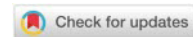


CONDUCTING AN INVESTIGATION IN RELATION TO THE CRIMINAL OFFENSE OF ABUSE AND TORTURE - STANDARDS OF EFFECTIVE INVESTIGATION IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: In order for the procedure body (public prosecutor, court or other state body before which the procedure is conducted) to be able to effectively examine serious and specific allegations of abuse and torture, the basic and first prerequisite is an effective criminal procedure law, based on the provisions of which to clarify all the circumstances under which an individual's human dignity was violated, great pain or severe suffering was inflicted with the aim of obtaining a confession, statement or other information from him or a third party or to intimidate or illegally punish him or a third party, or do so for another reason based on any form of discrimination. The paper analyzes the practice of the European Court of Human Rights with a summary of established relevant standards on the procedural obligation of domestic procedural authorities to conduct an investigation in the case of torture or ill-treatment in accordance with the provisions of the European Convention on Human Rights. The special value of this analysis consists in the identification of the standards of effective investigation in the case of abuse and torture and their content, as well as the recommendation that they be incorporated into domestic criminal procedural laws. The basic standards of an effective investigation have been identified: adequacy, thoroughness, independence and impartiality, timeliness, public oversight and participation of the injured party. Adequacy, as an element of an effective investigation, refers to the need to provide evidence that relates to the suspicious situation itself and that will lead to the discovery and punishment of the person responsible. On the other hand, thoroughness refers to questions about how the investigation should be conducted, as opposed to adequacy, which is more concerned with the purpose of the investigation. Independence and impartiality, as a standard of an effective investigation, refers to the persons who are responsible for organizing and leading the investigation, its direction, management and implementation. Timeliness, as a criterion, i.e. standard, of an effective investigation, implies that it is initiated in a timely manner and completed within a reasonable time, carried out with sufficient care in order to obtain the best possible quantity and quality of evidence. In order to ensure the rule of law, prevent possible collusion or tolerance of illegal acts, it is necessary to ensure the existence of the principle of public supervision of the investigation and its results, but in such a way that the objectives of the investigation and the rights of the parties in the proceedings are not jeopardized. In order for the investigation to be effective, it is necessary for the injured party to have access to the investigation, in order to adequately protect his interests. Conducting an investigation into alleged violations of Article 3 of the European Convention on Human Rights is . The aforementioned standards, despite the significant practice of the European Court, are not yet clearly defined, separated from each other, but they are important for strengthening institutions and raising the quality of judicial proceedings in order to create conditions for the fair and effective exercise of rights and legal interests. For these reasons, a recommendation is made to the domestic legislator that, in order to improve the existing normative framework of the investigation in terms of general principles, it should be harmonized with the practice of the European Court of Human Rights in the part where there is still a need for it. Conducting an investigation into alleged violations of Article 3 of the European Convention on Human Rights is an obligation of the state, in order to prevent violations of human rights, regardless of whether the alleged perpetrator of the violation is a state or non-state entity or natural person. The aforementioned standards, despite the significant practice of the European Court of Human Rights, are not yet clearly defined, separated from each other, but they are important for strengthening institutions and raising the quality of court proceedings in order to create conditions for fair and effective administration of justice. For these reasons, it is recommended to the domestic legislator that the standards of effective investigation be an integral part of the criminal procedural legislation, where this is not the case.

Keywords: investigation, abuse, torture, standards, practice, court.

Field: Social Sciences and Humanities.

1. INTRODUCTION

The prohibition of abuse and torture is absolute. In question of behavior that is prohibited in every occasion, which includes circumstances related to the fight against terrorism and organized crime, but

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also occasions for declaring a state of war or emergency. In this regard, the state has an obligation to refrain from abuse and torture, to prevent it with appropriate preventive measures, the first of which is to prohibit acts of torture and other abuses as criminal acts, to prescribe appropriate punishments for them. In the event that abuse or torture occurs, it is necessary to investigate such behaviors with the application of all principles that will make the investigation effective. An effective investigation seeks to determine the existence of grounds for suspicion that a criminal offense has been committed, the circumstances under which it was committed and all other facts important for the discovery of persons who participated in the commission of the crime. In order to achieve the stated goals, it is necessary to carry out an investigation that will meet the already established standards of effective investigation created in the practice of the European Court of the Human Rights (hereinafter European Court), as a permanent judicial body, which guarantees the rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention).

Seen from the aspect of domestic law, „the investigation is initiated: against a specific person for whom there are grounds for suspicion of having committed a criminal offense against an unknown perpetrator when there are grounds for suspicion that a criminal offence has been committed. In the investigation, evidence and data are collected that are necessary to be able to decide whether to file an indictment or suspend the proceedings, evidence that is necessary to establish the identity of the perpetrator, evidence that there is a risk that it will not be possible to repeat it at the main trial or their production was difficult, as well as other evidence that can be useful for the proceedings, and the production of which considering the circumstances of the case, proves to be expedient” (Criminal Procedure Code, 2011, Article 295).

The rules of effective investigation at the international level, that is, on the European continent, were mostly formed by the European Court, acting in cases in accordance with Articles 2, 3 and 8 of the Convention. The paper provides the necessary knowledge about the standards of effective investigation created in the practice of the European Court for Human Rights, related to the prohibition of torture and other forms of ill-treatment. Also, their content is specified, which strengthens the skills necessary for understanding and applying domestic law, which guarantees the right to life, the prohibition of torture inhuman or degrading treatment and punishment, and the protection of private and family life. In the development of effective investigation standards, the Court sought to ensure the implementation of the obligations contained in the Convention and its protocols, on this matter, by the signatory states and thus provide the necessary guarantees of all rights and freedoms guaranteed by the Convention. In order for the investigation to be considered effective, it must be such that it can lead to the establishment of facts about abuse or torture, identification and punishment of all responsible perpetrators. If the investigation could not fulfill the stated goals, in that case the prohibition of abuse, torture, inhuman and degrading treatment and punishment would be useless regardless of its civilizational importance. In practice, this would mean that persons acting on behalf of the state can violate the rights and freedoms of persons over whom they have control with impunity (Boštjan et.al.,2022).

2. MATERIALS AND METHODS

The research on the topic of conducting an efficient and effective investigation regarding serious allegations of abuse and torture began with a review of the existing international standards created within the framework of the Council of Europe, that is, in the practice of the European Court, as and review of the available literature that deals with the issue of the procedural obligation to conduct an effective investigation on the initiative of the state after knowledge of such behavior by the competent authorities. The mentioned approach influenced the creation of methods and tools for data collection and their analysis. During the research, several important scientific methods were applied, which were used to analyze the given problem and on the basis of which reliable and applicable results were reached. The methods included a normative analysis of international regulations created within the framework of the Council of Europe and a qualitative and quantitative approach to the analysis of judgments of the European Court in the area of effective investigation standards, or more precisely, empirical research.

The rules contained in the Guidelines of the Committee of Ministers of the Council of Europe on the Eradication of Impunity for Serious Violations of Human Rights (hereinafter referred to as the Guidelines) were analyzed, which contain principles for conducting an effective investigation in the event of serious violations of human rights, i.e. the existence of allegations of abuse and torture. In addition to the Guidelines, which contain the standards of an effective investigation, a comprehensive analysis of selected judgments of the European Court was carried out, in which positions, conclusions and opinions are presented, important for identifying the most important elements of an effective investigation, when

there is a suspicion of the existence of abuse or torture.

The adequacy standard is defined in the Guidelines. In according to this standard, the investigation must be able to lead to the discovery and punishment of all responsible persons (Guidelines, 2011). Officials are obliged to carry out acceptable actions, based on legal authority, in order to collect the necessary evidence on the case. In a series of rulings, the European Court also defines the content of this standard, stating its opinion that adequacy refers to the general goal of obtaining and securing all evidence (*Archip v. Romania*, 2011); states have the duty and obligation to define the punishment for serious crimes with their positive law and to implement them through effective investigation and criminal prosecution (*M.C. v. Bulgaria*, 2003). Also, the European Court on this issue further states its position that states must not allow impunity in the case of any attacks on personal integrity and that the condition for conducting an effective investigation is the existence of legal rules that provide for the punishment of abuse. If the person is a representative of a state authority, such an official must be removed from further proceedings in the case, while the proceedings are ongoing. In the event that he is convicted, that official person must cease to be an employee of a state body (*Cestaro v. Italy*, 2015).

Thoroughness, as a standard of effective investigation, is defined in the Guidelines. This standard starts from the fact that the investigation must be complete, that it deals with the collection of all important facts and evidence, which includes the causes of discrimination on racial or other grounds. The investigation should determine all deficiencies that led to the violation. by undertaking measures and procedures for gathering evidence, which includes actions to find suspects, witnesses and victims, as well as conducting interviews with them; carry out an investigation on the spot, i.e. where the alleged injury took place in order to collect relevant evidence, especially evidence of a medical nature by experts in the field of medicine or forensics. On the question of evidence, the European Court concludes that the collected evidence should be evaluated in a systematic, persistent, correct and independent manner. Thoroughness requires a strong effort to determine everything that happened in relation to the case. In this effort, it is necessary to avoid unfounded or reckless conclusions, as well as omissions during the investigation that make it impossible to identify the resulting injuries or establish the identity of the persons responsible for inflicting them. Such omissions will represent a risk of non-fulfillment of this standard (*Ciorap v. the Republic of Moldova*, 2016). Violation of the standard of thoroughness, according to the European Court, can occur when injuries in the case of abuse, ascertained by an official or a worker of the medical profession, who perform the duties of a doctor at prisons, be ignored by the acting state authorities during the investigation (*Siništaj and others v. Montenegro*, 2015). The investigation must be conducted on the basis of reasonable suspicion, without neglecting the evidence supporting the complaint (*Aydin v. Turkey*, 1997), the evidence must not be accepted uncritically, especially regarding the statements of police officers (*Virabyan v. Armenia*, 2012).

The standard of independence and impartiality is defined in the Guidelines as follows: Officials authorized to undertake investigative actions must be professional, objective and independent in relation to all persons involved in the case being investigated. This standard implies that state authorities connected to the case being investigated cannot direct the evidence collection process and the procedure preceding the investigation. This especially applies to officials, investigators, who cannot be part of the service to which they belong and the officials who are the subject of the investigation. The standard of "independence and impartiality" obliges officials, who are authorized to undertake investigative actions, to make expert assessments and apply investigative expertise. With regard to the actions of the police, the European Court concludes that the investigation cannot be independent if there is only one action taken by the internal control of the police due to the fact that the action was taken by the police themselves in a case where police officers were reported as abusers (*Siništaj and others v. Montenegro*, 2015). Persons performing investigative actions are obliged to independently and impartially evaluate the evidence (*Mikhail Nikolayev v. Russia*, 2016), that is, the analysis of the evidence should be correct, comprehensive and impartial. An investigation will comply with this standard only if there was no obvious connection between the official undertaking the investigation and the possible suspect. Then, that the investigation was conducted in such a way that there was no absence of independence and impartiality on the part of the investigator (*Mustafa Tunç and Fecire Tunç v. Turkey*, 2015). The application of this standard contributes to the public's trust in the state's monopoly in the use of force and represents the direction of strengthening institutions, reforming the police and the judiciary itself.

Timeliness, as another standard of an effective investigation, is defined in the Guidelines so that the investigation must be initiated in a timely manner with the aim of obtaining all available evidentiary material, that the investigation be completed within the planned period, and that investigative actions be conducted with the necessary care and responsibility. In this sense, the reaction of the authorities must be timely, regardless of the existence of obstacles or difficulties that may prevent the progress of the

investigation. In this way, the protection of basic human rights is ensured and suspicions about possible hidden agreements or favoritism towards acts that are not in accordance with the law are prevented. The European Court found that the standard of timeliness is not met in cases where there is a postponement of the investigation after the disputed event, when the collection of evidence has lost all meaning, and almost two years have passed since the disputed event (*Preminyin v. Russia*, 2011). In cases of abuse, the investigation must be urgent and must not last longer than is justified under the circumstances (*Selmouni v. France*, 1999). The European Court gives the opinion that "urgency", as a basic element of an effective investigation, refers both to the investigation and to the entire criminal procedure, but also to the procedure for the execution of criminal sanctions. The legal system must function efficiently and enable the courts to make decisions on the substance of the matter within a reasonable time (*Calvelli and Ciglio v. Italy*, 2002). The state prosecutor is obliged without delay to: identify witnesses and possible perpetrators, order a medical examination in case of injuries to the injured person, listen to the injured party (*Ramsahai and Others v. the Netherlands*, 2007) but also other examinations, such as examination of footwear, clothing and other items that are suspected to have been used during the commission of the crime, that is, abuse or torture (*Mikheyev v. Russia*, 2006). In order to fulfill the conditions for the investigation to be effective, where necessary, the state prosecutor is obliged to request reports on the use of force from every civil servant connected to the event, then carry out all actions to identify possible perpetrators of the crime, to ensure to immediately collect recordings and review them, as well as to prevent the deletion of recordings in any way (*Boštjan et al.*, 2022). Timeliness, according to the European Court, will not be met if the investigating authorities did not pay full attention to the claims of the injured parties, which related to beatings by law enforcement officers, during which the injured party was under his control, and about five years have passed since the complaint was filed and trials (*Bouyid v. Belgium*, 2015).

The standard of public supervision defined by the Guidelines implies the existence of control, supervision and insight into the work of the investigator during the conduct of the investigation as well as its results by the public. The reasons for this are to ensure accountability, maintain public trust, and ensure that the authorities respect basic human rights and freedoms and exclude the possibility of collusion and acceptance of acts contrary to the law. The beginnings of the standard of public supervision can be found in the judgment of the European Court, where the opinion is expressed that all circumstances related to the deprivation of life must be subject to careful supervision (*McCann v. United Kingdom*, 1995). In the *El Masri* verdict, at the applicant's request for "extraordinary surrender", the torture suffered, the European Court concluded that the right to know what happened was important for the injured party (the applicant), members of his family, but also for other victims torture and the general public. The European Court expressed concern that the term "state secret" can be used to prevent the truth from being known and that the investigation showed that the state had given a false statement regarding the actions taken by state bodies, that is, officials (*El-Masri v. the former Yugoslav Republic of Macedonia*, 2012). Regarding this standard, the European Court also concludes that the level of public supervision should not be considered an immediate requirement, but that it should be declared in each specific case. In support of this understanding, the possibility of jeopardizing the protection of the interests of natural persons as well as certain secret security operations is stated if certain official documentation were to be released to the public (*Jordan v. the United Kingdom*, 2001).

The standard "participation of the injured party" in the investigation is defined in the Guidelines, the part that refers to the involvement of victims in the investigation, unlike the previous standards, which are prescribed in the part of the Guidelines that refers to the criteria of an efficient investigation. The stated standard requires the state to provide procedural conditions so that the injured parties can protect their legitimate rights and interests during the investigation. This implies the possibility that the injured party can initiate the implementation of certain investigative actions and be informed of the results of those actions. But also on other issues, related to the very course and completion of the investigation, which may be important for the protection of the legal interests of the injured parties. In cases of death, under suspicious circumstances, or the disappearance of a person, with the use of force, the state has the obligation to provide all the necessary information about the fate of such a person to his family, to provide the necessary conditions to provide the injured party with professional legal assistance and other advice. To the extent that will ensure their participation in the procedure, when domestic law provides for the participation of the injured party as a party in the procedure of conducting investigative actions. States have an obligation to provide adequate measures for the protection of the injured and witnesses, their physical integrity and psychological state. States must strive to create the conditions for effective protection of the injured, not to suffer abuse, retaliation or deterrence by other means, due to filing complaints, i.e. conducting proceedings based on their complaints or participating in the proceedings. In several cases, based on the presented facts, the European Court expresses its opinion on the violation of the principle of "participation

of the injured party” in the investigation. This can best be seen by pointing out the failures of the state authorities regarding the inclusion of the injured in the investigation and criminal proceedings. These situations are described as the authorities’ refusal to recognize the applicant as a victim (Begheluri and Others v. Georgia, 2014); ignoring the testimony of the legal representative on behalf of his clients by the prosecutor (Ghiurău v. Romania, 2012); failure to inform the injured party about the developments in the case (Paduret v. Moldova, 2010); delay in the case (97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v. Georgia, 2007); limiting access to materials (Kolpak v. Russia, 2012); non-disclosure of case files to the representative of the injured party by state authorities, which had or could have the effect of reducing the ability to represent the client (Husayn (Abu Zubaydah) v. Poland, 2014).

3. RESULTS

The results of the research provide an answer to the basic question: What kind of investigation should be in order to be considered effective in case of suspicion of abuse or torture, whether it can lead to the establishment of facts, identification and punishment of all responsible perpetrators, whether it can protect the rights of the injured and provide public control? The relevant standards of effective investigation contained in the documents of the Council of Europe, i.e. the Guidelines, were identified, which were then examined in the light of the relevant judicial practice of the European Court. The standards of an effective investigation (adequacy, thoroughness, independence and impartiality, timeliness, public oversight and participation of the injured party) are presented as defined by the Guidelines. However, due to their generality, it was necessary to determine and describe their content in accordance with the decisions of the European Court. In this sense, the essential positions and opinions of the European Court are set out, for each standard mentioned, both with regard to the established violation of the rules of effective investigation by the defendant state, and with regard to the need and demand of the European Court that states respect and define and specify with their domestic legislation all those principles, i.e. standards, which will guarantee the fairness of the investigation and the protection of the rights and freedoms of all participants during the implementation of actions by civil servants in this phase of criminal proceedings. In order for the investigation of suspected abuse or torture to meet the requirements of effectiveness, it is necessary for civil servants (police officers) to report any suspicion of abuse during the procedure and to ensure the implementation of the necessary protective measures. In addition, it is their duty to ensure that the requirement of independence, as well as other elements of an effective investigation, is met. The effectiveness of the investigation implies the obligation of the prosecutor to react to suspicions of abuse or torture, to ensure the protection of persons deprived of their liberty and to monitor the mechanisms of protection against abuse. The court has a duty to respond to all indications of ill-treatment or torture in criminal cases of ill-treatment or torture and to enforce the rules on the acceptance/non-admissibility of evidence obtained through ill-treatment. In ensuring the conditions for conducting an effective investigation, lawyers have the duty to use all legal mechanisms that will influence that all actors perform their duties in such a way that the interests of the victim are protected. When it comes to the role of doctors in conducting an effective investigation, it is reflected in their actions being independent and thorough.

4. DISCUSSION AND CONCLUSIONS

Frequent violations of the rights of participants in criminal proceedings most often occur during the investigation in case of suspicion that the crime of abuse and torture has been committed. Violations of rights are the result of actions undertaken by state authorities, that is, officials who undertake actions on behalf of those authorities during the investigation, based on legal authority. Actions that are not in the function of achieving an effective investigation may result in danger to the life, health, physical integrity, freedom or property of the participants in the investigation. Omissions in the work of civil servants can also result in incorrect or incompletely established factual situation, especially if in the process of collecting evidence abuse or torture is undertaken, which can ultimately result in the absence of the rule of law and the loss of public trust in the legal order. The exposed violations of the right to an effective investigation in the decisions of the European Court are indicators that in some countries the domestic legislation does not contain clear and precise guidelines for the implementation of an effective investigation in case of suspected abuse or torture. Also, the standards contained in the Guidelines have not been implemented in domestic law as provided for in them. Therefore, the purpose of the subject research is reflected in the need for countries, which have the obligation to implement the Convention and the Guidelines, to harmonize their domestic legislation regarding the implementation of the investigation, where this is not the case, with the results obtained through this research. The results of the research deserve special attention

because they supplement the existing knowledge about the basic principles of an effective investigation in the case of abuse or torture and may have an impact on amendments to domestic legislation with the aim of improving all elements of the investigation, providing a guarantee to all participants in the criminal procedure that their rights and freedom during the investigation to be protected.

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