

**EUROPEAN COURT OF HUMAN RIGHTS**

**FIRST SECTION**

**APPLICATION no. 77617/01**

**B E T W E E N :**

**MIKHEYEV**

**Applicant**

**v.**

**THE RUSSIAN FEDERATION**

**Respondent**

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**INTERVENTION SUBMISSION**

**BY**

**THE REDRESS TRUST**

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**Introduction**

*The Redress Trust* (REDRESS) is an internationally focussed non-profit human rights organisation based in London. It provides legal advice and assistance to torture survivors for obtaining justice and other forms of reparation both through individual casework, law reform and advocacy programmes. REDRESS has intervened and assisted in landmark litigation in cases concerning torture and has published guidance for legal practitioners, human rights organisations and victims of torture on bringing proceedings for torture and on obtaining reparations.

REDRESS intervenes in this case in order to provide analysis and comparative law jurisprudence in respect of the argument advanced in this case questioning the investigation conducted regarding the Applicant's allegation of torture, as well as whether the criminal and civil remedies afforded to torture victims under Russian law, comply with the requirements of Articles 3, 6 and 13 of the European Convention on Human Rights. This submission is divided in three main propositions:

- 1) That under Article 3 of the European Convention on Human Rights the Russian Federation is obliged to investigate effectively allegations of torture or cruel, inhuman or degrading treatment or punishment.
- 2) That the Russian Federation has an obligation to afford effective domestic remedies to prevent and punish acts of torture in accordance with its obligation under Article 13 of the European Convention on Human Rights.
- 3) That the Russian Federation has an obligation, under article 13, in the context of Articles 3 and 6, to afford effective civil remedies capable of providing adequate reparation for torture victims.

To support this submission the Intervener intends to provide the Court with relevant jurisprudence from international human rights courts and bodies on the positive duties of States to implement adequate safeguards against torture or cruel, inhuman or degrading treatment or punishment, and to ensure a legal framework capable of effective investigation, prosecution and punishment of torture, as well as adequate reparations to victims.

# **1) The Russian Federation is obliged to investigate effectively allegations of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights**

## **1.1 The Russian Federation is obliged under the European Convention on Human Rights and under general international law, to investigate effectively allegations of torture and to punish perpetrators accordingly.**

The European Court of Human Rights (hereinafter the European Court) has consistently established that under Article 3 of the European Convention on Human Rights (hereinafter the Convention) there is an unequivocal obligation to investigate effectively allegations of torture or inhuman and degrading treatment or punishment.<sup>1</sup> This obligation however, does not extend to clearly frivolous cases or those that are ‘manifestly unfounded.’<sup>2</sup> The European Court has explained further, that such a duty includes the carrying out of a thorough investigation capable of leading to the identification and punishment of those responsible for any ill-treatment.<sup>3</sup>

The reasoning for the European Court to interpret Article 3 as including these procedural obligations is well described in *Assenov v. Bulgaria* <sup>4</sup>. The Court explained that without a proper investigation capable of leading to the identification and punishment of those responsible for any ill-treatment, the general legal prohibition of torture or inhuman and degrading treatment or punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.

Indeed, the European Court has observed on numerous occasions, that Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour<sup>5</sup>. In *Aksoy v Turkey*,<sup>6</sup> the European Court noted that: “even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” This interpretation is consistent with international law. The prohibition of torture is universally recognised and encompasses the obligation not to commit torture as well as the obligation to forestall and preempt any such acts.<sup>7</sup>

The importance of effective investigations to protect absolute rights/prohibitions like torture has been widely recognised by human rights tribunals and bodies. For example, the Inter-American Court of Human Rights observed, in similar terms as those described by the European Court in *Assenov v. Bulgaria*, that the failure to investigate might lead to “a situation of grave impunity.... [i]t is injurious to the victims, their next of kin and society as a whole, and fosters chronic recidivism of the human rights violations involved.”<sup>8</sup> The European Court, reaffirming the importance of investigating allegations of torture, has noted on several occasions that: “whatever mode [of investigation] is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures.”<sup>9</sup> Furthermore, the Court established in *Egmez v Cyprus*,<sup>10</sup> that the obligation to investigate exists regardless of whether there is a specific allegation of torture or it becomes evident through evidence. This view was also held by the Inter-American Court in *Velasquez Rodriguez v. Honduras* when it established that “(a)n investigation must ... be assumed by the State as its own legal duty, not... [a duty] that depends upon the initiative of the victim or his family....”<sup>11</sup>. This has been affirmed in subsequent judgments.<sup>12</sup>

## **1. 2. The Russian Federation is obliged to conduct a prompt, impartial and thorough investigation into allegations of torture in accordance with the requirement of “effectiveness” of Article 3 of the European Convention on Human Rights.**

### **1.2.1 Obligation to conduct a prompt investigation**

In *Aksoy v Turkey*,<sup>13</sup> the European Court established that investigations into torture allegations must be carried out promptly. When examining whether an investigation is effective, the European Court has applied the test of whether “the

<sup>1</sup> See for example, *Assenov et al v. Bulgaria* (1999) 28 E.H.R.R. 652.

<sup>2</sup> In the *Aksoy v. Turkey* case the Court referred to an “arguable claim”. In the same manner, the Special Rapporteur on Torture that certain steps should only be taken where the allegation is not manifestly ill-founded (UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (k).)

<sup>3</sup> See *Ilhan v. Turkey*, judgment of 27 June 2000, para 92

<sup>4</sup> See the *Assenov v. Bulgaria* judgment of 28 September 1998, Reports 1998-VII, p. 3290 para 102.

<sup>5</sup> See, for example, *Labita v. Italy*, judgement of 6 June 2000, para 119.

<sup>6</sup> *Aksoy v. Turkey* (1997) 23 E.H.R.R. 553 ECHR, para 62.

<sup>7</sup> *Prosecutor v. Furundzija* (10 December 1988, case no IT-95-17/1-T,(1999) 38 International Legal Materials 317), paras.144 and 148 See also *Al Adsani v U.K.*, where the Court recognized the jus cogens nature of torture(2002) 34 EHRR 11.

<sup>8</sup> *Caracazo Case*, Judgment of August 29, 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002) at para. 117.

<sup>9</sup> *Akias v. Turkey* (2004) 38 E.H.R.R. 18, para 299; *Ilhan v Turkey*, (2002) 34 E.H.R.R. 36, para. 63; *Kaya v. Turkey*, (1999) 28 E.H.R.R. 1,para. 89 ; *Salman v. Turkey*, (2002) 34 E.H.R.R. 17, para. 105.

<sup>10</sup> *Egmez v. Cyprus* (30873/96) [2000] ECHR 672 (21 December 2000) para 69

<sup>11</sup> *Velasquez Rodriguez v. Honduras*, supra, para.177.

<sup>12</sup> *Mariga Urrutia Case*. Judgment of November 27, 2003, Series C No. 103. I/A Court H. R., para 96.

<sup>13</sup> *Aksoy v. Turkey* (1997) 23 E.H.R.R. 553 ECHR

authorities reacted effectively to the complaints at the relevant time.”<sup>14</sup> Consideration is given to the starting of investigations,<sup>15</sup> delays in taking statements,<sup>16</sup> and the length of time taken during the initial investigations.<sup>17</sup>

Despite the fact that the International Covenant on Civil and Political Rights does not contain express provisions relating to investigations, the UN Human Rights Committee has also concluded that investigations must be carried out promptly. In its General Comment 20, the Committee established: “complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.” And it has repeatedly emphasised that a “State party is under an obligation to investigate, as expeditiously and thoroughly as possible, incidents of alleged ill-treatment of inmates.”<sup>18</sup>

The requirement of conducting prompt investigations is expressly set out in the two specialised international conventions against torture. Articles 12 and 13 of the UN Convention against Torture require “prompt” investigations upon receipt of complaints of torture, and Article 8 of the Inter-American Convention to Prevent and Punish Torture requires an “immediate” investigation. The Istanbul Protocol also establishes that “States shall ensure that complaints and reports of torture or ill-treatment shall be promptly and effectively investigated.”

The Special Rapporteur on Torture<sup>19</sup> as well as instruments such as the *Body of Principles on Detention* and the *Standard Minimum Rules for the Treatment of Prisoners*<sup>20</sup> have emphasised that complaints about torture should be investigated ‘promptly’. Equally, the Inter-American Court of Human Rights in *Cantoral Benavides v Peru*, when considering the failure of the State party to open a formal investigation following an allegation of torture, referred to Article 8 of the Inter-American Convention against Torture which “clearly sets forth the obligation of the State to proceed as a matter of routine and immediately in cases such as the present case”.<sup>21</sup>

The UN Committee against Torture has also expressed concern about the lack of prompt investigations in its concluding observations.<sup>22</sup> According to the Committee against Torture, the concept of promptness appears to relate not only to the time within which the investigation is commenced, but also the expediency with which it is conducted.<sup>23</sup> In *Encarnacion Blanco Abad v Spain*, the complainant alleged during her first arraignment on terrorism-related charges that she had been tortured. It took 15 days before the complaint was taken up by a judge and another four days before an inquiry was commenced. The investigation then took 10 months, with gaps of between one and three months between statements on forensic evidence reports. The Committee found this too to be an unacceptable delay.<sup>24</sup>

The European Court has also referred to the expediency in which investigations should be conducted. In *Indelicato v Italy*,<sup>25</sup> the Court found Italian authorities to have violated the duties subsumed within Article 3 not only because of the delay in commencing an initial investigation, but also the length of time taken during the investigation.

## 1.2.2 Obligation to conduct an impartial investigation

The European Court, when assessing the effectiveness of investigations, has often held that investigations lacked independence, e.g. where members of the same division or detachment as those implicated in the allegations were undertaking the investigation.<sup>26</sup> Furthermore, the European Court has noted that independence, according to the Convention, means not only a lack of hierarchical or institutional connection, but also practical independence.<sup>27</sup>

UN treaty bodies have approached the issue of impartiality by considering both procedural and institutional aspects.<sup>28</sup> Impartiality may relate to the proceedings or deliberations of the investigating body, or in respect of any suspicion of, or apparent bias, that may arise from conflicts of interest. In the *Encarnacion*<sup>29</sup> communication, the UN Committee against Torture concluded that the particular investigation was partial because the court failed to take steps to identify the alleged perpetrators, and because of its refusal to allow the complainant to adduce further evidence to the forensic doctor’s report.

<sup>14</sup> *Labita v Italy*, Application no. 26772/95 (unreported judgment of 6 April 2000), para. 131.

<sup>15</sup> *Çiçek v Turkey* (2003) 37 E.H.R.R. 20 ECHR, para.149. *Timurtas v Turkey* (2001) 33 E.H.R.R. 6 ECHR, para.89. See also *Tekin v Turkey* (2001) 31 E.H.R.R. 4 ECHR, 67; and *Labita v Italy*, supra, para. 133. *Tas v Turkey* (2001) 33 E.H.R.R. 15 at paras. 70-72.

<sup>16</sup> *Assenov & Others v Bulgaria*, supra.

<sup>17</sup> *Indelicato v Italy* (2002) 35 E.H.R.R. 40 ECHR, para.37.

<sup>18</sup> *Stephens v Jamaica*, Communication No. 373/1989, UN Doc. CCPR/C/55/D/373/1989 (1995), para.9.2. See also *Irvine Reynolds v Jamaica*, Communication No. 587/1994, UN Doc. CCPR/C/59/D/587/1994 (1997) and *Wayne Spence v Jamaica*, Communication No. 599/1994, UN Doc. CCPR/C/57/D/599/1994 (1996).

<sup>19</sup> Report of the Special Rapporteur of 23 December 2003, E/supra, at para. 39; General Recommendations of the Special Rapporteur on Torture UN Doc. E/CN.4/2003/68 at para. 26(j).

<sup>20</sup> Rule 36 (4).

<sup>21</sup> *Cantoral Benavides v Peru*, Judgment of August 18, 2000, Inter-Am. Ct. H.R., (Ser. C) No.69 (2000).

<sup>22</sup> See, for example, Concluding Observations : Egypt, UN Doc. CAT/C/XXIX/Misc.4, 20 November 2002, para. 5(b).

<sup>23</sup> *Halimi-Nedžibi v Austria*, Communication No. 8/1991, 18 November 1993.

<sup>24</sup> *Encarnacion Blanco Abad v Spain*, Communication 56/1996, February 1996.

<sup>25</sup> *Indelicato v Italy* (2002) 35 E.H.R.R. 40 ECHR para 37

<sup>26</sup> *Aktas v Turkey*, supra, para. 301; *Ilhan v Turkey*, (2002) 34 E.H.R.R. 36 ECHR, para. 101; *Güleç v Turkey* (1999) 28 E.H.R.R. 121 ECHR, paras. 80-82; *Toteva v Bulgaria*, supra.

<sup>27</sup> *Finucane v United Kingdom* (2003) 22 E.H.R.R. 29 at para. 68. See also *Edwards v United Kingdom*, judgment of 14 March 2002, at para. 70.

<sup>28</sup> See, for examples, Concluding Observations of HRC, Lithuania, UN. Doc. CCPR/CO/80/LTU, 15 April 2004; Concluding Observations of HRC, Latvia, UN.

<sup>29</sup> Supra note 24.

Similarly, in *Khaled Ben M'Barek v Tunisia* the magistrate who led the inquiry was found to be partial because of his failure to give equal weight to evidence from both sides.<sup>30</sup>

### 1.2.3 Obligation to conduct a thorough investigation

In several rulings, the European Court has held that a thorough investigation should be capable of leading to the identification and punishment of those responsible for any ill treatment and that it “must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities”.<sup>31</sup> Furthermore, according to the European Court, authorities must always make a serious attempt to find out what happened<sup>32</sup> and “should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.”<sup>33</sup> Investigations should be of reasonable scope and duration in relation to the allegations.<sup>34</sup>

There is ample jurisprudence of human rights courts and bodies to indicate that investigations must be “thorough” and/or “effective”. Whereas the term “thorough” generally relates to the scope and nature of the steps taken in carrying out an investigation, “effective” relates to the quality of the investigation. The Committee against Torture observed that investigations must be effective and thorough,<sup>35</sup> and that investigations must seek to ascertain the facts and establish the identity of any alleged perpetrators.<sup>36</sup> The Human Rights Committee has consistently held that States have a duty to investigate cases of torture and disappearances *thoroughly*.<sup>37</sup> In *Blake*<sup>38</sup>, the Inter-American Court of Human Rights specified that the State fails to comply with its duty to investigate effectively if “the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible”,<sup>39</sup> thereby stipulating an obligation of result in addition to process. The Court has also specified that ‘effectiveness’ requires that victims have full access and capacity to act at all stages of the investigation.<sup>40</sup>

In more detail, the European Court has analysed what steps authorities must take when gathering evidence, and has made reference in its jurisprudence to offers of assistance; objectivity; attitude of the authorities towards victims and alleged perpetrator(s); timely questioning of witnesses; seeking evidence at the scene, e.g. by searching detention areas, checking custody records, carrying out objective medical examinations by qualified doctors; use of medical reports, and, in death in custody cases, obtaining forensic evidence and carrying out an autopsy.<sup>41</sup>

### **2) The Russian Federation has an obligation to afford effective domestic remedies to prevent and punish acts of torture in accordance with its obligation under Article 13 of the European Convention on Human Rights.**

As established by the European Court, Article 3 of the Convention requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment.<sup>42</sup> This positive obligation on States to prevent torture and other forms of ill-treatment is specifically enshrined in the United Nations Convention against Torture as well as the Inter-American Convention to Prevent and Punish Torture.<sup>43</sup> And according to the Istanbul Protocol, taking measures to prevent torture is the first obligation to ensure protection from torture.<sup>44</sup>

### **2.1 The European Convention on Human Rights, as well as international human rights in general, require States to implement specific safeguards for individuals under police custody/detention—including the right to access a lawyer.**

The European Court has held that the authorities have a positive obligation to protect the physical integrity of persons in detention<sup>45</sup>. It has also sustained that the State is responsible for any person in detention who is entirely in the hands of the police<sup>46</sup>, and in particular, that the authorities are under an obligation to protect the health of persons deprived of their liberty<sup>47</sup>. Accordingly, where an individual alleges that he or she was injured by ill-treatment in custody, the State is under an obligation to provide a complete and sufficient explanation as to how the injuries were sustained. Otherwise, torture or

<sup>30</sup> *Khaled Ben M'Barek v Tunisia*, Communication 60/1996, UN Doc. CAT/C/23/D/60/1996.

<sup>31</sup> *Askoj v. Turkey*, supra, para. 95; *Aydin v. Turkey*, (supra, para. 103; and *Kaya v. Turkey*, supra, para. 89.

<sup>32</sup> *Timurtas v. Turkey*, *Timurtas v. Turkey* (2001) 33 E.H.R.R. 6 ECHR., para.88.

<sup>33</sup> *Assenov & Others v. Bulgaria*, supra, para. 104.

<sup>34</sup> *Akkoç v. Turkey*, supra, para.99.

<sup>35</sup> *Radivoje v Yugoslavia*, Communication 113/1998, para 9.6.

<sup>36</sup> *Encarnacion Blanco Abad v Spain*, supra, para 8.8.and *Hajrizi Dzemajl v Yugoslavia*, Communication 161/2000, para 9.4 :Criminal investigation must seek both to determine the nature and circumstances of the alleged act and to establish the identity of the persons involved.

<sup>37</sup> *Stephens v. Jamaica*, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995); *Katombe L. Tshishimbi v. Zaire*, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993(1996).

<sup>38</sup> *Blake case*, Interpretation of the Judgment of Reparations (art. 67 American Convention on Human Rights), Judgment of October 1, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 57 (1999), Para.65. See also, *Paniagua Morales et al. Case*, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998), para.91.

<sup>39</sup> *Velasquez Rodriguez*, supra, para. 176.

<sup>40</sup> *Ibid.*, para.117.

<sup>41</sup> See, for example, *Salman v. Turkey* supra, para. 106; *Tanrikulu v Turkey*, supra, para.109; *Gül v Turkey* (2002) 34 E.H.R.R. 28, para.89.

<sup>42</sup> *Z v United Kingdom* (2002) 34 E.H.R.R. 3. Para 73.

<sup>43</sup> See A.S. Treaty Series No. 67.

<sup>44</sup> Supra note **Error! Bookmark not defined.**

<sup>45</sup> *Pantea v. Romania*, judgement of 3 March 2003.

<sup>46</sup> See the *Ribitsch* judgement, cited above, para 31.

<sup>47</sup> See *Hurtado v. Switzerland*, judgment of 28 January 1994, *Keenan v. the UK*, judgement of 3 April 2001.

ill-treatment may be presumed in favour of the claimant.<sup>48</sup>In other words, recognising the vulnerability of persons under detention, States are not only responsible for the health of individuals in detention but are also obliged to afford specific safeguards/measures to protect persons who are taken into custody.

The European Committee for the Prevention of Torture (CPT) has referred to what it terms a "trinity of fundamental rights" for detainees at the outset of their detention: the right of a detainee to have the fact of their detention notified to a third party of their choice, the right of access to a lawyer and the right of access to a doctor, including the right to be examined by a doctor of their choice (additional to medical examinations carried out by a doctor called by law enforcement officials). Importantly, the right to access a lawyer has been widely recognised as fundamental not only to guarantee fair trial standards, but also as a safeguard against torture and other forms of ill-treatment.<sup>49</sup>

#### **2.4 Russia's domestic legislation regulating "Operative Search Activity" fails to provide adequate safeguards to protect individuals in police custody and to afford effective procedural remedies for the investigation of torture allegations.**

The need for procedural safeguards in domestic law is at its most powerful when absolute rights such as the prohibition on torture are engaged. The European Court has recognised the need for an appropriate legal framework in domestic law to protect the substantive right in issue.<sup>50</sup> The European Court has, in particular, acknowledged the primacy of effective procedural safeguards where absolute rights such as the prohibition on torture or cruel, inhuman or degrading treatment or punishment are concerned.<sup>51</sup>It is clear therefore that in accordance with Articles 3 and 13 of the Convention, States should provide effective procedural remedies in their domestic legislation to protect individuals from torture as well as to carry out effective investigations into torture allegations.

The domestic law regulating the "Operative Search Activity" (OSA) would appear to fail to provide the most essential safeguards to protect individuals under police custody from torture. For example, when an individual is questioned in an OSA procedure, the individual who has been questioned/interrogated has no right to access a lawyer. Similarly, information or statements obtained in the course of an OSA procedure can be used as evidence even if it is established to have been obtained as a result of torture. This is different from regular investigations, where according to article 75 of the Russian Federation Criminal Procedural Code, all evidence obtained illegally is invalid and cannot be used in further proceedings. Equally, OSA regulations seem to limit the ability to conduct effective investigations into allegations of torture. Due to the secrecy in which OSA procedures are carried out, the possibility of monitoring compliance with human rights is very limited.

Additionally, the remedies afforded to victims of torture in the context of criminal investigations would appear to be generally ineffective. Based on jurisdictional rules, inquiries and investigations into torture allegations are usually carried out by District Prosecutors. Any decision, action or omission by these prosecutors can be challenged before a higher instance in the Procuracy (*Procuratura*) or before a Court. However both remedies are not effective when it comes to torture cases.

The problem with the administrative remedies afforded within the Procuracy is the conflict between the different (and opposing) functions of the Procuracy under domestic law. The Procuracy is responsible for conducting criminal prosecutions as well as for supervising the lawfulness of investigations conducted by police. As observed by the United Nations Committee Against Torture there is an "insufficient level of independence and effectiveness of the Procuracy, due, as recognised by the State Party, to the problems posed by the dual responsibility of the Procuracy for prosecution and oversight of the proper conduct of investigations"<sup>52</sup>. While the Procuracy is formally independent of the police and the Ministry of Internal Affairs, it has been contended that in practice, the district offices of the Procuracy and the police work closely together in investigating crimes in joint "investigation brigades."<sup>53</sup> According to the Committee for the Prevention of Torture, the Procuracy has even openly discouraged victims to pursue their cases.<sup>54</sup>

But there is a further right of appeal to the Court, which can declare that the decision of the Procuracy "not to proceed" is unlawful and can order further actions. However, the Court's powers are very limited and therefore it does not constitute an effective remedy to guarantee thorough investigations of torture allegations. Article 125 of the Russian Federation Criminal Procedure Code provides that all actions or omissions of the investigating and prosecuting authorities may be

<sup>48</sup> *Ribitsch v. Austria*, judgment of 4 December 1995, para 34, *Assenov v. Bulgaria*, judgement of 28 October 1998, *Aksoy v. Turkey*, judgement of December 1996, para 61, and others

<sup>49</sup> UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, para 39; *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* was adopted by General Assembly Resolution 43/173 of 9 December 1988

<sup>50</sup> *X and Y v the Netherlands* (1985) 8 EHRR 235; *Young, James and Webster v UK* (1982) 4 EHRR 38.

<sup>51</sup> *Aydin v Turkey* (1998) 25 EHRR 251 para 103

<sup>52</sup> Conclusions and recommendations of the Committee against Torture : Russian Federation, 06/06/2002, CAT/C/CR/28/4, para 6 (h)

<sup>53</sup> See Alternative NGO Report ICCPR, supra, p.31. See also concerns expressed concluding observations of the Committee against Torture, supra, UN Doc. CAT/C/CR/28/4, 6 June 2002, para.6 (h)

<sup>54</sup> CPT, Report of Visit to the Russian Federation in 2001, CPT Inf (2003) 30, Section 10/48, para.43

challenged before a Court. However, this remedy is not sufficient to guarantee the effectiveness of investigations in torture cases. When the ‘ineffectiveness’ of the investigation lies in the failure to perform necessary actions (as it is claimed by the Applicant in the present case), the Court can only establish that not conducting such actions is unlawful and can only request the authorities to improve their investigation. But the Court itself, due to the principle of impartiality and equality of arms contained in Article 15 of the Russian Federation Criminal Procedure Code, cannot conduct investigative actions or specify the type of actions that should be conducted. In the same way, the Court cannot order the investigating authorities to evaluate evidence in a different manner, due to principle of freedom of evaluation of evidence contained in Article 17 of the same Code. Therefore, when investigating authorities are not investigating an allegation of torture effectively (or simply not investigating), the Court can only quash a decision not to proceed or to close the case, but is not able to enforce an effective investigation.

**3) The Russian Federation has an obligation, under article 13, in the context of Articles 3 and 6, to afford effective civil remedies capable of providing adequate reparation for torture victims.**

**3.1) States are obliged under Article 3 to afford compensation to torture victims**

According to the Court, in the case of rights protected under Article 3, the duty to provide effective remedies to victims includes an enforceable right to fair and adequate compensation.<sup>55</sup> Similarly, Article 14(1) of the UN Convention against Torture specifically provides for compensation. Furthermore, art 2.3 of the ICCPR providing the right of every person to an effective remedy, has been interpreted by the UN Human Rights Committee in the same manner as the European Court: as the obligation of States to use their resources to investigate, to punish violators, and to compensate the victims of human rights violations.<sup>56</sup>

**3.2) States are obliged to afford individuals under their jurisdiction effective access to court for the determination of their compensation claims for torture**

According to the European Court, the nature of remedies varies according to the rights protected: the type of the violation and the conditions of the victims.<sup>57</sup> This is also the view of the UN Human Rights Committee: the nature (judicial, administrative or other) of the remedy should be in accordance with the rights violated and the effectiveness of the remedy in granting appropriate relief for such violation.<sup>58</sup> Similarly, the Inter-American Court of Human Rights has established that for remedies to be effective, they must be suitable to address the legal right that has been infringed<sup>59</sup>

In *Assenov v. Bulgaria*<sup>60</sup>, the European Court recognised the special nature of the crime of torture and other forms of ill-treatment, particularly when it is committed by State authorities, and the requirement of specific remedies. Following the same reasoning, the Inter-American Commission on Human Rights, explained that torture and related crimes, such as forced disappearances and summary executions are of such gravity that they require specific measures.<sup>61</sup>

Acknowledging the special nature of fundamental rights like the prohibition against torture and the need to establish specific measures, human rights tribunals and treaty bodies have established that States need to guarantee individuals’ access to judicial remedies in cases of grave human rights violations. This right is enshrined in Article 6 of the Convention and the European Court has stated that the basic principle underlying Art. 6.1—regarding the individuals’ right of access to court for the determination of his civil rights and obligations— is consistent with the rule of law in any democratic society.<sup>62</sup> In the same way, the Court of Justice of the European Communities considered that a person’s capacity, when his/her rights have been violated, to appeal to a judicial procedure to enforce his/her rights “is the expression of a general principle of law, which has its basis in the constitutional traditions of the member States”.<sup>63</sup> The UN Human Rights Committee also explained that, “administrative remedies cannot be deemed to constitute adequate and effective remedies [...], in the event of particular serious violations of human rights”.<sup>64</sup> Furthermore, the individual right of access to court for the determination of civil rights and obligations regarding serious human rights violations is also recognised in other human rights instruments.<sup>65</sup>

In sum, under Articles 3, 6 and 13, States have an obligation to afford specific civil remedies that are accessible and capable of affording adequate compensation to torture victims.

<sup>55</sup> *Aksoy*, cited above, para 98.

<sup>56</sup> See Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40), UN Doc. Annex V, General Comment 7 (16), para 1 (1982).

<sup>57</sup> *Soering v. United Kingdom* App. No. 14038/88 Judgment of 7 July 1989 and *Velvarajah v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991).

<sup>58</sup> Concluding Observations of the Human Rights Committee, Finland: 08/04/98

<sup>59</sup> Inter-Am. Ct. H.R., *Velasquez Rodriguez* Case, Judgment of July 29, 1989, para 91.

<sup>60</sup> See the *Assenov v. Bulgaria* judgment of 28 September 1998, *Reports* 1998-VII, p. 3290 para 102.

<sup>61</sup> Samuel Alfonso Catalán Lincoleo, Case 11.771. Report No. 61/01 Inter-American Human Rights Commission, April 16, 2001.

<sup>62</sup> European Court of Human Rights, Judgment 21 December 2001, *Case Al-Adsani v. the United Kingdom*, para. 47, Application no. 35763/97.

<sup>63</sup> Decision of 15 May 1986, *Case Johnston*, N° 222/84, quoted in Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne*, Edition du Seuil, Paris, 2001, page. 236.

<sup>64</sup> *Nydia Bautista v Colombia* (No. 563/1993); *José Vicente et al v Colombia* (No. 612/1995).

<sup>65</sup> See e.g. Article 27.2 of the American Convention on Human Rights; Art 7 of the African Charter on Human and People’s Rights, Article 13 of the Convention against Torture and other Cruel Inhuman or Degrading Treatment.

### 3.3.) States are obliged to afford domestic civil remedies that take into account the nature of torture, to effectively afford appropriate compensation

According to the European Court, there should be an effective mechanism available to the victim or his family for establishing any liability of State officials for their acts involving the breach of their rights under the Convention<sup>66</sup>. Accordingly, the right to access to court for the determination of civil compensation arising from an act of torture or other forms of ill-treatment should be independent of any criminal investigation. As explained by the UN Committee Against Torture, a civil procedure should be available, regardless of the outcome of any criminal procedure.<sup>67</sup> When referring to questions about the persons or authorities that are responsible for redress or compensation, the Committee further established that “the State is itself responsible for compensation and redress”.<sup>68</sup>

In the Russian Federation, the injury inflicted on an individual as a result of unlawful actions (or omissions) of the State and local self-government bodies or of their officials is subject to compensation. The law provides for strict State liability for injuries inflicted on an individual as a result of illegal conviction, illegal prosecution, unlawful detention and illegal imposition of an administrative penalty of arrest or corrective labour.<sup>69</sup> Any other injury inflicted on an individual as a result of the illegal actions of investigative bodies is subject to the redress provided for by Article 1069 of the Civil Code, which is based on fault (not on strict State liability). Therefore, a case of torture needs to be brought before a civil court under Article 1069— that requires the claimant to prove the fact of torture.

This provision may be effective in cases where the rights of individuals have been affected by a decision of a public authority (in such cases, the actual fact or action is not disputed, and the claimant will only challenge the legality of such action), however, in cases of torture, it falls on the claimant to prove that the torture actually occurred and that the injuries sustained are a result of such action.

The European Court has recognised, that because of the specific nature of torture, in cases where an individual is taken into police custody in good health but is found to be injured at the time of release, a clear presumption of responsibility arises under Article 3 of the Convention<sup>70</sup>. In other words, taking into account the nature of the violation (torture committed in police custody) the Court considers that the burden of proof should be on the State, not on the claimant. In *Albert Womah Mukong v. Cameroon*, the UN Human Rights Committee explained that because of the nature of serious human rights violations like torture, “the burden of proof cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information”<sup>71</sup> Additionally, as observed by the European Commission on Human Rights and the Inter-American Court of Human Rights, claims against States are different than criminal cases or claims against individuals.<sup>72</sup>

Hence, civil remedies in domestic law need to reflect the nature of torture, and accordingly guarantee that claimants can obtain adequate compensation irrespective of the investigations carried out by the authorities of the State. However, under the reparation framework of Article 1069, the burden of proof lies completely on the claimant (regardless of whether he/she sustained injuries during police custody) and therefore, even if by law, civil claims can be brought independently of criminal investigation/prosecutions, in practice it is impossible for a claimant to prove his/her case before a civil court without a proper criminal investigation substantiating his claim. This is contrary to the principle established by the Court that a remedy must be effective in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the State.<sup>73</sup>

Additionally, although civil courts can award moral damages in cases of a violation of personal rights,<sup>74</sup> such damages will be compensated regardless of the guilt of the perpetrator only if the injury has been, inter alia, inflicted to life or health of an individual by a source of special hazards, or the damage has resulted from an illegal conviction, illegal prosecution, unlawful detention or imposition of an administrative penalty.<sup>75</sup> Therefore, these provisions, and the possibility of obtaining moral damage, do not apply to cases of torture either.

<sup>66</sup> See *Paul and Audrey Edwards v. UK*, judgment of 14 March 2002, para 97.

<sup>67</sup> See, for example, Summary Record of the 10<sup>th</sup> meeting of the UN Committee against Torture, Consideration of the initial periodic report of Sweden, CAT/C/SR.10, 18 April 1989.

<sup>68</sup> CAT/C/SR.10 No. 25; CAT/C/SR.12 No. 16; CAT/C/SR.91, No. 67; CAT/C/SR.95, No. 33; CAT/C/SR. 109, No. 27, A/47/44, No. 337 (Committee as a whole).

<sup>69</sup> Article 1070 (1) Civil Code.

<sup>70</sup> See *Aksoy v. Turkey*, cited above, para 61, *Tomasi v. France*, judgment of 27 August 1992, paras. 108-111, and *Ribitsch v. Austria*, judgment of 4 December 1995, para 34.

<sup>71</sup> *Albert Womah Mukong v. Cameroon*, Views on Communication No. 458/1991, of 21 July 1994

<sup>72</sup> *Ribitsch v Austria* (1996) 21 E.H.R.R. 573 para 111

<sup>73</sup> See *Aksoy v. Turkey*, judgment of 18 December 1996, para 95; or *Kaya v. Turkey*, judgment of 19 February 1998, para 106.

<sup>74</sup> Articles 1099 and 151 Civil Code.

<sup>75</sup> Articles 151 and 1101 Civil Code.