on-amendments-to-the-criminal-code-of-ukraine-concerning-criminal-liability-for-torture-draft->.

62. Nonetheless, there were often suggestions that certain legislative reforms were required<sup>40</sup>.

## 2. Incidence and nature of ill-treatment alleged

63. It is clear from the judicial statistics on State Court Administration’s website<sup>41</sup>, that there has been some decrease in the number of incidents in which ill-treatment inflicted by law enforcement officers has actually been established.

### Court decisions (general courts)

Article of Criminal Code of Ukraine	2017	2018	2019	2020
Art. 127 (torture)	14	18	7	14
Art. 365 (excess of authority or official powers by law enforcement officers)	64	14	21	10

64. From the statistics data prepared by the OPG on the basis of Unified Register of Pre-trial Investigations (“URPI”) data, the picture shows that there has been some increase in the number of cases under investigation and those being sent to court.

	Art. 127			Part 2 of Art. 365			Part 3 of Art. 365		
	2018	2019	2020	2018	2019	2020	2018	2019	2020
Registration	98	52	55	1765	1629	2192	146	216	195
Notification of suspicion	9	2	26	45	44	107	28	21	40
Sent to court	9	3	10	58	42	72	13	16	12
Stopped	1	7	2	4	17	14	0	11	11
Closed	47	54	59	1264	1390	2105	85	120	231
Remainder *	57	90	64	616	1624	1694	159	312	319

\* **Remainder** — the number of criminal offenses that at the end of the reporting period (ie as of 31.12.2018, 31.12.2019 and 31.12.2020) are in the status of proceedings.

65. The OPG statistics for Article 127, unlike Article 365, do not breakdown the figures according to the particular paragraph that is being relied upon. However, the breakdown for Article 365 points to the aggravated forms of the crime covered by Article 365 being invoked.

66. There is no correlation in the two sets of statistics between those for pre-trial investigations and those relating to the court decisions, not least because the respective activities do not take place in the same year or even the immediately following one<sup>42</sup>.

67. Nonetheless, the OPG statistics do show a slight upward trend of cases in which ill-treatment contrary to Article 3 is alleged, albeit not for the Article 127 offence.

<sup>40</sup> See, e.g., the following observation in *Kaverzin v. Ukraine*, no. 23893/03, 15 May 2012: “182. Nevertheless, the Court considers it necessary to stress that Ukraine must urgently put in place specific reforms in its legal system in order to ensure that practices of ill-treatment in custody are eradicated, that effective investigation is conducted in accordance with Article 3 of the Convention in every single case where an arguable complaint of ill-treatment is raised and that any shortcomings in such investigation are effectively remedied at the domestic level. In so doing, the Ukrainian authorities should have due regard to this judgment, the Court’s relevant case-law and the Committee of Ministers’s relevant recommendations, resolutions and decisions”.

<sup>41</sup> [https://court.gov.ua/inshe/sudova\\_statystyka/](https://court.gov.ua/inshe/sudova_statystyka/).

<sup>42</sup> In the SBI’s Annual Report for 2020, page 31, it is stated that “83 indictments were sent to court against 117 people, including 6 acts against 15 people – under Article 127 of the Criminal Code of Ukraine, others – under Part 2 of Article 365 and Articles 371, 374 of the Criminal Code of Ukraine”.

68. However, notwithstanding some increase in the number of cases sent to court, the vast majority of allegations are found to be unsubstantiated.
69. It should also be noted that the applications in which allegations of ill-treatment and ineffective investigation contrary to Article 3 of the European Convention that have been communicated to the Government of Ukraine all relate to incidents prior to 2015.
70. Nonetheless, the two sets of statistics do not provide any answer to the questions whether there is less or more ill-treatment, not least because they cannot give any indication as to whether there has just been a failure to register cases in which such treatment is alleged.
71. Nor do the statistics give any indication as to whether the investigation into allegations about such treatment has become more effective.
72. This is equally true of the actual rulings by the general courts in the course of 2019 and 2020 where the infliction of torture or the use of disproportionate force was a particular subject of the proceedings concerned. Thus, the majority of the 18 cases concerned were ones where the ill-treatment concerned had been inflicted by either one family member on another or by one private individual on another and only 5 of them involved police officers<sup>43</sup>.
73. In addition, there was a ruling of the Joint Chamber of the Criminal Court of Cassation of Supreme Court concerned with the admissibility of information obtained during an investigative action as opposed to interrogation<sup>44</sup>.
74. It is somewhat surprising that the incidence of ill-treatment considered in these cases should primarily involve persons in a context outside of law enforcement given that the volume of applications to the European Court pointed to it being the conduct of police and others that was the principal reason for violations of Article 3 being found.
75. The cases involving law enforcement officers were, with two exceptions<sup>45</sup>, all cases in which there was “only” an illegal and/or disproportionate use of force.
76. Nonetheless, the general impression gained from interviews and focus groups during the field research was that there had been a decline in the incidents of ill-treatment, particularly that involving the infliction of physical harm. It also seemed that this decline was more pronounced in some regions than in others. However, it was not possible to quantify these impressions in any way.
77. At the same time, it became clear from the interviews and focus group meetings that the investigation of cases involving ill-treatment was not a significant element of the work of SBI investigators, with estimates by those undertaking investigations into allegations that the percentage of their workload concerning them ranging from 10 to 30%.

<sup>43</sup> Case No. 398/2560/20 from December 12, 2020 (disproportionate use of force by a patrol officer, for which he was sentenced to 3 years' imprisonment for abuse of power with violence contrary to Article 365(2) but released from punishment with a probationary period of 1 year - <https://reyestr.court.gov.ua/Review/93178102>); Case No. 766/8485/20 from September 01, 2020 (disproportionate use of force by a patrol officer and torture of a handcuffed suspect at the police station, for which he was also sentenced to 3 years' imprisonment for abuse of power with violence contrary to Article 365(2) but released from punishment with a probationary period of 1 year - <https://reyestr.court.gov.ua/Review/91261169>); Case No. 153/448/20 from May 05, 2020 (disproportionate use of force by a patrol officer, for which for which he was sentenced to 4 years' imprisonment for abuse of power with violence contrary to Article 365(2) but released from punishment with a probationary period of 2 years - <https://reyestr.court.gov.ua/Review/89022141>); Case No. 167/1547/15-к from November 25, 2019 (torture to obtain a confession by an investigator following an illegal arrest, for which for which he was sentenced to 3 years' imprisonment for abuse of power with violence contrary to Article 365(2) but released from punishment with a probationary period of 1 year, with the terms of criminal responsibility for the arrest having expired - <https://reyestr.court.gov.ua/Review/85749698>); and Case № 331/1245/14-к from December 05, 2019 (infliction of bodily injuries by an off-duty police operative and an attempt was to stop other people by screaming “stop, police”, for which he was convicted as a civilian of hooliganism under Article 296 (rather than of fighting and inflicting bodily harm), with the issue under Article 265(2) being determined in closed proceedings - <https://reyestr.court.gov.ua/Review/86062597>). There were also 2 cases for which publication of the ruling is prohibited without any indication as to why that might be appropriate; Case No. 521/1554/20 from February 10, 2020 (<https://reyestr.court.gov.ua/Review/87429913>) and Case No. 692/825/19 from March 19, 2020 (<https://reyestr.court.gov.ua/Review/88249435>). Both cases were considered in a closed court session.

<sup>44</sup> <http://reyestr.court.gov.ua/Review/91702552>.

<sup>45</sup> Case No. 167/1547/15-к from November 25, 2019 and Case No. 766/8485/20 from September 01, 2020.



78. Moreover, even if there might be a higher percentage for some investigators' workload, as was suggested in some interviews, it was clear that investigations into alleged ill-treatment comprised only a minor part of the overall workload of investigators as a whole with them having to give considerably more attention to military crimes and corruption offences.
79. Furthermore, notwithstanding some assertions in the interviews and in the Annual Reports of the SBI<sup>46</sup>, from the reports to the public through its communication channels, it would not seem that the SBI as a whole sees the investigation of ill-treatment as one of its principal roles. This is despite the fact that this was supposed to be one of its main tasks when it was established and that the combating of torture was included in the SBI's priorities for 2017-2022<sup>47</sup>. It may be that the territorial departments of the SBI are not being given sufficient direction by its leadership as to the importance of conducting effective investigations into ill-treatment.
80. It was notable from the interviews and focus group meetings that there had been some change in the nature of the ill-treatment inflicted.
81. Thus, some decline in the infliction of physical harm was attributed to the fact that the adoption of the "new" CPC in 2012 had meant that statements given in the course of a pre-trial investigation were no longer admissible as evidence in a prosecution. Nonetheless, it was suggested that the use of disproportionate force amounting to ill-treatment contrary to Article 3 of the European Convention was frequent during arrest, whether because of resistance to this or of attempts to escape.
82. At the same time, there was considered to be a move to what were seen as more sophisticated forms of ill-treatment, namely, the use of psychological pressure before a suspect meets her/his lawyer, such as through keeping her/him in a cold cell for a long time without food or in handcuffs, not providing necessary medicine and taking advantage of the withdrawal symptoms of those using drugs.
83. Such techniques were seen as linked to the conduct of investigative experiments in a way that leads to self-incriminating statements being made by suspects when explaining how they had committed the crime concerned.
84. It will be important that any delays in lawyers gaining access to their clients, allowing such psychological pressure to be exerted on them, are recorded contemporaneously, both by the lawyers and by the law enforcement agency concerned.
85. As the Supreme Court ruling referred to above indicates the protocol of an investigative action could – in principle – be recognized as evidence where it serves a legitimate purpose<sup>48</sup>. By this is meant that, so long as the investigative action is not carried out solely for the purpose of obtaining a confession but to establish circumstances, verify technical possibilities, confessional information obtained during its conduct could be considered by a court.
86. Thus, such information should only be excluded if there were any signs of "confession obtaining". However, this has been observed as precisely what is now occurring and the judges interviewed indicated that they were aware of this illegitimate technique. Indeed, some declared that they had found the results of the investigative experiment inadmissible since it was obvious that the suspects concerned had behaved unnaturally during it and could not really show how they had committed the crimes alleged. Nonetheless, this does not demonstrate that this improper use of investigative experiments is not continuing or always being deprived of effect.
87. Nonetheless, ill-treatment (including rape) to obtain statements was a feature of the allegations investigated in three of the case studies, while disproportionate use of force to effect an arrest was the allegation investigated in the fourth one.

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<sup>46</sup> Thus, in its 2020 Annual Report, page 5, it is stated that: "The Bureau is actively taking measures to prevent and stop criminal offences related to torture and inhuman or degrading treatment by law enforcement. Thus, an indictment was sent to the court regarding torture committed by police officers in Kaharlyk".

<sup>47</sup> <https://dbr.gov.ua/strategicna-programa-dialnosti>. The explanatory note to the draft of law of February 12, 2015 No. 2114 (which later became the SBI Law) and its original text explicitly identified the prevention and investigation of cases of torture and other cruel, inhuman or degrading treatment or punishment by law enforcement officials as one of the SBI's main tasks.

<sup>48</sup> See para. 75.

### 3. Those affected

88. Although there were cases involving some high-profile individuals, those affected by alleged ill-treatment are primarily persons who have some criminal record and who belong to vulnerable or unprotected groups of people, particularly individuals with low or no income, drug and alcohol addicts and people suffering from mental illnesses.
89. The majority of those allegedly affected will thus not be well-equipped to assert their rights – on the assumption that they are even aware of them – and, while they may have defence lawyers to help them<sup>49</sup>, they are also unlikely to have support networks to help them pursue claims of ill-treatment.
90. Moreover, their background may mean that their alleged ill-treatment will not generally be considered significant enough to attract media attention<sup>50</sup>.

### 4. Attitude to and rationale for allegations

91. There was general acceptance in the interviews and focus group meetings that not all allegations of ill-treatment were well-founded.
92. However, there was some significant variation in the views taken of the extent to which allegations were unfounded. In particular, it ranged from the suggestion that there were not a lot of cases that were unfounded, through either 30% or about half of them having this character to that being so in 90% of the cases.
93. The last position is, on the face of it, the one that is most consistent with the statistics discussed above. Certainly, as can be seen from them, the great majority of claims registered do not result in a notification of suspicion, let alone lead to an indictment.
94. That outcome does not, of course, really mean very much as the statistics cannot reveal how well, if at all, the claims were investigated and thus that they were justifiably rejected.
95. Moreover, the suggestion that many claims were unfounded can be seen as indirectly reinforcing a sense that progress had been made in reducing the incidence of ill-treatment and/or investigating allegations more effectively.
96. Certainly, that might lie behind the rather surprising claim by one investigator that indictments had been issued in 40% of the cases investigated in 2020. Not only does the number of indictments cited (97) slightly exceed the total of 94 in the OPG statistics but it also leaves out of account the much greater number of cases in which no notification of suspicion was issued, and the investigation is closed (2269). This is not to allege an attempt to mislead but simply to be cautious about impressions, especially when the discussion below acknowledges shortcomings in the conduct of investigations.
97. According to some SBI investigators, unfounded allegations did not need to be entered into the URPI. It was not explained how it would then be possible to establish that a particular allegation was unfounded, but this approach seems like a throwback to the arrangement before the present CPC when there was investigation prior to opening a criminal case, which led to much abuse in the handling of cases<sup>51</sup>.
98. Whatever the level of justification for allegations of ill-treatment, there did not seem to be any disagreement that the making of them is also seen by suspects and their lawyers as a way of delaying proceedings, engaging in negotiations over the charges actually faced and undermining the admissibility of evidence.

<sup>49</sup> In three of the case studies the alleged victims were represented by lawyers.

<sup>50</sup> The case studies for Cases A and B seem exceptional in that respect.

<sup>51</sup> See, e.g., *Masneva v. Ukraine*, no. 5952/07, 20 December 2011. This is now prohibited by Article 214.3 of the CPC.

99. It is not possible to assess the degree of success resulting from such tactics by the defence. However, insofar as they relate to claims that are really unfounded, it would be in the interest of the criminal justice system as a whole to minimise the risk of them being made through arrangements that give greater confidence that ill-treatment could not have occurred so that resources do not need to be unnecessarily devoted to investigating them.
100. The value of the latter approach was implicitly recognised in the widespread support in the interviews for generalising the custody records scheme now being piloted and the various arrangements for videorecording in the course of law enforcements.

## **5. Understanding of standards**

101. It was clear from interviews with those in the upper levels of the SBI and the OPG that there was a good understanding of what constituted torture and the requirements for an effective investigation of alleged ill-treatment.
102. There also seemed to be general agreement in the interviews and focus group meetings that law enforcement officers were, in general, poorly qualified as regards what treatment was admissible. Indeed, there was some suggestion that training for them in techniques of restraint provided by United States law enforcement personnel had run counter to what was acceptable under Article 3 of the European Convention.
103. The leadership of both the OPG and the SBI emphasised that their personnel had received training in respect of the requirements of Article 3 of the European Convention.
104. However, from some of the interviews and focus meetings it appeared that this was not always the case for SBI investigators.
105. Moreover, there was disagreement amongst those interviewed as to whether there was any specialisation within the investigation units in the SBI's territorial departments. Even if this does exist, it is clear that investigation of ill-treatment will not be the main activity undertaken by any investigators<sup>52</sup>.
106. SBI investigators have, of course, access to guidance from both the SBI's Main Investigative Division and the Procedural Oversight Department. Nonetheless, that may only be helpful where there is at least some foundation concerning what is required by Article 3 of the European Convention so that it is possible to identify the issues on which such guidance might be considered necessary.
107. What was surprising about all the interviews and focus group meetings was the absence of any reference in them to inhuman and degrading treatment as opposed to torture.
108. This may be a reflection of the way in which provisions of the Criminal Code are framed. However, it also suggests an insufficient familiarity with the spectrum of ill-treatment and thus a weakness in the training being provided, with a risk of certain forms of treatment not being taken sufficiently seriously when allegations are made and/or investigated.

## **6. Investigation**

### **a. Background**

109. The desk research identified an extensive range of shortcomings found by the European Court with respect to the fulfilment of the requirements for an effective investigation of alleged ill-treatment.

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<sup>52</sup> See paras. 134-135 below.

110. These have included: obstacles to filling complaints about ill-treatment; the absence of independence on the part of those conducting the investigation; delayed, formalistic, discontinued and excessively long investigations; no investigation at all; shortcomings in the scope of investigation; failings in respect of collecting and testing evidence; loss and destruction of records; failure to consider the allegations in criminal proceedings against the complainant; the absence of victim status in proceedings against the alleged perpetrator.

## **b. Potentially significant developments**

111. There have, however, been a number of developments that have some potential to contribute to remedying shortcomings in the conduct of investigations

112. These include a move to expand a system of “custody records” (i.e., electronic registration of arrested people) currently being piloted in 6 cities<sup>53</sup>. This system was initially planned in the Strategy of development of the Ministry of Internal Affairs (2017–2020)<sup>54</sup> and the Action Plan for the implementation of the Strategy for the development of the system of the Ministry of Internal Affairs for the period up to 2020<sup>55</sup>.

113. However, following the “Kaharlyk case”<sup>56</sup>, plans for such an expansion were announced after a Coordination Meeting held between all law enforcement agencies and the OPG, with the participation of the Ministry of Justice and representatives from international organizations<sup>57</sup>. These plans envisage extending the custody records system to all pre-trial investigative detention centres and to the territorial units of the National Police (police stations first of all), as well as to study the establishment of similar record-keeping in the territorial units of the Security Service of Ukraine and other pre-trial detention facilities.

114. In addition, it was proposed to introduce: an electronic system for recording all actions with a detainee (instead of countless paper journals that are easily falsified); a human rights inspector whose position would be beyond the control of investigative and operational units; and zoning the police station in such a way that civilians without the procedural status of a detainee cannot find themselves in offices or, moreover, in non-working, technical premises, where, according to statistics, torture is most frequent.

115. Certainly, coordination meeting seems to have changed the attitude of the police leadership towards custody records; from now on, it is part of the general policy of the police, and they began to present custody records as their achievement and as a means to prevent problems similar to those in the “Kaharlyk case”<sup>58</sup>.

116. These developments are primarily ones that will contribute to restricting the scope for the infliction of ill-treatment. However, record-keeping should also assist the work of those who have to investigate allegations that ill-treatment has occurred.

117. Nonetheless, it needs to be borne in mind that the introduction of a custody record system and the other proposed reforms will require significant funding, as well as investment in the training of custody officers and other law enforcement officers. In terms of the latter, training will not be sufficient as a change of mindset

<sup>53</sup> <http://ecpl.com.ua/wp-content/uploads/2019/12/Monitorynhovyy-zvit-Custody.pdf>.

<sup>54</sup> Approved by the Decree of the Cabinet of Ministers of Ukraine, dated 15.11.2017, No. 023-r; <https://zakon.rada.gov.ua/laws/show/1023-2017-%D1%80#Text>.

<sup>55</sup> Approved by the Decree Cabinet of Ministers of Ukraine, dated 21.08.2019, No. 93-r; <https://zakon.rada.gov.ua/laws/show/693-2019-%D1%80#Text>.

<sup>56</sup> This concerned a young woman who was tortured and raped by police officers in Kaharlyk (Kyiv oblast) in May 2020. The case was investigated by the Kyiv district of the SBI and, at the beginning of December, an indictment was issued in respect of 5 policemen, who are accused of torture, violent kidnapping and rape; [https://www.gp.gov.ua/ua/news?\\_m=publications&\\_c=view&\\_t=rec&id=284840](https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=284840)). This case is included in the statistics set out above.

<sup>57</sup> [https://www.gp.gov.ua/ua/news?\\_m=publications&\\_c=view&\\_t=rec&id=274345&fbclid=IwAR3Xep5eOZ9UzT13TKNeb713YQNOhWXMOJu2d8Mhxbvu0WX6LLqdvqay2KU](https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=274345&fbclid=IwAR3Xep5eOZ9UzT13TKNeb713YQNOhWXMOJu2d8Mhxbvu0WX6LLqdvqay2KU).

<sup>58</sup> “Custody Records” system will automatize the police officer’s work and eliminates the human factor as a cause of illegal violence (UA) // MIA, 09.06.2020 / [https://mvs.gov.ua/ua/news/31538\\_Sistema\\_Custody\\_Records\\_avtomatizu\\_robotu\\_policeyskogo\\_ta\\_unemozhlivlyu\\_lyudskiy\\_faktor.htm](https://mvs.gov.ua/ua/news/31538_Sistema_Custody_Records_avtomatizu_robotu_policeyskogo_ta_unemozhlivlyu_lyudskiy_faktor.htm)

will also be needed. This will be difficult to achieve so long as law enforcements are poorly paid, overworked and see the use of ill-treatment as an appropriate way of acting and a useful means of fulfilling targets set for referring cases to the courts, something emphasised in the interviews and focus group meetings.

118. A number of potentially useful initiatives have also followed the establishment of the Procedural Oversight Department in the OPG.
119. Thus, it has reviewed all criminal cases concerning torture, which were proceeding slowly. Almost 200 of these cases turned out to be investigated by the police themselves, contrary to the standards for an effective investigation. The prosecutors exercising procedural supervision have changed the jurisdiction over the cases to the SBI. In addition, it found 40 cases to have been unreasonably closed and these reopened with certain instructions for the investigators as to the action to be taken<sup>59</sup>.
120. In addition, the Procedural Oversight Department prepared information letter for all lower-level prosecutors, with instruction as to the grounds for arrests, duration of arrest, who can arrest the person and so on<sup>60</sup>. This was an attempt to change the practice of “hidden arrest”, in which torture can sometimes occur.
121. Also, amendments were made to URPI to expand its analytical functions so that it would be possible in the future to search under Articles 127 and 365 entries for law enforcement officers who might be using torture or ill-treatment. As can be seen from the statistics above that were collected for the present research, no distinction has been made until now between perpetrators (i.e., civilians and law enforcement officers), which can mislead when interpreting data.
122. Also, the Procedural Oversight Department, together with experts from non-governmental organizations, has developed Ukraine’s first Counter-Torture in the Sphere of Criminal Justice Strategy (“The Strategy”)<sup>61</sup>, as well as a plan of actions for its implementation for the period 2021 – 2023.
123. This envisages: the development of an algorithm for the actions of law enforcement officers upon receipt of a report of torture, as well as informing the public about the peculiarities of the application of such an algorithm; a methodology for investigating torture and other serious human rights violations by law enforcement, training SBI investigators, and prosecutors working in this category of crimes; a mechanism of “torture whistle-blowers” within the criminal justice system (i.e., employees who will report torture by their colleagues and will be protected from possible harassment for such reports); and the development of a statistical data collection system so as to accumulate as complete information as possible on the scale of torture and provide a thorough analysis of the data collected.
124. The Strategy and plan of actions have been approved by the Cabinet of Ministers of Ukraine<sup>62</sup>.
125. It thus remains to be seen what impact the Strategy and the other initiatives mentioned will actually have.

### **c. Practice**

126. However, even though the shortcomings regarding investigation of alleged ill-treatment contrary to Article 3 might not be as extensive as those found in the rulings of the European Court referred to above, the interviews and focus meetings showed that the situation continued to be problematic in many respects.

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<sup>59</sup> Speech of the Head of Department Yuri Belousov on Legal Policy Committee of Verkhovna Rada hearings about Ukrainian problems with execution the ECHR judgments (9.12.2020) (from 11:52 AM) / [http://kompravpol.rada.gov.ua/news/main\\_news/73588.html](http://kompravpol.rada.gov.ua/news/main_news/73588.html). The two case studies in which proceedings are now pending before the courts are ones that were taken over by the Procedural Oversight Department and it instigated the investigation in one of the ones in which the proceedings were closed after being informed about the case by the regional representative of the Ombudsman when details had still not been entered into the URPI.

<sup>60</sup> <https://www.youtube.com/watch?v=5nXx7w55Ykk>.

<sup>61</sup> See: [https://www.gp.gov.ua/ua/news?\\_m=publications&\\_c=view&\\_t=rec&id=285169](https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=285169) and; <http://kompravpol.rada.gov.ua/uploads/documents/33179.pdf> (p. 17-18).

<sup>62</sup> See <https://www.kmu.gov.ua/news/uryad-shvaliv-strategiyu-protidiyi-katuvannyam-u-sistemi-kriminalnoyi-yusticiyi-ta-plan-zahodiv-z-yiyi-realizaciyi>.

127. The problems concern: staffing and workload; the collection of evidence; the prosecutorial role; victims; and outcome.

### **i. Staffing and workload**

128. Notwithstanding that the SBI began work towards the end of 2018, the undertaking of investigative activities has inevitably been affected by the time required for both the initial recruitment of investigators and the subsequent need to repeat the whole recruitment process in 2020, which led to staff turnover and loss of momentum.

129. Although the SBI is now fully staffed in its central office, it is generally acknowledged that the investigators are overloaded, with each one being responsible for 70-90 criminal proceedings.

130. Nonetheless, it was maintained by the SBI that cases involving alleged ill-treatment would have priority over ones raising other issues.

131. Moreover, as previously noted<sup>63</sup>, there is some disagreement as to whether there is any specialisation within the investigative units in the territorial departments – alleged ill-treatment does seem to be a major focus within the central office's Main Investigative Department – and there is in any event no guarantee that investigators who have had training on the requirements of Article 3 of the European Convention will be the first to respond where an instance of ill-treatment has been alleged and that will only be after staff of the relevant internal security unit has done some investigation.

132. Furthermore, investigation of ill-treatment will never be the principal work undertaken by investigators in the SBI's territorial departments.

133. Indeed, work on military crimes and corruption are much more significant demands on their time. As the former, in particular, may produce quicker results than the potentially more challenging task of investigating alleged ill-treatment, the prospects of obtaining such results may also be seen by investigators as more beneficial when the time come for their performance to be appraised and thus affect the choice of cases to be given priority.

134. Notwithstanding the guidance available to investigators in the territorial departments, greater focus by some investigators on handling allegations of ill-treatment is not only likely to increase their knowledge of the standards but can also be expected to strengthen their capacity to deal with the difficulties in gathering evidence required to determine whether ill-treatment was indeed inflicted.

135. The delay in filling the positions in the SBI's operative units meant that they were not making any contribution to the investigation of ill-treatment. It was suggested in the interviews and focus group meetings that this had contributed to the backlog in the investigations to be undertaken by the SBI. However, there was no specification as to what, if any, impact the absence of these units had had on investigations into alleged ill-treatment. All the units have since been established and their work has been intensified.

136. There does not appear to have been any instance reported within the SBI hierarchy of an investigator being involved in an investigation which concerned a law enforcement officer with whom s/he may have worked before joining the SBI.

137. However, although there is provision for reporting conflicts of interest to internal control units, it was surprising that the possibility of this occurring was not considered by all interviewed as having any potential to compromise either the integrity of the investigation or the confidence of the alleged victim and the public generally in its conduct.

138. All those working in the SBI who were interviewed were of the view that, despite the limited staff, this did not affect the quality of investigations undertaken. However, that does not seem to be borne out by the practice with respect to the collection of evidence.

<sup>63</sup> See para. 107 above.

139. Furthermore, all the foregoing observations need to be viewed in the light of the fact that for almost two years no appointment has been made to the position of Director<sup>64</sup>. This has led to this position being filled on an acting basis by the two Deputies, with there being provision for a rotation between them in discharging this responsibility<sup>65</sup>.
140. There can be no doubt that the absence of permanent appointment to the position of Director necessarily has an adverse impact on the stability and functioning of the SBI, not least in shaping, driving and implementing its priorities such as regards the investigation of alleged ill-treatment. It will also have affected the knowledge and skill management of staff and their feeling of being in secure workplace and of being really confident about their independence. Such a feeling will also have been undermined by the many institutional and organisational changes that have followed the adoption of legislative amendments and initiatives relating to the SBI's mode of operation and investigative authority.

## ii. Collecting evidence

141. Investigations were said by SBI investigators to be formally launched within 24 hours from the complaint, as required by the CPC. This was the situation in two of the case studies but in a third it was a month before an investigator was assigned to the case and in the fourth the interval was 2 months after the complaint had been entered into the URPI, with the latter only having occurred 3 months after the alleged incident.
142. However, it does not seem that they are always the ones doing the initial investigation into an allegation as it was also indicated that they received material gathered first by staff from the relevant internal security unit of the agency in which the ill-treatment was alleged to have occurred. The work undertaken by such staff could well have a decisive effect in any conclusions reached as to how well-founded were allegations of ill-treatment. However, the quality of such work and the effective independence of the staff concerned from the alleged perpetrators could not be evaluated in the research.
143. Moreover, where investigations were undertaken early on by SBI investigators, this will not necessarily be by ones who have some training background in the requirements of Article 3 of the European Convention. It appears that there are no guidelines governing the assignment of an investigator to deal with a case, whatever its subject-matter.
144. Undoubtedly, an earlier response than at present by SBI investigators will become more feasible following the creation of units within the centres of each territorial department's regions<sup>66</sup>. As a result, it should now be possible for them to reach the site of the alleged incident more quickly. Nonetheless, this does not mean that there will not still have been any preliminary work done by internal security units or that the SBI investigators first attending will have been trained as to the requirements of Article 3 of the European Convention for conducting an effective investigation.
145. The fact that two different investigative entities are involved in investigations seems unduly cumbersome. It might be more efficient for their roles to be integrated in some way.
146. Not all allegations of ill-treatment will be made soon after they have occurred and thus be registered at an early stage in the URPI.
147. This may be because the alleged victims do not feel confident about raising the matter while they are still in the custody of the police. Certainly, it was recognised in the interviews and focus group meetings that complaints by someone claiming to have suffered ill-treatment can be belated even after s/he gets access to

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<sup>64</sup> The First Deputy was dismissed in November 2020 and no appointment has also been made to this position. However, a competition for the selection of the SBI Director has been announced, with 18 November 2021 set as the deadline for the submission of applications by potential candidates.

<sup>65</sup> Article 12.4 of the SBI Law.

<sup>66</sup> Pursuant to Order No. 581 of the SBI, 15 October 2020.

a lawyer. This can, of course, have implications for collecting evidence as a delayed medical examination may make it more difficult to establish whether particular injuries have been inflicted and to determine their likely cause<sup>67</sup>.

148. This might be addressed by more systematic and more frequent medical examinations of persons held in police stations and by a right for a detained person to require a medical examination, as well as by an obligation for medical staff to record all injuries and their probable causes where persons are brought to hospital by the police for any reason and to inform the SBI where ill-treatment is suspected<sup>68</sup>.
149. However, there was concern in the interviews and focus group meetings that the doctors conducting forensic medical examinations were too closely linked to law enforcement officers through their work on other matters and could also be at risk of being corrupted on account of their low salaries.
150. It is clear that the gathering of competent and independent medical evidence at an early stage will be crucial for effective investigation of allegations of ill-treatment.
151. Other difficulties in collecting evidence cited by SBI investigators and others concerned its destruction, attempts to cover up an incident and an inability to get both records from police station and cooperation from those who may have witnessed the alleged incident.
152. Although those allegedly responsible for ill-treatment may have been wearing body cameras or there were video cameras in operation in the police station where such treatment was supposed to have occurred, it was frequently suggested in interviews and focus group meetings that the recordings made by these cameras were not always available or usable because they had been damaged or destroyed. In addition, it was said that sometimes these cameras were not functioning at the material time.
153. The availability of such recordings can be crucial for establishing what actually occurred and, in many instances, it can be beneficial for law enforcement officers as these can confirm that there was no ill-treatment. There is thus a need not only to expand their use – as is currently being proposed – but also to take measures to ensure that they are always functioning and that there is no scope for tampering with the recordings made.
154. Also problematic is the suggestion made in some interviews that some law enforcement officers – generally at the middle management level – try to cover up instances of ill-treatment being inflicted. This can, of course, be difficult to prove where the cover-up is well done but being aware of this possibility and gathering evidence in support of suspicions about this having occurred should be seen as an essential part of any investigation undertaken.
155. In order to establish the possible sequence of events for the purpose of confirming or refuting elements in the story of an alleged victim, it can be necessary to have access to the records of a police station or other place of detention as to the date and time when a person arrived and left there, as well as any other details regarding her or him during the period concerned.
156. Although Article 7.1(2) of the SBI Law requires state authorities to provide SBI investigators with information necessary for criminal cases within three days or, if they are unable to provide, within ten days at the latest to provide the said information or to notify on the reasons preventing the provision of information, requests for such information are not always complied with. This means that they are then obliged to seek an order from a court under Articles 160-166 of the CPC for the purpose of obtaining provisional access to objects and documents, which inevitably leads to a loss of time in the conduct of an investigation<sup>69</sup>.
157. There was no indication as to whether such lack of cooperation has led to any disciplinary proceedings but there is clearly a need to put in place arrangements that allow unimpeded access to the records required.

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<sup>67</sup> Although in the case study where entry into URPI was delayed by 3 months and investigations began only 2 months after that, it was still possible for a medical examination made a year after the alleged incident to conclude that a broken rib could theoretically have been inflicted by punches.

<sup>68</sup> In the four case studies, the hospital staff notified the police.

<sup>69</sup> The need to seek a court order to obtain information in three of the case studies. In one of them, the hospital had invoked patient confidentiality when refused to provide the results of the alleged victim's medical examination and documents related to his stay there.



158. It was recognised in the interviews and focus group meetings that cooperation can also be affected by the continuation in post of a law enforcement officer against whom allegations of ill-treatment have been made. This is because s/he may be able both to influence or intimidate colleagues and even the complainant – who may still be detained – and to conceal, damage or destroy evidence. Indeed, in the case of the complainant, it was suggested that s/he may be induced to drop her or his complaint as a result of pressure from the alleged perpetrator.
159. However, it is not possible to seek the suspension of such an officer from an investigating judge unless a notification of suspicion has been issued<sup>70</sup>. In any event, not only is such a notification often made at a late stage in the investigation so that its effect can be of limited value where evidence has been concealed, damaged or destroyed but there may not always be a willingness on the part of investigating judge to make the order required.
160. It was suggested by one investigator that an alleged perpetrator would be detained within 24 hours if there were signs of rape or other bodily injury.
161. However, it was also said to be difficult to get a measure of restraint imposed because it could not be established that the person concerned was dangerous and a potential threat to witnesses. Nonetheless, this was not expressed as a general concern and the difficulty in obtaining a measure of restraint in the circumstances mentioned does not seem entirely plausible unless the relevant submissions have not been well-presented. In any event, there does not seem to be a widespread practice of detaining alleged perpetrators of ill-treatment and, although they may be often being sought at a late stage in the investigation, it may be that judges do not always recognise the importance of ensuring that there is no risk of investigations being impeded by alleged perpetrators<sup>71</sup>.
162. A law enforcement body may suspend the officer against whom ill-treatment has been alleged without the need for a court order, but this does not seem to occur in most cases<sup>72</sup>.
163. Such suspensions should in cases of alleged ill-treatment be automatic. The prospect of this occurring may give rise to concern about the impact on police work. However, if investigations into ill-treatment were conducted with real priority and there was no obstruction in the gathering of evidence, the duration of any suspension should generally be quite short as it would then be relatively straightforward to establish what actually occurred.
164. The problem of cooperation is not just one of the alleged perpetrator's colleagues being influenced by her or him; they may themselves take the view that solidarity with a colleague is more important than ensuring that any law-breaking by her or him is appropriately sanctioned.
165. In order to change such a mindset, there is undoubtedly a need for clearer leadership as to the law enforcement role being applicable to the conduct of officers as much as to the public and other entities. Indeed, this is essential if the public are to have real confidence in policing.
166. In addition, as was underlined in some interviews, support is needed for law enforcement officers who might feel reluctant to "inform" on a colleague through providing suitable guarantees for those who become "whistle-blowers".
167. Notwithstanding these genuine difficulties that face those undertaking investigations into ill-treatment, it was evident from many comments made in the course of interviews and focus group meetings that it appeared often the case that these were not handled with either despatch or sufficient thoroughness.
168. Thus, it was suggested by investigators that the time taken for investigations depended on the complexity of

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<sup>70</sup> Articles 154-158 of the CPC.

<sup>71</sup> In one of the case studies (Case A) a request for house arrest as a measure of restraint was not granted and the alleged perpetrators, who were instead granted bail but also removed from office (fifteen months after the alleged incident). In another case study (Case B) two of the alleged perpetrators were remanded in custody three days after the alleged incident and two others were subjected to house arrest just over a month after that occurred.

<sup>72</sup> It did not occur in any of the case studies.

the case, with the periods involved ranging from 1-2 months (such as in cases of allegedly illegal detention) to 3 to 6 months and in some cases even a year.

169. Even if there were delays caused in gaining access to records, the shorter periods cited point to a rather slow pace for cases involving a single individual alleging ill-treatment in a defined setting.
170. Moreover, while some cases may be more complex or involve a lot of alleged victims (such as where ill-treatment was said to have been inflicted in a prison), the possibility of a year being required would suggest that insufficient resources are being deployed to deal with this<sup>73</sup>.
171. However, these suggested time frames may not be entirely accurate as in many interviews and focus group meetings it was observed that there was a lack of expediency at the initial stage of investigations despite this being crucial for the outcome of many cases<sup>74</sup>. In particular, it was suggested that there was either no urgency in conducting forensic medical examinations or there were delays in getting them done<sup>75</sup>.
172. Indeed, it was commented that complaints about ill-treatment are often left unaddressed after being registered and that action is only taken when an order for this is given by an investigative judge, following a motion by the alleged victim's defence lawyer<sup>76</sup>. The need to go to court for such an order inevitably adds to the delay before investigative actions are undertaken. Moreover, it was suggested that in some instances the order was made where there had been a failure to enter a complaint in the URPI.
173. Some support for the comments in the preceding paragraph might be seen in the apparent practice of the main investigative department in the SBI's central office taking over cases – doing so in up to 70% of cases – where its monitoring of investigations by territorial departments leads it to the conclusion that there were professional shortcomings in their conduct or difficulties were being created by the alleged perpetrator.
174. The need for cases to be taken over necessarily adds to the time required for the investigation and may also mean that important evidence cannot be collected.
175. The apparent failure to take investigative actions promptly is not the only factor that has a bearing on the thoroughness of investigations. It also seems a feature of the approach to evaluating medical evidence<sup>77</sup>.
176. Certainly, it was surprising that the forensic doctors interviewed were impressed not to get many questions about medical reports from investigators (or prosecutors) and that they rarely went to court unless there was a petition submitted by a defence.
177. Given the key nature of medical evidence in evaluating claims of ill-treatment and then pursuing criminal proceedings against an alleged perpetrator, it might be expected that investigators (and prosecutors) would show more interest in exploring the conclusions reached by the forensic doctors.

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<sup>73</sup> However, 9 SBI investigators were appointed in Case A (albeit that nothing was done by them for 3 months) and 20 investigators were appointed in Case B, which shows that it can be possible to deploy the necessary resources.

<sup>74</sup> In one of the closed cases the investigation lasted over ten months and in the other (in which entry into URPI was 3 months after the alleged incident) it took 1 year and 1.5 months. In the one of two case studies pending before the courts (Case A) the interval between the commencement of the investigation and the sending of the indictment to the court was 2 years and 10 months and in the other (Case B) it was just over 7 months. The latter case involved extensive investigative activities and, while possibly atypical, it does show that a methodical and determined approach to investigation is not only feasible but also delivers results.

<sup>75</sup> In one of the case studies in which the proceedings were closed, there was a failure to carry out any forensic medical examination at all, which was a key factor in the decision to close it. In the other one, the alleged victim refused to undergo such an examination, considering that the medical documents from the hospital were sufficient. In one of the case studies pending before the courts (Case A), a forensic medical examination was sought 5 months after the appointment of an investigator, and this took place some two months later. In the other such case study (Case B) the medical examination took place 2 days after the alleged incident.

<sup>76</sup> This did not occur in any of the case studies but the police and SBI investigators did not respond to motions relating to the investigation by the lawyer for the alleged victim in one of the pending cases (Case A) and there was also a period of 3 months in which nothing was done. Also, in one of the case studies in which the proceedings were closed, the OPG only assigned the case to an SBI investigator over a month after it had entered information in the URPI.

<sup>77</sup> The initial downplaying of the injuries in Case A (see fn. 93 below) points to a simple lack of respect for medical opinion as there does not appear to have been any attempt to seek clarification from the nurse who described them.

178. Indeed, there might be a need to seek a second opinion such as in a case cited by the Procedural Oversight Department, in which a forensic doctor's report that the supposed injuries to a suspect were no more than a skin disease had not addressed his assertions that they had been caused by burns or explained why this cause had been eliminated.
179. It may be that the reports by forensic doctors are not problematic but the fact that there is no effort to test them suggests either a lack of interest in ensuring that the conclusions are well-founded or insufficient competence to evaluate them in the light of other aspects of the case.
180. Also significant in this regard is the indication in interviews that investigating judges are prepared to order forensic medical examinations where the suspect appearing before them has signs consistent with the infliction of ill-treatment. This would suggest that Article 60 of the CPC is being properly applied but it might also point to shortcomings on the part of SBI investigators in at least some cases.
181. It was also emphasised in some interviews and focus group meetings that lawyers try to collect evidence on their own where there has been an insufficient response to allegations of ill-treatment.
182. Although it is impossible to be categorical about the existence of shortcomings in the conduct of investigations, there is reason to consider that not all of them are satisfactory because of the inadequate reasoning for closing cases in which no notification of suspicion has been issued.
183. Thus, the tendency seems to be to state no more than that there was no *corpus delicti*, thereby bringing the closure within one of the grounds open to an investigator to make such a decision, namely, that the "absence of occurrence of criminal offence has been established"<sup>78</sup>.
184. There may have been no ill-treatment inflicted in the cases concerned. However, the absence of any account of even the essential evidential basis for the conclusion can hardly give great confidence that there has been a serious investigation, particularly when the workload of investigators suggests that there are significant constraints on their ability always to conduct a thorough examination of allegations against law enforcement officers.
185. Moreover, this sort of perfunctory response when dealing with some allegations of ill-treatment is even seen in cases for which the European Court has found a violation of the procedural violation of Article 3 of the European Convention and the Agent's office has asked for further enquiries to be made for the purpose of executing the judgments concerned<sup>79</sup>.

### iii. The Prosecutorial Role

186. The official position of the SBI regarding the role of the prosecution is that this is very important. In particular, this was emphasised with respect to getting their methodological support and their analysis of the evidence.
187. However, the perspective of the prosecution was somewhat different, suggesting that there was a need for a change of mindset in the SBI because investigators did not understand the role of prosecutors in providing guidance to them, with the result that instructions or recommendations by prosecutors were not fully followed.
188. In this regard, one example given was the response to the instruction to undertake some investigation where nothing had been done was that there were other more important cases to be dealt with.
189. Such failings have apparently led the prosecution to undertake some investigative actions itself, particularly in high profile cases, which runs counter to the division between prosecution and investigation enshrined in

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<sup>78</sup> Article 284 of the CPC. This occurred in the two case studies in which the occurrence of the alleged ill-treatment was not sent to the courts but the absence of forensic medical examinations and the lack of cooperation by one of the alleged victims made the closure decision inevitable.

<sup>79</sup> Such a response is, of course, even more relevant where the European Court has found a substantive violation.

the CPC, as well as the aim of establishing the SBI as the body ensuring independent investigations in line with the requirements of the European Convention<sup>80</sup>.

190. It seems clear that the OPG would like to see the power of the prosecution regarding the conduct of investigations considered ineffective in Article 36.5 of the CPC enhanced so that it could suspend the investigator concerned and even challenge the role of the department concerned.
191. Moreover, the OPG would also like to be able to undertake more investigations itself rather than just provide guidance as to their conduct.
192. At the same time the Procedural Oversight Department would like to be present in all regional centres through developing specialised units within the structure of the existing prosecution departments in the regions.
193. Apart from the last point, it is not clear how the adoption of all these proposals would really improve the effectiveness of investigations into alleged ill-treatment.
194. Undoubtedly, there is a need for procedural guidance from the prosecution to be taken seriously by SBI investigators<sup>81</sup>, but this might be better achieved through greater institutional cooperation, training and, in more complex cases, joint teams than greater powers to dictate who should be investigating a case.
195. In this connection, there seems to be a need to overcome different views on the part of investigators and prosecutors as to what amounts to sufficient evidence, which can lead to delays. This could be facilitated by speedier communication, using electronic means rather than relying on paper documentation which inevitably slows down the whole process.
196. At the same time, the handling of cases by the prosecution has itself not been without weaknesses, particularly on account of not checking the quality of cases referred to the courts and not substantiating refusals to prosecute<sup>82</sup>.
197. This now seems to be being remedied following the establishment of the Procedural Oversight Department and there does seem to be merit in ensuring that prosecutors in the regions dealing with ill-treatment having some specialisation in this field and being ready to work closely with the Procedural Oversight Department.
198. It would be more efficient to concentrate on remedying deficiencies in the conduct of investigations by the SBI rather than creating parallel structures, which are unlikely to lead to speedier and more satisfactory investigations.
199. As has been seen, the SBI itself is not necessarily sufficiently proximate to the places where ill-treatment is alleged to have occurred and it is difficult to see how this would be remedied by the prosecution taking on an investigative role.

#### **iv. Victims**

200. There was very little interest shown in the interviews and the focus group meetings about the position of those who claim to be victims of alleged ill-treatment.
201. This is perhaps unsurprising given that such “victims” are invariably also suspects in criminal proceedings. As a result, although there may be investigation into ill-treatment, the focus of investigating judges, defence lawyers and prosecutors is undoubtedly more on those proceedings and the impact that the investigation may have on them<sup>83</sup>.

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<sup>80</sup> This occurred in two of the case studies.

<sup>81</sup> This was not an issue seen in the case studies.

<sup>82</sup> The prosecutors initially dealing with the matter in three of the case studies, with these being replaced by ones from the Procedural Oversight Department in two of them and ones from the Department joining the existing prosecutors in a third one.

<sup>83</sup> This was not an issue seen in the case studies.

202. Moreover, the position of the victim under the CPC is limited to rights and duties as a participant in criminal proceedings and no attention is given to the provision of support for such a person, which is particularly problematic in cases where the alleged crime may have serious repercussions for her or his long-term health.
203. Insofar as the notion of victim support was at all acknowledged, it was seen as a matter for other government departments.
204. In addition, an alleged victim who is a suspect is in a particularly precarious position where retaining her or him in custody may expose her or him to undue pressure regarding the allegations s/he has made<sup>84</sup>. Nonetheless, allegations of ill-treatment do not seem – according to the interviews and focus group meetings – to constrain a readiness on the part of investigating judges to impose measures of restraint involving detention on alleged victims, even though this could both aggravate the impact of ill-treatment that has actually been inflicted and discourage their participation in investigations.
205. There was no evidence of the gender of alleged victims having any particular impact on the fulfilment of the effective investigation requirement. However, as the Kaharlyk case indicates, there are clearly instances of a person's gender being relevant for the form in which ill-treatment is inflicted.
206. Emphasis was, however, placed by the SBI on the need for care conducting investigative actions involving women who are the alleged victims of ill-treatment, particularly as they can be depressed and weak. It was also recognised that male investigators may not always understand the mentality of such victims but that this needed to be taken into account.
207. These are definitely valid points. Nonetheless, while special consideration may be needed for women who are victims of ill-treatment, there should also be an awareness that all those subjected to it will suffer trauma that can affect how they respond in the course of investigations into their claims.
208. Thus, at present, the alleged victims of ill-treatment are just seen as a source of information; none of those interviewed really saw it as their role to care about them. Furthermore, there was very little training about understanding their situation.

## **v. Outcome**

209. It was recognised by the SBI that not all cases have led to indictment. However, it was considered that this was for objective reasons relating to the absence of evidence.
210. It was also suggested that if an accused was acquitted this meant that the investigator was not good enough or there were improper means used to collect evidence<sup>85</sup>.
211. Neither of these points seem to be borne out by the findings in respect of investigations.
212. So far, none of the cases being dealt with by the Procedural Oversight Department have been tried. This was ascribed to the lack of court hearings on account of Covid-19.
213. This makes it difficult to assess whether this apparently promising initiative has had some beneficial effect despite the difficulties regarding the conduct of investigations.
214. It should also be noted that cases referred back for investigation by the SBI – following a finding of a violation of the procedural obligation under Article 3 of the European Convention – have not led to ill-treatment being established. Rather the finding in them is an unsubstantiated one, namely, just that there was no *corpus delicti*.
215. This leaves unresolved whether a satisfactory resolution of the individual measures is feasible. The Procedural

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<sup>84</sup> This was not the situation in any of the case studies.

<sup>85</sup> Of the case studies in which the proceedings were closed, the death of the alleged victim in one and the unwillingness of the alleged victim in the other were the key factors leading to this decision.

Oversight Department has suggested that the applicants should receive an apology. However, although a truly effective investigation might not be feasible at this point of time, it might also be expected that the reason for this would require a more substantial explanation than that given so far and the provision of compensation.

## 7. Notification of suspicion and charging

216. The notification of charges, as the statistics from the OPG indicate<sup>86</sup>, has generally occurred only for a small percentage of the cases registered: 9.1% in 2018 and 3.8% in 2019 for Article 127; 2.5% in 2018 and 2.7% for Article 365.2; and 19.2% in 2018 and 9.7% in 2019 for Article 365.3.

217. There has, however, been some increase in 2020 in the percentage of registered cases being the subject of notification of charges: 47.2% for Article 127; 4.8% for Article 365.2 and 20.5% for Article 365.3.

218. The gap between registration of charges and notification of suspicion could be expected to reflect an assessment of the strength of the allegations in the cases concerned, with the view clearly being that there is no or insufficient evidence to justify pursuing the investigation of them further. The recent narrowing of the gap suggests, therefore, that the prosecution are more satisfied than before that investigations are producing stronger evidence in support of allegations relating to ill-treatment.

219. However, as has been seen, it appears that notification of suspicion is actually occurring at a relatively late stage in the process as the approach of the prosecution, according to the Procedural Oversight Department, is to make the notification only when it is virtually ready to issue an indictment<sup>87</sup>.

220. This is to an extent implicitly confirmed by the OPG statistics as there appears to be some correlation between the figures for issuing notifications and those for sending cases to court, although the figures for these different actions do not necessarily relate to the same sets of cases.

221. This practice of effectively linking the issuing of notification of suspicion to the issuing of an indictment is not, however, consistent with the differentiation of these processes in the CPC.

222. Moreover, it has the potential to work against the interests of an effective investigation as it is only when a notification of suspicion is issued that it is then possible for an investigator or prosecutor to apply for the suspension of a law enforcement officer from her or his duties where there is necessary to prevent a suspect from destroying or forging objects and documents of essential importance for the pre-trial investigation, or exerting illegal influence on witnesses and other participants in criminal proceedings, or otherwise illegally obstructing criminal proceedings<sup>88</sup>.

223. Certainly, such actions, as already noted, were cited in interviews and focus group meetings as being among the significant obstacles faced when conducting of investigations.

224. Furthermore, the linking of the two discrete steps in the proceedings is problematic given the view of the prosecution that cases should be sent to court only where there is overwhelming evidence as otherwise an acquittal would give rise to the need for an explanation that everything necessary had been done. Such an attitude echoes the notion that success in bringing prosecutions should be a factor in the assessment of a prosecutor's performance, which is inconsistent with Article 43(3) of the Law of Ukraine "On the Public Prosecutor's Office"<sup>89</sup>.

<sup>86</sup> See para. 66 above.

<sup>87</sup> There was no notification of suspicion in the two case studies in which the proceedings were closed and in the two pending cases such a notification was issued respectively after almost twenty-three months from the alleged incident in one of them (Case A) and just two days from it in the other (Case B).

<sup>88</sup> Pursuant to Articles 154-158 of the CPC.

<sup>89</sup> This provides that: "The acquittal of a person or closure of criminal proceedings by the court regarding him/her shall not serve as a ground for bringing to disciplinary actions the public prosecutor who has provided procedural guidance in a pre-trial investigation and/

225. Nonetheless, it appears that this attitude does not always prevail as some prosecutors acknowledged that they did not always have sufficient time and facilities to control the quality of all aspects of cases referred to court. In particular, issues such as whether statements were made voluntarily or under duress were thus left to be resolved in court. However, such practical difficulties were seen as a matter of concern primarily by reference to the effect of an acquittal in the cases concerned on them losing salary bonuses or even becoming the subject of an internal inquiry.
226. When it comes to the actual charges that are notified or are the subject of an indictment, more use is made of Article 365 than Article 127 of the Criminal Code.
227. This reflects in part difficulties in establishing all the elements required for torture – in particular, as has been seen in the discussion of investigations, demonstrating psychological pressure and mental suffering is seen as difficult – but resort to the crimes in Article 365 of the Criminal Code inevitably presents a less exacting challenge for the prosecution, especially where it can be shown that a use of force is unjustified without having to focus too much on its gravity or purpose.
228. In the face of possible uncertainties as to the view that a court might take of the evidence, it might be preferable if the two offences were charged in the alternative so that a conviction might occur on the lesser charge where the court is ultimately not satisfied that the infliction of torture had been demonstrated while still being required to consider whether that might have occurred.
229. The categorisation of the use of torture in one of the cases referred to in the subsection above on the incidence and nature of ill-treatment alleged – where a confession was sought by a law enforcement officer<sup>90</sup> – seems consistent with the approach required by Article 3 of the European Convention.
230. As regards the other cases referred to in that subsection<sup>91</sup>, their categorisation as involving offences under Article 365(2) of the Criminal Code should mean that there were no signs of torture. However, it is not evident from the rulings that this was something explicitly addressed in the proceedings. It is not possible, therefore, to assess whether the treatment inflicted by the law enforcement officers involved was appropriately qualified in the charges laid against them.
231. Although, as has been seen<sup>92</sup>, the definition of torture in Article 127 of the Criminal Code is not fully compliant with the definition in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and there was recognition that the provision needed to be revised, there was no suggestion that the latter's shortcomings had led to any failure to deal appropriately with instances of ill-treatment contrary to Article 3 of the European Convention<sup>93</sup>.
232. Furthermore, as has been noted<sup>94</sup>, the damaging or destruction of evidence and its concealment were emphasised in the interviews and focus group meetings as being among the significant obstacles faced when conducting of investigations.

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or prosecuted on behalf of the State in court in these proceedings, except for the wilful breach of legislation or improper performance of duties”.

<sup>90</sup> See para. 43 above.

<sup>91</sup> *Ibid.*

<sup>92</sup> See paras. 27–28 above.

<sup>93</sup> In one of the two cases studies in which proceedings are pending (Case A), the initial view taken of the alleged incident by the police investigator was that only the offence of causing light injuries under Article 125 of the Criminal Code when injuries described by the nurse should be classified as ones of medium gravity. Subsequently a notification of suspicion was issued to two officers in respect of both the Article 125 offence and also that of that in Article 365.2 (abuse of power with illegal use of force), with such a notification issued to two other officers in respect of Article 127 (torture). The final qualification in the indictment was that of just Article 365.2 for the first two officers and Article 127 for the other two. In the other case (Case B), the indictments and notifications of suspicion issued in respect of the alleged perpetrators were – depending on their alleged involvement – essentially the same, namely, for offences contrary to Article 127.2 (torture by a group of people), Article 146.2 (illegal arrest or kidnapping of a person) and 152.3 (rape, committed by a group of people, either as executor or abettor). However, the notification of suspicion relating to Article 146 for one of the alleged was the lesser offence of illegal arrest in paragraph 1.

<sup>94</sup> See paras. 156 and 160 above.

233. It is surprising, therefore, that there was no suggestion in those interviews and meetings about either the appropriateness of taking some action against those law enforcement officers responsible for concealing, damaging or destroying evidence or that any such action had been taken. Indeed, there was no mention at all of using any of the offences in the Criminal Code that could be relevant where there has been conduct that could or does impede or otherwise undermine an investigation into ill-treatment<sup>95</sup>.
234. Moreover, it was not suggested that the formulation of offences in the Criminal Code created any obstacles to bringing proceedings in respect of action taken to impede or undermine investigations.
235. Of course, it may not always be feasible to bring such proceedings as assertions about this having occurred may sometimes only be based just on suspicions that arise, for example, where it was claimed that a video recording system had only malfunctioned on the very day when the ill-treatment being investigated was alleged to have occurred.
236. Nonetheless, given the emphasis on efforts to impede or undermine investigations, tackling the possibility of this having occurred would seem to deserve some priority in responding to allegations of ill-treatment. Certainly, a few instances where this is established and those responsible are properly sanctioned could serve as a deterrent to others who might be tempted to undertake such efforts.

## E. CONCLUSIONS AND RECOMMENDATIONS

237. It is encouraging that there do seem to be signs both of a decrease in the occurrence of ill-treatment contrary to Article 3 of the European Convention and of more instances in which allegations of this having occurred being sent to the courts.
238. It is also encouraging that a number of institutional and practical measures have been taken, or are being planned, to forestall the use of ill-treatment and to assist investigations where it is alleged that this has occurred.
239. Nonetheless, not only are there attempts to evade the inadmissibility under the CPC of evidence obtained through ill-treatment by resorting to different strategies involving psychological pressure, but it is also clear that there continue to be instances where confessions are sought through the use of force and of excessive force being used to apprehend suspects.
240. It would, therefore, be a mistake for some positive trends to lead to complacency about all problems in ensuring the effectiveness of investigations into allegations of ill-treatment having been overcome. Indeed, the contrary is clear from the findings of both the desk and field research that has been undertaken.
241. Thus, there are shortcomings with respect to the legal and institutional framework, as well as in various working practices, that still need to be addressed.
242. This has also been emphasised by the Committee of Ministers in its most recent decision adopted pursuant to its supervision of the execution of the Kaverzin group (Application No. 2389303), Afanasyev group (Application No. 38722/02) and Belousov (Application No. 4494/07) v. Ukraine<sup>96</sup>.
243. Thus, while it noted ongoing efforts to improve safeguards against torture and ill-treatment by law enforcement officers, to provide compensation to victims and to increase effectiveness of investigations into allegations of such acts, the Committee of Ministers expressed concern about the lack of resolute action, as many of the envisaged measures were not yet finalised despite the time that had passed since the first identification of these problems by the European Court.

<sup>95</sup> See para. 38 above. In this connection, it is interesting to note that in the SBI's Annual Report for 2020, in which it refers indictments being sent to court, that one of offences mentioned is Article 374 of the Criminal Code (violation of the right for defence); page 31. However, it would be desirable for other possible offences relevant for action that undermines or impedes an investigation also to be invoked.

<sup>96</sup> At its 1398th meeting, 9-11 March 2021; available at [https://hudoc.exec.coe.int/eng#%22display%22:\[2\],%22EXECIdentifier%22:\[%22CM/Del/Dec\(2021\)1398/H46-5E%22\],%22EXECDocumentTypeCollection%22:\[%22CEC%22\],%22EXECtitle%22:\[%22kaverzin%22\]}](https://hudoc.exec.coe.int/eng#%22display%22:[2],%22EXECIdentifier%22:[%22CM/Del/Dec(2021)1398/H46-5E%22],%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECtitle%22:[%22kaverzin%22]}).



244. In particular, the Committee of Ministers urged the authorities to step up their efforts to resolve all the outstanding issues, in particular the adoption of the necessary amendments to the legal framework on torture and ill-treatment, the adoption of the adequate methodologies to ensure effective investigations into allegations of such acts and the elaboration of assessment tools capable of showing reliable data on the reduction of instances of torture and ill-treatment and whether the domestic case law had evolved in accordance with the Convention requirements on fight against impunity of such acts.
245. In the light of the shortcomings identified and the concern expressed by the Committee of Ministers and apart from the importance of the current competition leading to an early appointment of a Director for the SBI, there is a need for the following institutions – individually and in some instances collectively - to adopt the measures set out below and to do so as a matter of urgency:

#### *The Verkhovna Rada*

- Amend the Criminal Code so that the offence of torture is fully in conformity with European and international standards, there are no gaps regarding the proscription of ill-treatment contrary to Article 3 of the European Convention that does not amount to torture and remove the limitation periods applicable for all offences entailing a violation of Article 3 of the European Convention;
- Require all complaints of ill-treatment by law enforcement officers to be investigated from the outset by SBI investigators rather than police internal security units;
- Provide for the automatic suspension of law enforcement officers once a complaint of ill-treatment has been made against them for as long as this is considered necessary by SBI investigators or prosecutors;
- Enable SBI investigators to obtain provisional access to objects and documents from all places of detention with the authorisation just of the prosecutor responsible for providing procedural guidance but with that prosecutor being required to ensure that such provisional access is justified and that data protection standards are observed;
- Provide for more systematic and more frequent medical examinations of persons held in police stations and for a right for a detained person to require a medical examination, as well as for an obligation for medical staff to record all injuries and their probable causes where persons are brought to hospital by law enforcement officers for any reason and to inform the SBI where ill-treatment is suspected;
- Provide for forensic medical examinations to be undertaken by persons who do not have a working relationship with the law enforcement body in the town or district in which the ill-treatment is alleged to have occurred;

#### *Law enforcement agencies in general*

- Ensure the implementation (including the necessary funding and training) of plans (a) to extend the custody records system to all police stations and pre-trial detention facilities after taking account of lessons learnt from the pilot programmes, (b) to introduce an electronic system for recording all actions with a detainee beyond the control of investigative and operational units, (c) to zone police stations in such a way that civilians without the procedural status of a detainee cannot find themselves in offices or, moreover, in non-working, technical premises; (d) to develop an algorithm for the actions of law enforcement officers upon receipt of a report of torture and other forms of ill-treatment and a methodology for investigating such violations of Article 3 of the European Convention, (e) to establish a mechanism of “torture whistle-blowers” within the criminal justice system and (f) to develop a statistical data collection system so as to accumulate as complete information as possible on the scale of torture and other forms of ill-treatment provide a thorough analysis of the data collected;
- Expand the use of videorecording throughout police stations and the wearing of body cameras by law enforcement officers, while taking measures to ensure that they are always functioning and that there is no scope for tampering with the recordings made;

### *The SBI*

- Ensure that its territorial departments are given sufficient direction as to the importance of conducting effective investigations into ill-treatment and that their annual action plans indicate the measures to be taken by them to respond to complaints of alleged ill-treatment, including those required to prevent any delay in investigation that would be prejudicial to establishing whether any crime has been committed;
- Ensure that more of its investigators have the necessary specialised knowledge and skills to investigate allegations of ill-treatment (including the assessment of relevant forensic evidence) and adopt guidelines governing the assignment of an investigator to deal with such cases that will lead to them being handled by investigators with this specialised knowledge and skills;
- Require fuller reasoning than that there was no *corpus delicti* when closing investigations into alleged ill-treatment where no notification of suspicion had been issued;

### *The SBI and the OPG*

- Implement all the elements envisaged in the Strategy for the effective investigation of alleged ill-treatment, protection of whistle-blowers, training of their staff and the collection and analysis of data relating to alleged ill-treatment;
- Bring appropriate criminal proceedings against all law enforcement officers where there is a well-founded basis for concluding that they have concealed, damaged or otherwise impeded or undermined an investigation into ill-treatment;
- Facilitate better appreciation by SBI investigators of the need to act on prosecutorial guidance with respect to the investigation of alleged ill-treatment through greater institutional cooperation, training and, in more complex cases, joint teams, as well as the use of speedier, electronic forms of communication between prosecutors and SBI investigators;
- Monitor closely the handling of allegations of ill-treatment throughout the country, publish a statistical analysis of all the allegations concerned and the outcome of the criminal and disciplinary proceedings in respect of them and ensure that the issue of achieving an effective investigation of the allegations is a matter addressed in the performance evaluation of all prosecutors and SBI investigators;

### *The OPG*

- Ensure that prosecutors in the regions dealing with cases of alleged ill-treatment have sufficient specialised knowledge and skills for this work and are ready to work closely with the Procedural Oversight Department, with the latter being responsible for developing the capacity of the former to deal with cases involving alleged ill-treatment;
- Require prosecutors to cease the practice of effectively linking the issue of notifications of suspicions to the point in an investigation into alleged ill-treatment where they are ready to issue an indictment;
- Ensure that prosecutors do not refer cases of alleged ill-treatment to court where they have not had sufficient time and facilities to control their quality, especially as regards such as whether statements were made voluntarily or under duress;
- Charge alleged perpetrators with all the possible offences that might have been committed so that, even though a conviction might ultimately be possible on the less serious offence, the court will have had still to consider whether the more serious one had in fact been committed;

### *The SBI, the OPG and the National School of Judges of Ukraine*

- Provide SBI investigators, prosecutors and judges with training on the trauma that can be caused to those who have been subjected to ill-treatment so that they can understand its potential impact on them in course of investigations and prosecutions of the alleged perpetrators of that ill-treatment;

### *The Ministry of Justice*

- Increase the authority of the Agent's office to facilitate an effective investigation is made into cases in which a violation of the procedural violation of Article 3 of the European Convention has been found by the European Court and to expect to be provided with substantive reasoning going well beyond the absence of any corpus delicti when it is asserted that it has not been possible to establish whether the alleged ill-treatment did occur;
- In those cases where the passage of time means that it is no longer possible to establish whether the alleged ill-treatment did occur, provide not only an apology to the alleged victim but also a detailed explanation as to why that is so and compensation for the damage that should be presumed to have been suffered;

### *Investigating judges*

- Recognise the importance of ensuring that there is no risk of investigations being impeded by alleged perpetrators when determining applications for the imposition of measures of restraint on them on account of their alleged involvement in the infliction of ill-treatment;
- Ensure that there is no hesitation in fulfilling their duties under Article 206(6) and (7) of the CPC;
- Have regard to the possibility that imposing a measure of restraint involving detention on a person who has alleged that s/he has been subjected to ill-treatment could exacerbate the trauma suffered and impede the investigation into the allegation concerned;

### *Lawyers*

- Ensure that a contemporaneous record is made of any delays in being able to gain access to their clients in which psychological pressure was exerted on them.

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