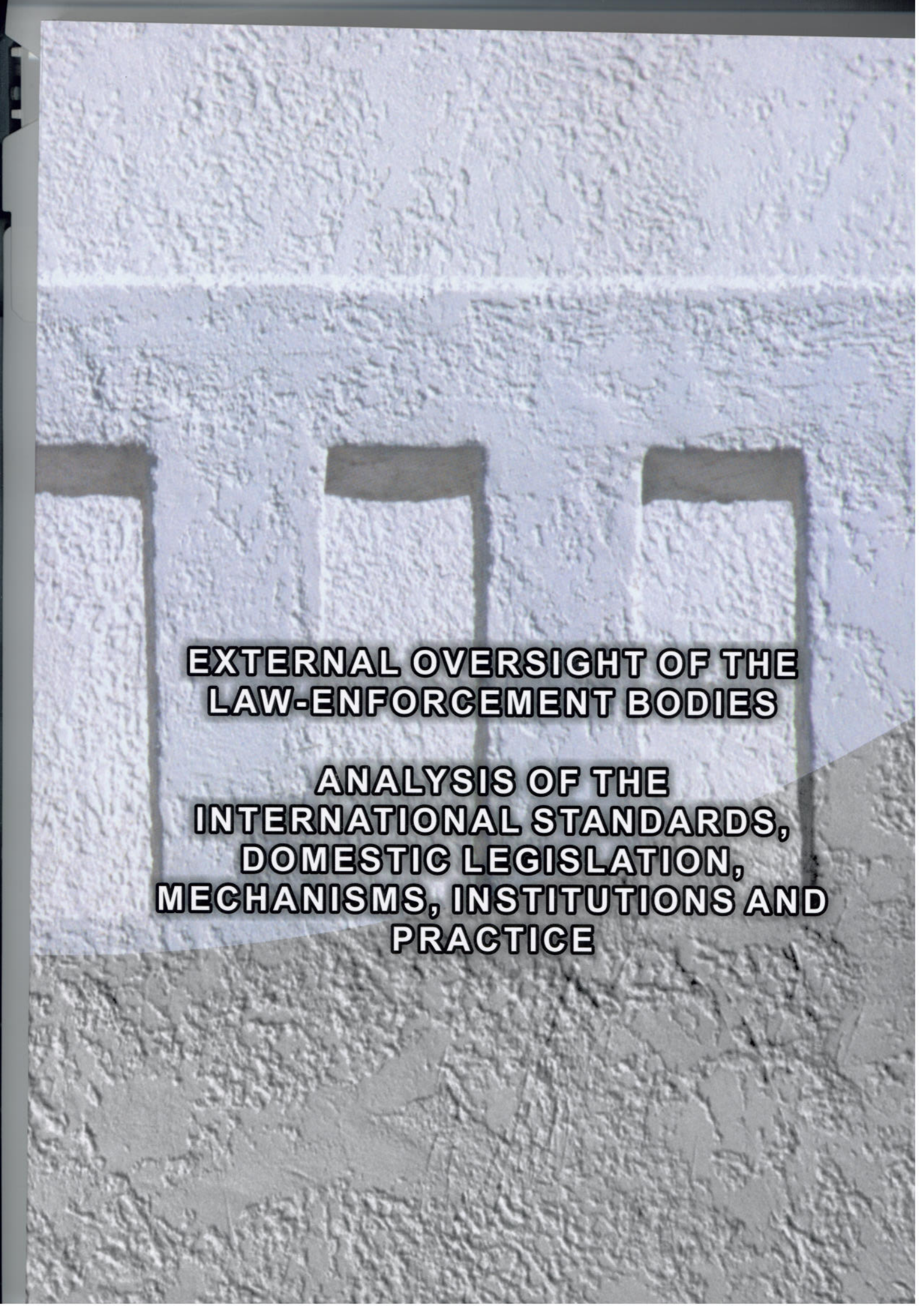

EXTERNAL OVERSIGHT OF THE LAW-ENFORCEMENT BODIES

ANALYSIS OF THE INTERNATIONAL STANDARDS, DOMESTIC LEGISLATION, MECHANISMS, INSTITUTIONS AND PRACTICE

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INTRODUCTION – BRINGING FORWARD THE IDEA

During the second half of 2006, the OSCE Spillover Monitor Mission started a background and needs assessment process of the legislative and institutional mechanisms, established in the country[1], for investigating alleged cases of abuse of power by law-enforcement officials with a special focus on those cases that have resulted in serious human rights violations.

The main aim of that research was to assess the compatibility of the domestic legal and institutional system with the requirements of the article 2 and 3 of the European Convention on Human Rights (ECHR), its case law and other applicable international standards. These research and assessment revealed that the existing mechanisms run short of some of the key requirements, such as principles of impartiality, effectiveness, independence and transparency.

In addition, the OSCE Mission supported a public opinion survey - "Citizens' knowledge and perception of the current system for investigation of allegations of ill-treatment or abuse of power by law-enforcement officials".[2] The survey was administered in November 2006 via phone to a representative segment of the population, 1220 citizens, randomly selected to be representative for the target audience – sample stratified by gender, age (18 and older), ethnicity, urban and rural, throughout the country. The sample was also differentiated regionally, and according to the educational background. The main finding of the conducted survey *inter alia* is that the citizens would favour an independent external oversight mechanism of the law-enforcement bodies.

In December 2006, the OSCE Mission facilitated an expert level round table,[3] dedicated to the need of establishment of an external oversight mechanism of the law-enforcement bodies in the country. Following the conclusions, reached at that round table, the OSCE Mission supported the establishment of a working group composed of local experts, state officials, and NGO representatives for developing a model for external oversight mechanism of the law-enforcement bodies, which would better serve the country in achieving the compliance with its international obligations and European best practices.[4]

The OSCE Mission provided the working group with the required expertise, secretarial and logistical support, throughout the whole process.

The working group, supported by the OSCE Mission, conducted analysis of the applicable international standards, as well as analysis of the domestic legislative framework related to the mechanisms, institutions and practice for investigation of cases of abuse of power by law-enforcement officials.

The OSCE Mission further supported the working group in conducting the necessary comparative analysis and research. The OSCE Mission organized two study visits for the working group members. One group of experts visited Northern Ireland to study the oversight and complaint mechanisms related to the law-enforcement bodies. Second group of experts visited the Max-

[1] See annex 1: Concept paper.
[2] See annex 2: Results of the public opinion survey.
[3] The round table was supported by the Mission's RoLD and it was attended by representatives of the Parliament, the General Secretariat of the Government, the Ministry of Interior, the Ministry of Justice, the judiciary, the Public Prosecutor's Office, the forensic institute, the Ombudsman's Office, NGOs handling police abuse complaints as well as academics and representatives of the international community present in the country, who were identified and selected by the Mission's RoLD during the background and needs assessment process.
[4] See annex 3: Round table conclusions, list of participants, and working methodology of the working group.

Planck Institute for Foreign and International Criminal Law in Germany to study the criminal justice systems related to the prosecutorial control over the law-enforcement bodies.

Based on the conducted background and needs assessment, the comparative analysis and research of the domestic legal framework and the applicable international standards, the working group members developed three possible models for the external oversight mechanism of the law-enforcement bodies in the host country.

1. Independent Commission
2. Enhancement of the power of the Ombudsman Office;
3. Enhancement of the power of the Public Prosecutors Office;

At its last regular coordination meeting held on 20 November 2007, the working group adopted the presented three models and decided to combine them and elaborate one comprehensive model that would include elements of all three models. At this stage, we would like to present all three models for your consideration and seek for your input and support in moving this process forward.

The mechanisms will be presented at the monthly regular coordination meeting of the working group in November 2007.[5] They will be assessed in a comprehensive manner and the selected mechanism will be presented to the Government for its consideration.

[5] See annex 4: Notes and conclusions from the regular coordination meeting of the working group for development of a model for external oversight of the law-enforcement bodies.

REQUIREMENTS OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AS REGARDS THE INVESTIGATION OF DEATH OR SERIOUS INJURY AT THE HANDS OF STATE OFFICIALS

Issues:

1. What are the requirements that the ECHR places on the entity responsible for carrying out the investigation into the circumstances of death or serious injury when such occurs at the hands of state officials?
2. Does the Macedonian system for such investigations comply with the ECHR requirements?

1. ECHR Requirements

1.1. General Principles of Article 2: Protection of Right to Life

Article 2 of the ECHR states that "[e]veryone's right to life shall be protected by law." Exceptions to this clear obligation are allowed only from the use of force that is no more than absolutely necessary,[6] and
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Where agents of the State have used lethal force against an individual, the facts relating to the deprivation of life and its motivation are likely to be largely, if not wholly, within the knowledge of the state. It is, therefore, essential – both for relatives and for *public confidence in the administration of justice and in the state's adherence to the rule of law* – that a deprivation of life by a state agent be subject *to open and objective oversight*.[7] Thus, the European Court of Human Rights (the Court) has interpreted Article 2, together with Article 1,[8] as requiring an official investigation or inquiry, whenever an individual is killed as a result of force used by a state official.[9] This is a separate duty of the State, such that the lack of an effective investigation/inquiry will, in and of itself, constitute a violation of Article 2 of the Convention. The inquiry must determine the cause of death and, if it occurred by use of force, whether that force was necessary and justified.[10]

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[6] Article 1 of Protocol no. 6 prohibits capital punishment. The Protocol has been ratified by the Macedonian Parliament.
[7] See *mutatis mutandis*, *McCann and Others v. the United Kingdom (Appl. no. 18984/91) (1995)*, para. 161.
[8] In conjunction with Article 1: "to secure to everyone within [its] jurisdiction the rights and freedoms defined in the Convention".
[9] *Hugh Jordan v. the United Kingdom (Appl. no. 24746/94) (2001); McCann and Others v. the United Kingdom,* cited above*; Salman v. Turkey (Appl. no. 21986/93) (2000);* and *Anguelova v. Bulgaria (Appl. no. 38361/97) (2002).*
[10] Id.

Whether an official investigation meets the standards of the ECHR is an entirely separate inquiry from that examining whether a state violated the right to life itself. The Court has developed the following standards by which to judge whether an investigation/inquiry conducted by a ratifying state complies with the ECHR.

A. The Investigation/Inquiry must be "effective"

a. The investigative body must be independent and impartial

For an investigation of killing by State agents to be effective, the Court deems it necessary that those persons responsible for and carrying out the investigation be independent from those implicated in the events.[11] This means not only a lack of hierarchical or institutional connection but also a practical independence.[12]

b. The investigation must be able to determine the cause of death

Citing the Minnesota Protocol[13], the Court stated in Hugh Jordon v. United Kingdom[14], that the purpose of such inquiry/investigation is:
(a) To identify the victim;
(b) To recover and preserve evidentiary material related to the death, to aid in any potential prosecution of those responsible;
(c) To identify possible witnesses and obtain statements from them concerning the death;
(d) To determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
(e) To distinguish between natural death, accidental death, suicide and homicide;
(f) To identify and apprehend the person(s) involved in the death;
(g) To bring the suspected perpetrator(s) before a competent court established by law.

That one of the purposes of an inquiry is to discover the cause of death is also noted in Salman v. Turkey.[15] The Court stressed that there should be an "autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death." The ruling in the Salman[16] case and Kaya v. Turkey[17] also emphasized that the involved officials' account of the events should be corroborated by independent evidence, and that the investigating authorities' conclusions cannot be based on an unsubstantiated hypothesis.

c. Reasonable evidence should be collected

Concerning the types of evidence that an investigative entity should collect in order to conduct an "effective" investigation, the Court admits that specific standards cannot be set forth due to the particularities of each case. However, the Court does describe investigative acts that should have

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[11] *Güleç v. Turke, (Appl. no. 21593/93) (1998)*, paras. 81-82; *Öğur v. Turkey, [GC] (Appl. no. 21954/93) (1999)*, paras. 91-92; and *Anguelova v. Bulgaria,* cited above, para. 138.
[12] *Ergı v. Turkey (Appl. no. 23818/94) (1998)*, paras. 83-84; *Hugh Jordan v. the United Kingdom*, cited above, para. 120; *Kelly and Others v. the United Kingdom (Appl. no. 30054/96) (2001)*, para. 114; and *McKerr v. the United Kingdom (Appl. no. 28883/95) (2001)*, para. 112.
[13] UN Manual on Extra Legal, Arbitrary and Summary Executions. III Model Protocol.
[14] Cited above, para. 92.
[15] *Salman v. Turkey*, cited above, para. 105.
[16] See, *mutatis mutandis*, Id. paras 100-103.
[17] See, *mutatis mutandis, Appl. no. 22729/93 (1998)*, para. 88.

or could be taken in the course of an "effective investigation." For example, in *Kaya v. Turkey*[18], the Court noted that an investigative entity should do the following:

(a) Collect sufficient evidence to corroborate the police's version of the events;
(b) Conduct on-site tests/collect evidence at the scene;
(c) Take statements from eye-witnesses;
(d) Create an independent reconstruction of the events;
(e) Run tests for gunpowder and fingerprints;
(f) Create an Autopsy Report[19];
(g) Perform an on-scene post-mortem and forensic examination;
(h) Conduct ballistics tests (number of bullets, firing distance);
(i) Question witnesses in the vicinity of the homicide;
(j) Question the members of the security forces involved in the incident;
(k) Check whether custody records match the official's version.

More support for steps necessary in the collection of evidence is found in McShane v. United Kingdom[20] and Anguelova v. Bulgaria[21].

> "The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including inter alia, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation that undermines its ability to establish the cause of death or the person or persons responsible, falls afoul of the standard required under Article 2 of ECHR."

An effective investigation/inquiry must also be able to compel witnesses, particularly those directly involved in the incident. As noted in McShane, "The effectiveness of the Inquest was undermined by the lack of compellability of security force witnesses."[22]

The court in Kaya also noted that, when such deaths occur in an area prone to "terrorist violence," the obligation for an effective investigation is no less. "[N]either the prevalence of armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths . . ."[23] In that case, the Court stated that the body should have been transported to a safer place and any tests conducted there.

d. If the cause of death was force employed by state officials, whether that force was "justified"

The use of lethal force by the agents of the State must be subjected to scrutiny capable of determining whether the force used was or was not justified under the circumstances.[24] The investigative body must also be able to determine whether the use of force was unlawful.[25]

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[18] Id. paras. 88-90.
[19] *Salman v. Turkey*, cited above, para. 89.
[20] *Appl. no. 43290/98 (2002*), para 96. See also, *mutatis mutandis*, *Tanrıkulu v. Turkey (Appl. no. 23763/94) (1999),* para. 109 and *Gul v. Turkey* (*Appl. no. 22676/93) (2000),* paras. 89-94
[21] Cited above, para. 139.
[22] Cited above, para. 120.
[23] *Kaya v. Turkey*, cited above, para. 91.
[24] *Kaya v. Turkey* cited above, para. 87*;* and *McShane v. United Kingdom,* cited above*,* para. 136. See also, *mutatis mutandis*, *McCann and Others v .the United Kingdom* cited above, para. 161.
[25] *McShane v United Kingdom,* cited above, para 121.

e. Responsible individuals should be identified and punished

The investigation must also be effective in the sense that its results can identify the culpable state official and lead to his or her eventual punishment.[26] "This is not an obligation of result, but of means," according to the decision in *Öğur v. Turkey*. In sum, the inquiry must be able to effect punishment of wrongdoers.

B. Investigation must be subjected to public scrutiny

There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.[27]

According to the Court the nature and degree of (public) scrutiny which satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case.[28]

C. Investigation must be prompt and expedient

The Court also requires that death investigations proceed promptly and expeditiously.[29] While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating the use of lethal force is regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts.[30]

D. Investigation should be initiated proprio motu

The essential purpose of these death investigations is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. Whatever mode is employed, the authorities must act on their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the decedent's next of kin to lodge a formal complaint or to take responsibility for the initiation of investigative proceedings.[31]

When the facts are largely or wholly within the knowledge of the state authorities, it is the state's responsibility to provide a satisfactory and convincing explanation of how the death or injury occurred.[32]

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[26] *Öğur v. Turkey,* cited above, para. 88; and *McShane v. United Kingdom* cited above, para. 96.
[27] *McShane v. United Kingdom* cited above, para. 98; *Güleç v. Turkey,* cited above, para. 82*; Öğur v. Turkey,* cited above, para. 92*; Gül v. Turkey,* cited above, para. 93*;* and *McKerr v. the United Kingdom,* cited above, para. 148.
[28] See, *mutatis mutandis*, *Tanrıkulu v. Turkey,* cited above, paras. 101-110, *Kaya v. Turkey*, cited above, paras. 89-91; and *Güleç v. Turkey*, cited above, paras. 79-81.
[29] *Mahmut Kaya v. Turkey (Appl. no. 22535/93) (2000*), para. 107; and *Tanrikulu v. Turkey,* cited above para. 109.
[30] *Hugh Jordan v. the United Kingdom,* cited above, para. 108.
[31] See, *mutatis mutandis, İlhan v. Turkey [GC] (Appl. no. 22277/93) (2000),* para. 63.
[32] *Salman v. Turkey,* cited above, paras. 99-100*;* and *Hugh Jordan v. the United Kingdom,* cited above, para. 103.

1.2. Relevant case-law regarding Article 2

A. Requirement for an independent investigative body

a. Gulec v. Turkey[33]

During a demonstration, the applicant's son was killed by gendarmes. The applicant filed a criminal complaint with the competent public prosecutor against unknown perpetrators and against the commander of the security forces. The prosecutor, however, declared himself "not competent" to deal with the case on the grounds that the eventual suspect (an officer) had been acting in the performance of his duties and that civil servants were subject to special legal provisions that rendered the court incompetent to hear the case. The judge transferred the case file to the Provincial Administrative Council (PAC) for a preliminary investigation.

Two gendarmerie officials, appointed by the Provincial Governor, conducted the preliminary investigation. Senior provincial civil servants also sat on the Council, which was chaired by the Provincial Governor or his deputy. The gendarmerie never supplied the names of the soldieries who were involved in the incident. The PAC discontinued the proceedings on the ground that it was impossible on the basis of the evidence in the case-file to identify a perpetrator. The Supreme Administrative Court, to which the case was automatically transferred, upheld that decision ruling that it was impossible to bring a prosecution against civil servants where the identity of those responsible and their status as civil servants had not been established.

Both the Court and the European Commission for Human Rights examined the applicant's complaint under Article 2 and ruled that there was not a proper investigation into the circumstances of the applicant's son's death.

According to the Commission, 1) the authorities responsible for the investigation lacked the requisite independence and impartiality, as two members of the Council were gendarmerie officials and hierarchical superiors of the gendarmes whose conduct they had to investigate, and 2) the PAC was composed of the District Commissioner and senior civil servants of the provincial administration, all under the orders of the Provincial Governor who was in charge of the local gendarmerie.

The Court, like the Commission, concluded that this investigation failed to meet the minimum standards, in large part because the PAC's structure did not guarantee the independence of the investigation.

b. McShane v United Kingdom[34]

During public riots the applicant's husband fell underneath a billboard. An armored personnel carrier, driven by a military serviceman drove over the billboard, injuring the applicant's husband. He later died as a result of injuries he sustained in the incident. Following a police investigation, the Director of Public Prosecution (DPP) decided not to bring criminal proceedings on the basis that there was insufficient evidence to provide a reasonable prospect of conviction. The applicant did not pursue her right to have the decision reviewed by a judge. Two years and seven months after the death, the police transmitted the case-file to the coroner to conduct an inquest, an

[33] Cited above.
[34] Cited above.

investigation of suspicious or violent deaths which is conducted before a jury. The inquest was still pending at the time the European Court pronounced its judgment.

The Court examined the police procedure, proceedings conducted by DPP, and the inquest procedure and found a violation of Article 2. The Court ruled that the police investigation was conducted by police officers connected, albeit indirectly, with the operation under investigation and that fact cast doubt on its independence. In particular, although the soldier who was involved in the incident was not a member of the police, he was acting under the order of a police inspector when he drove towards the billboard. Moreover, both the army and the police were involved in attempts to control the riots.

The effectiveness of the Inquest was further undermined by the lack of compellability of security force witnesses and by the lack of the Inquest's power to issue a verdict or other means by which the inquest could form an effective part of a criminal proceeding. For example, had the Inquest concluded that the applicant's husband was killed unlawfully; the results of the Inquest could have been a basis for reconsideration of the prosecutor's decision not to prosecute, but would not have compelled the prosecutor to reconsider his decision.

B. Requirement for public and adversarial investigative proceedings

a. McCann and Others v. United Kingdom[35]

McCann involved the shooting death of three IRA members in Gibraltar by U.K. military forces. The case was first investigated by a police chief-inspector. Later, the Gibraltar Coroner opened a special inquest procedure with a jury at which the relatives of the deceased were represented. The jury, as directed by the Coroner, found that the IRA members were lawfully killed.

On appeal, the European Court scrutinized the special inquest, and its alleged shortcomings. The Court noted that there was no independent investigation into the operation leading to the shootings, normal scene-of-crime procedures were not followed, not all eyewitnesses were traced or questioned by the police, and that some witness statements that were available in advance to the Crown and to the lawyers representing police and soldiers were not available the applicants' lawyers. While it found that some shortcomings were present, the Court ultimately concluded that the inquest proceedings did not "substantially hamper" the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killing. The Court noted that the inquest was public and that events in connection with the killing were reviewed in detail, the applicants were legally represented and could examine and cross-examine witnesses and make submissions. Consequently, the Court found no violation of Article 2 in this respect.

C. Requirement for criminal proceedings

a. Andronicou and Constantinou v. Cyprus[36]

An officer from a special police unit killed a young couple during a rescue operation. During the initial investigation, the police officer in charge was told not to interfere with any real evidence on the ground and that his inquiry was not a criminal one, but purely administrative. At the same time, the Council of Ministers ordered the President of the Supreme Court to carry out an inquiry in accordance with the "Commissions of Inquiry Act." While the Supreme Court President had

[35] Cited above.
[36] *Appl. no. 25052/94, (1997).*

the authority to determine who, if anyone should be held responsible for the homicides and to make necessary recommendations, he was not competent to grant a remedy to the couple's family.

The Supreme Court's President concluded that no criminal acts had been committed and that the police could not be criticised in any way for their handling of the case. Unsatisfied with this result, the applicants requested the Attorney-General to initiate criminal proceedings. The Attorney General refused their request in light of the inquiry's findings.

In the Court's opinion, the "effective remedy" in such circumstances would have been to institute criminal proceedings against officers involved. As it stood, the Attorney-General's refusal left the family without the possibility of obtaining a verdict from a criminal court that the deceased had been unlawfully deprived of their lives, which was the essence of their complaint under Article 2 of the Convention. Thus the Court drew a firm conclusion that whatever investigative body undertakes the inquiry, it must have the power to determine criminal culpability.

1.3. Conclusion

The European Court requires a thorough and effective investigation into cases of death at the hands of state authorities. The authorities tasked with conducting these investigations must be "independent and impartial," i.e., not have any hierarchical, institutional or practical links to the officials whose conduct is being investigated. In addition, the investigative body should have the power to compel witnesses, to issue a verdict and its proceedings should be public. "Inquiries," "inquests," "reviews," or investigations of any other name which fall short of those minimum standards, breach the European Convention

1.4. General Principles Regarding Article 3: Prohibition of Torture, Inhuman or Degrading Treatment[37]

According to the Court's case law, in circumstances where an individual raises a *prima facie* claim that he or she has been unlawfully (and seriously) ill-treated by the police or other state agents, Article 3, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention," requires an "effective official investigation."[38]

This investigation, as with that under Article 2[39], should be capable of leading to the identification and punishment of those responsible. To be "effective," the inquiry has to be conducted "diligently," the authorities "have to be determined to identify and prosecute those responsible."[40] In addition, the Court has established the principle that where an individual alleges to have been injured or ill-treatment in custody, the Government is under an obligation to provide a complete and sufficient explanation as to how the injuries were caused.[41]

As with investigations required under Article 2, through its case law, the Court has developed specific standards for investigations into alleged violations of Article 3's prohibition of torture, inhuman and degrading treatment or punishment.

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[37] Article 3 reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[38] *Labita v. Italy* [G.C] *(Appl. no. 26772/95) (2000*), para 131; *Krastanov v. Bulgaria (Appl. no. 50222/99) (2004)*, para 57.
[39] See, *mutatis mutandis*, *Yaşa v. Turkey (Appl. no. 22495/93) (1998),* para. 98.
[40] *Selmouni v. France (Appl. no. 25803/94) (1999*), para. 79.
[41] *Ribitsch v. Austria (Appl. no. 18896/91) (1995),* para. 34.

1.5. Relevant Case-Law Regarding Article 3

A. Requirement for effective investigation

a. Tomasi v. France[42]

The case involved a victim's allegation of torture and abuse at the hands of the police. During proceedings, the Government could not provide any other reasonable explanation for the victim's cause of injuries. The European Court found a breach of Article 3 and ruled that although the applicant's injuries may have appeared slight, they nevertheless constituted outward signs of the use of physical force on individual deprived of his liberty.

b. Assenov and Others v. Bulgaria[43]

The applicant, a Roma youth accused of gambling, was allegedly ill-treated by police both on the street and while in police custody. The applicant's father had also beaten him in front of the police in an apparent effort to show the police that he was a strict disciplinarian. Upon the applicant's complaint, a colonel from the District Directorate of Internal Affairs investigated the matter. He took evidence from arresting officers and other policemen involved in the incident, but did not take evidence from other eyewitnesses present. He concluded that the applicant had gotten the bruises described in the medical certificate only from his father's beating. The applicant further complained and the prosecution office then accepted the case, but did not undertake additional investigation. The prosecutor refused to instigate criminal proceedings against the police officers.

The Court found a violation of Article 3 on the following grounds: 1) no testimonies were taken from independent eyewitnesses in the immediate aftermath of the incident; 2) the Internal Affairs Directorate concluded that the applicant's bruises had been caused by his father but without any real and objective evidence to support the claim; and 3) the prosecutor's conclusion that "even if the blows were administered on the body of applicant [by police officers], they occurred as a result of disobedience to a police order" ran contrary to Article 3's principle that with respect to a person in police custody, "recourse to physical force which has not been made strictly necessary by his own conduct is in principle an infringement of his rights."[44] The Court ruled that the investigations conducted by Directorate of Internal Affairs and the Prosecutor's Office were neither thorough nor effective.

c. Labita v. Italy[45]

Police put the applicant in pre-trial detention under suspicion of having been a member of a mafia-type organization. He complained to an investigative judge[46] about ill-treatment by the police and wardens in the detention facility. The applicant produced medical record evidence consistent with his allegations of maltreatment. The public prosecutor requested the investigative judge to open an official inquiry and instructed the Carabinieri to question the applicant. The judge showed the applicant photocopied pictures of the 200-plus wardens at the facility. When the applicant could not identify the perpetrators, the investigative judge and public prosecutor closed the file. They

[42] *Appl. no 12850/87 (1992).*
[43] *Appl. no. 25803/94 (1998).*
[44] Ibid, para 94; and *Tekin v. Turkey (Appl. no. 22496/93) (1998), paras. 52 and 53*.
[45] *Appl. no. 26772/95 (2000).*
[46] Investigating judge – these judges are elected and dismissed by the Parliament.

did so despite other reports alleging ill-treatment of the prisoners confined in the same prison as the applicant and in spite of the applicant's repeated statements that he could recognize the wardens concerned if he saw them in person.

The Court concluded that the Italian authorities had remained inactive in the face of evidence of mistreatment by wardens at the prison and that therefore the investigation was neither thorough nor effective. Consequently, the Court ruled that Italy had violated Article 3 of the ECHR.

d. Toteva v. Bulgaria[47]

The applicant who was in good health when arrested and brought to the police station had a number of injuries, including a bite, when she was released a few hours later the same day. When the applicant complained to the competent public prosecutor, the prosecutor did not undertake an independent investigation, but entrusted the verification of the allegations to the same police officer who handled the initial criminal investigation against the applicant, had testified in the criminal case against her and was the hierarchical superior of the officers who had allegedly bitten the applicant. The prosecutor also failed to gather medical evidence regarding the applicant's injuries, even though such evidence was readily available. In addition, the authorities did not conduct any additional investigative action regarding the applicant's complaints for more than eight years after the incident and never issued a formal decision on the merits of her complaint.

The Court found a violation of Article 3 of the ECHR, concluding that the Bulgarian authorities failed to conduct a thorough and effective investigation into the applicant's claim.

e. Krastanov v. Bulgaria[48]

The applicant was awarded compensation by the Bulgarian courts because in civil proceedings it had been established that he was ill treated by police officers. The prosecution authorities who were made aware of this judgment carried out a preliminary inquiry. The Ministry of Internal Affairs also carried out an internal inquiry. However, none of these resulted in a criminal investigation against the perpetrators.

On the basis of the submitted materials the Court established that the only fact which should have been ascertained was the identity of the police officers involved, but the Government did not provide any information as to any efforts to that effect. Consequently, the Court established that the investigation led by the authorities did not satisfy the requirements of Article 3 of the ECHR.

f. *Bekos and Koutropoulos v. Greece*[49]

The Greek Ministry of Public Order launched an informal inquiry into the applicants' allegations of police abuse and mistreatment. After the incident received public attention, the Ministry upgraded the internal investigation into a Sworn Administrative Inquiry, which concluded that the police subjected the applicants to ill treatment. At the conclusion of the inquiry, the Chief of Greek Police fined one of officers involved in the alleged abuse less than 59 euros.

The applicant initiated criminal proceedings which were unsuccessful, as the Greek court found that there was no evidence implicating the police officer in any abuse.

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[47] *Appl. no. 42027/98 (2004).*
[48] *Appl. no. 50222/99 (2004*).
[49] *Appl. no. 15250/02 (2006).*

The European Court found a breach of Article 3, noting that despite evidence uncovered during the administrative inquiry and ensuing judicial proceedings that the police subjected the applicants to abuse and ill treatment, no police officer was ever punished. The Court concluded that the investigation did not appear to have produced any tangible results and the applicants received no redress for their complaints.

g. Zülcihan Şahin and Others v. Turkey[50]

Domestic prosecution authorities declared themselves incompetent regarding complaints of ill treatment lodged by the applicants against law enforcement officials. The applicants were not notified of this decision. Authorities from the Prefecture took over the case, conducted an investigation and concluded that the applicants' complaints were unfounded.

The Court found that the state did not provide the applicants with an effective domestic remedy for allegations that the police violated Article 3. In its ruling, the Court noted that the administrative bodies to which the applicants appealed lacked the ability to conduct investigations that would satisfy the ECHR's requirements. In particular, the Court noted that the inspector charged with conducting the investigation was a colonel from the gendarmerie belonging to the same corps as the agents implicated in the ill treatment, and the administrative body which should have decided whether to start criminal proceedings was composed of high officials of the sub-Prefecture and chaired by the deputy Prefect administratively responsible for the local police. In addition, the prosecutor did not inform the applicants of his decision not to prosecute the case and they were also unable to get access to the documents in the case file, question witnesses or present their version of facts in the administrative proceedings.

B. Requirement for diligent/prompt investigation

a. Selmouni v. France[51]

The applicant, who was allegedly ill-treated by the police while in pre-trial detention, lodged a complaint with the investigative judge. After the judge concluded the investigation, the prosecutor charged the officers involved in the attack with assault, violence and coercion. The trial court convicted the police officers and sentenced them to three and four year's imprisonment. The Appellate Court substantially reduced the officers' sentences.

The proceedings against the police officers lasted for more than six years and seven months and were still pending when the European Court pronounced its judgment. During the criminal proceedings, some investigative activities were carried out with one or more years of delay.

The Court held that France had violated Article 3 of the ECHR because the applicant did not have an effective and adequate remedy at his disposal, due to the fact that there were substantial delays between different investigative activities even though the applicant had a serious and credible claim.

[50] *Appl. no. 53147/99 (2005).*
[51] *Cited above.*

b. Berlinski v. Poland[52]

Police allegedly beat the applicants in a nightclub and in a police van. The applicants filed a complaint with the public prosecutor. The prosecutor opened an investigation and heard, *inter alia*, the police officers involved, independent witnesses and examined two separate expert opinions. The investigation lasted for fourteen months. The prosecutor discontinued the investigation on the grounds that there was no unequivocal evidence that the police officers had committed a criminal offence.

The Court found no violation of Article 3 of the ECHR. It concluded that since the prosecutor questioned pertinent witnesses, examined expert reports, and conducted the investigation promptly, and because the applicants could appeal the public prosecutor's decision to a higher prosecutor, the investigation was thorough and effective. The Court also noted that there was no indication that the prosecutor's decision to discontinue the investigation was in any way arbitrary.

c. Afanasyev v. Ukraine[53]

The applicant alleged that a police officer bit him during an interrogation in order to extract a confession from him. The prosecutor rejected his request to open a criminal investigation against the officer. The applicant appealed the decision to a higher prosecutor but did not succeed in reversing the prosecutor's decision. In accordance with Ukrainian law the court ordered criminal proceedings to be opened against police officers, as the prosecution has acted unreasonably by, *inter alia*, failing to investigate the cause of the applicant's injury. But that happened only substantially later.

The Court found that the applicant did not have an effective legal remedy because, based only on the statements of the questioned police officers, the prosecutors refused to initiate criminal proceedings. The prosecutors reached this decision despite the existence of other evidence which indicated possible ill treatment. When domestic courts finally decided to investigate the incident, over one year had passed and the court did not collect statements from some of the witnesses until significantly later, if at all. The Court concluded that these omissions at the initial stage of consideration substantially affected the subsequent course of the overall investigation, and they provided a sufficient basis for the conclusion that the state authorities fell short of their obligation under Article 3 of the ECHR.

C. Macedonian Cases in Respect of Article 3

a. *Admissibility decision in the case of Jašar*[54]

On 25 May 1998 the applicant filed a criminal complaint with the public prosecutor against unidentified perpetrators alleging police brutality. Following a couple of requests for information, on 11 November 1999 the prosecutor responded that he requested additional information from the Ministry of Interior and was waiting to receive it. To date, the applicant has not received any fresh information regarding his case; the criminal proceedings are still pending. The applicant also filed a civil claim for damages, but the court dismissed his case because it concluded that the applicant had sustained the injuries before police took him into custody and that the officers did not cause his injuries.

[52] *Appl. nos. 27715/95 and 30209/96 (2002).*
[53] *Appl. no. 38722/02 (2005).*
[54] *Appl. no. 69908/01 (2006).*

The Court concluded that the applicant had exhausted all domestic remedies since he complained to the prosecutor. With respect to the other available remedies of which the applicant did not avail, the Court noted the following:

1. The Court did not view the possibility of initiating a disciplinary or internal inquiry as an effective remedy in cases of alleged police ill treatment. The Court noted that special departments within Ministry of Interior such as the Sector for Internal Control and Professional Standards lacked the necessary independence.
2. The Court also found administrative dispute proceedings before the Supreme Court to be ineffective since they were applicable only in cases when there was no alternative judicial remedy. In addition, administrative proceedings served only to provide protection against ongoing unlawful measures, and to prevent repetition.
3. The Court did not consider filing a complaint with the Ombudsman to be an effective remedy. Among other things, the Court noted the non-binding nature of decisions and advice issued by the Ombudsman Institution.
4. The Court also rejected the Government's argument that the applicant could have initiated an internal inquiry within the Public Prosecutor's Office to force the prosecutor assigned to the case to be more proactive, since the ultimate effect would have been disciplinary proceedings against the prosecutor.

b. Admissibility decision in the case of Sulejmanov[55]

The applicant, who complained of police ill treatment before the Court, submitted a criminal complaint to the public prosecutor on 3 November 1998. After several requests for information, the prosecutor replied to the applicant that he had asked the Ministry of Interior to provide information, but to no avail. To date the applicant has not received any further information regarding his case from the prosecution authorities. Sulejmanov also filed a civil claim, which the court dismissed because it concluded that the injuries he suffered had not been inflicted by the police.

The European Court declared the application admissible, finding that an appeal to the Sector for Internal Control and Professional Standards or initiation of administrative proceedings before the Supreme Court were not effective remedies for this type of case. In addition, the Court noted that the prosecutor never issued a decision rejecting the applicant's criminal complaint, which would have allowed him to start criminal proceedings in the court as a subsidiary prosecutor.

1.6. Conclusion

Like Article 2, European Court case law related to alleged Article 3 violations require that state authorities investigate allegations of ill-treatment by law-enforcement officialst, that the investigations are effective, diligent, prompt, and can potentially lead to the identification and punishment of perpetrators.

The Court indirectly addressed the issue of hierarchical dependence of an investigative body in the *Assenov and Others v. Bulgaria* case, where it found that internal affairs units tasked with investigating allegations of police misconduct lacked sufficient impartiality *per se*. The Court also addressed this issue in Zülcihan Şahin and Others v. Turkey, where it found that administrative

[55] *Appl. no. 69875/01 (2006).*

bodies connected with the police and responsible for its work also lacked the capacity to carry out investigations which would satisfy the requirements of the ECHR.

Conclusion

The above-cited cases set out the requirements that the Court considers essential when abuse allegations arise. The requirements include a prompt and thorough investigation by a body that is hierarchically independent from the law enforcement agency it is investigating. The investigation should provide the victims the opportunity to state his or her version of events, present evidence, and question witnesses.

2. Compatibility of the Macedonian System for Investigation of Police Abuse Cases with the ECHR Requirements

2.1. ECHR Requirements

The European Court and its relevant case law requirements for investigations into cases of death or serious injury at the hands of state authorities can be summarized as follows:

- The investigation must be "effective"
    - Once the matter has come to their attention, the authorities must act on their own motion;
    - The investigative body must be "independent and impartial," i.e., not have hierarchical, institutional or practical links to the officials whose conduct is being investigated;
    - Reasonable evidence should be collected (sufficient evidence to corroborate the police's version of the event; independent reconstruction of the events; conduct on-site tests/collect evidence at the scene; take statements from eye-witnesses; tests for gunpowder and fingerprints; autopsy report; on scene post-mortem and forensic examination; ballistics tests; check whether custody records match the official's version);
    - The investigation must be able to determine the cause of death, and in cases when physical force was used, whether it was justified;
    - The investigation must lead to identification and punishment of the responsible individuals;
    - The investigative body must have power to compel witnesses, especially those involved in the incident, and to issue a verdict.
- The investigation must be subjected to public scrutiny;
- The complainant and/or his close relatives must be involved to the extent necessary to safeguard their legitimate interest;
- The investigation must be prompt and expedient.

Investigations, "inquiries," "inquests," and "reviews," which fall short of the above-listed minimum standards constitute a violation of the ECHR.

2.2. The Current System for Investigation of Police Abuse Cases

A. The MoI Sector of Internal Control and Professional Standards

Under the current system, when allegations of police abuse arise, citizens can lodge a complaint with the Sector of Internal Control and Professional Standards (MoI Sector), which is an organizational unit within the Ministry of Interior, subordinated to the Minister. The MoI Sector is responsible for carrying out internal investigations regarding allegations of misconduct and abuse of authorization by the Ministry's employees.

During the investigation, the MoI Sector is authorized to interrogate the complainant and everyone who has direct information about the allegations. The MoI Sector can also question any alleged perpetrators. The inspector assigned to the case may also take blood and urine samples from officers for analysis. The inspector may also utilize photographs and medical reports to investigate allegations of bodily injury. Finally, the inspector may use expert witnesses during the investigation.[56]

The supervisors of the organisational departments in the Ministry of Interior, and all other Ministry employees, are obligated to cooperate fully with the Sector during its investigations, and must present to the Sector's investigators all data, information and documentation, regardless of the type and degree of their confidentiality, as well as make their employees available for interview.

Once the internal investigation is complete, the Sector can recommend the initiation of disciplinary procedures against any implicated law enforcement officials. If the internal investigation reveals evidence of a crime, the Sector must inform the competent public prosecutor and the Criminal Police Department.

Despite the system described above, investigations conducted by the MoI Sector fall short of the previously-listed minimum standards requirements:

- The Sector is subordinated to the Minister and its members are employees of the Ministry of Interior, thus the Sector is not hierarchically or practically independent from those being investigated.
- Investigations performed by the Sector are not open to the public, thus they lack the element of independent and public scrutiny. Close relatives of the deceased are also not allowed to take part in the investigation, nor do they have access to the case-file of the investigation.
- In addition, police internal investigations do not meet the requirements for punishment of the implicated individuals, since the Sector can only propose the initiation of disciplinary procedures, which the European Court found insufficient to protect citizen's rights under Articles 2 and 3.

B. Investigative judge and public prosecutor

Pursuant to the Constitutional amendments of December 2005, judges are elected and dismissed by the Judicial Council, which is an autonomous body of the judiciary that ensures and guarantees the independence and impartiality of the judicial power.

[56] Operation Rules of the MoI Sector, Article 16

Likewise, public prosecutors are elected by the Council of Public Prosecutors without any limitations of the duration of their mandate. The Republic Public Prosecutor is nominated by the Government and approved and dismissed by the Parliament. Consequently, it appears that the public prosecutor and the investigative judge likely fulfil the requirement of independence and impartiality set out by the European Court regarding investigations into cases under article 2 and 3 of the ECHR.

Both of these bodies appear to satisfy ECHR criteria for investigative bodies. Certainly, in the above-cited cases involving civil-law countries, it was always the prosecutor who conducted the investigation or requested the investigative judge to conduct the investigation, and in no case did the Court find a violation of the Convention because of dependence or partiality of the judge or prosecutor.

To trigger the investigation, the prosecutor must believe there is a "grounded suspicion" *(osnovano somnenie)* that a certain person has committed a criminal offence. Once that threshold is met, he or she may request the investigative judge to open an investigation.[57]

The judge's investigation is confidential; however, the parties to the proceedings, including the damaged party, have access to the case-file and may attend the hearing of experts and the suspect. The damaged party may also attend the hearing of a witness if he or she cannot be examined during the trial, if the damaged party so requests, or when the investigative judge considers it necessary.

When the investigation is completed, the investigative judge forwards the case file to the prosecutor, who is obligated within 15 days to decide whether he or she will issue an indictment.

It appears that in cases where the prosecutor rejects the criminal report or discontinues the investigation, the damaged party is not entitled to appeal the prosecutor's decision to a higher public prosecutor. Thus the damaged party cannot avail himself of a critical procedural right that was available to the complainant in Berlinski v. Poland.

Still, in view of the Court's tests set forth above and developed to protect the right to life and prevent torture, several shortcomings in the current Macedonian system are evident:

- Although the pre-investigative activities (in cases when criminal report has been submitted with the Office of the Public Prosecutor, but the perpetrator of the criminal offence is unknown) and the investigation against certain persons are led by an investigative judge or public prosecutor, the investigative activities, excluding autopsy and exhumation, aimed at identification of the perpetrator[58] are undertaken by the Ministry of Interior, which appears to run afoul of the standard set out in Gulec v. Turkey[59] concerning the hierarchical independence of the investigating body.
- According to the Law on Criminal Procedure, citizens can request the investigative judge to investigate the legality of activities undertaken by Ministry of Interior officials and to determine whether a citizen's rights were violated. The Law does not, however, establish a procedure for handling such cases.

[58] Article 152, paragraph 2
[59] See page 6 of the text.

- The investigative judge cannot directly compel police officers to testify, but rather requests the institution or the officer's supervisor to produce the officer for interrogation.[60] In addition, there is no statutory deadline by which the officer's supervisor is obligated to produce him or her for interrogation.
- The Office of the Public Prosecutor does not automatically conduct a thorough investigation *proprio motu* and immediately when it learns that someone has died at the hands of state officials. Rather, the prosecutor requests (or requests the investigative judge to request) the report of the incident from the Ministry of Interior. (If the Ministry does not respond, the case stalls). Because of this procedure, the public prosecutor does not automatically interview officers present at the time of death or other eyewitnesses or check custody records and other reports to corroborate the police or official version of events. Instead, the prosecutor must normally rely on the Ministry of Interior's assessment of the incident.
- Neither the investigative judge nor the public prosecutor's investigations are subject to public scrutiny.
- Like the investigative judge, prosecutors appear to lack the subpoena authority to directly compel the officers involved to give a statement or answer questions.
- It appears that a descendent's relatives cannot obtain the MoI Sector investigation case-file.

3. Recommendations

In order to comply with the ECHR requirements for efficient investigation of death or serious injury at the hands of state officials, a change aimed at the establishment of a hierarchically and practically independent investigative body is necessary[61].

Pursuant to ECHR requirements such a body should:

- Be "independent and impartial," i.e., not have any hierarchical, institutional or practical links to the officials whose conduct is being investigated;
- Start an investigation immediately and *proprio motu* – in every case of death, or *prima facie* case of excessive force or torture - at the hands of state officials. Every death in custody must be investigated as a possible homicide[62];
- Have full investigative powers in order to determine the cause of death, and if force was used, whether the use of such force was justified;
- Have power to compel witnesses, especially those involved in the incident, and to issue a verdict;
- Have at least the decedent's next-of-kin involved in the proceedings, including the ability to submit questions to witnesses;
- Complete the investigation promptly and expeditiously;
- Have the ability to transmit the case-file to the Office of the Public Prosecutor for initiation of criminal proceedings, if evidence of a crime is uncovered;
- Make its reports public.

[60] Pursuant to Article 177 of LCP, the investigative judge shall not order the arrest of Ministry of Interior officials, but he will request the Ministry to bring them for interrogation.

[61] In this respect, CPT recommendation following the Committee for the Prevention of Torture's (CPT) October 2001 visit to the host country is worth noting. The Committee stated that: "Consideration should also be given to creating a fully independent investigating agency to process complaints against law enforcement officials: such a body should have the power to instigate disciplinary proceedings against law enforcement officials and to refer cases to the prosecution and/or judicial authorities which are competent to consider whether criminal proceedings should be brought", see document CPT/Inf. (2003) 3, para 64.

[62] The Minnesota Protocol – cited with approval in *Hugh Jordan v. the United Kingdom,* cited above.

In this regard, the competencies and authorities of the Office of the Public Prosecutor and investigative judges should be strengthened, so that:

- The public prosecutor always undertakes all investigative activities *proprio motu,* conducting a thorough investigation in all cases and always determining the legality of the cause of death. Every death in custody must be investigated as a possible homicide.
- Investigative judges and public prosecutors should complete these investigations expeditiously and be given the powers to do so. For example, the Law on Criminal Procedure and the Law on the Ministry of Interior should be amended in a manner that guarantees the presence of Ministry of Interior officials at hearings. Disciplinary measures should be imposed on the responsible officers when information is not supplied to the public prosecutor in a reasonable time.
- The decedent's next-of-kin should be involved in the prosecution and investigative judge's investigations and receive full access to the case-file. Relatives should have the rights of a formal party to civil litigation.
- Introduction of a provision in the relevant legislation to authorise the imposition of disciplinary sanctions on judges who do not investigate allegations or signs of ill-treatment of persons deprived of their liberty.[63]
- Whenever criminal suspects brought before an investigating judge at the end of police custody allege ill-treatment by the police, the judge should record the allegations in writing, order a forensic medical examination immediately and take the necessary steps to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment. A similar approach should be followed by prosecutors whenever they become aware of information suggesting that a person may have been ill-treated by the police.[64]

[63] CPT report CPT/Inf (2004) 29
[64] CPT report CPT/Inf (2003) 3

INTERNATIONAL STANDARDS REGARDING THE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS (PERSONS WITH POLICE AUTHORITY)

1. Protecting the right to life

The international documents for human rights guarantee the right to life as fundamental right. Article 6(1) of the International Covenant for Civil and Political Rights determines that: "*Every human being is entitled with the right to life"* providing that: "*this right is protected by law. No one can be deprived from the right to life".* Article 2 of the ECHR recites about the right to life and its protection: *"The right to life shall be protected by law…"* This provision implies an obligation to the government to protect the "right to life" that is followed with the prohibition to intentionally deprive of life. This applies only in cases when violation of this right is caused by or is due to insufficient protection by the government, followed by a simple reason that complaints for violation and breach of the right to life can only be submitted due *to acts and omissions by the government*. For the government the ban on intentionally depriving someone of their life foresees obligations to withstand activities that may jeopardise that person's life needlessly or without cause. The case-law of the ECtHR and the Commission had affirmed that this obligation to protect the right to life does not burden the legislator but also the government that ought to undertake appropriate measures to protect the life.

The right to life is not an absolute. There are recognised conditions in Article 2 of the ECHR that are limiting this right by indicating other interests. Sometimes is a matter of private interest; when a person is under attack and is defending themselves from unlawful violence; sometimes the limitation is of public interest, as when the state is authorised as bearer of the punishment or when the death is a result of indispensable use of death force.

The ECHR specifies two groups of conditions that allow the state to limit the right to life without violating article 2 of the Convention. The first condition is based and court-settled, while the second represents limitation of this right without court decision. The enforcement of the 6th Protocol of the ECHR[65], for the states that ratified the agreement, excludes the possibility of depriving the life of any individual for any serious criminal act as a result of court verdict. In other words, the possibility of pronouncing the death penalty is excluded.

In the second paragraph of article 2 of the ECHR, there are three cases for deprivation of life that are not subject of limitation stated in the first paragraph of this article. It is a matter of where deprivation of life is a result of force used for a concrete goal:

> "(a) in defense of any person from unlawful violence;
> "(b) in order to effect the lawful arrest or to prevent escape of a person lawfully detained;

[65] This protocol was enforced on 1st of March 1985

"(c) in an action lawfully taken for the purpose of quelling a riot or insurrection.

Regarding the first condition the states considers not only defense, but also the necessity to protect other from violence not allowed by law, while in the second and third condition within the frame of the law determines the police action. It is clear from article 2 of the ECHR that the right to self-defense is acknowledged for official with police authority in protection of individuals from unlawful violence.

The second article form the ECHR confirms that force as an act and the use of police force and other forces for security to extent and kind must be determined by law. Furthermore, these articles are confirming the need for transparency and availability of the right to public inquiry, making clear the action that is undertaken by person authorised to use force. The action of the officials with police authorisation must always be followed by necessity and the force used must be appropriate with the danger threat that shall be removed as well as the level of endangerment of the wealth that needs to be protected[66].

The occasions in article 2 of the ECHR that allow deprivation of life are related to use of force that is "absolutely necessary", i.e. the estimated amount of force that needs to be used without providing objective standards that will assess when and which force was necessary that was used by the police. Due to the different interpretation of the term "absolutely necessary force" in several states (for example: the upper house of the Parliament of Great Britain considered that "necessary" means less then "absolutely necessary" and more then "merely adequate"[67]. The European Court for Human Rights allows each state to independently determine its own standards to assess the used force as "absolutely necessary" within the frame of the Convention. It is very important that in each concrete case, under the jurisdiction of an independent judiciary to be assessed, if the force used by the officials with police authorization was "absolutely necessary" according to the facts. This requires scrutiny of the content of the action, the used weapons and the applied tactic by the police.

2. UN Code of Conduct for Law Enforcement Officials and Basic principle for use of force and firearms by law enforcement officials

In line with article 2 of the ECHR regarding the use of force by the police, is the **UN Code of Conduct for Law Enforcement Officials**[68], in which is explicitly stated that force will be used only when is necessary and in accordance with the circumstances, and in measures that the conduct requires.

The comments of the Code are confirming the principle of proportionality in regard to applied force to eliminate the cause, considering not allowing use of force that is out of proportions with the legitimate target that needs to be achieved. In the contest of use of force by the police the use of firearms is the last resort[69] .

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[66] When the widow of a person killed during the demonstrations in Belgium complained of violation of article 2 to the European Commission for Human Rights the complain was rejected as obviously groundless, because the police acted within the frame of the legally allowed defense: the police felt endangered and that is why he used his firearm. The Commission considered that there are no reasonable doubts that his action was made with intent to kill, Application 2758/66, *X v. Belgium*, Yearbook XII (1969), str. 174 - 192.

[67] David Feldman, *Civil Liberties & Human Rights in England and Wels* (Oxford: Clarendon Press, 1993), str. 102.

[68] "The law enforcement officials" is related to all law representatives no matter if they were appointed or selected that perform police authority and especially the authority to arrest or detain. See: comment to article 1 Code of conduct for Law Enforcement Officials

[69] 1978 UN Code of Conduct for Law Enforcement Officials, art. 3:

The elaboration of the force used and firearms by the police is part of the UN document from 1990, named as **Basic principles to use force and firearms by law enforcement officials"**[70]. With this document the use of firearms is related to cases of immediate threat by death, serious injury or death threat and is justified when the less extreme means are insufficient to eliminate such threats.

Meanwhile, it must be considered that lethal force by the police is the last mean, after determining that the other means were not effective in protection of life.

These principles that have to be respected by the states also need to be acknowledged to the persons entitled to law enforcement, as well as to the judges, public prosecutors, lawyers, government, the legislator and to the citizens. This document confirms the principle of proportionality with the seriousness of the threat that needs to be eliminated and the legitimacy of the objectives that want to be reached by use of police. In that regard, every time the use of force and firearms cannot be avoided, the protection of life should be taken into consideration and the damage or violation inflicted to be as small as possible. When force or fire arms are used, the police must provide first aid to the injured or affected, for which the members of the families must be informed promptly.

In terms of control, this document foresees that in cases of violation or occurrence of death as a result of use of force or firearms, the police officer should immediately inform his superior[71]. The government and the police must ensure effective oversight which enables independent administrative body, or the prosecution as institution to undertake investigation on the case.

This oversight mechanism of control should function for cases of serous injuries or death. The persons/victims of use of force of fire arms by the police or their legal representatives have the right to bring the case in front of the court[72]. The government and the police have to ensure that the responsibilities on for the excessive use of force or death fall also under the senior police officer who might have known or have known that the police officer have used force or firearms out of the written legal rules.

[70] At the eight day of the UN congress for prevention of crime and treatment of prisoners held in Havana, (Cuba) 1990, are determined the: **"Basic principles for the use of firearms by the police"**
[71] Principle 22.
[72] Principle 23.

THE COMPATIBILITY OF THE LEGALLY PERMISSABLE USE OF FIREARMS AND OF THE EXAMINATION OF ITS LEGITIMACY WITH THE EUROPEAN CONVENTION FOR HUMAN RIGHTS AND THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Basic Human Rights, State Coercion and Democratic Control

1. The democratic control over police and other law enforcement bodies is a key issue of the impending reforms in the judiciary, police and public administration. It is the point of contact between the repressive power of the state and the individuals, upon which - how that relation will be established and whether citizens have opportunities to control it or not – the democratic character of society also depends.

Individual human rights and freedoms can be deprived or limited only in cases prescribed by the constitution and law and only in a procedure regulated by law, which is subject to control through a system of legal remedies. This is the principal postulate of a democratic state governed by the rule of law, which is an expression of the idea of limitlessness of human freedom, save from the equal rights and freedoms of others and from the prohibitions proscribed by law, as well as an expression of the stringency on the authorisations of government bodies, except when they are entrusted with such legal authorisations as determined by the constitution and law.

The individual human rights and freedoms can be deprived or limited in the following cases: as a consequence of a punishable offence, in the form of a sanction or other legal consequence; in a penal procedure determined by law, which has the purpose to establish whether a punishable offence has been committed and to subsequently pronounce a sanction; and as a preventive measure undertaken by authorised state bodies in order to prevent future violations of legal goods. The most serious consequence of the application of preventive measures may be the deprivation of one's life or infliction of grave bodily injury. This has to do with consequences that cannot be prescribed as sanctions or other legal consequences, which is an idiosyncratic absurd – the encroachment upon certain freedom or right not to be treated as a punishment or other consequence, but be allowed as a preventive intervention *ante delictum*. All this imposes the need to apply restrictive approach towards encroachment upon such means, generally inspired by the idea of necessitated defence. The application of such measures needs to be observed as an important limitation of human rights and freedoms.

2. The regulations, whereby the use of firearms by authorised officials is permitted, have the character of legal grounds for exclusion of unlawfulness of acts, which by virtue of such use of firearms may constitute punishable offences: murder and grave bodily injury. These ought to be observed as exceptions from the general criminal law prohibitions: no one shall be deprived of his/her life, no grave bodily injury can be inflicted on another person! The following basic requirements are important for the general legal status of these exceptions:

- First, these exceptions have to be regulated by law, because in the overall legal system, a fundamental prohibition prescribed by the CC cannot be suspended by by-laws applicable in a

concrete case. The laws regulating the cases of lawful use of firearms and thereby causing death or grave bodily injury to an individual can be contained not only in the penal law, but also in other branches of the law (police, customs, penitentiary or military law);

- Second, the substantive and essential aspect of the provisions enshrined in specific laws concerning the exclusion of unlawfulness of an act must be determined and guided by the same idea, which also determines the necessitated defence as a common basis for exclusion of unlawfulness in the CC. In other words, the justification and thereby also the scope of these acts are based on the idea of necessitated defence as an actual protection of the life or physical integrity of an official or other person, or of an exceptionally important good from unlawful assault, which is necessary to repulse such assault. Or, the use of firearms resulting with lethal outcome cannot be justified merely by the interest of efficient performance of the function by the authorised officials, because that would lead to an extensive setting out of cases in which the unlawfulness of such acts is excluded, but rather refers to carrying out their functions in "hot situations" of necessity to reach for their firearms in order to achieve legal and legitimate objectives;
- third, as exceptions from the general prohibitions (for murder and bodily injury), the provisions that contain such grounds for exclusion of unlawfulness should not only be narrowly and precisely laid out as regards the cases in which the use of firearms is permitted, but moreover they should also be narrowly interpreted;
- and fourth, bearing in mind that we are dealing with permissive norms, with which the criminal law prohibitions are excluded, the establishing whether the conditions for their application have been fulfilled have to be meticulously regulated by the law; these norms have to be implemented by an independent entity, which has the full capacity and authority to establish that the effect of a criminal law prohibition is not applicable in the concrete case.

3. The control over the authorisations of the police and other bodies regarding to use firearms, which results in death or bodily injury of a person, has a dual meaning: a substantive law meaning, consisting of establishing the existence of legal grounds for the use of firearms and exclusion of unlawfulness of acts of murder or grave bodily injury; and a procedural law meaning, regarding the procedure for determining the legitimacy of the use of firearms, that is the exclusion of unlawfulness of such acts.

The significance of these issues is enormously increased owing to the following two circumstances: firstly, an increasing number of bodies authorised to use firearms (in addition to the police – these are customs authorities, authorities responsible for execution of criminal sanctions, and the ARM members), which demonstrates the tendency to "militarise" the executive branch. This tendency should be countered by solid legal safeguards for the protection of individual rights and freedoms.

Second, the tendency to move the procedural authorisations in the criminal procedure "from right to left", especially with regard to the prevention of organised and other serious forms of crime, leads to an increase in the authorisations of the police and other bodies being justified by the necessity of efficient prevention of these types of crime. At the same time, however, such tendency imposes the need to establish a new balance, over and over again, between the increased authorisations of the police and the ever more intensive protection of individual rights and freedoms.

4. The subject matter of our interest – the use of firearms by authorised officials, which results in death or grave bodily injury of a person, requires clarification of two prior issues. The first one refers to the notion of arms, and makes problematic the narrowing down of the debate only to the

use of firearms with severe consequences. Namely, one should bear in mind the fact that the Law on Weapons (Article 2) contains a broad definition of the notion of arms, according to which "firearms" is only one of the possible types of weapons (pneumatic, gas, explosive, electrical devices, etc.) that can be equally lethal as firearms. Therefore, it is incomprehensible why in the Law on Internal Affairs, the Law on Police and other laws, only "firearms" is mentioned, and wherein the grounds for its lawful use are specified in a relatively detailed manner, but there is no mention of other types of lethal weapons. Accordingly, in all these laws, in addition to the notion of "firearms", other weapons which can result in death of a person or grave bodily injury have to be added thereto. Or the use of any weapon that can cause such consequences should be put under the same regime of fixed grounds for its use, which currently only refers to firearms.

The second issue pertains to the compatibility of the grounds for lawful use of firearms, as well as of the control of the legitimacy and proper use of firearms in cases of causing death or grave bodily injury by the police. However, other state bodies are also legally authorised to use firearms: customs officers, security guards in penitentiaries, and military personnel. Considering the fact that the ECHR makes no distinction between the bodies authorised to use lethal weapon, but rather departs from the interest to ensure effective protection of the individual rights and freedoms – the right to life and physical integrity - it is undisputable that the authorisations of officials working within these bodies have to be in the focus of our interest.

Legal grounds for the use of firearms and their compliance with the ECHR

1. **The Law on Internal Affairs** (Article 35) distinguishes four grounds for exclusion of the unlawfulness of use of firearms, including:

- protection of the lives of citizens;
- repulsion of a direct assault jeopardizing one's life;
- repulsion of an assault on a building or a person that are being secured; and
- prevention of the escape of a person caught *in flagranti* i.e. in the course of commission of a crime for which an imprisonment sentence of at least five years is prescribed, as well as an escape of a persons deprived of his/her liberty and a person for whom there has been issued a warrant for deprivation of liberty due to committing such criminal offence.

The legitimacy, justifiability and correctness of the use of means of coercion or firearms are in every case directly assessed by the immediate responsible superior (Article 38).

This statutory solution contains several weak points. First and foremost, it partly deviates from the basic, underlining idea of using firearms in a state of necessity and, thereby, of its proportionate use based on the idea of necessitated defence. If this is clearly emphasised in the first and the second item of the above article, it is not the case with the third and the fourth. It remains unclear as to what building or person, which is being secured, is the third item about: whether securing of some subsidiary building (a food storehouse) also constitutes a legally permissible ground for deprivation of the assailant's life. If this provision were interpreted in that manner, then it would come into an obvious discrepancy with the provision on necessitated defence contained in the CC. Pursuant to this criminal law provision, a person under assault is entitled to defend himself/herself with impunity by repulsing the assault, provided that he/she acts in defence which is necessary to repulse such assault and which is proportionate to its intensity. Nevertheless, according to the interpretations by our court practice, as well as the foreign one, an assault on property does not provide a ground to encroach upon the life of the assailant with impunity. An exception to this would be a material good that has a particular significance for the basic human rights and

freedoms and their security (destroying dams, water supply systems, highly valuable properties, etc.). What applies to ordinary citizens, should even more so apply to authorised officials. The last item of the abovementioned article is also problematic - preventing the escape of a person caught in the course of commission of a crime, or a person deprived of his/her liberty or for whom a warrant for deprivation of liberty has been issued due to committing such criminal offence. Can only the gravity of the offence, which has already been committed, justify the use of firearms resulting in death or grave bodily injury of the perpetrator? Or, rather, should every such case be necessarily treated as overstepping of the authorisations?

The second shortcoming of this statutory provision is that it does not differentiate, when it comes to the examination of justifiability and correctness of the use of firearms by "the immediate responsible superior", between the use of firearms that resulted in death or grave bodily injury, and the use which did not have any such consequence. It is obvious that the lack of distinction of these two situations derives from the fundamental principle to legalise a broad discretionary power, the legitimacy of which suffices to establish whether there are grounds (Article 35), without addressing the issue of intensity of the use of firearms as a last resort?

2. **The Law on Police** makes a step forward with regard to the procedure for reporting and additional checks, but on the other hand, it extends the grounds for lawful use of firearms. The Law first defines (Article 80, paragraph 1) the notion of coercion as a "use of legitimate, appropriate and proportionate physical or mechanical pressure" against a person, which is being employed "only in case when police matters cannot be carried out in another way" (principle of subsidiarity, coercion as *ultima ratio*). When the coercion mean has been used within the limits of police authorisations, the liability of the police officer concerned is excluded, as well as of the responsible senior police officer who ordered such use (Article 81, paragraph 1). This is, in fact, exclusion of the unlawfulness of a given act, which cannot be treated as a punishable offence (hence, for example, other persons who assisted the official person will not be punished as accomplices either). The Law further sets out a precise requirement that the legitimacy, justifiability and correctness of the use of coercion means be directly assessed by the immediate superior head officer, whereas for each case of use of firearms he/she is to inform the competent public prosecutor (paragraph 2). A special procedure is provided when death or grave bodily injury is caused to a person by using firearms or other coercion means: in that case the legitimacy, justifiability and correctness of the use is assessed by a special organisation unit within the MoI responsible for internal control and professional standards. This unit looks into the circumstances under which the coercion mean was employed and prepares a report containing its opinion on the legitimacy, justifiability and correctness of the use, which it further submits to the Minister (paragraph 3). Even though the Law is understated, it should be noted that this report is submitted to the competent public prosecutor as well, although the Law only requires this explicitly (paragraph 2) with regard to the use of firearms (*argumentum a minore ad maius*). These statutory solutions are an indisputable progress in comparison to the former regulations.

On the other hand, however, the Law on Police extends the grounds for use of firearms against individuals (Article 89). Sticking to the requirement for its use as a last resort, when it is absolutely necessary and when police matters cannot be carried out with the application of other coercion means, the Law allows such use in order to (paragraph 2):

- protect one's own life and the lives of others;
- prevent the commission of a criminal offence for which an imprisonment sentence of at least four years may be pronounced;

- prevent the escape of a person caught in the course of committing a crime for which an imprisonment sentence of 10 years or a more serious sentence may be pronounced, or a person for which an arrest warrant has been issued due to commission of such offence;
- prevent the escape of a person deprived of his/her liberty for having committed criminal offence as referred to in item 3, or a person for whom a warrant has been put forward owing to his/her escape from serving a prison sentence for such crimes; and
- prevent an assault on a building or a person that are being secured.

The Law narrows the grounds for lawful use of arms in cases to prevent the escape of persons, and in cases of most severe crimes for which an imprisonment sentence of 10 years has been prescribed. On the other hand, the imprecision of the Law on Internal Affairs has not been removed as regards the prevention of an assault on a building or a person that are being secured. However, particularly problematic is the new ground for exclusion of the unlawfulness contained in item 2 – the use of firearms for the purpose to prevent the commission of a more serious offence for which an imprisonment sentence of at least 4 years is prescribed. This provision conflicts with the provisions of the CC pertaining to necessitated defence, which is the leading idea for the solutions on exclusion of unlawfulness contained in the Law on Police and thus, in fact it derogates this criminal law institute. Pursuant to this statutory solution, it means that firearms may be used not only for the purpose to prevent a murder, for example, for which an imprisonment sentence of at least five years is prescribed (Article 123, paragraph 1 of the CC), but also to prevent larceny of a good under temporary protection or a cultural heritage (Article 236, paragraph 3), however not for the purpose to prevent robbery or burglary (Articles 237, 238). Such wording and formulation in the Law would not be problematic if the following distinction was made: one thing is to prevent the commission of a punishable offence directed against the life and body, another thing is to prevent an offence directed against other goods protected by law (property, etc.). In the second case, the permissibility to use firearms should not whatsoever imply use so as to deprive a person of his/her life before the offence is committed. The other imprecision in this statutory provision could be removed by means of teleological interpretation: namely, the Law does not specify whether the use of firearms for the purpose to prevent the commission of a crime implies that the intention of the perpetrator should be known, whether it implies to far-reaching and non-punishable preparatory actions undertaken by the perpetrator, or it only applies when the commission of an offence is immediately impending. Applying the general conditions of the institute of necessitated defence, it should be taken into account that here also there is justification for the use of firearms only provided that the assault i.e., the commission of the offence is immediately impending, is ongoing or temporarily interrupted, but not after the offence is completed.

Another imprecision in the Law has to be rectified by systematic interpretation of the provision per Article 89: paragraph 5, supra, which stipulates that firearms can also be used against an apprehended person when that is necessary so as to prevent the escape of that person. This is a very general formulation, which is to be related to the general conditions set forth in paragraph 2 as regards the prevention of escape of a persons deprived of his/her liberty (paragraph 2, item 4).

3. **The Law on Service in the Army of the Republic of Macedonia (ARM)** contains provisions for carrying and use of arms (Article 13): military servicemen may use means of coercion or firearms in the course of their duty if there is no other way:

- to protect the lives of people whom they secure;
- to repulse an assault or imminent danger from an assault on a building or other means they secure; and
- to repulse an imminent assault whereby their lives are jeopardised.

The manner of using means of coercion and firearms is more closely regulated by the rules on internal order and relations in carrying out duties within the service in the ARM.

Pursuant to the Law on Defence, the operations for prevention and disclosure of criminal offences within military units and facilities of the ARM are conducted by authorised officials of the Ministry of Defence. The Law provides that they have authorisation to use firearms (Article 135) in the following cases:

- if they cannot protect the lives of people in that area with other means of coercion;
- to repulse a direct assault whereby their lives are jeopardised;
- to repulse an assault on a building or a person that are being secured; or
- to prevent an escape of a person caught in the course of commission of a crime for which an imprisonment sentence of at least five years is prescribed.

Between these two statutory solutions, which relate to a cognate matter (defence), there is a difference expressed as extension of the ground for lawful use of firearms and for the purpose to prevent an escape of a person caught in the course of commission of a crime for which an imprisonment sentence of at least five years is prescribed. In addition, the imprecise determination of the ground which consists of repulsion of an assault on a building or a person that are being secured is also typical for the statutory solutions in the sphere of defence. It is not closely determined – what this assault constitutes. We can also rightfully imagine an assault that consists of breaking into a building to commit a robbery, or a less serious physical assault on a person being secured!

4. **The Law on Execution of Criminal Sanctions** also contains provisions for authorised use of firearms by the security staff of penitentiaries (Article 187). The security staff member can use firearms if he/she cannot act otherwise in order to:

- protect the life of a person;
- repulse a direct assault jeopardising his/her life;
- repulse an attack on a building he/she is securing;
- prevent an escape of a convicted person from a closed type institution, that is from a closed section thereof ; and
- prevent an escape of a convicted person in the course of his/her escorting if he/she has been convicted for a punishable offence for which an imprisonment sentence of 15 years or a more severe prison sentence has been prescribed.

When the official duty is carried out under direct leadership of the manager of the penitentiary institution or of the official in charge of the security service, firearms may be used only following their order.

In determining the grounds for exclusion of "unlawfulness and liability" this Law also includes the already mentioned grounds for repulsing an assault on a building that is being secured, as it is the case with other abovementioned laws. As compared to the Law on Police, this Law lays down more broadly the ground which consists of preventing the escape of a prisoner from a closed penitentiary institution, that is a closed section thereof. Whereas the Law on Police determines that in cases of escape of a person deprived of his/her liberty, the person concerned should be a perpetrator of a punishable offence for which an imprisonment sentence of at least ten years is prescribed, this Law does not set out any condition as regards the length of sentence pronounced for the conviction, nor the gravity of the offence for which the person concerned has been convicted. His/her penitentiary status is taken as the only criterion – whether he/she is placed in a

facility of a closed type or a closed section. If we analyse the legal conditions for referral of convicted persons to such facilities, we may conclude that they do not always come down to the length of the sentence pronounced, but also other factors are taken into consideration (recidivism, etc.).

The Law also provides for a procedure for reporting on the use of firearms (Article 188), which consists of drafting a report by the security staff member who used firearms and a notification for the penitentiary management, which assesses the justification of such use of firearms. The case when the use follows an order by the manager of the facility, who in such a case would have to notify himself/herself, is not regulated!

5. Finally, the **Law on Customs Administration** also contains provisions for lawful use of firearms (Article 440), which allows the customs officers to resort to firearms under the following conditions:

- in a self-defence situation;
- if there is no other way to stop the persons who intend to cross the border and they do not obey the repeated orders to stop given by the customs officer;
- there is no other way to stop the vehicles, as well as "animals that intend"(!!!) to cross the border even after the repeated orders to stop given by the customs officer (!!!);
- and cannot otherwise prevent deliberate damaging of buildings or resources of the Customs Administration.

If we exclude the first ground – self-defence (it would be better to say – necessitated defence), other grounds have nothing to do with preventing the commission of a punishable offence or catching a perpetrator of a punishable offence. They refer to the prevention of illegal crossing of borders, whereby the ground mentioned in the second and third item are completely identical, because it is obvious that vehicles do not move on their own, or that animals must be driven or led by a man, whereas the ground of deliberate damaging of buildings, which as infractions (the first one is of formal nature, while the other one is about property), cannot be considered sufficiently serious to trigger use of firearms, which could result in death or grave bodily injury. In addition, this Law does not contain even minimum provisions on the manner of examining the justifiability and legitimacy of the use of firearms.

6. The superficial analysis of the authorisations to use firearms that are regulated by law, leads to the conclusion that there exist extremely inconsistent and insufficiently elaborated grounds for exclusion of unlawfulness of the acts of deprivation of life or infliction of grave bodily injury by means of use of firearms. In other words, no matter how rough it may sound, this means that the state allows lawful murder of individuals under different, uneven conditions for exclusion of its unlawfulness.

As a justification for the uneven approach of these laws, the different nature or importance of the functions performed by these bodies cannot be used. The sole measure for the degree of permissibility to use firearms with a lethal consequence may only be the right to life and physical integrity that is the basic human rights, which require a synchronised shaping of permissible exceptions from the absolute nature of the right to life and physical integrity of every human being.

The principal shortcoming of these statutory solutions is that in general they regulate the permissible use of firearms, notwithstanding the consequence thereof (death, grave bodily injury or ordinary bodily injury). The laws do not introduce any closer criterion for differentiation

between these cases, except for the general reference to proportionality, the use of firearms as a last resort, etc. There is no value-based criterion that would be defined as "a necessity for lethal use of firearms", that is "a necessity for use of firearms which results in grave bodily injury". Contrary to this, there is a presumed permissibility of death consequence or grave bodily injury, whose occurrence seams to be justified by the ground itself, but not with the necessity of causing them. Such arrangement undoubtedly relies on the experience judgment that "*vulnera non dantur ad mensuram*"- the injury cannot be measured in advance! But this rule need not apply to all cases (thus, for example, when preventing a person to abscond, it is not the same whether the firearms is in the hands of a well trained sniper shooter, some excellent shooter or a regular police officer).

In the legal formulations of cases of permissible use of firearms, it is not clearly determined whether the exclusion pertains to unlawfulness of the act or to criminal liability. This distinction is necessary, because from the criminal law point of view these notions have different meanings. Thus, in the Law on Execution of Criminal Sanctions (Article 189) – both unlawfulness and liability are excluded. It is even unnecessary to add liability, because the exclusion of unlawfulness also implies exclusion of liability. The Law on Police (Article 81, paragraph 1), on the contrary, speaks only about the exclusion of liability, which could imply a conclusion that the offence remains unlawful, but the guilt of the person who used a weapon is excluded.

7. According to the ECHR (Article 2), the right to life of every person is protected by law, and the exceptions are allowed only when the use of force is absolutely necessary for the purposes of:

- affecting a lawful deprivation of one's liberty or preventing an escape of a lawfully detained person;
- defence from unlawful violence;
- undertaking lawful actions for suppressing riots and insurrections.

The ECHR very explicitly expresses the main idea behind these exceptions, which embraces the requirement to limit a forcible encroachment upon the right to life only in those cases when that is absolutely necessary. By emphasising this substantive, essential element - "the absolute necessity (indispensability)" implies a restrictive approach towards determining and formulating the legal grounds for lawful and permissible use of firearms by official persons.

In this respect, for instance, the ECHR does not recognize exceptions from the absolute respect for the right to life in order to prevent commission of an offence, unless it is connected to the prevention of unlawful violence (necessitated defence), protection of buildings (as it is the case of the Law on Police, the Law on Customs Administration, the Law on the ARM), or to prevent people or vehicles to cross the state border. **Such provisions in the laws are obviously in contradiction with the ECHR and ought to be urgently removed from the legal system.**

Legal regulation of the procedure for examination of the cases of use of firearms

1. In addition to the regulations concerning the grounds for exclusion of unlawfulness of the use of firearms, which are inconsistent and incompatible with the ECHR, a legal system for an independent and competent investigation of the legitimacy of such use in concrete cases has not yet been established and levelled. This should ultimately result in an indisputable assessment that all legal conditions for exclusion of unlawfulness of the acts of deprivation of one's life or infliction of grave bodily injury are met: the formal legal conditions as well as the substantive legal condition for a necessity to use firearms and its proportionality and justifiability as a last resort are fulfilled. This is, undoubtedly, a complicated procedure, in which the one who assesses the legitimacy and justifiability of such use puts himself/herself in the role of a judge, who is to

make a judgment in a difficult case – whether the unlawfulness of the use of firearms has been excluded, whether the limits of such lawful use have been exceeded, or adversely, an unlawful use is at stake. Moreover, in the second and third case, a criminal procedure against the perpetrator of a crime of murder or grave bodily injury should be instituted and added to this assessment.

Contrary to the existing incomplete provisions on the control mechanisms of the legitimacy and justifiability of the use of firearms, as contained in the mentioned laws, the conditions for its use and the procedure against the authorised officials who used firearms are further elaborated with by-laws.

2. For the MoI authorised officials such relevant by-law is the Regulation on the Use of Means of Coercion and Firearms of 1998 (I have no information whether a new regulation has been enacted or that such one has been prepared for the purpose of application of the new Law on Police). Incidentally, the Regulation specifies the conditions under which firearms may be used (Articles 22-26), thereby allowing even to modify the legal grounds envisaged in the Law on Internal Affairs. Thus, for instance, the Regulation considers that larceny, damaging, destroying and ruining of a building or parts thereof constitute an attack on a building, without specifying the type of building, its value and characteristics, etc. (a police station, warehouse, storage with consumables, etc.). With regard to the procedure for examination and determination of the legitimacy and justifiability of the use of firearms, the Regulation envisages (Articles 27-29) the following: submission of a written report by an authorised official and setting up a commission to look into the circumstances and to prepare a report with an opinion about the legitimacy, justifiability and correctness of the use of firearms. By the amendments to the Regulation as of 2004, the commission was substituted with the special organisational unit responsible to conduct internal control within the MoI. No further details concerning these procedures are envisaged, nor consequences following the review of the report by the Minister of Interior.

3. With a special Regulation on the Use of Means of Coercion and the Use of Firearms of 2005, the conditions for the use of firearms by customs officers as well as the procedure for examination of its legitimacy and justifiability were further elaborated. As regards the conditions for application (Articles 14-19), the Regulation contains confusing provisions (like Article 16, in which the provisions from Articles 14 and 18 are repeated), wherein formulations from the police regulation were reciprocated. The legal condition which consists of stopping people who intend to cross the border (whether they may be, for example, also women or children), or preventing attacks on buildings and (unlike the police regulation) resources, has not been particularly elaborated in details, however without specifying the type of buildings and resources (whether, for example, firearms can be used if someone wants to steal a rear view window from a customs vehicle?). With regard to the procedure for examination of the legitimacy and justifiability, only one provision is envisaged (Article 20), according to which this procedure is reduced to submission of a written report to the immediate superior in charge.

4. Owing to the analysis of both the laws and regulations, we can conclude that the procedure for examination of the legitimacy and justifiability of the use of firearms is elaborated with by-laws, even in cases when the use of firearms results in death or grave bodily injury of a person. This is contrary to the principle of legality, pursuant to which all circumstances, including the circumstances leading to the exclusion of unlawfulness of a punishable offence, must be determined in a procedure regulated by law, and not with by-laws. The by-laws could allow for the statutory provisions to be suspended in a criminal procedure, which is initiated always when there are grounds to suspect that a punishable offence has been committed (principle of legality). In spite of the fact that here, there are no grounds to suspect that a punishable offence has been

committed, the existence or non-existence of such grounds must also be clarified in a procedure regulated by law. Otherwise, this could result with lower standards and requirements for examination of a concrete case in the procedure regulated with by-laws, compared to those applicable in the procedure governed by the law.

In addition to this basic objection, the analysis shows us that neither the by-laws regulate all necessary procedural actions that should be undertaken in such case, like the firearms expert analysis, inspection into the crime scene, photo-documentation, and the like. All this has been replaced by preparing a written report by the official person concerned, which resembles to an ordinary administrative procedure, and *inter alia*, it suggests in advance the possibility of subjectivism in its preparation. It is entirely natural to expect that the official concerned will not write a report in which he/she will leave even the slightest possibility for suspicion into the legitimacy and justifiability of his/her use of firearms.

The following criticism of the existing legal solutions is based on the observation that independent bodies and organs have not been envisaged, which would establish the circumstances of the case. The entire procedure is closed within the institution, which is the ministry to which the authorized official belongs. The possibilities of subjectivism and voluntarism are more than obvious. Here also, it is logical to expect that the internal control mechanisms, even when they are institutionally separated, such as special organisational unit for internal control, do not guarantee independence and impartiality of the assessment as to whether the formal legal grounds have been fulfilled, whether the use of firearms was necessary from a substantial point of view, and whether the procedural formalities for registering all facts and collecting all evidence necessary to make an assessment have been adhered to.

5. The incompatibility of the existing solutions in the primary and secondary legislation with the ECHR is more than obvious. According to the viewpoint of the ECtHR in its interpretation of Article 2 of the ECHR, this provision implies an official investigation for examining each case of deprivation of one's life by an official person by use of force, which should determine not only the formal justifiability, i.e. the fulfilment of the formal conditions for using force, but also the necessity, i.e. the substantive, essential condition for such use.

According to the interpretation of the ECtHR, made in several cases, this examination has to be:

- independent and impartial, both in hierarchical and practical terms;
- effective, so that the key circumstances important for the assessment can be established (identity of the victim and of the person who caused his/her death, the cause, the manner, etc.);
- collecting necessary evidence (expert analyses, statements, testimonies, etc.);
- determination of the justifiability of the use of firearms;
- identification and ultimate punishment of those responsible;
- open to the public;
- information and involvement in the procedure of close relatives of the victim;
- prompt and efficient investigation;
- initiation of the investigation *proprio motu*.

The analysis of the by-laws makes valid the conclusion that our standards are far bellow the ECtHR interpretation. Even with regard to the regulation, which at first glance approaches the ECtHR jurisprudence, whereby such examination of the legitimacy is entrusted and conducted by the Sector for Internal Control and Professional Standards within the MoI, not all standards are met from which the ECtHR departs (such examination is not public, the Sector has no insight into

the autopsy findings, it cannot summon witnesses, etc.). Even less are these standards represented in the proceedings before the customs, penitentiaries or the ARM, where not even a formally independent investigative body is envisioned in the law.

6. The standards and requirements which the ECtHR jurisprudence takes as a starting point are met when the case of using firearms gets to the investigation stage, which is conducted by the investigative judge upon the request of the public prosecutor pursuant to the provisions of the LCP (Articles 150-174). This procedure ensures independence of the body responsible to assess the legitimacy and justifiability of the use of firearms, as well as transparency, adversarial argumentation, and participation of the damaged party. However, the basic precondition to initiate a criminal investigation and its preceding actions – filing a criminal report, decision of the public prosecutor following the criminal report and submitting a motion to open investigation – is the existence of "grounds for suspicion" that a punishable offence has been committed, which is prosecuted *ex officio*. Owing to the internal character of the procedure for examination of the legitimacy and justifiability of the use of firearms, it can rarely be expected that "grounds for suspicion" will be established in an independent and impartial manner as well. They refer to fulfilling the formal legal condition, but also to the substantive criterion, that is a necessity to use firearms. The preliminary procedure itself, as we have seen, does not provide the safeguards required to ensure impartiality and effectiveness. Hence, such cases reach the stage of investigation before the court very rarely, as a rule, when the formal legal condition is not met, but even more rarely, almost never, when the requirement for necessary use of firearms has been violated in substantive, essential terms.

On the other hand, the initiation of investigation in every case when firearms are used with lethal consequences is unacceptable as a general solution, because it is contrary to the very nature of the investigation procedure aimed at confirming or denying the existence of grounds for suspicion that a punishable offence has been committed, as well as of the substantive legal grounds for exclusion of unlawfulness. The establishment of unlawfulness is based on the assumption of unlawfulness of every act of encroachment upon the life or physical integrity of a person, but this does not imply at all a conclusion that the application of the provisions concerning exclusion of unlawfulness primarily denotes accusation of the person who caused such consequences with his/her actions, and then examination whether there was any ground for exclusion of unlawfulness that affected his/her action. On the contrary, the existence of grounds for exclusion of unlawfulness is being established together with the existence of grounds for suspicion that a given act is unlawful, in a procedure that precedes formal initiation of the pre-investigation procedure and the investigation itself. This emphasises even more the need for a meticulous legal arrangement of such preliminary procedure.

Future regulations

Out of the numerous solutions emerging as possible improvements to the existing legislation, such as strengthening the role of the Ombudsman, a hierarchically separate Sector for Internal Control within the MoI, an *ad hoc* body to be formed within the Ministry of Justice, or conducting investigative actions by the court, the most optimum solution seems to be the creation of an independent body within the public prosecution office.

In principal, the referral of the competence to examine these cases to the MoI, even under the condition to strengthen the independent position of the Sector for Internal Control, is not in compliance with the requirement for a hierarchical independence, and especially it does not take into consideration the fact that the use of firearms is also allowed for authorised officials in other

state institutions (customs administration, ARM, penitentiaries), upon which the MoI cannot have jurisdiction.

Placing such a procedure under the competence of the Ombudsman, however it may be in line with its basic function to protect fundamental human rights (to life and physical integrity), it would however encounter numerous obstacles related to insufficient operational capacity of this entity, which would have to forward its findings further onto other bodies (MoI, the public prosecution office), thus lacking effective authorisation to eventually undertake procedural actions for conducting criminal proceedings.

The solution of proclaiming the investigative judge as an independent body that is to conduct proceedings in such cases is also ruled out, because this would contravene the accusatory character of our criminal procedure: the investigative judge cannot, according to our system, initiate any proceedings against any person *ex officio*. Moreover, if this were combined with initiating a procedure before the investigative judge upon the request by the public prosecutor (and were regulated under LCP), it would deviate from the very nature of the investigation, which can be conducted against a person when there exist grounds for suspicion that he/she has committed a punishable offence, whereas here we are discussing precisely about a procedure for examination and determination - *whether* there are grounds for suspicion.

Accordingly, the public prosecution office remains to be the body where all information should be obtained and gathered about the cases of use of firearms resulting in serious consequences by authorised persons in the mentioned state institutions. For them, following the model of the new Police Law, such legal duty has to be incorporated in the law. This idea is now also accepted in the Law on Public Prosecution Office, which has to be also supplemented for the purpose of complementary arrangement of this proposed solution with the following provisions:

- the Public Prosecutor of the RM shall establish a permanent body with a four years term of office in order to examine this type of cases, which shall be composed of: the public prosecutor on whose territory the use of firearms occurred, the immediate superior official to the person who used firearms (who, in case of a vague situation, should be designated by the Basic Public Prosecutor), one representative of the MoI, Customs Administration, the ARM and the Ministry of Justice (depending on the case), a deputy of the Ombudsman, a forensic expert and an independent expert for ballistics (as assigned on the basis of a public vacancy notice);
- upon request by the public prosecutor, the respective body or institution is obliged to make available other authorised persons for the purposes of inspection, recording of traces and collecting evidence;
- the Basic Public Prosecutor, together with the members of this permanent body and, if needed, the authorised persons engaged from the respective body or institution shall carry out inspection and reconstruction, collect all reports and traces from the crime scene, summon and interrogate persons – witnesses of the incident and undertake other actions in order to clarify all circumstances of the case;
- after completing the case file, the permanent body shall prepare a report on the incident, which shall be submitted to the damaged person, together with the established facts, as well as to the person who used firearms and the respective state institution to which he/she belongs; these entities are entitled to object to the report within a specified period of time;
- after the expiration of the deadline for objections and adoption of the final report, the public prosecutor may make a decision to undertake pre-investigative actions for the purpose to preparing a criminal report and initiating an investigation before the competent court, or to close the case down with an assessment that it concerns a legitimate and

justified use of firearms. In the latter case, members of the permanent body or the damaged person are entitled to appeal this decision, and the appeal shall be reviewed by the collegium of the higher public prosecutor. The decision of the higher public prosecutor shall be final as regards the criminal procedure; however it does not constitute an obstacle for the damaged person to file a criminal report, and if it happens to be rejected, to submit a motion to initiate an investigation before the court acting in the capacity of subsidiary criminal plaintiff, or even to initiate civil proceedings for compensation of damages.

These proposed solutions could not be incorporated into the LCP, because the preliminary procedure for examination and determination of the legitimacy of the use of firearms does not have a character of an investigative procedure, based on the existence of grounds for suspicion that a punishable offence has been committed. Hence, this can be arranged by a separate law, which would also encompass and synchronise the legal grounds for use of firearms, or this could be accomplished by the Law on Public Prosecution Office. In the latter case, the legal regulation of this procedure does not diminish or exclude the need for urgent intervention in other laws (on the police, customs administration, ARM and penitentiaries), in order to comply with the ECHR and the ECtHR jurisprudence.

INTERNATIONAL STANDARDS ON ADEQUATE INVESTIGATION INTO CASES OF DEATH UNDER DUBIOUS CIRCUMSTANCES

Introduction

International practice regarding the protection of human rights, particularly the right to life confirms that a great number of cases of extra-legal, arbitrary and summary executions remain undocumented and undetected.[73] Such cases include:

1) Political murders;
2) Death as a consequence of torture or mistreatment in the places of detention of the persons deprived of their freedom;
3) Death as a result of forced disappearance;
4) Death as a result of use of excessive force by the police;
5) Execution without a right to a complaint;
6) Genocide.

The failure to detect and reveal such cases of execution is the principal obstacle to delivering justice in the society and to a possible prevention of future cases of executions. The international instruments for human rights which guarantee the right to life are clear in their advocacy that no one can be deprived of their life arbitrary.[74] All these instruct the member states to take action through their legislations in order to ensure respect for the right to life, which implies two modes of effectuation: a threat of punishment against those who will commit, attempt or induce someone to murder, or any other act which has death as a consequence, including assisting or inducing someone to suicide; and by making an assessment on the death of the person and a right to a complaint for indemnity as a compensation when death is provoked with intention or by negligence.

Outside of the conditions that justify the restriction on the right to life (the former are judicially established and based, whereas the latter assume a restriction on this right without a court decision), the dubious death cases have been the subject of continuous interest by the International Community in finding and establishing control standards by the states in order to detect, condemn and prevent such execution cases. Particularly active in this sphere have been the following: the UN General Assembly, the Economic and Social Council, the Committee for Crime Prevention and Control, the Human Rights Commission and its rappourters, the Sub-commission for Prevention of Discrimination and Protection of Minorities, the International Labour Organisation, the Human Rights Committee, the Inter-American Human Rights Commission, the African Human and National Rights Commission, the European Court of Human Rights.

[73] Execution.
[74] See: Article 3 of the Universal Declaration on Human Rights (UN Resolution 217A(III) as of 10th December 1948); Article 6(1) of the International Convention on Civil and Political Rights as of 1966; Article 40 of the American Convention on Human Rights; Article 2(1) of the European Convention on Human Rights.

All of these international organisations have perceived the deficiency which existed in the international legal protection of the right to life, particularly with regard to the dubious death cases. Such cases of extra-legal, arbitrary and summary executions implied establishment of appropriate standards of an independent, impartial and objective investigation so as to detect and prevent the executions. For that purpose, the UN General Assembly, with the Resolution 45/151 as of 8th December 1988, urged the states, the international and non-governmental organisations to support the efforts which were made within the UN bodies for adoption of international standards for adequate investigation into all death cases under dubious circumstances, including provisions for adequate autopsy.

Such standards are determined in the Principles of Effective Prevention and Investigation into extra-legal, arbitrary and summary executions, (a document prepared by the UN Economic and Social Council in 1989) and the Prevention Manual, prepared as a supplement to the former. In the further analysis these documents will be taken into consideration, as directives for building a mechanism of external control over the "law enforcement officials"[75] in the Republic of Macedonia.

1. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

One of the least exploited documents of the UN in the building of the external control mechanisms of the police and all other agencies which have police authorisations is the UN Resolution 1989/65 adopted on 24th May 1989, whereby the **Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions** [76] are determined. With this document of the UN Economic and Social Council, the governments of the UN member states are imposed on to prohibit by law the cases of extra-legal, arbitrary and summary executions and to make provisions for them as criminal acts in their legislations, as well as to determine penalties for the perpetrators taking into consideration the gravity of the acts.

In order to prevent them, the governments ought to ensure strong control, including a clear command responsibility of all the persons responsible for arrests, detentions, custody, as well as those who are authorised to use force and fire-arms in accordance with the law. This control presumes protection through judicial and other mechanisms for the persons who run the risk of being the subject of extra-legal, arbitrary and summary executions, or death threat. For that purpose, the governments are required to keep the detained persons in officially assigned places for that specific purpose and to acquaint the relatives, lawyers or other trustworthy persons with the precise information about the detention. What the Recommendations from 1989 require from the states is the possibility for qualified inspectors, including medical staff, or another independent body to carry out regular inspection of the places for detention and remand, as well as to be authorised to carry out this kind of inspection without prior notice, on its own initiative, whereby it is a must that their independence be fully respected. The inspectors must have a full and

[75] For the purposes of this analysis "law-enforcement officials" shall refer to all the representatives of the law notwithstanding the fact whether they are appointed or elected, who exercise police authority, and particularly the authority of arresting or detaining. See: comment on Article 1 of the UN Code on Conduct of the Persons Responsible for Law Enforcement.

[76] One of the recommendations of the rappourter of the Human Rights Commission as of 1987 (E/CN.4/1987/20) is for the states to carry out an investigation into the bodies which they have at their availability for investigation into death under dubious circumstances so as to ensure impartial and independent investigation into the death, including adequate autopsy.

unrestricted access to all the persons who are kept and detained, as well as an insight into their files.

For all the cases where there is a suspicion that a person has been illegally, arbitrary and summary executed, or there is a suspicion among the relatives that it happened, or the reports indicate an unnatural death under strange circumstances, there must be carried out a quick and independent investigation. The government ought to have departments (bodies) for this kind of investigation and a procedure within which the investigation should be carried out. The goal of the investigation is to determine the causes, the manner and the time of death, the responsible person and what would the manner or practice that could explain the death be. In the context of the procedure, there should be included the following:

1) Appropriate autopsy;
2) Collected and analysed all the physical and documented evidence and statements of witnesses;

The investigation ought to provide an answer to whether the death was:

1) Natural;
2) Accidental;
3) It was a case of a suicide; or
4) Murder

The body that carries out the investigation ought to be authorised so as to obtain all the information necessary for the investigation. The persons who conduct the investigation have to obtain all the financial and technical means by the government for the sake of an efficient investigation. In addition, they must be authorised to summon the responsible persons who are suspected of alleged participation in the execution of the person into whose death the investigation is being carried out to testify for the case. The same applies to the witnesses. This body ought to be authorised to issue summons with which it summons the witnesses and the persons whom it suspects that they deprived of their life the person for whom the investigation is being carried out to submit evidence for the case.

If the investigation is inappropriate owing to a lack of expertise or impartiality, due to the importance of the case, or because of the existence of an obvious example of violence, following a complaint by the victim's family, the government shall entrust an independent investigation commission with the investigation or it shall conduct a similar procedure. The members of such a commission shall be elected owing to their impartiality, expertise and independence (as individuals) from any kind of institution, agency or individual, who could be the subject of the investigation. The commission is authorised to acquire all the necessary information relevant to the investigation and to carry out an investigation in accordance with the UN principles as of 1989.

The body of the victim cannot be buried before a doctor conducts an autopsy, who, if possible, shall be a forensic expert. The person who conducts the autopsy is entitled to have an insight into the entire investigation material, an access to the place where the body was found, and to the place where it is assumed the death occurred. If the body of the victim has been buried, and later there arises the need for an investigation to be carried out, the body shall be exhumed and its autopsy shall be conducted. If it is a skeleton, it shall be exhumed and investigated in accordance with the anthropological techniques.

The autopsy ought to give answers to the following:

1) The identity of the victim;
2) The cause and the manner of death;
3) The time and place where death occurred (if it is possible to be determined).

The entire process of the autopsy ought to be documented with (colour) photographs in order to confirm the findings of the autopsy. The autopsy report ought to be complete and detailed and it should contain a description of all the bodily injuries, including the evidence of torture. The person who performs the autopsy ought to be impartial and independent from any kind of pressure coming from a certain person, organisation or entity.

The witnesses and the persons who carry out the investigation, as well as their families shall be protected against violence, or any other form of intimidation, if they complain about any such thing. Those persons who are suspected of having performed an illegal, self-willed and in short order execution of some person shall be removed from the position they hold and they shall be disabled from exercising influence over witnesses, their families and those who conduct the investigation.

The family of the victim and their lawyers shall have full access to all the relevant information regarding the course of the investigation as well as the right to produce evidence. The family of the victim may insist that another medical professional be present in the course of the autopsy, who shall be assigned for that purpose. After the identity of the victim has been established, their family shall immediately be informed about it, and the body shall be delivered to the family at the completion of the investigation.

After the completion of the investigation, a written report shall be prepared in which the methods that have been employed and the facts that have been established in the course of the investigation are explained. The report is public and it contains conclusions and recommendations which are based on the findings of the investigation, the facts established and the applied law. In a reasonable time-frame the government shall either respond to the report or it shall indicate the next steps it shall take with regard to the report. In addition, the government ought to ensure that the persons who have illegally, self-willingly and in short order executed another person be taken to court, or be extradited to the country where they are to be tried. An order by a superior or an order by the authority may not be a justification for the illegal, self-willed and in short order execution.

The special rappourter appointed at the request of the UN Human Rights Commission in its report regarding the analysed UN Resolution as of 1989 notes that: “the governments which will not apply the principles in the resolution may be an indicator of their responsibility even in cases when their representatives are not directly involved in the acts of death under dubious circumstances.

2. The UN Manual (The Minnesota Protocol) on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

The principles of effective prevention and investigation of Extra-legal, Arbitrary and Summary Executions have been operationalised with the UN Manual (the Minnesota Protocol) on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.[77] For the

[77] Concerning the text see: **U.N. Doc. E/ST/CSDHA/.12 (1991).**

purposes of this analysis section D of the Manual which provides directives for establishing a special commission for investigations (hereinafter Commission) into the cases of death under dubious circumstances, which have resulted from the experience of several states which have established such commissions is taken into consideration.

In those cases where there is a suspicion that the government itself has been involved in the case of death of a person under dubious circumstances, what is necessary is an objective and impartial investigation. For that purpose, an Investigation Commission ought to be established. The Minnesota Protocol provides the model for creating and functioning of one such Commission, which has been taken from the experience of functioning of similar bodies that have investigated mass cases of infringement of rights.

The factors, which justify the belief that the government has been involved into executions, and which impose on it the necessity to create a special impartial Investigations Commission, include:

1) The political, religious and ethnic affiliation of the victim raises a doubt concerning the way in which the death occurred and the possible involvement of the government in the matter;
2) The victim has been last seen alive at a police station;
3) *Modus operandi* is a recognisable way of action by the government's execution units;
4) The persons in the government or the persons connected to the government impede or delay the investigation into the execution;
5) The physical or written evidence for the investigation of death under dubious circumstances are inaccessible.

Several prerequisites have to be considered with regard to the establishment of such a commission. Firstly, the persons who are the subject of the investigation ought to be guaranteed protection in accordance with the rules of international law during the entire course of the investigation. Secondly, the Commission has to be supported by adequate technical and administrative personnel and to be advised regarding the law so as to ensure that it will produce evidence for the possible criminal proceedings. Thirdly, the government ought to provide full support to the Commission concerning the finance and authorisations; and finally, the Commission members are entitled to ask for expert's assistance from the International Community as regards law, medicine and forensic sciences.

The independent investigations commission will be established if the regular investigation should be inadequate due to several reasons:

1) Lack of expertise;
2) Bias in the investigation;
3) Importance of the case;
4) Obvious existence of evidence of violence;
5) Owing to a complaint by the family of the victim to the conducted procedure.

The government that establishes the Commission has to define the scope of investigation, to legitimise legally its work, to provide assistance to the Commission members to reach a consensus on the scope of investigation and to provide criteria for evaluation (assessment) of the report of the Commission. The *terms of reference* have to be:

1) Neutral and they cannot prejudge a decision. This means that they may not restrict the investigation which can disclose the government's responsibility in the cases of illegal, self-willed and in short order executions;

2) They have to state precisely on what incident and issue the investigation and the Commission need to be concentrated in its final report;
3) They have to ensure flexibility in the scope of the investigation which should be conducted by the Commission

The authorisations of the Commission have to provide it to:

1) Obtain information necessary for the investigation (for instance: the autopsy protocol, the government reports and information it has and the like);
2) The report it will prepare ought to be public;
3) To prevent the burial of the victim until the autopsy is carried out;
4) To visit the place where the body has been found and the place where it is assumed that the death has occurred;
5) To obtain evidence from witnesses and organisations outside the country.

The Commission members shall be elected on the basis of their impartiality, competence and independence as individuals.

Impartiality – the Commission members may not be connected to any individual whatsoever involved in the case, to the government, a political party or organisation which is believed to be involved in the case of execution or disappearance of the victim, organisation or association whose member was the victim.

Competence – the Commission members have to be trained and competent to make an assessment of the evidence and for that purpose, they can include individuals with special expertise in law, medicine, forensic sciences and the like.

Independence – the Commission members have to be well-known in their community for their honesty and fair treatment.

The Manual principles do not contain guidelines for **the number of members** of the Commission, but there are some views that there should be three and more, but the investigation must not be conducted under any condition by one person only.

The Commission may have an impartial expert – an advisor. If the Commission investigates the involvement of the government in cases of dubious deaths, the expert ought to be external (non-governmental). In addition, the Commission may request technical expertise in the areas such as pathology, forensic medicine, ballistics, etc. The Commission may have its own investigators whereby the credibility of the conducted investigation will be significantly increased.

The government is obliged to protect the Commission members against possible threats and intimidations.

The Commission has the right to collect evidence regarding the case and for that purpose to summon persons to testify, to produce relevant evidence, to employ relevant evidence produced in another proceedings, to make an analysis of the autopsy protocol, as well as to inform the family and the legal representatives of the victim about the results of the investigation and the evidence collected. For the persons who can be the subject of criminal liability in the course of the investigation, the Commission has to provide a legal representative in the course of the testimony before it and it must not urge the witnesses to testify against themselves.

The Commission shall have access to all the information and evidence in order to determine their importance, authenticity, accuracy and correctness. Within a reasonable period of time after the completion of the investigation, the Commission publicly publishes a report in which the following is to be stated:

1) The scope of the undertaken investigation and the *Terms of reference*:
2) The procedure and the methods employed in the evaluation of the evidence;
3) The list of witnesses who have been interrogated, except for those whose identity needs to be protected and those who have testified in front of cameras;
4) The time and place of every meeting held by the Commission;
5) The brief outline of the social, political and economic milieu in which the investigation took place;
6) The specificity of certain events in the course of the investigation;
7) The law which the Commission has applied;
8) The conclusion it has reached based on the law it has applied and the facts it has established;
9) The recommendations based on the conducted investigation.

The government may respond publicly to the report submitted by the Commission, or it can point to the steps it shall undertake as regards the report.

ANALYSIS OF THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Introduction

Reaffirming human rights as a universal value and civilizational achievement, the international community recognized that torture represents a serious violation of the fundamental rights of any human person – his dignity, physical integrity and security of person. Article 5 of the Universal Declaration of Human Rights stipulates that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 7 of the International Covenant on Civil and Political Rights expanded this prohibition also for any person to be subjected to medical and scientific experimentation without his free consent. The need for absolute respect of this right is strengthened by the possibility that this right may not be subject to any restrictions also in times of "public emergency which threatens the existence of the nation, as well as by requests that all the persons deprived of their liberty are treated with humanity and with respect for the inherent dignity of the human person".

The fight against torture was accomplished with the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[78] The Convention not only defines the notion of torture, but also provides strict obligations for the states in regard to the respect of this right by taking efficient legislative, administrative and other judicial measures aimed at preventing torture. The Convention excludes any possibility of exceptional circumstances, such as a state of war, threat of war, internal political instability or any other public instability or any other public emergency as a justification to invoke torture. By accepting this Convention, the states, also undertake to cooperate in recognizing the act of torture and detecting its offenders thus reaffirming the human principle in regards not to extradite a person to a state where there are substantial grounds for believing that he would be subjected to torture. As a control mechanism of the Convention, a Committee Against Torture was established, this, among other functions, considers complaints (communications) from the State parties or from individuals for acts of torture.

Twenty years after the adoption of the Convention against Torture, the General Assembly of the UN by the Resolution A/RES/57/199 adopted the Optional Protocol to the Convention on 18 December, 2002, which entered into force, after the deposition of the twentieth instrument of ratification, on 22 June 2006.[79] It should not be forgotten that Article 2 (1) of the UN Convention against Torture requires that all State parties take legislative, administrative, judicial and other effective measures to prevent torture within the territory under their jurisdiction. The Protocol to

[78] The Convention was adopted by the General Assembly of the United Nations on 10 December, 1984, and entered into force on 26 June 26, 1987. For the text of the Convention, see: http://www.unhchr.org, or http://www.apt.ch/un/conventions.shtml ,

[79] For more about the procedure for adopting the Protocol, see: http://www.hri.ca/fortherecord2000/vol1/torture.htm

the Convention is one of these measures that should be carried out by the state as a priority in combating and preventing torture.

Basic Characteristics of the Optional Protocol to the Convention against Torture

The Optional Protocol to the Convention against Torture is a new mechanism established by the international community to prevent and eliminate torture or other forms of inhuman and degrading treatment or punishment. The aim of the Protocol is to assists states in fulfilment of their obligations undertaken under the UN Convention against Torture. In contrast to the traditional reactive approach which most of the international instruments have in the area of protection of human rights, the Optional Protocol offers a proactive international and national mechanism for control and prevention of torture through regular or periodical visits to places where persons deprived of their liberty are detained.

The Optional Protocol is based on two pillars. The first establishes a system of prevention of cases of torture, instead of a reaction against them after they happen. Such a preventive approach is based on regular and periodical unannounced visits conducted by experts to any place where persons deprived of their liberty are detained, with a view to preventing possible violations of coercive measures by the authorised officials.

Also, the Optional Protocol requires that the states provide access to all information to national and international bodies for prevention of torture with regard to the treatment of detained persons, as well as to be informed and acquainted with conditions at the holding cells, and the opportunity to have private interview with such persons.

The second pillar on which this Optional Protocol relies upon is the cooperation of the State parties in preventing and eliminating cases of torture. It implies that instead of reviewing the fulfilment of the obligations by the State Parties under this Convention Against Torture, and publicly condemning specific actions and failure to fulfil them (passivity) in the area of torture, the Optional Protocol promotes much more constructive and less antagonistic way of securing the implementation of internationally undertaken obligations in this area. In this respect, the Protocol requires self-sustainable means of cooperation among states on the longer term basis with regard to eliminating cases of torture.

The creation and adoption of the Optional Protocol is a result of the practical experience which confirmed that visits to the holding cells is one of the most efficient ways for prevention of torture and other forms of inhuman and degrading treatment and punishment and a means for enhancing conditions at holding cells. Such visits not only have a dissuasive effect, but also make possible for the experts to directly, at first hand, become familiar with the treatment that the detained persons have, and the conditions prevailing at the places of their detention. In this regard, the Optional Protocol makes operational this concept by creating a system of independent inspection to the places of detection aimed at preventing torture and monitoring condition existing in such places.

The Optional Protocol to the Convention Against Torture establishes an international body for visiting holding cells – Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - consisting of ten international experts, and guided by the principle of confidentiality secrecy, impartiality, non-selectivity, universality and objectivity, while on the other hand, the State parties to the Protocol have an obligation to designate, set up, or establish on domestic level one or several bodies that would be authorised to conduct visits to the

detention facilities. These mechanisms of external control should start with their regular and periodic visits to holding cells month after the entry into force of this Protocol.

The difference between the visits undertaken by the Subcommittee and those undertaken by the national bodies established for that purpose is with regard to the reports they prepare after the visits are made. The reports by the Subcommittee become public after previous consent of the State parities, while the reports made after conducted visits by the national bodies established for that purpose are directly accessible to the public. In particular, State Parties have a positive obligation to publish the reports of their national bodies for visits to places where persons deprived of their freedom are detained. The intention of the Optional Protocol is to open a debate, after the visits and reports made, among the authorities and bodies for control with a view to prevent violations of human rights and eliminate reasons generating conditions for torture. The visits referred to in the Optional Protocol are not a goal per se, but a means for strengthening the protection of the detained persons, while the obligation of the State Parties to enter into dialogue with the visiting bodies (international and national) must be carried out bona *fide*.

UN Optional Protocol to the Convention against Torture: an Efficient Preventive Tool

The adoption of the Optional Protocol confirms the fact that the greater is the openness and transparency of the places for custody and detention, the smaller are the possibilities for abuse of power by the authorised officials, and thus the greater is the protection of persons deprived of their liberty who are extremely vulnerable and unprotected from the possibility to be subjected to torture and inhuman or degrading treatment or punishment.

Opening holding cells to external control mechanisms as stipulated by the Optional Protocol is the most efficient preventive tool for possible abuses in using coercion and improving the conditions in the holding cells facilities. The experiences by the international Committee of the Red Cross and the European Committee on Prevention of Torture, confirm that regular visits to the holding cells of persons deprived of their liberty may be efficient in practice. Such visits as external preventive mechanisms are efficient for several reasons:

1) Deter authorities from possible abuses in practicing coercion;
2) Make authorities responsible for undertaken actions, in particular with regard to the use of coercive means that might result in cases of torture or inhuman treatment or punishment;
3) Make possible for the independent experts to have direct insight with regard to the manner in which detained persons are treated, as well as to evaluate the conditions for holding of such persons;
4) Make possible realistic and objective recommendations to the authorities with regard to the respect of rights of detained persons;
5) Open possibilities for a dialogue with the authorities for eliminating reasons that might generate cases of torture or inhuman treatment or punishment; and
6) Are strong source of moral support to detained persons whose rights were violated, in particular to the category of vulnerable persons such as women, children, migrant and persons with mental disabilities.

Authorisations of International and National Preventive Mechanisms for Prevention of Torture

The members of the international and National Preventive Mechanisms for prevention of torture have a mandate to carry out visits to holding cells on a permanent or periodical basis. Such

authority granted to the experts that these bodies are composed of is of extreme importance because there is no need for prior consent by the states for such visits.

Likewise, the Protocol accepted a rather broad definition of "holding cells" with the aim of providing full protection of persons deprived of their liberty under any condition. This implies that visits by international and national experts to holding cells are not restricted only to prisons and police stations, but also include centres with holding cells for minors, for migrants and asylum seekers and for detained persons, transit zones at airports, holding cells at border zones, as well as medical and health institutions.

Experts carrying out such visits are entitled to have interviews with detained persons without the presence of government representatives, as well to have interviews with persons responsible for their security and physical health, as well as with the members of their families. The expert have unrestricted access to the complete file of the detained person and the right to examine the rules for disciplinary punishment, as well as the list of detained persons and the number of premises foreseen for that purpose. And finally, the team carrying out the visit (irrespective whether a national or international) is entitled to make full inspection of the detention cells, such as bedrooms, kitchen, canteens, solitary cells, bathrooms, places for exercises and ambulances.

Relations between international Subcommittee on Prevention and National Preventive Mechanisms

The International Subcommittee on Prevention against Torture has the obligation to advise State parties concerning the establishment of their national preventive mechanisms and to make recommendations with a view to enhancing their capacities in preventing torture and other forms of inhuman and degrading treatment or punishment. The International Subcommittee on Prevention of Torture maintains direct, and whenever necessary, confidential contact with the national preventive mechanisms against torture, offering them training and technical assistance with a view to strengthening their capacities. Furthermore, it will advice and will assist national mechanisms in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty. A special fund will be accessible for the needs to educate and train national preventive mechanisms.

Implementation of the Optional Protocol at the National Level

The ultimate goal of the Optional Protocol is to create a system of monitoring that will carry out oversight in regard to the treatment of persons deprived of their liberty and the conditions under which they are detained. It is less important how many bodies there will be created and what the character of such bodies at the national level to carry out their function of monitoring would be; it is much more important to secure their efficient functioning.

It is important to note that the text of the Optional Protocol does not deal with the form and type of national preventive mechanisms for prevention of torture. The State Parties have been given great flexibility in this respect: they are free to establish a completely new structure, and for that purpose to use the already existing mechanisms for protection of the rights in the state (Ombudsman, parliamentary committees, civil organizations (civil sector), and etc.) or to combine the existing ones with new ones.

According to the manifested practice by the State Parties, most of them have decided for the option to use the existing mechanism for protection of human rights for the aims of the Protocol,

such as the Ombudsman and the existing parliamentarian committees, expanding their oversight capacity to also cover cases of torture. In Great Britain approximately 30 already existing oversight bodies for protection of rights have been designated to fulfil the aims of the Optional Protocol, while in Denmark there is a debate going on for possible creation of a new body that would be a kind of linkage of the non-governmental sector with a national institution for protection of rights. This confirms the commitment of many states that the non-governmental sector must be a part of the process of creating bodies for prevention against torture at the national level. Two states, Switzerland and Germany (both federal states), have established completely new structure that should operate as a national body for prevention against torture. Creation of national mechanisms for oversight is crucial in the process of developing their efficiency.

Independence and Composition of National Mechanisms for Oversight

In order to guarantee independent and efficient functioning of national preventive mechanism and to insure that they would be free of any influence, it is for the first time that an international instrument stipulates specific guarantees that must be respected by the State Parties. They include:

1) Independence of the members of the national preventive mechanisms;
2) Functional independence (activity free of any influence and pressure coming from the Government);
3) Financial independence (by giving at disposal adequate sources of income).

Regarding the composition of the national preventive mechanism, it is very important for the state to give due consideration (and is also obligate) that the persons have required quality, guided by their professional experience, gender (sex) balance and representation of members of ethnic or minority groups in such bodies.

The national preventive mechanism does not have judiciary functions and is not a substitute of the judiciary authority in the state. They are neither under government control, nor are non-governmental organizations, although, the non-governmental sector is not excluded from participating in their establishment and functioning. Existing as part of the state structure, National Preventive Mechanisms for prevention of torture are independent and at the same time critically oriented towards such authority, which do not prevent or eliminate conditions generating cases of torture and other inhuman treatment and punishment of persons deprived of their liberty. The national preventive mechanisms warn the Government regarding the general situation existing in the holding cells of the persons deprived of their liberty, and in particular, regarding the politics or cases of torture or inhuman and degrading treatment and punishment. Recommendations prepared by such bodies should be the guiding guidelines for the governments in promoting the situation of persons deprived of their freedom and conditions in which they are detained.

Instead of Conclusion: Guiding Principles in Constituting National Preventive Mechanisms for Prevention of Torture

Must be established by law - National Preventive Mechanisms may not be left to the good will of the government. They must be established by law, or, it is recommended to be established with an amendment to the constitution. The legislation establishing them must be beyond the general principles of their functioning, in order to prove their independence in practice and functioning on the entire territory of the state.

Independence - National Preventive Mechanisms must not be part of the government, parliament, judiciary system, penitentiary system or to be perceived as a part thereof. The independence must be guaranteed by law in regard to the facilities in which they are to exercise their function, in regard to their funding, resources available for communicating with persons deprived of their freedom, state institutions, the public and the Subcommittee on Prevention.

Adequate funding, free of political influence - National Preventive Mechanisms must be funded in a way that make possible their full independence from the state and the policy and would exclude the possibility to exercise their political control through financial control. A stabile financing must be provided for such bodies, thus avoiding the possibility to be "sanctioned" by the state for their critical reports on treatment of persons deprived of their freedom in the detention places.

Composition of the National Preventive Mechanisms – there where such bodies are newly establish, the legislation must provide for procedure for electing persons – members of these bodies, must provide for methods and criteria for their election, the term of their office, their immunity and privileges, and the procedure for their resignation, or expiration of their office. The members must be independent experts in their relevant fields (in particular: law, medicine, psychology, human rights), and must be gender balanced as well as to depict ethnic and minority picture of the society.

Full access to all relevant information – the National Preventive Mechanisms must be provided with prompt and full access to information necessary to exercise their functions, including the number of persons deprived of their liberty, the number of holding cells and their location, as well as information regarding to the treatment of these persons and their conditions of detention.

Full and secure access – persons deprived of their liberty, members of their families, friends, their legal representatives, the personnel in the holding cells, and all those who are in a need of complaining or transferring information to the National Preventive Mechanisms must be in a position to do so easily, promptly, with discretion and without any consequences, or the persons who are detained. To this end, all information by these bodies and the contacts with them must be made public and all person deprived of their liberty must be informed thereto.

Wider definition of the "holding cells" and "persons deprived of their liberty" – these notions must included, but may not be limited only to police stations, military and other security centres for detention, places where detainees are kept, prisons, places outside prisons where prisoners are employed, hospitals or clinics where prisoners have medical treatment, rehabilitation centres for minor persons, migration centres, transit zones at international airports, centres where asylum seekers are kept in custody, refugees or internally displaced persons, psychiatric institutions and health institutions.

Full and unrestricted access to all holding cells and to persons deprived of their liberty – the National Preventive Mechanisms must be allowed and permitted to visit holding cells. Such visits must be planned, previously announced and coordinated. However, this does not restrict such bodies to visit holding cells and to carry out their inspection unannounced, to have meetings with persons deprived of their liberty, with personnel and to remain as long as it is necessary with the aim of establishing factual situation and conditions of persons deprived of their liberty. The visits must include a meeting with the director of the place of detention. Financial resources must be provided to fully cover the activity carried out by the national preventive mechanisms to the effect that such prevention is effective.

Direct, unimpeded and non-intercepted communications with the Subcommittee on Prevention – national preventive mechanisms must be in a position to communicate with the Subcommittee for Prevention of Torture, and the authorities or any other agency should not impede, intercept, trace or record their communications.

The Recommendations made by the National Preventive Mechanisms must be seriously dealt with by the authorities – the legislation must make possible for the national preventive mechanisms to submit, on their initiative, reports concerning situations observed in the holding cells of persons deprived of their liberty and the manner of their treatment, and inform the directors of such places, the legislative body, the government and other political institutions thereto. The mechanisms for cooperation and dialogue must have open and swift channels for communication with the directors of the holding cells and the government. Such mechanisms should also include the forum for discussion in the context of submitted reports and recommendations.

Supplement to the Analysis:

1. Existing National Preventive Mechanisms - Overview

The states have established different forms of national preventive mechanisms for detention of persons deprived of their liberty. In the context of this analysis, mechanisms existing in several European states are presented below as possible models that the Republic of Macedonia should be guided by in its deliberations to establish or designate anew the existing instruments for protecting rights, with the aim of fulfilling its obligations with regard to the Optional Protocol to the Convention against Torture.[80]

Austria	25.09.2003	The Ministry of Foreign Affairs drafted a document recommending establishment of a completely new national preventive mechanism.	
Croatia	23.09.2003	25.04.2005	The Government intends to designate the Ombudsman as national preventive mechanisms in accordance with the provisions of the Protocol
Czech Republic	13.09.2004	10.07.2006	The Ombudsman is designated as preventive mechanism after the Law was amended to add its function
Denmark	26.06.2003	25.06.2004	Establishment of a new body as a combination of the existing state organizations with participation of non-

[80] For more see: National Preventive Mechanisms Country-by-Country Status under the Optional Protocol to the UN Convention against Torture ("OPCAT"), April 16, 2007, http://www.apt.ch/component/option,com_docman/task,cat_view/gid,49/Itemid,59/lang,en/; http://www.apt.ch/

			governmental is debated
Estonia	21.09.2004	18.12.06	Ombudsman was designated as national preventive mechanism.
Finland	23.09.2003		This function is expected to be entrusted to the Ombudsman.
France	16.09.2005		The Ombudsman was authorised to implement the Optional Protocol in the part for national preventive mechanisms
Georgia	09.08.2005		The so called model "Ombudsman plus" is a model expected to be adopted in this state.
Germany	20.09.2006		An extremely weak model of national preventive mechanism, consisting of the members of the Joint Commission of the regions (4) and Federal Commissioner authorised for inspections of prisons (1), supported by the secretariat of two.
Italy	20.08.2003		The Italian authorities started a debate on designating a National institution for protection of human rights as a national preventive mechanism.
Macedonia	01.09.2006		No information that a process has been initiated.
Montenegro	23.11.2006		The office of the national preventive mechanism is expected to be assumed by the Ombudsman.
The Netherlands	03.06.2005		Existing monitoring mechanisms are under consideration as a possibility to be designated as a national preventing mechanism.
Poland	05.04.2004	14.09.2005	The office of the national preventive mechanism is expected to be assumed by the Ombudsman.
Slovenia	23.01.2007		It is anticipated, as a possibility, that a new body will be established as national preventive mechanism, as a combination of Ombudsman with participation of non-governmental organizations and humanitarian organizations.

Spain	13.04.2005	04.04.2006	Options under consideration: to establish a new body, as a combination of an Ombudsman and the civil sector.
Switzerland	25.06.2004		A new Commission for Prevention of Torture is proposed, as a new united federal body composed of 12 members.
Great Britain	26.06.2003	10.12.2003	Approximately 30 existing mechanisms for visits are designated as national preventive mechanisms, without changing their mandate and authorisation.

Slovenia

Slovenia is a rather interesting example with regard to the inclusion of the civil sector in the establishment of the national preventive mechanism, in accordance with the Optional Protocol to the Convention Against Torture. In the statement submitted by Slovenia in view of the accession to the Protocol it is underlined that: "the authorisations and obligations of the national preventive mechanism shall be carried out by the Ombudsman in accordance with the non-governmental organizations registered in Slovenia, and organizations having a status of humanitarian organizations." **Slovenia is the only European state which officially paved the road for participation of the non-governmental sector in the work of the national preventive mechanism in cooperation with the Ombudsman.**

Spain

The Catalonian section of the network of non-governmental organizations propose, in December 2007, establishment of national mechanism for prevention of torture as a new body that will have jurisdiction over the territory of Catalonia and in which the civil sector will participate. The proposal was communicated at national level in March the same year. The considerations take two directions: for that purpose, to designate the Ombudsman, or to also accept participation of the civil sector in the operation of this body. The debates are carried out under the leadership of the Vice President of the Government, in coordination with the Ministry of Justice, Foreign Affairs and the Ombudsman.

Switzerland

The Draft Law presented in 2006 proposes the establishment of a unique national body that would be set up at the federal level. Such a decision depended on several factors: support by the cantons; efficiency; reduction of its costs; uniform standards for its operations; speeding up the procedure for its acceptance.

It has been planned that the body has 12 persons, appointed by the Government, upon proposal by the ministries of Justice and Foreign Affairs. A possibility was given for the non-governmental sector to nominate members for this body. The minimum funds anticipated for its operation were criticized by the cantons and the political parties.

2. Situation Concerning the Ratification of the Optional Protocol[81]

Albania	.	1 Oct 2003 a
Argentina	30 Apr 2003	15 Nov 2004
Armenia	.	14 Sep 2006 a
Austria	25 Sep 2003	.
Azerbaijan	15 Sep 2005	.
Belgium	24 Oct 2005	.
Benin	24 Feb 2005	20 Sep 2006
Bolivia	22 May 2006	23 May 2006
Brazil	13 Oct 2003	12 Jan 2007
Burkina Faso	21 Sep 2005	.
Cambodia	14 Sep 2005	.
Chile	6 Jun 2005	.
Costa Rica	4 Feb 2003	1 Dec 2005
Croatia	23 Sep 2003	25 Apr 2005
Cyprus	26 Jul 2004	.
Czech Republic	13 Sep 2004	10 July 2006
Denmark 1	26 Jun 2003	25 Jun 2004
Estonia	21 Sep 2004	18 Dec 2006
Finland	23 Sep 2003	.
France	16 Sep 2005	.
Gabon	15 Dec 2004	.
Georgia	.	9 Aug 2005 a
Germany	20 Sep 2006	.
Ghana	6 Nov 2006	.
Guatemala	25 Sep 2003	.
Guinea	16 Sep 2005	.
Honduras	8 Dec 2004	23 May 2006
Iceland	24 Sep 2003	.
Italy	20 Aug 2003	.
Liberia	.	22 Sep 2004 a
Liechtenstein	24 Jun 2005	3 Nov 2006
Luxembourg	13 Jan 2005	.
Madagascar	24 Sep 2003	.
Maldives	14 Sep 2005	15 Feb 2006
Mali	19 Jan 2004	12 May 2005
Malta	24 Sep 2003	24 Sep 2003
Mauritius	.	21 Jun 2005 a
Mexico	23 Sep 2003	11 Apr 2005
Moldova	16 Sep 2005	24 Jul 2006
Montenegro 2	23 Oct 2006 d	
Netherlands	3 Jun 2005	.
New Zealand	23 Sep 2003	14 Mar 2007
Nicaragua	14 Mar 2007	.

[81] http://www.ohchr.org/english/countries/ratification/9_b.htm

Norway	24 Sep 2003	.
Paraguay	22 Sep 2004	2 Dec 2005
Peru	.	14 Sep 2006 a
Poland	5 Apr 2004	14 Sep 2005
Portugal	15 Feb 2006	.
Romania	24 Sep 2003	.
Senegal	4 Feb 2003	18 Oct 2006
Serbia	25 Sep 2003	26 Sep 2006
Sierra Leone	26 Sep 2003	.
Slovenia	.	23 Jan 2007
South Africa	20 Sep 2006	
Spain	13 Apr 2005	4 Apr 2006
Sweden	26 Jun 2003	14 Sep 2005
Switzerland	25 Jun 2004	.
The Former Yugoslav Republic of Macedonia	1 Sep 2006	.
Timor-Leste	16 Sep 2005	.
Togo	15 Sep 2005	.
Turkey	14 Sep 2005	.
Ukraine	23 Sep 2005	19 Sep 2006
United Kingdom of Great Britain and Northern Ireland	26 Jun 2003	10 Dec 2003
Uruguay	12 Jan 2004	8 Dec 2005

ANALYSIS OF THE REPORTS OF THE COMMITTEE FOR PREVENTION OF TORTURE (CPT) MADE AT THE VISIT TO THE REPUBLIC OF MACEDONIA IN THE PERIOD 1998–2006

Analysis of the Reports of the Committee for Prevention of Torture (CPT) made during the Visit to the Republic of Macedonia in the Period 1998–2006

1. Reasons for establishing the Committee for Prevention of Torture (CPT)

Very little can be seen from what is happening behind the closed doors of the prisons, police stations, institutions for mental illnesses and the like. This was the precise reason why in 1987 the European Convention on Prevention of Torture and Inhumane or Degrading Treatment was adopted, and came into force in 1989. The Convention supplements the protection available pursuant to the ECHR establishing the European Committee on Prevention of Torture (CPT) composed of independent and impartial experts in various fields, including law, medicine, penitentiary issues and politics. The Committee visits the premises where people are detained, detention or prison facilities, in order to see how the detainees, remanded or imprisoned persons are being treated. It has unrestricted access to these places and it can talk in private with the persons. The Committee may also freely talk to other persons who may provide relevant information, including non-governmental organisations that work in the field of human rights. After every visit, the Committee compiles a report about the country concerned, making recommendations so as to ensure that the arrested, detained or imprisoned persons are appropriately protected against torture and ill-treatment. Afterwards the governments are requested to give a response to the report. In exceptional cases, if the country should refuse to co-operate or enforce the recommendations of the CPT, the Committee may also decide to come out with a public statement.

European Convention on Human Rights, Article 2 and 3

Article 2

Right to life

1. The right to life for every human is protected by law. No one may be deliberately deprived of their life, except for the execution of a capital punishment pronounced by a court verdict, whereby the person has been found guilty of a criminal act which, pursuant to law, is punishable by such a penalty.
2. It is considered that the provisions of this Article have not been infringed if the death occurred as a result of an absolutely necessary use of force:
a) in defence of every individual from illegitimate violence;
b) when arresting a person in accordance with the law or prevention from escape of a person apprehended on grounds of law;
c) at legal prevention of unrest or riot.

Article 3 *Prohibition of torture*
No one is to be subjected to torture, inhumane or degrading treatment or punishment.

2. Major characteristics from the visits of the CPT to the Republic of Macedonia

The Republic of Macedonia has been a member of the Council of Europe since 1995. With the accession and ratification of the European Convention on Protection of Torture and Inhumane or Degrading Treatment or Punishment and the ECHR, conditions for visits by the Committee on Prevention of Torture have been created, with the objective to carry out an inspection into the treatment of the persons whose freedom has been restricted and if necessary, pointing out to the disrespect of certain provisions of the Convention.

In the period from 1998 until today, the Committee has made six visits to the Republic of Macedonia, three regular and three extraordinary visits:

1. a regular visit, between 17th -27th May 1998
2. a regular visit, between 18th -27th November, 2002
3. a regular visit, between 15th -26th May, 2006 and
1. extraordinary, between 21st -26th October, 2001
2. extraordinary, between 15th -19th July, 2002
3. extraordinary, between 12th -19th July, 2004

The regular visits are carried out in duration of 10-12 days, and the extraordinary last between 4-7 days. The regular visits have the objective to conduct an inspection with regard to the European Convention on Human Rights, from all the aspects and on the whole of the territory of the state. The extraordinary visits are based on the same standards and they are most frequently oriented to concrete, very significant issues like dealing with impunity and the protective measures with regard to the maltreatment, initiated by concrete events. There is a particular interest in investigating cases with reference to Articles 2 and 3 of the ECHR, investigating deaths or serious infringement provoked at the hands of authorised officials.

After every presented finding, fact or evaluation, the Committee states measures and recommendations to the Macedonian authorities on how to act in order to overcome the established conditions.

Within the framework of the visits, the CPT members have meetings with representatives, including those of the highest level, at the ministries of justice, interior, health, defence, foreign affairs. At their own initiative and finding, without accompaniment, they pay visits to several edifices of the ministries in which there are staying persons deprived of their freedom and prisoners.

The Ministry of Interior (the Police and the Bureau of Security and Counterintelligence) and the police competencies have been of greatest interest for the CPT (an exception is the last visit in 2006, when the penitentiary and health care institutions were in the first place). Particularly interesting for the CPT were the concrete cases which were treated by the Bureau of Security and Counterintelligence and a part of the criminologist service – NTS, to which pertain the most serious remarks with reference to Articles 2 and 3 of the ECHR. In that sense, the CPT in its reports from 2001 and 2002 shows an interest to obtain information for all the premises and locations where persons are being detained by the BSC (UBK). In the CPT report from 2006 it is

concluded that there is an improvement with respect to the place of detention of persons, that is that the UBK members utilise the premises for detention within the police stations.

When having visited the police stations, where an inspection was conducted into the premises for detention, the CPT members had conversations with the persons who were at that moment detained, then with persons who had previously been detained, as well as with police officials regarding the manner of recording the undertaken measures and treatment of the detained persons.

During the first visits of the Committee, the remarks in the sphere of police work and the application of the police authorisations were most frequently referred to the unharmonised legislation with the ECHR, Articles 2 and 3, and above all, to the right to notify the family, the right to have access to a counsel for the defence and a right to a medical doctor. A serious remark, which is reiterated in the course of several visits of the Committee, refers to the procedure of recording of the remanded and detained person, as well as to the registering of the contacts of the police officials with him/her, that is documenting the entire period of time the arrested person has passed in the police station. In the subsequent visits of the CPT, the remarks refer to the non-compliance with the legally prescribed procedures. Generally, the CPT is interested in concrete results and measures undertaken in concrete, individual cases, but also in the principal remarks on the system shortcomings.

During the visits to the detentions on remand and the Penitentiary-Correctional Facility Idrizovo, the CPT members are interested in the conditions of the prison premises, as well as in the realisation of the rights of the imprisoned persons. The CPT is investigating especially carefully the conditions and states during its last visit in 2006, as a result of several death cases and suicides that happened in the previous period in the prisons and mental hospitals. The CPT shows a particular interest in cases of treatment of prisoners who have manifested violence, pointing to the rules of action of the prison staff in such cases and accepting that it is allowed to use only necessary force, in order to neutralise their aggressive behaviour. The visits to the psychiatric hospitals and special institutions were concentrated on the treatment of the persons, as well as on the conditions within them. The remark about the bad conditions and states is continually present, and it was especially sharply presented after the last visit in May, 2006. In order to overcome the bad conditions in the psychiatric hospitals, the specialised facilities for social care and the prisons, the CPT expects a rapid reaction by the Macedonian authorities, thereby threatening by making a clear statement, in accordance with the authorisations as referred to in Article 10, paragraph 2 of the Convention against Torture.

The CPT is investigating with huge interest the cases of tying mentally ill, aggressive persons to radiators in the Skopje detention on remand (2004) and juvenile prisoners with serious mental problems (suicidal drug addicts) at the Idrizovo prison (2006), which is seriously condemned.

The Committee compiles a report at every visit. The reports ascertain the conditions, particularly if the remarks from one visit are reiterated at the next one. For concrete information which the CPT could not obtain during its visit, it determines a deadline for the host country to submit. Such misunderstandings by certain police and UBK officials, prosecutors and judges were recorded (1998, 2001, 2002, and 2004), particularly during the extraordinary visits, which were afterwards overcome by submitting the requested information. There is an impression that by increasing the number of visits of the CPT, the recognition of its competencies is increasingly accepted by both the central government and the officials at the operational level.

The CPT reports are submitted to the country which has been visited. Prior to the publication of the report, the host country is obliged to give two responses: the first, within three months and the second within six months. In both cases the country states the measures and activities that have been undertaken, in accordance with the findings and conditions established in the course of the visit. The host country also states that the report be transparent and published.

3. Why is the CPT important?

The CPT report is exceptionally important for the international organisations, the creators of the international politics, because it explains the state and the maturity of the country as regards the rule of law and the protection of the human rights and freedoms. The CPT report is also significant for the national authorities, because it determines the direction in which the reforms ought to be made in order to strengthen the rule of law and the human rights.

The CPT reports are a significant possibility to understand the international practice as regards the requirements envisaged in the ECHR, the domestic practice and stability, as well as suggestions for better solutions concerning Articles 2 and 3 of the ECHR.

With the analysis of the CPT reports, special attention is paid to the Articles 2 and 3 of the ECHR. The requirements envisaged by the Convention in the CPT reports can be recognised through the questions:

- Whether the procedure with persons deprived of their freedom, detained or sentenced persons has respected the rights as prescribed by law;
- Whether the procedure was run by an independent body;
- Whether the investigation by the state institutions has been effective;
- To be public, particularly for the family of the victim;
- To be prompt and effective; and
- To be initiated by a government body, without any delay whatsoever.

4. Analysis of the CPT findings for the period 1998-2006

4.1. Co-operation between the CPT and the authorities in the Republic of Macedonia

In the announcement to the Government of the Republic of Macedonia in all the CPT reports until now, the necessity of thorough information and detailed acquaintance with the responsibilities contained in the Convention on Prevention of Torture that determines the competences and authorisations of the Committee on the Prevention of Torture has been mentioned in order to ensure that the information about the mandate of the CPT is accessible to all the relevant authorities, including those on a local level. This recommendation has been emphasised as an important measure which is necessary for the unimpeded operation of the CPT delegation.

Even though the access to information and the places that the delegation has visited are crucial to the fulfilment of the objectives of the Convention on Prevention of Torture, in the report it is emphasised that the principle of non-prevention and co-operation during visits is not decisive in the protection against torture itself and a complete protection of the fundamental human rights. Namely, it is emphasised that for a complete improvement of the condition in the area of prevention against torture, it is necessary to have decisiveness and concrete actions by all the segments of the judicial system and the police.

The CPT reminds of the importance that the clients present the contents of the reports compiled after the visit by the Committee in front of the relevant authorities and employees in an appropriate form.

The translations of the CPT reports need to be widely accessible and it would be preferable to be utilised when carrying out trainings of diverse categories of employees who work with persons deprived of their freedom.

CPT recommendations:

Although there is a clear progression in the segment of co-operation and receptiveness by the official persons and institutions with which the Committee delegation comes into contact during its visits to the Republic of Macedonia, the necessity for complete informing of all the relevant structures about the responsibilities that Macedonia has undertaken by having signed the Convention on Prevention of Torture of Persons Deprived of Their Freedom has been clearly emphasised. The informing of the official persons about the competences of the CPT and the responsibilities as referred to in Article 8 of the Convention is necessary for unimpeded performance of the work of the CPT.

In the report from the visit made in July 2002, a very important recommendation was stated which illustratively explains the steps, that is the principles on which a procedure about a committed torture over a person deprived of their freedom is to be grounded. Namely, in the recommendation, the following elements have been emphasised:

- the persons responsible for conducting the investigation ought to be independent and out of any kind of contact with the persons involved in the incidents (the cases of torture);
- the investigation has to establish whether the force that was used was justified/necessary, identify and possibly punish the persons involved;
- reasonable steps ought to be undertaken when providing evidence related to the incident; here we also include witnesses that is their statement, forensic evidence and a possible autopsy which will provide complete information about the injuries.

Furthermore, an objective analysis of the clinical findings is mentioned, including the cause of death.

- the investigation ought to be timely initiated and completed within a reasonable time-frame;
- the principle of public as regards the investigation itself, that is the outcome of the investigation is characterised as necessary, with the aim to ensure a real responsibility.

The Committee appeals for a formal letter to all the public prosecutors in which the obligation to initiate **a proposal for undertaking certain investigation activities** shall be emphasised in those cases where it shall be concluded / perceived a sign of inhumane treatment, that is signs of physical torture and beating of persons who have been deprived of their freedom. This measure should be undertaken no matter whether the person will respond and say that they have been subjected to torture.

4.2. Ill-treatment

The visits by the CPT continually establish numerous irregularities in the work of the security structures under the MoI management. It is mentioned that the majority of the identified cases of ill-treatment and torture have been committed by “common criminals” (2004). On these grounds it is said that the problem with the infringement of the rules of deprivation of freedom and a

procedure of detained persons **is deeply rooted in the system**. Thus, these forms of ill-treatment are not merely reflected upon the persons suspected of felonies against the state that could be related to the 2001 incidents, but it is also a practice in the police work. **The previous qualification does not occur frequently in the work of the CPT, so hence the seriousness with which the authorities should approach the issue is extremely significant.**

A further presence of prohibited items on the police premises has been found by the CPT delegation in their reports from 1998, 2001 and 2002. The presence of these items in the environment in which the persons deprived of their freedom have been detained is a condition which has been several times condemned in the CPT reports and as before, this time again a serious recommendation was sent out to the authorities in the Republic of Macedonia, that is to the MoI, so as to eradicate this practice.

In the part entitled "Measures for combating torture and improper treatment" the Committee mentions that in its previous addresses to the Government of the Republic of Macedonia it has also recommended a preparation of a formal statement, that is an announcement at the highest political level which has to be addressed to the structures which come into contact with detained (remanded) persons or persons in detention. The CPT reiterated again during its last visit in 2006 that police chiefs regularly instruct their subordinates that ill-treatment by the police shall not be tolerated, and all the relevant information which pertain to alleged ill-treatment shall be severely punished. This announcement which has been recommended as a measure for eradicating torture as a practice, would have the purpose to remind precisely those structures that the disrespect of the rights of the persons deprived of their freedom, in detention, torture and inhumane treatment of such persons shall be subject to severe sanctions and those sanctions shall be enforced.

The entire process of gathering information and taking appropriate action following all the cases of torture and inhumane behaviour to people deprived of their freedom has been characterised as necessary on the path to a modern legal system. This reminder for the national authorities is incorporated in a recommendation which is encountered for the first time in the announcement after the visit in October 2001. Of course, this recommendation would be met in accordance with the legal regulations for the treatment of persons deprived of their freedom, and at the same time respecting their rights.

The relevant authorities ought to send a clear message to the employees in the Skopje Prison that:
- The ill-treatment of prisoners by the prison staff is unacceptable and shall be subject to severe sanctions;
- Steps should be undertaken in order to guarantee that the file on the convicted person in the prison contains every contact made by the employees who enforce the law over the persons in detention (Article 142 paragraph 5 of the LCP);
- To undertake measures in order to provide that the rules and regulations regarding resorting to physical coercion as an ultimate solution be noticeable in practice;
- The CPT recommends that the national authorities prepare a strategy for improvement and maintenance of the conditions in the premises for police detention, prisons and health care institutions. The frequent independent inspections of these premises need to become an integral part of the strategy.

CPT recommendations:

In the report after the visit made in November 2002, a very important recommendation is stated, which illustratively explains the steps, i.e. the principles on which a procedure for a committed torture over a person deprived of their freedom should be based. Namely, the recommendation emphasises the following elements:

- the persons responsible for carrying out the investigation ought to be independent and out of any contact whatsoever with the persons involved in the incidents (cases of torture);
- the investigation has to establish whether the force that has been used was justified/necessary, identify and possibly punish the persons involved;
- reasonable steps ought to be undertaken when providing evidence related to the incident; here we also include the witnesses that is, their statements, forensic evidence and a possible autopsy which will provide complete information concerning the injuries. Moreover, an objective analysis of the clinical findings is also mentioned, including the cause of death;
- the investigation ought to be timely initiated and completed within a reasonable time;
- the principle of public as regards the investigation itself, that is, the outcome of the investigation is characterised as necessary, in order to ensure real responsibility.

The Committee appeals for a formal letter to all the public prosecutors in which the obligation for initiating a **proposal for undertaking certain investigative actions** shall be emphasised in those cases where it will be concluded / perceived a sign of inhumane treatment, that is signs of physical torture and beating of a person who has been deprived of their freedom. This measure should be undertaken no matter whether the person will respond and say that they have been subjected to torture.

4.3. Right to medical assistance

Access to medical assistance, that is, access to a medical doctor is one of the key measures which are continually pointed to in the CPT reports. The right to the persons deprived of their freedom to have an access to a medical doctor, although formally existing, the Committee delegation points to a systematised reduction, that is, non-familiarisation of the persons deprived of their freedom in a police station with their right to a medical doctor.

As an appropriate reaction to this problem, the CPT urges the Macedonian authorities to seriously enforce this principle, using the following remarks:

- all the medical check-ups ought to be performed outside of the hearing process that is, gathering information with the person who is deprived of their freedom. This remark directly emphasises that the medical check-up ought to occur without a presence of a police officer in the room (unless the doctor requests that due to security reasons).
- the findings of each medical check-up and all the accompanying remarks ought to be neatly documented by the doctor. These materials together with the conclusions about the state of health condition of the person should be accessible to the legal representative and to the person in question.

These clearly and repetitively emphasised principles in the CPT reports have been formulated with several objectives. **Firstly**, the contact with a doctor may be a preventive measure also to the person who is staying at the police station whereby the probability for them to be subjected to an inhumane treatment and torture knowing that they have the right to a doctor, is significantly decreased. **Secondly,** if the person should undergo any kind of torture, if there should be used force in the process of arrest or they are in a delicate state of health condition, it may be timely

recorded. **Thirdly**, the room for false allegations that the person has been subjected to maltreatment has been reduced and that would be a lot easier proved in court. There is a probability for a person who has received injuries prior to their coming into contact with the police to misuse those injuries, with the purpose of a false accusation addressed to the official persons who have had contacts with them.

The investigating judge is recommended to record the accusations in writing at every contact with a person who has been deprived of their freedom (at the expiration of the police detention) who accuses of torture and infringement of their rights, and to immediately request an examination by a medical expert, that is to do everything so that such accusations be appropriately examined. It is recommended that this approach become practice, notwithstanding the fact whether the concrete person possesses visible traces of an inhumane treatment. In addition, it has been underlined that even in cases when the person does not raise such accusations, and the judge suspects that the person was a victim of torture and that they were subjected to inhumane treatment, to initiate such a procedure.

A useful recommendation for the penitentiary institutions is the segment where the role of the penitentiary institutions in the torture prevention is explained. Namely, the report establishes that the submission of the findings to the medical services within the prisons to the investigating judge and prosecutor is a good method of sanctioning of the inhumane treatment by the police. It is recommended that the file compiled by the prison doctor, which is formed at the admission of the person in the prison, to contain the following:

- a complete statement by the person, which is related to the medical examination (including a description of the state of health and the torture allegations);
- a complete record of the objective medical findings based on an extensive examination;
- conclusions of the doctor as regards the previous two items and an opinion on the degree of correctness of the person's allegations and the medical findings.

Moreover, the results of the examinations including the aforementioned records ought to be accessible to the detained / imprisoned person and to their legal representative.

4.4. Spatial and staffing issues

The CPT underlines that the conditions of the facilities where detained and imprisoned persons are kept are inappropriate. Serious efforts should be made in order to decrease the number of detained persons who are awaiting trial in detention. In the prison cells with more prisoners, it is the aim to provide a minimum of 4 m^2 of living space for each inmate (the sanitary premises are excluded); where possible, the sanitary premises should be equipped with washbasins and a bathroom and their enclosing in the cells with more inmates ought to be improved. Generally, the authorities need to continue to undertake all the necessary steps and to explore all the possibilities with regard to improving the material conditions in the penitentiary institutions.

The national authorities ought to undertake urgent measures in order to improve the activities concerning the detained persons awaiting a trial. **The aim is to ensure that all the inmates have the possibility to spend a reasonable part of the day outside their cells, engaged in useful activities**: work, primarily of craftsman's value: education, sport. The legal framework which regulates the detention has to be appropriately revised.

The authorities need to ensure that all the juvenile inmates, including the detainees who are awaiting trial, are being kept in detention centres designed for persons at this age, offering

conditions adequate to their necessities and equipped with personnel trained for working with young persons. In the meantime, necessary steps ought to be undertaken so as to ensure that the juveniles who are placed in the prisons, including those detainees who are awaiting trial, are provided with the full programme of educational activities (including physical education) and are placed separately from the adult inmates.

4.5. Procedure with a person deprived of their freedom / an arrested person

In the segment which refers to the methods for protection of torture and inhumane treatment of persons deprived of their freedom, the Committee makes several standard recommendations.

- The respective authorities are to ensure that the authorised official person complies with the legal provision on the 24-hour limit for detaining a person.
- To undertake appropriate measures for unimpeded access to a legal representative for the detained person. This recommendation refers above all to the police who represent the first institution that initiates and enforces the deprivation of one's freedom. It is mentioned that the standardised forms for this purpose need to be modified. This measure has been stressed several times as a method for prevention of actions that would mean overstepping of the authorisations and a possible inhumane treatment of the detained person. This possibility is one of the principal instruments for torture prevention in the period when a person is being isolated in a police station.
- Undertaking measures for termination of the practice of a supervised contact (presence of an MoI official) between the arrested person and the legal representative.
- The authorities should strengthen the efforts to remove all the non-standard items (clubs, metal rods, truncheons and other) from the premises in the police stations.
- Establishing a practice for the persons deprived of their freedom to sign a statement which confirms that they have been informed about their rights.
- The respective authorities should undertake the necessary steps in order to establish standardised registers and their application in the prescribed manner without any exception.

4.6. Implementation of recommendations:

In the first several visits of the CPT, several remarks and recommendations for improving the regulation with reference to the rights of the persons deprived of their freedom and their treatment have been made.

At first it can be noticed the positive influence by the recommendations made by the Committee. The adoption of a Rulebook on the treatment of the persons deprived of their freedom is one of the recommendations which have been persistently addressed to Macedonia. The implementation of the Law on Police, adopted in 2006, gives a possibility for this issue to be resolved. The adoption of the **Police Code** in 2004 processes in detail a myriad of the CPT remarks on the formal arrangement of the rights of the persons deprived of their freedom. Starting with the basic principles on torture prevention, such as appropriate informing of the persons deprived of their freedom on the right to a legal representative, right to a doctor, informing of a close relative and a series of other mechanisms which, in normal circumstances, ought to be available to any citizen held in police. This concludes a compact legal framework for regulating the attitude of the police officers to the persons deprived of their freedom.

With the adoption of the Police Code (2004) and the numerous trainings of the police regarding human rights and the good police work, the Law on Police (2006) and the completion of a wide range of bylaws, many of the formal gaps for compulsory correct treatment of the arrested persons

are regulated. Related to this, but also to many other conditions in the country, the CPT, during its last visit in 2006 concludes that "...the state in the Republic of Macedonia is being normalised, whereby the problems with which we face are changing from acute to systematic. Because of that, last time the perceived shortcomings in the sphere of the police were larger. That is precisely why, in this period, the efforts ought to be doubled regarding the police training, to create a new climate in which the functioning of the police will be based on the highest internationally recognised standards for respecting human rights" (Mauro Palma, Skopje, 26.05.2006.).

4.7. Independent body for investigation and punishment of torture:

An interesting and a very significant recommendation for an essential change in the system of investigation and punishment of the cases of torture in contact with the persons deprived of their freedom may be encountered in the report from the visit made in October 2001. In this recommendation, the Committee addresses the MoI with a proposal for the Sector of Internal Control and Professional Standards to be obliged to notify the respective judicial body about each case of torture that is due to incorrect (i.e., criminal) behaviour of police officials. It is recommended to establish a completely independent investigative body which will be in charge of the processing of complaints regarding the conduct of members of the security forces in the segment of treatment of persons deprived of their freedom. Such an investigative body would have authorisation to initiate the disciplinary hearings of the MoI members and to forward cases for completion to the prosecution which would further decide whether additional procedures should be initiated.

Recommendations

The recommendations in the text refer to the establishment of a hierarchically and practically independent investigative body in order to meet the requirements by the ECHR for effective investigations regarding death or a serous injury at the hands of state officials, which was suggested by the CPT during their visit in 2001 to the Republic of Macedonia.

The strengthening of the competencies and authorisations of the public prosecution and of the investigating judge are in line with the ECHR requirements regarding cases of death or serious injury inflicted in the presence of authorised official persons, as well as with the new legal decisions in the Law on Public Prosecution, which make the role of the public prosecutor more active and stronger.

The initiated police reforms in which the decentralisation of the MoI competencies has a significant place, is a possibility for involving representatives of the public (not from the police trade union), which will contribute to a transparent managing of this part of the procedure.

5. Annex to the analysis

In addition to the analysis of the CPT recommendations made after the visits to Macedonia, adequate attention is being paid to the essential part which initiates the necessity for recommendations and advice by the Committee on Prevention of Torture. In this part, the cases of torture are chronologically outlined, as recorded by the CPT in its reports on the Republic of Macedonia.

Cases recorded during the visit on 17th -27th May 1998

Case	Period of occurrence and location	Service involved	Indicators of torture and deprivation of one's rights
Case #1	15th May 1998 Gjorce Petrov PS	Police	At the moment of deprivation of his freedom, the person was allegedly surrounded by about twenty police officers. Afterwards the person was hit with a rubber truncheon on the back part of his head and his back. Allegedly, while the person was being held by two police officers, he was being hit in the area of his face and his thoracic cage. After having been arrested and taken to the Skopje Prison on 16th May, wounds and swellings on his back, bruises on his left eye were recorded.
Case #2	17th May 1998 Gazi Baba PS	Police	After having been arrested and taken to the police station, the person was allegedly beaten until the moment he lost his consciousness. After having lost his consciousness as a result of the beating with rubber truncheons in the area of his head and abdomen, the person woke up in the hospital. After having had stitches on the wounds on his head, the person was taken back to the Gazi Baba PS, where he was detained until the next evening. The prison medical services confirm that the person received medical care outside their institution. In addition, injuries were found which correspond to the description of the physical mistreatment of the person.
Case #3	17th May 1998 Gazi Baba PS	Police	The person in question was allegedly a victim of excessive use of force at the moment when he was deprived of his freedom. The report alleges that the person was hit and kicked on the back side of his body with rubber truncheons and kicks. In the medical records of the Skopje Prison, it was recorded that the person had minor injuries in the area of his head. The same person was examined by the medical expert from the delegation and the findings suggest that several swellings were visible, which resulted from blows in the back part of his head and back.
Case #4	4th March 1998 Gostivar PS	Police (civilian)	The injuries recorded with the person in this case were allegedly caused in the attempt to get information by two police officers in civilian clothes. The injuries caused to the person were in the area of his palms and feet. These injuries impeded his movement in the following 10 days. These injuries have also been recorded by the medical services of the Skopje Prison and by the CPT delegation.

Cases recorded during the visit on 21st -26th October, 2001

Case	Period of occurrence and location	Service involved	Indicators of torture and deprivation of guaranteed rights
M.S.	8th -9th February 2001 Gazi Baba PS	UBK members	Non-recorded deprivation of his freedom, visible injuries of his torso and extremities, disrupted renal function, problems with his respiratory system (as diagnosed at the Skopje City Hospital).
Case #1	28th -29th May 2001 Kumanovo PS	Police – Kumanovo	Visible injuries of his torso and extremities (as diagnosed at his admission to the Skopje Prison on 29th May 2001).
Case #2	28th -29th May 2001 Kumanovo PS	Police – Kumanovo	Visible bruises and swellings on his lower extremities, back, feet, scratches over his forehead and face. A fracture of a rib and serious damage to the kidneys. The person was put on dialysis until 20th June 2001 (as diagnosed at the admission in the Skopje Prison on 29th May 2001).
Case #3	5th September 2001 Kumanovo PS	Police – Kumanovo (alleged beating and mistreatment by 7 MoI members, in the course of detention)	Serious injuries in the area of his head and face (open wounds, bruises and scratches); Injuries on his shoulders and chest; Injuries in the area of his thighs. (Diagnosis carried out by the doctors from the CPT delegation staff)
Case #4	2nd October 2001 Kumanovo PS	Police – Kumanovo (alleged beating and mistreatment by MoI members with a shovel handle, prior to the detention)	Bruises and swellings on his left eye, back and buttocks. (Diagnosis made at his admission at the Skopje Prison on 4th October 2001; a repeated examination by a doctor from the delegation confirms the findings).
Case #5	12th August 2001 Ljuboten / Mirkovci PS	Members of the special police	Alleged beating with weapon handles of the police officers on the way to the police station. A cut with a shape of a cross, allegedly made with a bayonet by the special police members. After the admission at the Skopje City Hospital on 12th August 2001 the following injuries were diagnosed: a cerebral contusion, face injuries and several fractures of the rib. The hospital records on the necessity of medical assistance where it was stated "beating by the police", attempts for manipulating the document were visible, by covering precisely that phrase with successive "X" marks.
Case #6	12th August 2001 Ljuboten / Mirkovci PS		In the prison medical file dated 15th August 2001, the following injuries were listed: wounds and bruises on the face and the back. The doctor from the CPT delegation who examined the person on 23rd October 2001

			confirms those findings and makes the remark that 2 of his front teeth in the lower jaw were broken, whereby the roots of those teeth were visible.
Case #7	12th August 2001 Kisela Voda PS		After having been deprived of his freedom, the person was taken to the Kisela Voda PS where he was allegedly beaten in the halls of the building. In the medical records of the Skopje Prison it has been stated that the person has visible injuries in the area of his head and back.
Case #8 A.Q.	Mid-August 2001		According to the information which the delegation has obtained from a non-governmental organisation, the person A.Q. – a resident of Ljuboten, was deprived of his freedom by the MoI. The same person was found in the street and brought to the Skopje City Hospital on 13th August 2001 at 5 o'clock in the morning. The hospital records state that the person was in a coma at the moment when he was brought to the hospital and that he passed away at 13.30h the same day. The autopsy conducted on 15th August resulted in locating numerous serious internal and external injuries all over the body of the deceased person. The cause of death of the person A.Q. according to the autopsy findings was a "traumatic shock".
Case N. A.	13th August 2001 Clinical Centre; Centre Police Station	UBK and NTS members	During the act of deprivation of the person N. A. of his freedom together with three other persons, the MoI members allegedly used excessive force on the spot. After the arrested persons had been transferred to the Centre PS, the alleged physical mistreatment and torture continued. At 3:00 AM on 14th August, 2001, the person N. A. was admitted to the Skopje City Hospital with numerous injuries, including 13 different injuries on his head. In the hospital records, it has been stated that the death occurred at 7:20AM. When analysing the autopsy report by the CPT delegation, the report states that the injuries resulted from numerous blows with objects resembling sticks and truncheons, kicks, fist-blows. It has been stated that the deceased was beaten to death, most probably by several persons.
Case #9	22nd October 2001	MoI members from the Bit Pazar PS	The person deprived of his freedom was allegedly forced to lie on the ground and he

	Bit Pazar PS		was being hit by 5 MoI members (some of them reservists). The injuries have been recorded in the medical file of the Skopje Prison dated 23rd October 2001.
Case #10	26th October 2001	MoI – NTS members	At the meeting of a CPT delegation member with a person who has been deprived of his freedom by the MoI

Cases recorded during the visit on 18th – 27th November 2002

Cases	Period of occurrence and location	Service involved	Indicators of torture and deprivation of guaranteed rights
Case #1	26th August 2002 Deprived of his freedom in Gostivar Detained at an unknown location in Skopje	UBK members	Hit in various parts of the body with a blindfold on his head without any orientation of where he was. The injuries were located on the left side of his back, feet and thighs. At his taking to the judicial body (Skopje Basic Court 1) the injuries were recorded by the medical service of the Skopje Prison at his admission there.
Case #2	29th -30th August 2002 Karpos PS	Police, Lions Special Unit, UBK	Contusion of the head provoked by a handle of a shovel. Blows in the area of his chest which resulted in several fractured ribs. The hospital records of the Skopje Military Hospital contain data on the person's stay in the institution or about the X-ray of the injuries. Doctors from the delegation confirm the allegations about a torture after an examination of the medical evidence made at another institution. Visible injuries of the torso and the extremities (as diagnosed at the admission at the Skopje Prison on 29th May 2001)
Case #3	30th August 2002 Karpos PS	Police, Lions Special Unit	After the transportation from the Gostivar – Tetovo motorway to the Karpos PS, the person had his head hit against the wall and was hit on his head and body while his arms were tied behind his back. On the same day when the person had an examination made at the State Hospital, the police registers state that he was released from the station.
Case #4	20th November 2002 Stenje Border PS	Police	The person was allegedly hit, kicked and beaten with a wooden object while he was in detention at the border police station. The examination made (on 22nd November) by the doctors from the delegation resulted in identifying 5 fresh isolated scars in the area of his head. According to the opinion of the medical experts, the injuries correspond to the allegations of the person. After having been sent to detention by the Resen Basic Court, the judge ordered the person to "see a doctor" about his injuries.

ANALYSIS OF DOMESTIC LEGISLATION, INSTITUTIONS AND PRACTICES IN CASES OF ABUSE OF POWER BY LAW ENFORCEMENT OFFICIALS[82]

1. Introduction

1.1. Purpose and aims of the analysis

Subject matter of this analysis is the domestic legal framework in regard to the functioning of the existing mechanisms in the Republic of Macedonia and their compatibility with the requirements of the ECHR, the recommendations of the Council of Europe Committee for Prevention of Torture (CPT), and other international standards for effective and independent investigation of cases of abuse of power by law enforcement officials that have resulted in death or serious bodily injuries (according to Articles 2 and 3 of the ECHR). The results of this analysis are to be the grounds based on which the solution for effective investigations of the cases of serious abuse of authorizations by law enforcement officials is to be found. The seriousness of the problem is emphasized by the fact that according to CPT reports and other relevant sources, the Republic of Macedonia has been singled out as a state which has registered a widespread and systematic practice of impunity of law enforcement officials who have abused their authorizations.[83]

1.2. International Standards

A basic standard for assessing the competent domestic institutions and other entities responsible for overseeing the police and similar authorities with special authorisations were the standards established by the law and jurisprudence of the ECHR, and those established within the UN system. Special attention is dedicated to the *Minnesota Protocol* (UN Manual on the Extra-Legal, Arbitrary and Summary Executions) and the Istanbul Protocol, which, it seems that are not sufficiently known to the domestic professional public, and which, otherwise establish in details

[82] Pursuant to the UN Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979, commentary to article 1, the term ***"law enforcement officials'***, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In addition, it stipulates that in countries where police powers are exercised by ***military authorities,*** whether uniformed or not, or by ***State security forces***, the definition of law enforcement officials shall be regarded as including officers of such services.
The Law on Internal Affairs, article 24, paragraph 2, stipulates that law enforcement officials are:

1. employees of the Police and operational employees;
2. employees who perform activities directly linked with police or operational matters;
3. the Minister, his/her Deputy, Heads of specific organizational units.

Pursuant to article 145 of the Criminal Procedure Act, the authorized persons from Custom administration of Republic of Macedonia and the financial police are having the same authorizations which the Ministry of Interior is having in the pre-investigative procedure and in the investigation, in the cases when they work on disclosing of criminal acts and their perpetrators and for gathering evidence necessary for criminal prosecution of the perpetrators of criminal acts.

[83] CPT/Inf (2004) para. 19-27; J. Murdoch, The treatment of prisoners – European Standards, CoE Publ. Strasbourg, 2006, 128-131.

the measures to be carried out when investigating cases of lethal or serious injuries inflicted by law enforcement officials.

The basic requirements imposed on the body responsible for conducting investigation of cases of death or serious bodily injuries with the international standards are as follows:

The investigation must be:

1. **conducted by a competent, independent and impartial body**
   - ***Competent*** – those conducting the investigation must be capable of evaluating and weighing evidence and exercising sound judgement. If possible, the investigation should include individuals with expertise in law, medicine and other appropriate specialized fields;
   - ***Independent*** - those carrying out the investigation are to be independent of those implicated in the events (lack of hierarchical or institutional link and practical independence). In addition, their job positions should be isolated of political influence.
   - ***Impartial*** **–** those conducting the investigation should not be closely associated with any individual, State entity, political party or other organization potentially implicated in the cases.

2. **effective**
   - the investigation must be in a position to establish the factual situation;
   - to collect evidence for possible criminal prosecution of perpetrators;
   - to identify witnesses and obtain statements from them;
   - to identify suspects and to take statements from them, and to undertake adequate procedure against them leading to criminal, disciplinary and substantive punishment.

3. **subjected to public scrutiny**
   - investigation or its results must guarantee accountability in practice;
   - the nature and degree of public scrutiny depends on the circumstances of the particular case;
   - in all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard/protect his/her legitimate interests.

4. **prompt and expedient**
   - investigations must be expedient and prompt;
   - prompt response by the authorities in investigating the use of lethal force is regarded as essential in maintaining public confidence in their respect of the rule of law and preventing any appearance of collusion in, or tolerance of illegal acts.

5. **initiated on their own motion "proprio motu"**
   - the authorities must act on their own motion once the matter has come to their attention. They cannot leave it to the initiative of the decedent's next-of-kin.

- when the facts are largely or whole known to the state authorities, it is the state's responsibility to provide a satisfactory and convincing explanation of how the death or injury occurred.[84]

In order for the state to guarantee impartial, independent, thorough, prompt and effective investigation, those conducting the investigation should be authorized to the following:

- To necessary budgetary and technical resources for effective investigation;
- To obtain all information necessary to the inquiry, to issue summonses to witnesses, including any officials allegedly involved in the cases;
- To demand the production of evidence, including state and medical files;
- To be in a position to protect complainants, witnesses, those conducting the investigation and their families from violence;
- To conduct on-site visits, including at the location where the torture is suspected to have occurred;
- To receive evidence from witnesses and organizations located outside the country;
- To have available technical expertise in areas such as pathology, forensic science, psychiatry, psychology, gynaecology and paediatrics;
- To have its own investigators to pursue and develop evidence.

In this respect, the main task of the authors was to 'scan' the domestic mechanisms and institutions competent to act upon cases of abuse of power by law enforcement officials. To this aim, the focus was on the analysis of: a) **institutional structure** of the legal system of the RM from the aspect of competencies, independence and impartiality; b) **legal authorizations, real (investigative) capacities and the competence of the body** (institution); and c) the implementation of the legislation in practice. Due to the importance, the greatest attention was paid to the Sector for Internal Control and Professional Standards (SICPS) within the Ministry of Interior (MoI), Public Prosecutor's Office (PPO), the Ombudsman of RM as well as the respective parliamentarian committees. Each of the relevant sections ends with conclusions and recommendations for more efficient functioning of the particular institutions (entities). In the end, concluding analysis of the domestic system as a whole is conducted and the same would be the ground for proposals for measures for upgrading the functioning of the control over the law-enforcement bodies, especially in cases of severe abuse of power. Namely, whether a satisfactory system is possible by upgrading the competence, independence capacities and efficiency of the existing institutions, or there is a need to change the system as whole and/or to require a new body with specific position and authorisations.

[84] See: Requirements of the ECHR as Regards the Investigation of Death or Serious Injury at the Hands of State Officials.

2. Internal Control within the MoI

2.1. Introduction – Control over the Police

During the entire period of transformation of the police, special attention has been paid to the mechanisms for control of its work, due to the fact that when exercising police authorisations, without any exceptions, we deal with the area of guaranteed human freedoms and rights.

In the period until 1998, the oversight over the police was conducted by the police itself, through mechanisms and duties of its own hierarchy. Back in 1992, for the first time a *Sector for Internal Control,* was established, tasked to carry out proceedings for establishing cases of violation of human freedoms and rights by law-enforcement officials as well as to conduct proceedings for establishing cases of unauthorised policing. In 2003, another unit – for professional standards - was added, so that it becomes *Sector for Internal Control and Professional Standards.*

By the end of 2003, this SICPS was operating without any established rules, statistics was not maintained, evidence was not collected and analytical reviews were not made. It worked on the basis of a complaint submitted by a citizen through the Minister or directly submitted to the Director of the Public Security Bureau; request by the Minister or the Director of the Public Security Bureau, carrying out proceedings and submitting reports to the Minister or the Director. The Report contained assessments on the behaviour of law-enforcement officials and proposal for undertaking measures, in cases when it was assessed that there were omissions or illegalities in the acts by the law enforcement officials. Based on the report, the Minister or the Director of the Public Security Bureau, were deciding whether a proceedings for establishment of the responsibility of the law-enforcement official is to be initiated. In other words, with the submission of the report all further competencies of the SICPS cease to exist.

In 2003, *Rules of Operation of the MoI's SICPS* were enacted and for the first time an effort was made to legally regulate its work. The Rules of operation and the description of the tasks and duties were the first step in the efforts to establish a stable capacity for controlling the work of the police and to define the rules pursuant to which the proceedings are to be conducted.

The Rules of operation for the first time have established an obligation to provide a written response, within a period of 30 days to the citizens or other entities that have lodged a complaint; the Rules are also setting an obligation for all organizational units of the MoI to cooperate with the SICPS and to fully implement measures proposed in its reports; also, there is a possibility for the SICPS to directly bring criminal reports against the law-enforcement officials who have committed criminal offence during their work, and the Rules are also introducing a maintenance of records for the conducted proceedings.

Such a position of the SICPS, and in particular its closeness resulted in absence of elementary cooperation among the key factors responsible for controlling the work of the police, primarily with the Ombudsman.

2.2. Legal framework for the work of the MoI's SICPS

The Law on Police (LP) as a legal framework for the implementation of the Strategy for Police Reform gives the basis for full transformation of the SICPS. Namely, the LP makes distinctions between the MoI, as a classical body of the state administration, responsible for carrying out

Government policy in the area of internal affairs and the police, as a professional service responsible for carrying out police work.

Therefore, the mechanisms for control of the police are placed on two levels. The first level of control over the police is the control according to the vertical line of professional hierarchy of the police. Each supervisor of an organizational unit (starting from the police department and all the way through the police stations and the Sector of Internal Affairs), is liable, within his/her competences, to carry out control in regard to working discipline, respect for the standards of policing, and in particular, the segment of legality in implementing police authorisations, respect for the human freedoms and rights, respect for Code of Ethics and Rules of Conduct and internal mutual relation of law-enforcement officials. In this respect, according to the provisions of the Law on Labour Relations, the provisions of the Collective Agreement of MoI, it is the supervisor of the organizational unit who submits an initiative for termination of the employment with dismissal (disciplinary procedure). The supervisor of the Sector for Internal Affairs, acting upon a proposal, adopts a decision for a dismissal procedure and a decision for suspending a law enforcement official.

The dismissal procedure is conducted by a Dismissal Commission established by Minister's decision. The Commission, based on a procedure carried out pursuant to the provisions of the MoI Collective Agreement, makes a proposal to the Minister for enforcing the measure – dismissal or replacing such a measure with reduction of the salary in the amount of 15% for a period not exceeding 6 months. However, the Minister is entitled to change the measure proposed by the Commission.

The second level of police control is carried out by the MoI. According to the LP, the MoI organizes and carries out surveillance, internal control and financial audit. This provision establishes the competence of the MoI in regard to internal control and professional standard of the police.

When a person against whom police authorisations have been applied, deems that his/her freedoms and rights have been violated, he/she has the right to lodge a complaint to the police. The police are obliged to check the allegations in the complaint and, within a period of 30 days from the date such a complaint is received, to inform in writing the complainant about the measures undertaken.

The legal basis, defined in such a manner, enabled amendments of the Rules of procedure of the SICPS (not enacted yet) in order to overcome all existing weaknesses. The new Rules of procedure stipulate that all the employees of the MoI and police are to cooperate with the SICPS; in addition the Rules stipulate that any refusal for cooperation will be treated as violation of the working discipline; tasks the supervisors to undertake actions for sanctioning all forms of working misconduct, as well as all form of infringement of human rights by the police officials; establishes an obligation for each organizational unit of the MoI or the Police to inform the SICPS promptly, and within 24 hours at the latest, regarding any complaint; establishes an obligation for supervisors of the working units to compulsory implement measures proposed by the SICPS; establishes an obligation to give an answer regarding any complaint lodged by a citizen, or other entity within legally established period; establishes the manner of action, the manner of introducing special investigative techniques and methods of operation in the SICPS; establishes the obligation to inform the PP for all cases of serious bodily injury or death resulting from use of police authorisations; regulates the records maintained by the SICPS; defines the condition under which quality control of policing may be carried out.

Lately, the communication with the Ombudsman has been significantly improved. Namely, the Ombudsman is directly communicating with all organizational units of the Police, as prescribed by the Law on Ombudsman, without any restrictions or mediation. A joint training of the employees of the SICPS and the members of the Ombudsman's Offices has been planned. Furthermore, relevant communication has been established also with the non-governmental organizations and the electronic and written media.

2.3. The statistics of the SICPS

There are statistical reports for the work of the SICPS for the years 2004, 2005 and 2006. However, relevant analysis with regard to complaints, the measures undertaken and effects achieved are lacking.

Structure of the complaints

Year	Total # of Complaints	Complaints by the Ombudsman	Complaints by NGOs	Anonymous calls
2004	1377	33	36	113
2005	1385	68	63	73
2006	1377	112	87	106
until 05.`07	297	16	36	56

Structure of Findings by the SICPS

Year	Grounded	Criminal Reports	Disciplinary Procedure	Suspension	Reassignment	Other Measures
2004	168	47	75	12	13	21
2005	184	38/55 acquitted	75	27	36	8
2006	152	37/41 acquitted	58	12	29	16
05.`07	83	51/89 acquitted	32/81 acquitted	15/62 acquitted	5/22	50/101 acquitted

The SICPS' statistics are not sufficient for developing overall analysis regarding its work. Likewise, the way the statistics were maintained prevents analysis of the cases implicating law-enforcement officials under article 2 and 3 of the ECHR, even under the assumption for involvement of the SICPS in such cases. It is not possible, *inter alia*, to conclude how many and which cases of serious bodily injury or death were handled by the SICPS. The Analytical service of the SICPS is undergoing complete reorganization; so the classification and statistics in relation to the cases will be carried out according to different parameters, that will make enable conducting of analysis and to fully study the work of the SICPS.

2.4. Control over the Financial Police and the Customs Office

Based on the 2004 amendments of the LCP, certain police authorizations have been given to the Financial Police and the Customs Office. However, these authorizations are only partially stipulated by the appropriate laws. Namely, article 10 of the Law on financial police only stipulates the cases in which the financial police officers are authorized to wear and use firearms,

without stipulating solution or pointing out to other legal provision for existing of a mechanism or a procedure for control of the practical application of these solutions. Similarly, article 44 of the Law on the Customs Office, stipulates the conditions under which the customs officials are authorized to use means of coercion and to wear and use weapons. This law also does not contain provisions by which the legality and the justification of the means used in coercion and firearms will be assessed. Unlike the Law on financial police, this law sets an obligation for the Government of the RM to closely regulate the use of means of coercion and firearms by customs officials.

2.5. Conclusions

Based on the analysis of some specific cases where the citizens have complained of police brutality and flagrant violation of human freedoms and rights, the following conclusions could be made:

- The SICPS has adequate capacities to investigate cases of human rights violations, but most frequently the final outcome of such procedures is not corresponding to the committed violation, due to the position held by the leading political or professional managerial structures for protection of implicated persons;
- Very common cases are those in which police solidarity to protect colleagues exists, this is so in order to protect the colleague, to minimize or make relative the responsibility;
- In most of the cases the SICPS has identified the implicated officials, but when measures are being proposed to be imposed to them, there is a tendency to "minimize the guilt", and to propose a less rigid measure than the one objectively envisioned for such conduct;
- In many cases the procedure was without any reason whatsoever postponed, and as a consequence deadlines for conducting disciplinary procedure expired, which in the end results in impunity of the law enforcement officials;
- According to the Law on Labour Relation and the provisions of the MoI Collective Agreement, there is no disciplinary procedure, but a dismissal procedure, due to which there is a limited number of disciplinary measures (fine and dismissal) that could be imposed;
- The SICPS was to a great extent dependent on the managerial policy and professional structure in the MoI, in particular, in cases when concrete measures regarding the responsibility were to be undertaken;
- The cooperation with the Ombudsman was neglected as a result of the general policy of the managerial staff of the Ministry;
- Measures proposed by the SICPS were frequently ignored by the supervisors of the organizational units and no one was held accountable;
- In its work, the SICPS is lacking transparency, publicity and analytical approach;
- Although, the financial and judicial police as well as the customs are authorized to carry out police authorisations, they are lacking specific control mechanism for exercising control over their work.

2.4. Recommendations

From the above stated, the recommendations are as follows:

- The SICPS must be transformed into a practically independent and competent body of the MoI responsible for exercising control over the work of the police;
- The SICPS has to make its functioning transparent, public and analytical;

- In the implementation of the annual Training Program of the SICPS, to include also other entities involved in combating crime (Department of Organized Crime, Basic Public Prosecutor's offices, Financial Police, Judicial Police and Customs), as well as the non-governmental organizations, which program goals include protection of human rights and freedoms;
- In its work the SICPS must establish permanent and open cooperation with the Ombudsman and the non-governmental sector;
- The SICPS, in its work must respect the legally prescribed obligations and terms, in which it has to give answers to citizens and legal entities who have submitted a complaint with the Sector or the Police;
- Measures proposed by the SICPS must be binding for all, while failure to act upon proposed measures be treated as serous disciplinary violation;
- Legislative amendments are needed in the part related to disciplinary procedure, to include a range of disciplinary measures relevant to the gravity of the violation. These legislative amendments should inevitably result in amendments of the MoI Collective Agreement;
- In order to perform its work in an efficient, effective and impartial manner, it is necessary that the authorisations of the SICPS are expanded. Such expansion in its authorisations should include the possibility to independently bring a suspension decision as well as decision for initiation of disciplinary procedure;
- With regard to the capacities of the SICPS to carry out the procedures, it is necessary to respect established procedure for selection of candidates that would work with the SICPS, build a system of legal protection of its employees, as well as its substantive and technical equipment, that will, on the other hand help in shortening the deadlines for completing the procedures;
- Recruitment of new staff of the SICPS must be transparent, based on the principles of expertise, competence and professionalism, and human and moral credibility of the candidates;
- It is necessary to define mechanisms for protection and security of the SICPS employees' job position, especially if they perform their duties in a professional, responsible, prompt and in good faith manner.

3. Prosecutorial and judicial control

3.1. Organisational structure of the Public Prosecutor' Office

The Public Prosecutor's Office (PPO) is a unique and independent state body with main task to prosecute perpetrators of criminal offences. The PPO is independent and performs its tasks and functions on the basis of the Constitution, laws and international treaties ratified in accordance with the Constitution.

However, regarding the *ex officio* prosecuted criminal offences, the public prosecutor's office is responsible to undertake required measures for the purpose of detecting the criminal acts and identifying the perpetrators and directing the pre-investigative procedure. This implies that the PPO, apart from other state bodies and institutions, is also a body responsible for detection.

The December 2005 constitutional amendments introduced novelties with regard to the mandate of the Public Prosecutor and the manner of election and dismissal of Public Prosecutors. The analysis of constitutional and legal provisions shows that PPO is prosecuting all perpetrators of criminal offences, including all law enforcement officials, who while exercising their authorisations will commit criminal offence by using force or firearms and other coercive means, resulting in death or serious bodily injury of a person.

3.2. Competences of the PPO and its relation with other bodies responsible for conducting investigation in cases of abuse of power by law-enforcement officials

The LCP and the LPPO provide solid legal base for more active involvement of the public prosecutor in detecting criminal offences and their perpetrators, providing solid evidence, and everything for the purpose not to delay the procedure and not to keep the citizens against whom there is a founded suspicion that he/she committed a criminal act in suspense.

For criminal acts that are to be prosecuted *ex officio*, the public prosecutor is authorized:
- To take required measures necessary for identifying criminal offences and the whereabouts of the perpetrators, and for directing the pre-investigative procedure;
- To give orders for implementation of special investigative measures in the pre-investigative procedure under conditions and in manner established by the LCP;
- To request initiating of an investigation, raise and represent indictments, give regular and extraordinary legal remedies against final court decision, as well as to perform other activities stipulated by this Law.

Even though those bodies competent for identifying criminal acts and perpetrators are liable to act on their own motion in providing evidence and collecting all information that may be used for successful criminal procedure whenever there is grounded suspicion that a criminal act is being committed, the public prosecutor is the one who is coordinating the activities carried out by such bodies, and giving instructions related to the provisioning of relevant evidence.

Timely involvement of the public prosecutor in this stage of the procedure gives a guarantee that the procedure will be successfully guided, and that measures and activities for providing good quality evidence in accordance with the provisions of the LCP will be undertaken. This is of relevance because the public prosecutor, according to his/her position, is a link between the pre-investigative and court procedure. The involvement of the public prosecutor in the pre-

investigative procedure provides legal procedure in which the basic human right and freedoms guaranteed by the Constitution will be respected.

According to the provisions of the LCP and LPPO, the activity of the public prosecutor in this stage of informal procedure is manifested by:
- activities regarding the measures undertaken for identifying criminal offences and their perpetrators,
- issuing orders for carrying out special investigative measures,
- receiving criminal reports,
- request for collecting previous information, activities which he/she could carry out, activities to be carried out after the criminal report until the indictment decision is adopted by the prosecutor's office.

The participation of the public prosecutor in the stage of identification of the perpetrator and the criminal offence, as mention above, is aimed at coordinating the activities, i.e. giving instructions related to provision of evidence within his/her legal authorizations, implementing measures to secure traces of the criminal act, items used to commit the criminal act, or result from the criminal act, as well as other relevant measures. Criminal reports as basic instrument for reporting the criminal offence and perpetrator are not considered as evidence in the procedure, but represent a motivation for initiating a procedure. The Criminal report is submitted in writing or orally.

Once the criminal report is submitted, the public prosecutor may, depending on the available corroborated proof and the answer on the basic crime-related questions, act in the following manner:
- to reject the criminal report,
- to request information from other bodies to be provided or undertake to do this in person,
- to request investigative actions to be carried out.

Following the receipt of the criminal report the public prosecutor based on the evidence at disposal may: reject the criminal report; request gathering of relevant materials through other bodies or it can do it independently; or to request investigative activities to be undertaken.

Where the public prosecutor is not in a position to assess that the allegations in the criminal report are credible, or that the date stated in the report and the attached evidence failed to give sufficient grounds for the public prosecutor to request an investigation or bring charges, or has come up to information that a criminal offence is committed, especially in cases when the perpetrator is unknown, **the public prosecutor will request that the MoI** or other body provide required information and carry out other measures for identifying such perpetrator and criminal offence, **whenever he/she is not in a position to do it in person**. In addition, the public prosecutor may request that state bodies, other institutions with public authorizations and other legal entities, the local self-government bodies, provide required data and information, documents, case file, evidence and reports. He/she also may discuss the issue and seek an opinion of experts in relevant field.

Pursuant to the LCP, the public prosecutor may call upon the person submitting the criminal report, and the suspect in the presence of his/her attorney, and other persons whose information, according to the public prosecutor, may contribute to the assessment on the credibility of the statements presented in the report. Also a law-enforcement official can be summoned, but in practice they do not show up, though properly summoned. The public prosecutor has no authorization to compel witnesses.

The public prosecutor shall give advice to the invited person regarding his/her rights referred to in article 3 of this law. The minutes on information gathered from the citizens and made in the presence of the public prosecutor and signed by the citizens may be used as evidence in the criminal proceedings. When the public prosecutor calls upon other persons whose information may contribute to assessing the credibility of the statements in the report, and the perpetrator is known, he/she calls upon the suspect and his defence lawyer. Minutes on gathered information, presented to the public prosecutor, the suspect or his/her lawyer, and signed by such person may be used as evidence in the criminal procedure.

In addition, the MoI and other state bodies, institutions performing public authorisations and other legal entities are liable to immediately act upon the request by the public prosecutor, within a period not exceeding 30 days the most from the date the request is received. Only in exceptionally complex cases of serious criminal offences committed by several persons at wider area or by organized criminal group, the MoI, other state bodies, institutions performing public authorisations and other legal entities are liable to act upon the request by the public prosecutor within a period not exceeding 90 days from the date the request is received.

The public prosecutor may request, at any time, to be promptly informed about the measures undertaken, but, while gathering such information to be careful not to harm the honour and reputation of the persons to whom such information refers.

Following receipt of the criminal report, the public prosecutor may propose to the investigative judge to carry out concrete actions. The investigative judge shall be liable to undertake such actions within the shortest possible time. The public prosecutor may, following the actions carried out, decide to submit a proposal for indictment or make a decision to reject the criminal report. Investigative actions refer to taking testimony from a person appearing in a capacity of witness, expert witness, collecting relevant documentation, etc.

The provisions of LCP create specific problems when a criminal report is submitted to the PPO, but the perpetrator of the criminal offence is unknown, because, only an investigative judge, and not the public prosecutor, may give an order for autopsy and exhumation. The provision in the LCP preventing both the investigative judge and the public prosecutor to compel the law enforcement officials to stand as witnesses and instead to require that the institution or his/her superior provide such interrogation is a gap – Article 177, paragraph 5 of the LCP. In addition, there is no deadline within which the superior is liable to provide the involved official, respectively law enforcement official.

3.3. PPO statistics in relation to the submitted criminal reports against law-enforcement officials

In order to have an overview of the above stated situation, all the public prosecutor's offices were requested to submit data on all cases of abuse of power by law-enforcement officials by using excessive and unjustified force based on submitted criminal reports during the period 2005-2006.

Subject of this analysis were committed criminal acts referred to in Chapter XV of the CC, which include criminal offences against freedoms and rights of the citizens, and in particular, criminal offences: Coercion referred to in Article 139; Illegal Arrest, Article 140; Torture or Inhuman or Degrading Treatment or Punishment, Article 142, and Ill – Treatment in Performing Official Duties, Article 143 of the CC.

During the period, subject to this analysis, a total of 54 criminal reports were submitted to the basic public prosecutor offices out of which 28 in 2005, and 26 in 2006.

3.3.1. The status of the submitted criminal reports with the Appellate PPO

Appellate Public Prosecutor's Offices - Skopje

The Basic Public Prosecutor's Offices within the jurisdiction of the Appellate Public Prosecutor's Office – Skopje, during 2005 and 2006 received a total of 23 criminal reports against 40 persons, out of which 14 criminal reports for the criminal offence *Ill–treatment in Performing Official Duties of Article 143 of the CC,* 7 criminal reports for criminal offence *Illegal Arrest of Article 140 paragraph 4 of the CC,* and 2 criminal reports for the criminal offence *Torture or Inhuman or Degrading Treatment or Punishment of Article 143 of the CC*. Thirty three of the persons against whom criminal reports were submitted are law enforcement officials and seven inspectors.

Appellate Public Prosecutor's Offices - Bitola

In 2005, Basic Public Prosecutor's Offices within its jurisdiction, have received 12 criminal reports against 20 persons, and in 2006 received 11 criminal reports against 30 persons, which indicates an increase of 10 reported persons. The total for the period of both years is 23 criminal reports against 50 persons.

Number of submitted criminal reports during 2005 u 2006

Criminal acts	**2005**		**2006**		**Total**
	No. of criminal report	**L.E.O.**	**No. of criminal reports**	**L.E.O.**	
Art. 139, para 3			1	5	1/5
Art. 140, para 4					/
Art. 142	1	2	1	4	2/6
Art. 143	11	18	9	21	20/39
Total	12	20	11	30	23/50

Number of the submitted criminal reports with the BPPO

BPPO	**Art. 139, para 3**		**Art. 140, para 4**		**Art. 142**		**Art. 143**	
	2005	**2006**	**2005**	**2006**	**2005**	**2006**	**2005**	**2006**
Bitola							4	**8**
Prilep		5					1	**2**
Ohrid						4	10	**11**
Kicevo					2		3	
Struga								
Resen								

With regard to the nature of the criminal offences, it is evident that no criminal reports were submitted for the criminal offence referred to in Article 140, paragraph 4- *Illegal Arrest.*

With regard to the nature of the criminal acts, in 2005 and 2006, there was 1 criminal report against 5 persons for the criminal offence referred to in Article 139, paragraph 3, 2 criminal report against 6 persons for the criminal offence referred to in Article 142, 20 criminal report against 39 persons for the criminal offence referred to in Article 143 of the CC.

Twenty four of the persons reported for criminal offences are law enforcement officials, 12 inspectors and 14 other persons.

Status of the reported law-enforcement officials

BPPO	Status of the reported law-enforcement officials			
	Police officers	**inspectors**	**Other**	**Total**
Bitola	6	1	5	**12**
Prilep	3		5	**8**
Ohrid	12	9	4	**25**
Kicevo	3	2		**5**
Total	**24**	**12**	**14**	**50**

Submitters of the criminal report

	Submitters of the criminal report				
BPPO	**MoI**	**Victim**	**BPPO**	**Other citizens**	**Total**
Bitola	1	11			**12**
Prilep	1	7			**8**
Ohrid		23	2		**25**
Kicevo		3		2	**5**
Total	**2**	**44**	**2**	**2**	**50**

Appellate Public Prosecutor's Offices - Stip

In 2005 the Basic Public Prosecutor's Offices within this area, received 4 criminal reports against 6 persons, and in 2006 received 4 criminal reports against 4 persons. All criminal reports were submitted for the criminal offence *Ill – Treatment in Performing Official Duties of Article 143 of the CC.* 12 of the persons reported for criminal offences are law enforcement officials and 2 other persons.

3.3.2 Submitters of criminal reports

During 2005 and 2006, submitters of criminal reports were MoI with 10 criminal reports, the Ombudsman with 4 criminal reports, and the other criminal reports were petitioned by other damaged persons and citizens.

Hence, the Appellate Public Prosecutor's Office Skopje received 5 criminal reports submitted by MoI, 15 criminal reports by damaged persons and 3 criminal reports by the Ombudsman.

The Appellate Public Prosecutor's Office Bitola received 2 criminal reports submitted by MoI, 2 cases were made on the initiative by the basic Public Prosecutor's Office Ohrid on its own motion, 2 criminal reports were filed by other citizens and the remaining were submitted by the citizens as damaged persons.

The Appellate Public Prosecutor's Office Stip received 3 criminal reports submitted by MoI, 4 by the damaged and 1 by the Ombudsman.

In relation to the cases that are of special concern for this analysis (data for sever bodily injuries and/or death inflicted by law-enforcement officials) there are no data in the Appellate PPO – Skopje, there are 10 cases at the region under the jurisdiction of the Appellate PPO – Bitola, and

there is 1 criminal report at the region under the jurisdiction of the Appellate PPO – Stip for severe bodily injuries. There are no reports for cases of death. The other reports are for inflicted bodily injuries.

3.3.3 Decisions upon the submitted criminal reports

Appellate Public Prosecutor's Office - Skopje

Out of the total number of the criminal reports (24), 14 were resolved with a request for an investigation submitted to an investigating judge, and most of them are still in the investigation stage as additional investigative activities were requested. Five criminal reports were rejected, due to lack of grounds for suspicion that the reported persons committed the reported criminal acts; for 3 criminal reports requests were submitted to MoI to collect required information. The procedure regarding the decision for rejection for the criminal reports lasted for 2 to 6 months. For one criminal report a proposal was submitted for undertaking investigative actions.

In 2005 and 2006, Basic Public Prosecutor's Offices submitted three indictments and one proposal for indictment. One case of criminal offence falling under Article 142, paragraph 1 of the CC, ended with acquittal, and the PPO did not appeal it, as the damaged party submitted to the PPO an additional statement verified by a notary claiming that no physical force was used by the defendant or his friend. For one indictment, a decision was reached for the criminal offence of Article 140, paragraph 4 of the CC with alternative measure sentence on probation. With regard to undecided indictments, court hearings are scheduled, and postponed, due to the lack of conditions for the main hearing, so the trial is pending.

During this period, five decisions on appeal were made in the Appellate Court Skopje. With the decision for criminal offence of Article 143 of the CC, the Appellate Court Skopje confirmed the first instance decision on sentence on probation in 4 cases, and only in one case the first instance decision was abolished and the case was returned for retrial.

Appellate Public Prosecutor's Office -Bitola

Acting upon the submitted criminal reports, the BPPO under the jurisdiction of the Appellate PPO - Bitola have brought decision against 42 persons, out of which rejected criminal reports against 31 persons, requests for investigation against 10 persons and unresolved criminal reports against 8 persons.

Out of the total number of the criminal reports against 50 persons, the Basic Public Prosecutor's Offices filed requests **for prior information** for 35 persons, or 70%. **The checks were made through the MoI.**

According to the data, the procedure against 21 persons was prompt, with the exception of some criminal reports. Namely, the procedure lasted up to one month for 21 persons, up to 3 months for 7 persons, up to 5 months for 5 persons and for 2 persons the procedure is still pending.

So, BPPO Kicevo was obliged to send 4 written interventions for 5 persons to the Interior Affairs Departments Kicevo and Makedonski Brod, and BPPO Ohrid, despite the request for collecting information submitted to Interior Affairs Department Ohrid, and despite written interventions has not **received a reply yet**. It was about two criminal reports in 2005 against to inspectors who, in

the premises of Internal Affairs Department Ohrid physically abused two persons – suspects in order to obtain statements that they committed theft.

Out of the total number of submitted requests for investigation against 10 persons, the public prosecutor made a decision regarding 9 persons, for 6 persons withdraw from prosecution, indicted 3 persons, and for 1 person remained undecided by the investigative judge.

Procedure upon the submitted criminal reports

	Rejected		**Investigations**		**Other**		**Solved**		**Unsolved**	
BPPO	**2005**	**2006**	**2005**	**2006**	**2005**	**2006**	**2005**	**2006**	**2005**	**2006**
Bitola	3	6	1	2			4	8		
Prilep		7	1				1	7		
Ohrid	8	7		1		1	8	9	2	6
Kicevo			5				5			
Total	**11**	**20**	**7**	**3**		**1**	**18**	**24**	**2**	**6**
	31		**10**		**1**		**42**		**8**	

Appellate Public Prosecutor's Office - Stip

Acting upon the submitted criminal reports, the Public Prosecutor's Offices under the jurisdiction of this area made appropriate decision; 2 criminal reports were rejected, out of which in 1 criminal report the damaged party in capacity of subsidiary plaintiff continued the criminal prosecution and after the main hearing upon the subsidiary indictment, the court reach a decision on acquittal which is final. Five criminal reports followed by a request for investigation, and after the conducted investigation all cases ended with indictment, out of which only one was adjudicated and sentenced with 4 months imprisonment, the decision is final, while the procedures in relation to the remainder of the indictments are pending.

BPP	**L.EO.**	**Description of the act**	**Submitters of the criminal charge**	**Activities of the PPO**
BPP Stip Case No. 1 2005	1 criminal charge under art. 143 and 131 of the CC against police officers from SoI Stip and two people from the security agency	Use of physical force that caused severe body injury	The damaged party and the Ombudsman	After the conducted investigation the BPP submitted an indictment under art. 143 of the CC against two officials – police officers.
BPP Stip Case No. 2 2006	1 criminal charge under art. 143 of the CC against two police officers from SoI Stip	Causing bodily injuries while resisting	SICPS	The BPP submitted an indictment against both police officers, not decided yet.
BPP Strumica	1 police officer of Border Police	The first act was committed while	MoI	The BPP submitted request for

Case No. 1 2005	Station in Novo Selo (2 charges under art 143 of CC	performing its official duty, and had forced the damaged to take off the rear plates of the van, which was followed by a strong squeeze on the neck and hitting his head from the van, humiliating his dignity and human personality, which also caused bodily injuries. The second act was committed in such a way that he broke the registration car plates and grabbed the damaged party by the hand, pulling him towards the premises of the border crossing in Novo Selo, and pushing him against the wall, humiliating his dignity.		investigation in relation to art. 143 of the CC. The investigation lasted for 4 mounts. In regard to one charge the BPP had withdrawn due to lack of evidence. In regard to second charge BPP submitted indictment against the official person, who was found guilty and was sentenced to 4 mounts imprisonment. The verdict is legally valid.
BPP Strumica Case No. 2 2006	Criminal charge in relation to art. 143 of the CC against one official – police officer from PS Strumica	Insulting the damaged in front of several people, causing bodily injuries that humiliated his dignity.	MoI	BPP submitted a request for investigation which was followed by an indictment, upon which there has not yet been a court outcome.
BPP Kocani Case 1, 2006	1 criminal charge in relation to art. 143 and art. 22 from the CC against 4 official- ALFA police	Third and fourth suspect by doing a „полуга” on both hands, have put him in a vehicle and driven towards Kocani where he was beaten by hand and mobile phone in the head. All suspects used force by hitting him all over his body and head, punch in the back and caused post-traumatic stressful disorder.	The damaged party	BPP submitted an investigation request which was followed by indictment upon which yet there is not court outcome.
BPP Delcevo Case 1, 2005	1 criminal charge related to art. 143 from the CC against a			

	director of a national-cultural institution.			
BPP Radovis Case 1, 2005	Criminal charge related to art. 143 of the CC against one official – police officer SoI Radovis	A police official without any kind of warning has beaten the damaged party all over his body and as a consequence the latter had a scratch on the eyebrow, bruise on the hand and a scratch on his neck.	The damaged party	BPP brought a decision for rejecting the criminal charge The damaged party as a subsidiary plaintiff continued the prosecution. The court has brought an acquittal judgment.
BPP Radovis Case 2, 2005	1criminal charge in accordance to art 143 against a teacher	The student was hit by a piece of wood.	The damaged party	BPP submitted request for conducting investigation which is still on going.

From the analysis of the criminal reports submitted to the public prosecutor's office, it could be concluded that **in almost 70% of the cases the complainants were the damaged persons,** which leads to a conclusion that **there is a "dark figure" and** that in most of the cases, subject to this analysis, persons employed in the MoI are not reported

3.4. Practical problems and observations

Based on the analysis data, it can be stated that the PPO, when dealing with such cases, is faced with particular concrete problems that have an impact on the procedural efficiency on one hand, and on collecting quality material evidence in relation to the reported cases of police abuse on the other hand. The problems are in most of the cases, the following:

- Insufficient information in the reports or lack of medical documentation – medical certificate, in which cases the public prosecutor requested necessary data, both for the reported persons and the reported events, as well as relevant medical documentation. This, of course, has an impact on the efficiency of the criminal procedure, even more, because, frequently, the period from the submission of the request and the replay is long. On the other hand, the request for the relevant medical documentation is provided upon a request by a PPO only if the PPO pays for it, and **the PPO cannot makes payments as it has no funds for that purpose!**
- **The medical documentation lacks clear description** of injuries, so therefore it is not possible to establish when, in which manner and by which means the injures were inflicted. In cases when a person is subjected to police abuse and suffers physical injuries, it is required that such person seeks immediate medical assistance and precise definition of injuries, their location, size, possible colour of the injury, so that the time of the injury is established.
- In cases when there are no injuries and other witnesses of the event, it is customary that the court accepts no evidence of the act committed as, except for the statement by the damaged person, there is no other evidence to corroborate the allegations.
- Moreover, the efficiency and quality of the procedure is, to a certain extent influenced, by the fact that there is no **specialization,** both in the PPO and the judiciary, so that all prosecutors and judges work on various kinds of crimes. It should be noted that in the

context of the excessive force used by the police, the vagueness of the provisions of Article 80, paragraphs 1, 3 and 4 of the Law on Police add to this fact. The lack of precise provisions creates difficulties in establishing criminal responsibility.

- During the procedure, public prosecutors and damaged persons are faced with the problem of "friendly gesture" and partiality of the MoI members summoned to give statements in the course of the procedure, declining to appear before the courts, as well as absence of legal possibility to be forcefully apprehended, also not sharing information on the disciplinary procedures initiated against reported persons, etc.
- The experience of the basic public prosecutor's offices related to collection of evidence in case of founded grounds that such criminal acts are committed, shows that the cooperation with MoI is not always at satisfactory level because the answers to the requests on data and information were not complete and within a reasonable time, resulting in delaying the procedure and covering up the use of force by law enforcement officials.

3.5. Conclusions

- Beside the justified critics about the influence of the executive power over the selection of the Public Prosecutor of RM, the existing constitutional and legal position of the public prosecution, generally is fulfilling the basic principles for impartial and independent investigating body;
- There are legal grounds for the public prosecutor's active engagement in the detection of the criminal acts and their perpetrators as well as securing solid evidences;
- In practice, the PPO is dependent from other bodies, especially from the MoI. That is to say, instead of collecting the necessary information about the acts, the PP is addressing them back to the MoI, although that is not the intention of the LCP. This is a case, even more when there are subjects of a police authority exceed, according to practice, usually the MoI, respectively the SICPS did not show willingness to investigate them thoroughly and effectively;
- The PPO in the current situation lacks sufficient institutional, structural, technical, financial and human capacities/resources necessary for a competent, professional, independent, efficient, thorough and prompt conducting of the investigative procedure. In order to change this, there is no ambition by the prosecution itself or by the state.

3.6. Recommendations

- The PPO without any compromise has to ensure soundness and lawfulness of measures and activities that are undertaken in the pre-investigative procedure and should supervise the respect of human rights by the MoI authorities and other state bodies;
- If the public prosecutor is aware that by MoI authorities and other state bodies are infringed the official jurisdictions and that the civil rights and freedoms are abused, he should immediately request information if a procedure for verifying their responsibility is initiated, as well as information about its progress and outcome;
- In such case, the public prosecutor *ex officio* initiates a procedure for verifying responsibility, as well as a procedure for verifying responsibility about the usage of firearms by the MoI officials or other state bodies, in case when there is a severe bodily injury or death;
- The Public prosecutor *ex officio* should receive the report about the justification of firearm usage by the authorized MoI officials and other state bodies every time when there is a severe bodily injury or death, as well as to conduct insight in all the evidences and files based on which the assessment for the justification for the use of a firearm is made;

- It is necessary to be applied the provision from the article 144 paragraph. 3 from the LCP according to which the public prosecutor can consult and gather opinions from experts of respected fields necessary for deciding about a criminal charge. This provision it is not applied in practice, since the public prosecution has a lack of means about this purpose. If in the future this provision will start to be applied then it would result with effective procedure and collection of relevant evidences;
- In the function of an efficient protection of the basic human rights and freedoms, specialized trainings as well as continues education of the public prosecutors, judges and attorney offices is needed. It is expectable the experience from Slovenia, to draft a legal obligation for a certain unit in the public prosecution which will investigate cases of misconduct by the state officials and other official authorities;
- In order to provide a thorough and impartial investigation, the public prosecutor should be entitled to compel witnesses and testimonies, especially those who are involved in torture or maltreatment.

3.7. The role of the judiciary

The role of the courts in controlling the executive power is especially important when there is a usage of means of coercion and firearms. It is particularly important that the citizens in these cases, in front of impartial court with regular legal means to acquire justice in sense of civil and criminal responsibility of the responsible officials.

Courts perform the following goals and functions:

- Unbiased law application regardless of the position and the capacity of the parties;
- Protection, respect and promotion of the human rights and freedoms;
- Ensuring impartiality, equality and non-discrimination upon any ground;
- Ensuring legal security based on the rule of law concept.

They are autonomous and independent state bodies which are directed by the Constitution, laws and international agreements ratified in accordance with the Constitution, as well as by the principles of: legitimacy; equality of parties; due process; lawfully; publicly; contradictoriness; two-instances; directly; right of defense, respectively represented; free evaluation of evidences and procedural economy.

In comparison to the above-analyzed institutions, the court has limited possibility for its own initiative during the investigations of police infringements, since it depends on the initiative, respectively from the request of a public prosecutor. However as it can be seen from the reports of the CPT, from the court it is expected for each case that exists suspicion of a police abuse or illegal use of firearms, the case to be processed and to be forwarded to the competent bodies (the public prosecutor in charge).

Of course, the court can sanction the police infringements also procedurally, which means that according to article 15, paragraph. 2 from LCP, all statement and other evidences obtained illegally or by violating the basic human rights or freedoms will be excluded and the same can not be used as a proof during the court procedure.

Judicial control over the police

During the procedure, the court is authorized to exercise control over the work of the police, by using the following possibilities:

- Some **police authorizations may be carried out by a law-enforcement official based on an approval/order** by the competent court (publicizing in the mass media a photograph or photo-robot of a person aimed at establishing his/her identity; gathering information from persons detained or in custody, aimed at revealing other criminal acts committed by such persons, his/her accomplices, or criminal acts committed by other perpetrators; special investigative measures are established with an order issued by a public prosecutor or investigating judge in pre-investigative procedure, while during the investigation only with an order issued by an investigative judge.
- During the **pre-investigative procedure,** the person against whom **the police officer carried out certain actions**, may, **within a period of 30 days** starting from the day the action has been undertaken, submit a request to the Investigative Judge, to **examine their legality and possible violation of human rights**, while the competent court has the obligation to make a decision thereto.
- During the **investigation,** the MoI is liable, whenever the investigative judge requires assistance by the MoI (criminal – technical and other) – upon his/her request to provide such a assistance; the investigative judge may entrust to MoI the enforcement of the order to search his/her home/persons or to temporary seize items; upon request or approval by the investigative judge, MoI may take picture of the accused or take fingerprints.

4. Ombudsman's Office

4.1. Introduction

The role of the Ombudsman as a body competent for protection of the constitutionally and legally guaranteed rights of citizens is established by the Constitution of the Republic of Macedonia. The Ombudsman is conceived as a control mechanism, with authorizations that do not contain any reprisal or decision-making, but instruments aimed at resolution of situations where the rights of the citizens are violated by acts or actions by a state administration body, and at the same time aimed at enhancing the awareness of the civil servants for the need to respect human freedoms and rights. With the provisions of the Framework Agreement and the constitutional amendment XI the position and status of the Ombudsman has been changed and amended, and at the same time the organizational structure and competence of the institution have been enhanced.

The function and performance of the Ombudsman of the Republic of Macedonia, as well as the comparative, theoretical and practical observations with regard to the function and performance of such and similar institutions in the countries with well developed democracies, showed that in order to have efficient performance and results in the work it is necessary to have in place relevant attitude of the state authorities towards this institution and good quality normative regulation that will enable independent and efficient performance of the function.

The Ombudsman protects the constitutionally and legally guaranteed rights of citizens when these are violated by acts committed by the state administration bodies and by other bodies and organizations, and concurrently undertakes actions and measures for the protection of the principle of non-discrimination and adequate and equitable representation of community members in the state administration bodies, the units of the local self-government, and public institutions and agencies.

The Ombudsman is elected and dismissed by the Parliament of the Republic of Macedonia upon proposal by the competent Parliamentary Committee, with a majority vote of the total number of parliamentarians; whereas majority votes of the total number of the parliamentarians who belong to the non-majority communities in the Republic of Macedonia is needed as well. The same procedure for election and dismissal of Ombudsman's deputies is followed. The Ombudsman function is not compatible with performing another public function and profession or with membership to a political party. In the conditions for dismissal, apart from the existing conditions with regard to the previous legal framework, a novelty was introduced which gives a possibility for dismissal of the Ombudsman on the grounds of incompetent and in bad faith performance of the function.

The special majority required for election of the Ombudsman is an instrument for preserving his independence, but the criteria for his appointment and dismissal (competence, impartiality) are a fertile ground for abuse and political influence, and therefore should be formulated more precisely, and maybe a special body which will define such criteria should be established.

Another factor that may have a direct impact on the independence of the institution is the fact that this institution is not financially independent, being one of the conditions of special relevance for such kind of institution, established with the UN Paris Principles.

4.2. Ombudsman's competences in cases of human rights violations by law-enforcement bodies

The competence and the manner of work are set forth by the Law on the Ombudsman. The law *inter alia* stipulates the handling of citizens' complaints, the implementation of the principles of impartiality, efficiency and responsibility; communication with the bodies of the state authorities; deadlines in the procedure, and so on.

The Ombudsman follows especially the situation with regard to the respect and protection of constitutional and legal rights of persons detained, arrested and serving a prison sentence. The Ombudsman may visit and inspect detention places, at any time, without any prior notice and approval, and to talk with the persons placed in these bodies, institutions, and organizations without the presence of law enforcement officials. Persons deprived of their freedom are entitled to submit a complaint to the Ombudsman, in a closed envelope, without being checked by the law enforcement officials of the body, organization or institution in which they are placed and to receive an answer in a closed envelope without any checks by the law enforcement officials.

The Ombudsman is entitled to undertake the following measures and actions for investigating a complaint:
- **Request necessary explanations, information and evidence** regarding the allegations in the complaint (both from the law enforcement officer and the complainant);
- **Enter the official premises and directly inspect the files** and matters falling under their competence;
- **Interview** an assigned or appointed person, and official or any other person who can provide certain data for the procedure**;** (the law enforcement officer has to come to the interview, but there are no sanctions if he declines to do so. This case may only be made known to the public as obstruction of the work of the Ombudsman);
- **Request** the opinion of scientific and specialized institutions**;**
- Undertake other actions.

Whenever the Ombudsman concludes that the constitutional and legal rights, of the person that has lodged a complaint have been violated by the state bodies to which the complaint refers, or that other irregularities, have been committed, the Ombudsman may:
- Give recommendations, proposals, opinions and indications on the manner of the removal of the established violations;
- Propose that certain procedure is reintroduced in accordance with the law;
- Raise an initiative for commencing disciplinary proceedings against an official, i.e. the official or responsible officer; and
- Submit a request to the competent public prosecutor for initiation of a procedure in order to determine a criminal responsibility.

The Ombudsman has two paths to follow. The first is examination and establishment of violated rights and undertaking measures for their removal, and the other path is the preventive action.

Due to the participation of the several different bodies and institutions that restricted the freedom or are liable for their safety and stay, the legal frameworks for examination of violated rights may be different. However, in all these three categories of such persons, there are three aspects which are general and essential and which the Ombudsman is taking into consideration while conducting the investigation and acting upon a complaint:
- reasons for arrest,
- treatment and

- conditions for stay and accommodation in the detention facilities.

Irrespective of the grounds on which persons are detained and apprehended, subject of investigation and action by the Ombudsman for this category of persons is:
- reasons for detention and apprehension;
- the manner of apprehension and the procedure during the detention;
- the behaviour of the officials, use of physical force;
- medical finding (if such exists);
- information regarding the rights and obligations of the detained person by the law-enforcement officials (the right of the person to be informed promptly of the reason for detention, the right to legal assistance, the right not to be kept in custody for a period exceeding 24 hours, the right to be brought before the court within this timeframe, the right to keep silent, etc.);
- conditions for stay and accommodation in the facility where the detained person is kept, and his/her treatment during the detention.

The action and procedure by the Ombudsman in such cases is frequently rather complicated when it should be established whether official authorisation are excessive and whether there is unjustified use of force. The main difficulty is the communication of such person with the Ombudsman when none is informed that such person is detained and in police custody, so frequently, following his/her release, when he/she comes before the Ombudsman, his authority to act is hampered as traces of unauthorised behaviour are concealed.

Consequently, of relevance are sources and information imparted on timely manner to the Ombudsman aimed at efficient prevention of illegal acts and excessive use of official authorisations. When there is a timely information, the Ombudsman may **visit the person,** and have a conversation with him/her without the presence by an official, **to discuss with the officials** – police officers, **to have an inside into the documentation** (whether the summon is handed to him, whether the official identified himself, whether the person is informed about the reasons for detention, to establish the time of detention and the time of release, etc.), as well as to inspect the premises in which the person is detained.

In case of established illegalities, irregularities or abuse of authorisation by the police, the Ombudsman may initiate criminal or disciplinary procedure against such official before the competent bodies. Also, imparting information to the public result in significant preventive effects.

The institution has **faced difficulties when cooperating with the MoI, in particular the SICPS**, and therefore, the view is that there is no adequate mechanism to hold accountable the perpetrators who exceeded official authorisations and prevent such actions in future. Namely, the institution has faced with rude refusal to give information on the names of the perpetrators, who, with their treatment seriously violated physical and psychical integrity of the citizens. Such an act is an additional reason to inform the public about the cases handled by the Ombudsman, upon which the SICPS and the MoI declined cooperation. Use of instrument Public Criticism was interpreted by the MoI as obstruction of the work of the police, where the excuse to release information was the reference made to the Law on Classified Information. In such cases, very frequently MoI submits criminal reports against persons subjected to excessive force, justifying that they have committed the criminal act of an "Attack on an Official". The above stated maybe interpreted as a kind of alibi to protect authorised officials exceeding their authorisation and committing criminal offences.

4.3. Statistics of the Ombudsman

During the course of **2005**, **391 complaints** related to the work of the MoI were submitted to the Ombudsman, out of which **40 complaints** for violation of rights due to the use of force during police actions. In **2006, 500 complaints,** related to the work of the MoI, were submitted to the Ombudsman, out of which **53 complaints** for use of force during police action, and only one referred to case of death.

Overview of more specific cases of serious abuse of power by law enforcement officials, upon which the Ombudsman has acted (2005/2006)

Period	Authorized official	Elements of Torture	Actions by Ombudsman	Outcome
Case 1 2005	Uniformed MoI members	Threats with firearms when detained and in police station, inflicted injuries with rubber truncheons and fist-blows	Criminal report	Imprisonment and termination of labour relation with dismissal
Case 2 2005	Members of Alpha Unit	**Serious injuries on the head** when detained and in police station, inflicted with fist-blows and hard items	Criminal report	Basic PPO decision pending, waiting decision following report by MoI, against the victim for Attack of Official
Case 3 2005	Uniformed MoI members	**Serious injuries on the head** and chest when detained and in police station	Criminal report	Basic PPO decision pending, waiting decision following report by MoI, against the victim for Attack of Official
Case 4 2005	Alpha Unit	**Serious injuries** on the head inflicted with hard items when detained	Criminal report	Basic PPO decision pending, waiting decision following report by MoI, against the victim for Attack of Official
Case 5 2005	Uniformed MoI members	**Serious bodily injuries inflicted when detained**	Criminal report	Basic PPO reported that the decision is pending, while awaiting answer by SICPS
Case 6 2005	Uniformed MoI members	**Serious injuries on the head**	Criminal report against unknown perpetrators (**no names reported by SICPS)**	No answer by Basic PPO, and MoI submitted criminal report against victim for Attack of Official
Case 7 2005	Uniformed MoI members	**Serious injuries on the head and bodily injuries, when checking suspects, outside the police station**	Criminal report against unknown perpetrators **(no names reported by SICPS)**	Basic PPO reported that investigative procedure is pending

Case 8 2006	Inspectors	Serious injuries with rubber truncheons all over the body during interview in police station	Criminal report by the Ombudsman	Basic PPO awaiting information from SICPS. Disciplinary procedure initiated by the SICPS
Case 9 2006	Inspectors	**Injuries on the head** during interview in police station	Medical certificate issued a few days following the incident, SICPS claims unfounded allegations	Procedure closed due to lack of evidence
Case 10 2006	Inspectors	Extracted confession in police station and inflicted **injuries on the head**	No medical documentation. SICPS claims no use of force	Procedure closed due to lack of evidence
Case 11 2006	Uniformed MoI members	**Serious injuries on the head inflicted** during interview in police station	Ombudsman submitted Indication and SICPS established no excessive force by authorised officials	SICPS initiated procedure against the law-enforcement officials for establishing responsibility, and the party submitted Criminal report
Case 12 2006	Alfa	**Serious injuries on the head and body** (not taken to the police station, but to another unknown location) when detained	SICPS established existence of excessive use of authorization following the Indication by Ombudsman	SICPS submitted criminal reports and Initiative for disciplinary responsibility
Case 13 2006	Alfa	During action and in police station inflicted **serious bodily injures with hard items**	Following Indication by Ombudsman, SICPS initiated (only?) disciplinary!! procedure	The party submitted criminal report before putting forward Complaint to the Ombudsman
Case 14 2006	Alfa	**Serious bodily injures with hits on the head** inflicted in unknown location	Ombudsman submitted Indication to SICPS	The party has had already submitted criminal report
Case 15 2006	Alfa	During action, outside police station, resulting in death – Official statement by Institute for Forensic Medicine – no signs of torture	Criminal report	Criminal report rejected

Conclusions:

- The existing constitutional and legal position provide for the required independence and impartiality, except for the financial independence;
- Authorisations provide prerequisites for carrying out an investigation, but in practice all measures are not fully implemented (law enforcement officials are not summoned for an interview);
- Existing instruments are lacking coercive instrument, leaving space for voluntary behaviour of law enforcement officials with regard to the recommendations, indications for undertaking measures to establish responsibilities in cases of abuse of power;
- The possibility to seek an opinion of scientific and professional institutions is not used in the practice due to a limited budged;
- The Ombudsman is not entitled to compel witnesses, especially those acting in official capacity;
- The Ombudsman is not receiving the evidence directly, but it is submitted by the body, thus living room for doubts that not always relevant evidence is submitted for the Ombudsman to establish the factual situation;
- There are no sanctions binding law enforcement officials to send relevant information and carry out recommended actions;
- The institution has not appropriate expertise to assess findings by medical persons with regard to violations resulting from use of force, i.e. has no professional medical staff;
- Has no conditions to request expert witnessing in case of doubts regarding the findings by competent institutions, due to lack of financial means for that purpose; and
- The decisions made by the Ombudsman have no legal power and are not binding.

4.5. Recommendations

- Enhancement of the institution's independence**,** primarily financial independence;
- Closely defining conditions for dismissal, i.e. defining how incompetent, impartial and in-bad-faith performance is to be determined;
- Foreseeing administrative fines for civil servants, state officials and office holders failing to act upon a request or recommendation by the Ombudsman;
- Setting up a special department within the Ombudsman institution that will deal with the category of persons referred to in Article 31 of the Law on Ombudsman, thus meeting criteria of the UN OPCAT.

5. Standing Inquiry Committee for Protection of Citizen's Freedoms and Rights

The political character of the protection of freedoms and rights of citizens is linked to the highest legislative body of the State – the Parliament of the Republic of Macedonia. The main goal for setting up the Standing Inquiry Committee for Protection of Citizen's Freedoms and Rights (Committee) is to establish political accountability of the holders of public offices in respecting the citizens' freedoms and rights.

5.1. Legal position of the Committee

The Committee is the only working body which the Parliament is responsible to set up according to the Constitution of the Republic of Macedonia. This Committee has been set up at the same time when other working bodies were set up. With regard to its composition, the Committee has nine members (chairperson and eight members), who have their deputies in case of their absence, thus providing unimpeded and continuous work of Committee.

The Committee has **two basic functions**:
1. To review human rights protection related issues; and
2. To initiate procedure for determining liability of holders of public offices, whenever the Committee finds that freedoms and rights of citizens are violated.

The efficiency of the Committee is limited due to the fashion in which it conducts its activities and functions. Namely, it does not exercise investigative or other judicial functions. It only debates on the situation with regard to freedoms and rights of citizens in principle and general manner. In particular, gives opinion and proposals on the legal formulation of freedoms and rights and the manner in which they are protected in the domestic legislation and adopted international instruments. The work of the Committee remains unchanged even in cases when citizens are pointing out possible group or individual violations of freedoms and rights in their (communications) complaints to the Committee.

Since the Committee has no Rules of Procedures, it uses the procedures, including the rules for publicity and voting, and methods of complaints handling (working groups, information, invitations for attendance of complainant's representatives) set forth by the rules of procedures of the Parliament, applicable for the remainder of the working bodies of the Parliament.

5.2. Composition of the Committee

With regard to the composition of the Committee, there are no strict legal rules regarding how it is constituted. A principle according to which the chairperson position in the Committee belongs to the Parliamentary Opposition (most frequently the most numerous opposition party or opposition block in the Parliament), while the majority is reserved for the biggest parliamentary group or coalition of the ruling party. Thus, 6 seats in the Committee are reserved for the parliamentary majority (4 for the most numerous parliamentary group, and the remaining 2 seats for the smaller parliamentary groups of the parliamentary majority), while 3 seats are reserved for the parliamentary opposition, irrespective of the size of the parliament groups. The composition of Committee just reconfirms the political character of the Committee, and therefore that the efficiency of the system for protection of the freedom and rights is prone to compromise.

5.3. Functioning of the Committee

From the practice implemented until now in the Committee, several basic characteristics could be observed:

- The Committee is not discussing at all about the situations, falling under its competence, with regard to the protection of freedoms and rights of citizens, in principle and general manner, in particular, when analyzing legal projects on rights and freedoms, controversies about the implementation of specific legal institutes that might endanger freedoms and rights, etc;
- The Committee is mostly concentrated on review of citizens' complaints (individual and collective) regarding violation of freedoms and rights;
- The Committee cooperates with non-governmental organizations and institutions dealing with the protection of freedoms and rights of citizens;
- The work of the Committee is open to the public, although the Rules of Procedure give the possibility to work in closed session. The complainants are invited to attend the sessions of the Committee;
- Having in mind its political character, very frequently the Committee is blocked in its work, and consequently, the efficiency of its role in protecting freedoms and rights of citizens is at stake;
- The composition of the Committee very often leads to majorization of its work, thus blocking the process of efficient and independent protection of freedoms and rights of citizens. The attempt to abuse the Committee for political purposes is increasingly present, manipulating with freedoms and rights in the interest of building negative image for the current government.

5.4. Procedure before the Committee upon communications, complaints and citizens' requests for protection of freedom and rights

Any citizen, group of citizens may initiate a procedure before the Committee, in writing or orally. Usually, documents and case files must be enclosed with the complaint, on the basis of which, the factual situation may be established and, if failing to do this, the complainant is advised to act thereto. The complainant may be assisted in formulating the complainant in order to accurately establish violation of the right referred to into complaint. Since complaints give a signal or address direct violation of human rights, it is transferred to the concerned body indicated in the complaint that it violated the rights, in order to make a statement upon the complaint. If the nature of the complaint requires it, the Committee, in its communication to the concerned body, will quote provisions from the Constitution and international documents at which the violation of the rights refers to, and the body concerned should take them into consideration when giving the answer. In cases where the violation of rights is evident, the body concerned is reminded that its further action leading to violation of rights and freedoms of citizens, may constitute a ground for further action by the Committee, i.e. producing finding for establishing political liability.

Statistics related to the activities of the Standing Inquiry Committed during the period 2002 - 2006

Number of complaints		**Complainant Gender Structure**		**Geographic Representation**		**Ethnical Affiliation of the Complainants**	
Individual	44	Male	31				
Group	30	Female	9	Skopje	33	Macedonians	24
		Spouses	4	Kumanovo	4	Albanians	2
				Bitola	3	Roma	3
				Prilep	3	Serbian	1
				Kicevo	2		
				Tetovo	2		
				Gevgelija	2		
				Berovo	2		
				Makedonska Kamenica	2		
				Ohrid	2		

Structure of Group Complainants		**Types of Complaints**	
Trade Unions	9	Labour Relations	16
Private Enterprises	6	Judiciary	14
Group of Citizens	5	Distractive Procedure	10
State Bodies	4	Social Requests	6
International Associations	2	Police Actions	5
Parliamentary Party	1	Urbanism	4
		Statutory Issues in Public and Private Enterprises	4
		Displaced Persons	4
		Local-Self Government	4
		Public Prosecutor's Office	3

Most frequent actions undertaken by the Committee:

- Received for discussion (47)
- Instructions on the activities that are to be undertaken by the complainant (33)
- Requested information from competent body (32)
- Given advice to wait decision by competent body or the Ombudsman (26)
- Assisted in formulating a complaint (23)
- Received answer (17)
- Debated before the Committee (6)

5.5. Conclusions

- The Committee is an underdeveloped, inefficient and politically influenced mechanism for protection of citizen's rights and freedoms;
- Due to its political nature, this Committee has failed to become a serious mechanism for protection of rights and freedoms of citizens during the recent fifteen years, and it is perceived as a mean for political fighting, by abusing the concept of human rights protection;
- Although, the constitutional character of the Committee is undisputable, it has failed to develop its own procedure and methodology different from the one of the other working bodies of the Parliament, especially taking into consideration the specifics of human rights protection;
- The debate within the Committee regarding the situation with freedoms and rights of citizens in a general fashion is another argument supporting the underdevelopment of such system for protection of rights in the Parliament of the Republic of Macedonia;
- The work of the Committee is affected by insufficient knowledge of problems related to the protection of freedoms and rights by the parliamentary members of the Committee, and consequently the Committee has to cooperate with the non-governmental and other organizations dealing with human rights protection;
- The Committee failed to impose itself as functional and national system (mechanism) for protection and promotion of human rights, beyond the partisanship concerns. In addition, it cannot play the role of a national institution for human rights protection, at least, not according to the criteria required in the UN Handbook, No. 19 on National Institutions for Protection of Freedoms and Rights of Citizens;
- Apart from already indicated shortcomings, the Committee lacks infrastructure favourable for unimpeded performance of its task. In this respect, the present capacity is extremely modest both in number of state officials, (technical service) assisting the Committee and its premises and technical conditions.

6. The Committee for Supervising the Work of the Security and Counter-Intelligence Directorate and the Intelligence Agency

Supervising the performance of the intelligence work is one of the key factors of the securing the mechanisms for following of the legitimacy in the work of the Intelligence Agency (Agency) and Security and Counter-Intelligence Directorate (Directorate) at the MoI. With the Law on Intelligence Agency, it is determined that "the Assembly of RM is supervising the work of the Agency through appropriate Committee". The Committee is presenting report for performance to the Assembly of RM at lest once per year. Before the report is submitted, the Committee is obliged to present the report to the Director of the Agency for obtaining his/her opinion and especially from the aspect of protection of confidentiality of certain parts. "The Director is obliged to enable insight and to present all reports and data within the mandate of the Committee". There are similar provisions set by the Law on Internal affairs in which the supervision over the Directorate is regulated.

In parliamentary practice, the Committee requests annual report from the Agency and Directorate and inspect the reports jointly. The Agency is submitting summary of its report, while and the Directorate is submitting the whole report. Having in mind the report are with confidential content they are inspected only by the members of the Committee, and other members of the parliament are not receiving the above-mentioned reports.

Based on the Committee's request, access can be approved for the members of the Committee to the top-secret information and their insight and to the security organs, as in the case/affair with unauthorized phone tapping on high officials, politicians, journalists etc. from the end of year 2000 and the beginning of 2001. This right to intermediate insight and access to top-secret information was given to the president and several members of the Committee.

The legal provisions for supervising the Work of the Directorate and the Agency are basis of conducting of parliamentary control. Nevertheless, it must be emphasized that in this way presented legal obligation is too general and insufficiently precisely set. The missing part is determination of clear procedure throughout which the parliamentary control is going to be conducted and readiness of intelligence agencies to cooperate with the Committee supervising their work.

6.1 The legal position of the Directorate

The Directorate is a body within the MoI formed for execution of affairs related to security and counterintelligence. Pursuant to the Law on Internal affairs, security and counterintelligence refer to activities for protection and espionage, terrorism or other activities directed towards endangerment or destruction of the democratic institutions determined by the Constitution of RM with violent measures as well as for protection from more severe forms of organized crime.

The Directorate is managed by Director that is appointed or dismissed by the Government of RM on four years and on suggestion on the Minister of Internal affairs. The Director is autonomous in the accomplishment of the tasks of the Directorate and for it is responsible to the Minister and Government of RM. In accomplishment of the duties from own authorizations, staff from the Directorate has right to collect data, notifications and information from its scope of activities. The Assembly of the RM supervises the work of the Directorate through the Commission.

6.2 Authorizations and composition on Committee

The Committee is composed of a president and eight members that have their own deputies in order to enable continuous functioning of the Committee in cases of the absence of some of its members. With the aim of building trust between the political subjects it is accepted that the President of the Committee is to be nominated by the largest opposition party represented in the Parliament.

The Committee is authorized to discuss questions related to:
- Respect of the rights and freedoms determined by the Constitution and laws by the Directorate and the Agency on citizens, companies and other legal entities;
- Lawfulness in the performance of the authorizations of the Directorate and the Agency from the aspect of abuse of authorizations, undertaking illegal procedures, misuses etc.;
- Methods and means that are used by the Directorate and the Agency from the aspect of lawfulness and respect of rights of citizen and other entities;
- Material, personnel and technical equipment of the Directorate and the Agency;
- Other issues related to the Directorate and the Agency.

6.3. Conclusions

- Established as a form of civil control over the Macedonian secret services the Committee did not respond to the imposed challenge. Namely, in the last three years, the secret services did not submit any reports on its work to this Committee;
- The non-functioning of this Committee has given space for political misuse of these services, and especially on the methods of their work that seriously interfere in the rights and freedoms of the citizens. For that reason, the involvement of the Directorate in the affairs of illegal phone tapping on certain political subjects presented in 1989, and especially mentioning of this service in the affair of phone tapping from 2000/2001 and the case of German citizen Al Masri from 2003 was not surprising at all;
- The functioning of this Committee is problematic and because it is obvious it is not a form of parliamentary control over the executive power, but for collision and control within the parliament – between the opposition and position. This control is not in condition to provide systematic and continues control of intelligence services, which opens the space for their misuses for political goals and purposes;
- The Directorate as a segment of the intelligence system of Republic of Macedonia instead of serving the state has become a powerful tool of political control, ignoring the principles of ethical and professionalism in its work. Because of that, the general tendency of every government has been to minimize the role of the Committee. The best proof of this is the example of the last presentation of the report of the Agency, where intentionally the Committee was eliminated in their work and the report was forwarded to the President of the state, prime-minister and president of the Assembly. However, based on the request of the President of the Committee, for the first time after three years reports from the Directorate and the Agency were delivered and reviewed during a closed session.

7. Non-Governmental Organizations

7.1. Introduction

The civil sector represents a crucial, if not essential pillar in the protection of human rights in the country and it appears as a constant "watchdog" of the human rights situation, informs the public about the determined situation, which in a later phase is used for awareness raising and for providing proposals and ideas on how to improve the human rights situation.

The NGOs that are active in the field of human rights are accomplishing an essential role of informal controller of the work of available institutional and legal mechanisms for human rights protection. Namely, there are NGOs which register cases of violation of human rights by law-enforcement officials, and they provide free legal advice to alleged victims on how to realize their rights, on how to submit a complaint to the available mechanisms, as SICPS, Ombudsman, PPO, and they are following how the complaints are processed in the system.

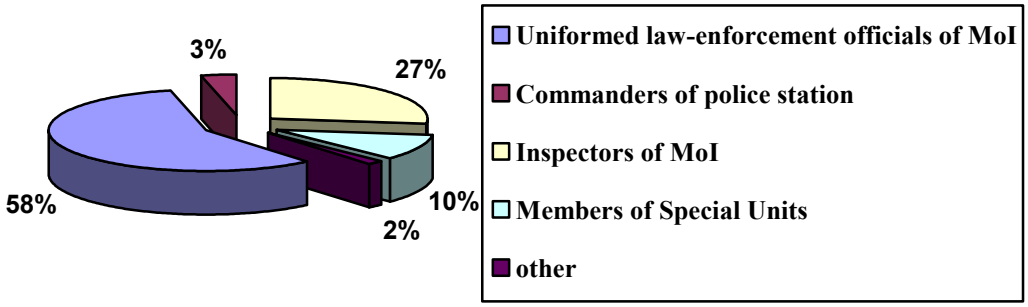
The NGOs are monitoring/following the way in which the submitted complaints are processed by the available mechanisms, based on which they are making conclusions and recommendations for adequate improvements and legislative and practical changes. However, it is questionable as to how seriously the State approaches the recommendations of the civil sector, and whether they are taken into consideration during the creation of policies.

7.2. Human Rights Support Project (HRSP)

The HRSP is comprised of five NGOs (Coalition "All for Fair Trials", ARKA, CDD, CCI and Choice) and represents an initiative of the civil society in RM that is focused on the occurrence of the unlawful conduct or abuse of power by law-enforcement officials.

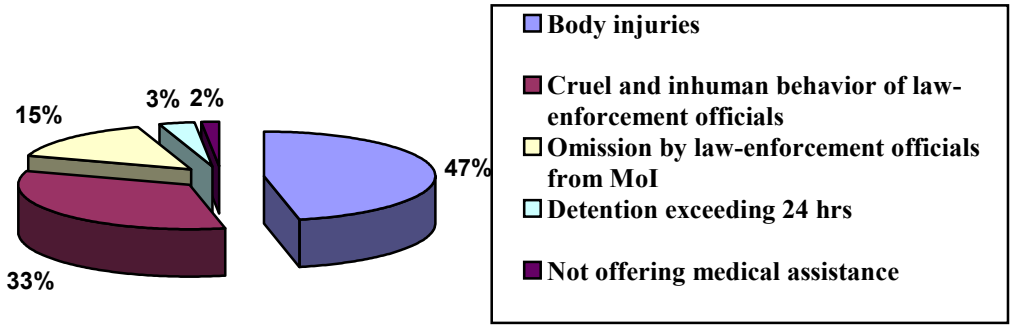
Within the scope of this project there are 162 registered cases of unlawful conduct or abuse of power by law-enforcement officials. 63 of registered case are closed. In total there are 99 open cases, out of which 55 are registered in 2006.

Law-enforcement officials involved in the cases
The majority of the cases are implicating uniformed law-enforcement officials, inspectors as well as members of the special units.



Rights allegedly violated by the law-enforcement officials

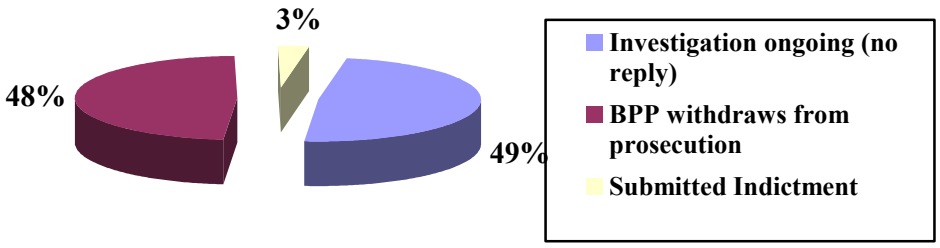
When we are talking about the committed violations, the alleged victims in most of the cases are complaining of bodily injuries, ill-treatment, as well as of detention exceeding 24 hrs.



The results of the criminal reports submitted with the PPO

During the period of 2005 and conclusive with 1 November 2006, 33 criminal reports have been submitted with the PPO. While the number increases to 38 until December 2006, out of which 10 were on the grounds of Torture and other cruel, inhuman or degrading treatment and punishment, art. 142 from the CC, 18 for maltreatment while performing duty, art.143 from the CC, 7 for misuse of official position and authorization, art. 353 from the CC and 3 for violation of the inviolability of the home, art.145 from the CC.

Outcome of the submitted criminal reports



Only in one case has the PPO made an Indictment; in 16 cases the PPO has withdrawn from prosecution, in 9 cases the damaged party has been advised to submit subsidiary complaint, and the other cases do not have any answer.

Civil claim for compensation of damage

According to the registered cases within the HRSP, main finding is that the alleged victims are not interested in confirming the criminal responsibility of the law-enforcement officials, but they are directly initiating a civil claim for compensation of damage.

Claims for compensation of damages are raised in 15 out of the total number of registered cases under the HRSP. Only one has an epilogue and the same one is raised over ten years ago, and the victim has received 120,000.00 MKD as a compensation for damages. All other claims are before the First Instance Courts or Courts of Appeals. It is interesting that in one of the registered cases a verdict for a civil claim by the Basic Court Skopje I, has been brought, by which the MoI is obliged to pay 300,000.00 MKD to a citizen for severe bodily injury committed by a law enforcement official. Contrary to the obligation from the LCP, article 142 (1), the Court in the concrete case has not informed the BPP or the SICPS at the MoI, in order to enable criminal prosecution of the officials involved.

8. Concluding observations

It can be concluded that institutions authorized to conduct control over the police, and other bodies authorized to use coercive measures and firearms are **seriously disappointing** in accomplishment of their important role in a democratic state governed by rule of law. A general observation is that **they do not use entirely the authorizations that are given to them by the existing legislation**. Common shortcoming of almost all (some more, some less) is non-professionalism, lack of serious devotion to the role devoted in the system and lack of proper proactiveness and consistency in solving the cases of abuse of power.

Let us resume shortly:

Internal control in the MoI, Sector for internal control and professional standards has significant realistic authorizations and capacities for thorough and efficient investigation of cases of abuse of power by law-enforcement officials. So, beside the problems with independence and impartiality with right presented in jurisprudence of ECtHR, the SICPS is indispensably the most competent body that usually intervenes first and whose "services" as we can see are used by PPO and the Ombudsman when they are dealing with cases reported to them. The human rights NGO are also addressing to them requests for information and complaints. On the other hand, experiences from comparative law are showing that internal control everywhere is irresistible instrument in fight against abuse of power by law-enforcement officials. Because of that, we should furthermore work energetically and systematically for promotion of the independence, impartiality, professionalism, skills, the human resources and technical equipment of the SICPS. The problem of "dual standards" is related to the professionalism, and which demands serious work. How MoI will be more capable to solve and to process the majority of cases of police misuses, so much easier will be for the other control bodies to perform their own role.

CPT also insists that the "Fight against impunity must begin at home, i.e. in the frames of the concerned institution, in this case MoI. Too often team spirit leads to willingness to help each other when there are allegations of misuses, in order to cover illegal activities of colleagues. Positive action is requested throughout trainings and, for example, it is needed to promote a culture that will consider it unprofessional and uncertain for one's career to work and keep contacts with colleagues that reached towards maltreatment, and at which and will take into consideration as proper and professionally payable to have contacts with teams that abstain from such acts. An atmosphere must be created in which it is thought that is proper to report maltreatment performed by colleagues. It must be clearly understood that guilt of maltreatment is not stopping only with offenders, but continues to those persons that have knowledge that maltreatment is ongoing and did not report or not acted to prevent from happening".[85]

Nowhere in Europe lacks a standardized mechanism for internal control, but they differ from state to state, and the systematic decisions for protection of rights and freedoms, security and awareness of the citizen are crucial.

Since 2001, development in the Sector has been assisted by ICITAP, and it is being done according to the American model. With police reforms, the SICPS is continuing to be developed according to best European practices and for that greatest contribution was made by the former PROXIMA Mission.

[85] See: Report to the Government of "the Former Yugoslav Republic of Macedonia" on the visit carried out by the CPT from 12 to 19 July 2004 (CPT/Inf (2006) 36 paragraphs 31-36; CPT/Inf (2003) 3, paragraphs 28, 34, 56 - 64, CPT/Inf (2003) 5, paragraphs 13 - 32; CPT/Inf (2004) 29, paragraphs 28 - 33. (http://www.cpt.coe.int).

Fulfilment of "Minnesota" rules from SICPS is conditioned by fulfilment of several assumptions. Firstly, it is necessary to provide the legal framework that will strengthen the position of the SICPS, will expand its authorizations and provide legal protection and guaranties for security of working positions of its staff. It is necessary to strengthen the selection criteria for the staff that is employed with the SICPS, emphasizing the principles of competence and affirmation of moral, human and professional credibility of the candidates. It is necessary to provide material and technical assumptions, and before everything, computerization and software support so the work of the SICPS can be properly managed. In addition, it is necessary to start with the analytical-research work, in order to notice the weakness in the work of the SICPS, and according to this necessary education and training of the SICPS's staff to be defined and realized. Important segment in accomplishment of "Minnesota" rules is the transparency of work of the SICPS and its cooperation with the Ombudsman institution. Creation of these assumptions is a key condition for providing guaranties for fulfilment of those rules.

Judiciary and public prosecutors office. Whatever prosperity was achieved in SICPS, key role for control over the police in every legal state has the criminal justice system – **court and public prosecutors office.**

In its reports, CPT is highly critical in relation to not acting of relevant authorities in relation to allegations and other information that point out to maltreatment. CPT concludes that judges and prosecutors are showing small interest, even if there is indisputable evidence for maltreatment.

Too often, there is tendency at relevant authorities to avoid responsibility for taking steps necessary for effective investigation. It is not rarity for these authorities to show sympathy for protection of authorized officials that are subject to allegations. It is indisputable that intensive acting will be necessary in criminal justice system and the MoI, in order to overcome the inaction and obvious "support" that in this moment is undermining the system of responsibility and accountability of those officials.

Public prosecutors office and judiciary has key role. It is imperative that they take decisive action when during the procedures that are ongoing in front of them; information that is pointing to maltreatment is appearing. In addition, they should lead the procedures on that way that involved persons will have realistic possibility to give a statement on ways that they were maltreated.

When persons suspected of criminal acts are brought before a public prosecutor or judiciary and they are alleging maltreatment, those allegations should be noted in written form, medical expertise should be prescribed (inclusively inspection of court psychiatrist if there is a need) and proper actions should be undertaken to assure that allegations will be properly examined. This approach should be accompanied with inspection if involved persons have noticeable injuries. *Even in absence of assertive allegation for maltreatment, there should be requested a medical examination when there is other ground that certain person was victim of maltreatment.*

It should not be forgotten the principles of effective investigation of eventual maltreatment conducted by authorized officials presented in the CPT reports. Firstly from crucial meaning is that persons responsible for conducting investigation should be independent from persons that are involved in the events. Furthermore, *public prosecutor should* ***monitor carefully and effectively*** *the conduction of criminal investigation for eventual maltreatment by law-enforcement officials.* ***Clear guidelines*** should be given in relation to the manner in which the public prosecutor is expected to oversee such investigations.

Investigation should respect the criteria of thoroughness. It must bring to decision if the use of force or other methods was justified, taking in consideration the circumstances and to determine the punishment for involved persons. There is no obligation the outcome of the investigation to be such, but the obligation is imposed on the manner in which the investigation is conducted. This requires undertaking reasonable steps in order to assure evidence in relation to the incident, inter alia, inclusively, identification and interviewing of alleged victims, suspects, witnesses (ex duty officers, other arrested persons), in order to identify the instruments that maybe were used while maltreatment and to gather court evidences. Other condition that should be respected is thoroughness; if there are many alleged incidents and facts related to the eventual maltreatment, scope of the investigation should not be limited. In order to be effective, investigation should be conducted *promptly and in reasonable deadline.*[86]

It is obvious that regardless how effective the investigation is, it will not be useful if the prescribed penalties for maltreatment are inappropriate. When maltreatment is proven, an appropriate penalty should be imposed. Strong effect for persuasion would be achieved. Similar to this pronunciation of mild penalties can bring to creation of climate of impunity[87].

First important step in this direction is done with the new Law for Public prosecutor that is in parliamentary procedure. That law is introducing clear principle of responsibility of public prosecutors office as *dominius* of the pre-investigative procedure and protector of legality and human rights. PPO is protecting the legality of the measures and acts undertaken in pre-investigative procedure and in that sense is monitoring the respect of human rights from the police and other state bodies with special authorizations[88]„

In order to overpass the problem of police solidarity that results with concealment and impunity of police misuse of authorizations, the new Law on PPO foresees a kind of automatic control of PPO **over all incidents** of the police that resulted with serious consequences (art.36 of the new Law on PPO). Certainly that PPO as until now, without any kind of mechanism can (and according to the Law, it must) prosecute the perpetrators of the offence that can be qualified as criminal acts but, as already mentioned, the practice shows that solidarity does not end in MoI, however the alliance exists (or at least a sort of tolerance) between the police and PPO, which can be seen by the fact that police officers are being prosecuted for criminal acts done within the frames of the service, only when they are exposed by the media.

For that reason, the new Law on PPO is now making an attempt to regulate two situations. First, in all cases when the PPO will *hear* about *overstepping police authorizations and/or* human rights violation, the public prosecutor requests to be informed whether a procedure or pre-investigative procedure has been initiated (art. 36, paragraph 1). It should be a procedure for determining the justification of the usage of authorizations and the possible disciplinary procedure or pre-investigative (depending on the nature of the act) because criminal procedures can be initiated only by the prosecutor). If there is no appropriate procedure initiated for determination of responsibility, the PPO initiates investigation *ex officio*. From the other hand, for cases of usage of fire arms with consequences of severe bodily injury or death, the PP initiates procedure ex officio which is regulated by the law for determination the justification of the use of fire arms.

[86] Para. 33.
[3] See: //www.cpt.coe.int/documents/mkd/2006-36-inf-eng.htm.
[4] Recommendation to Member States on the role of public prosecution in the criminal justice system (2000), 19.

The main deficiency until now was that public prosecutor sent back the procedure to MoI instead of conducting detailed investigation in all cases where there are indicators of police misconduct, to which CPT and ECtHR[89] are insisting. These provisions are connected to art 81 from LP, where it is also foreseen certain automatic control of the SICPS. Namely, the public prosecutor *ex officio* will receive the report from the SICPS for determining the justification of the use of firearms by the police officials and of other state bodies authorized by the law, if the use of weapons has resulted in severe bodily injury or death. The public prosecutor will have to have access/insight to all evidence and writs based on which the decision for justification of the use of firearms has been brought.

Ombudsman: If certain solidarity within the MoI and the solidarity between police and public prosecutor can not be approved, but at least it can be understood having in mind their cooperation in revealing and prosecuting crime, it is hard to understand the failure of the Ombudsman. Indeed, this body, and the Ombudsman himself in the last two years demonstrated bigger aggressiveness while confronting MoI especially in cases of police misconduct. However, instead of going out in the field and actively collecting evidence by interviewing the involved parties, hearing the witnesses, securing forensic and autopsy, he awaits information from MoI and corresponds with the SICPS. It is difficult for a country which attempts to obey to the rule of law to find understanding even for the deficit of material means for medical examinations and other source of expertise. If the Ombudsman wants to be seriously understood and to act as a controller of the police, the institution will have to work on human and material resources as well as to receive appropriate trainings for investigators that are supposed to conduct thorough and effective investigations similar to those of SICPS or CPT. For the above mentioned issues the Ombudsman institution can learn more from many other countries in the world. Certainly that future specialization of a special department or establishment of special police Ombudsman as in Northern Ireland deserves greater attention[90]. Otherwise, the observation of ECtHR in the case of Jashar saying that the Ombudsman is not an effective legal remedy per se should not be interpreted as a discredit because this remark is given from the aspect of the request for exhausting all domestic legal remedies, and not in general (similar to the stand for the SICPS). On the contrary if the investigation is thorough and results in founded criminal charge it should be efficient from the aspect of the required standards for cases of police misconduct.

From the above-presented data and from the report of CPT, as well as from the different governmental and non-governmental organizations (Amnesty International, Helsinki Watch, Helsinki Committee for Human Rights in RM etc.) it is noticeable that police misconduct are not only few isolated incidents of individuals. On the contrary, vis-à-vis the declarative adoption of modern valuable paradigm both lawful state and human rights and freedoms, the police in RM considers that persons who in accordance to them violate the law do not deserve any kind of rights. Actually, they look at human rights as something that limits successful law enforcement. This is a police subculture that is really hard to change. What worries the most is that these values are shared by the bodies that in one lawful country should control the police – SICPS and the PPO, and even the Court. Instead of sanctioning the cases of police misconduct they attempt to cover and conceal.

This is a serious occurrence of impunity, of police misconducts which in the reports of the CPT has special emphasis. There are many reasons for this, but except the mentioned problem shared

[89] See: CPT's 14th General Report, paragraphs 25-42 (CPT/inf (2004) 28), The CPT standards, CPTINF/E

[90] For example, the special Police Ombudsman is being informed by the police for any kind of use of force during each case of arrest, interrogation or other action; the police is obligated to appoint an official person that will assist the Ombudsman in the investigation; there is a guaranteed cooperation between the Ombudsman and the police.

values, mainly, if it could be said, solidarity with "colleagues" or avoidance and even fear "to deal with" the police. The reasons for the dysfunctional system deserve special attention and possibly special research. At the bottom line if the problems lie in the dual morality, the legal (lack of) culture, incompetence, lack of education and training, human and financial resources etc., consequently there is no sense to request the solution of the above mentioned weaknesses in some new institution. If we have concluded that the existing institutions do not use the given authorization and capacities why would we expect that from another new body? That leads us to a conclusion that the problem is complex and multidimensional, which means that it can not be consistently overpass by a simple creation of new institution and/or better legal solutions.

Such argumentation leads to the fact that clear policy should be taken towards some issues. For example there is a need for serious research on the main sources which lead to undelivered justice, because even the known reason has not been truly subjected to research. Second step would be development of systematic solutions that should secure significant reduction of the revealed problems and risks.

Besides the analyses and assessments for each of the competent institutions, it is really important how the system functions as a whole. In that sense, it is important - if we could put it that way - inter-institutional ‘games’ in sense of certain check and balances.

When we are discussing about a possible new body, it is important to know whether it would be kind of genuine bearer of the independent investigation like SICPS, public prosecutor or to certain extent, Ombudsman, or it would be a kind of "controller" of the authorized institutions for investigation - like NGO, media, Parliamentary Committees, CPT, European Court for human rights etc. which undertakes activities when the system would conceal (more precisely, the previously enlisted). However we decide, the main point is the state to be able to conduct impartial, fast and efficient investigation that will result in appropriate sanctions for the perpetrator and with just compensation (moral and material) for the victim (or family). How will the state secure this, it seems, there are no ready receipts. What seems important to us is the existence of will, knowledge and interest to do something in the interest of the citizens.

Special attention should be paid to the following issues:

- The legal framework has important role. All competent state institutions have to possess clear legal obligations and authorizations for undertaking thorough investigations, whenever well-grounded information for a case of police misconduct, is received;
- The legal provisions, certainly would not be enough to guarantee effective, thorough investigation and due to that a special attention should be paid to the development of a sense and dedication to the competencies that have been granted;
- The competent authorities must accept that in such cases, they have the obligation to undertake decisive action. This also means to undertake all the measures for through and prompt investigation pursuant to the international standards;
- The investigations of police abuse allegations should include field work, urgent forensics and interviews with suspects and witnesses;
- The institutions competent for investigations of such cases should be equipped with all needed material, technical and human resources. They should be independent from the involved in the case/event;
- Investigations must be thorough, comprehensive and able to bring to a decision whether the use of means of coercion or fire arms was justified in the given circumstances, and whether the prescribed procedures were respected, and to enable the identification and punishment of the involved officials.

On the other hand, even though they are incomplete and scientifically verified and systematized, the available statistical indicators show that it is not justified the attention to be focused solely on cases of where severe bodily injury or death have occurred. These are very few in comparison to the number of cases of torture or ill-treatment that are of huge dimension. Even if that is not an immediate task of the group, we can not avoid indicating the measures that MoI and other competent institutions should undertake in order to prevent these unpleasant arises. The clearer legal norms for police authorizations, the training on legal use of means of coercion during arrest, detention and apprehension (when the mostly abuse of power and authorization is committed) and a special set-up of the conditions and the way of dealing with the persons kept in police stations (where the mayor misuse-torture, inhuman treatment happen) can significantly reduce the incidents, as in a country where the rule of law is obeyed.

In the end, we should not forget that practices of reforms up to now show that the way on which the police, PPO and courts work on cases in their everyday practice and in the majority of cases the procedure is based on unwritten rules which are hard to be changed by amending the legislation and the administrative measures. We are stating that when debating about possible solutions for bigger control on police, the local legal culture has a great impact. The existing mechanisms can even be disrupted in case the new legal solutions are imposed without appropriate preparation and real assessment of the success and the possible risks of the reforms.

Appendix 1

Analysis of the domestic cases regarding Article 2, 3 and 13 of the ECHR before the ECtHR

1. Jasar v. the Republic of Macedonia (Application no. 69908/01)

On May 11, 2006 the ECHR having deliberated on the appeal by Perjusan Jasar from RM, founded it admissible.

1.1. Facts of the case

On April 16, 1998 Perjusan Jasar (Roma from Stip) was in a local café where two men were gambling. The man who lost pulled out a gun and fired several shots. In the police raid Jasar was brutally caught by his hair and put into the police car. During the police custody he was hit on the head and beaten with rubber truncheons by the police. The medical certificate issued immediately following his release from the police station the next morning, supported that Jasar had injuries on his head and back.

In May 1998, his legal representatives filled a criminal complain with the PP against an unidentified perpetrator - the police officer who has beaten him while in the police custody. Investigative activities had not been carried out to confirm or reject allegation in the criminal complaint for more than eight years. Also, Mr. Jasar submitted a compensation claim of non-pecuniary damage, which was dismissed in 1999. After Mr. Jasar had exhausted all available legal remedies, he, through his legal representatives, submitted an application to ECHR. In the application to ECHR, Mr. Jasar claimed that he has been subjected to acts of police brutality specified as torture and inhuman and degrading treatment and violation of Article 3 of ECHR. Also, in the application he called on the fact that the Prosecutor has not carried out any investigation that would lead toward the identification and punishment of the police officer responsible for his torturing during the custody in the police station, which, according to his legal representatives, constituted procedural violation of the same article. Inability to have efficient legal remedy in the domestic legislation because of the failure on the part of the authorities to investigate into the allegation in his criminal complaint, he believed that Article 13 of the Convention had been violated, [91] in conjunction with the violation of Article 3.

The Government of the Republic of Macedonia, in response to the complaint by Mr. Jasar found that the case should not have been considered as admissible by the ECHR, because not all domestic legal remedies have been exhausted. According to the Government, Mr. Jasar should have complained to the police officer in charge of the police station, or, to the SICPS in the Ministry of Interior for initiating an initiate disciplinary procedure against the responsible police officer. Also, the Government found that the applicant had failed to bring administrative proceedings before the Supreme Court of RM, and also had not referred the case to the Ombudsman in regard to the police brutality manifested during his police custody.

[91] According to Article 13 of the Convention "Everyone whose rights and freedoms are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in a official capacity. "

With the decision on admissibility of the case of Jasar v. RM, the Court found that the applicant exhausted all available possibilities to use domestic legal remedies available in the case.

1.2. The Court Assessment

What the Court had admitted as indisputable is the fact that in cases where an individual makes allegations that he has suffered treatment at the hand of the police or other agent of the state that have similar authorisation infringing Article 3 of ECHR, where due to the fulfilment of the obligation of the state according to the Article 1 of the Convention, to secure to everyone within its jurisdiction the rights and freedoms of the Convention, the state is liable to carry out efficient official investigation. The aim of the investigation is to identify and sanction that person or persons who had violated the rights of the ECHR, in the given case the right to freedom of torture. Without such an investigation, the protection of this right would have been inefficient in practice, thus making possible impunity of the state law enforcement officers to abuse the right of those under their control.[92] **The Court requires the state to carry out expeditious investigation, which implies prompt response by the state regarding alleged violation of the right of freedom of torture.**

In the given case, the applicant had filed a criminal complaint and claim for compensation of damage immediately following the violation of his right, however, an investigation had not been carried out regarding the case, and special justification has been given regarding the reasons for delay. Although the applicant had not been informed about the identity of the person responsible for the violation of the right of Article 3 of the ECHR, the mere fact that he had filed a criminal complaint for police brutality against unidentified perpetrator, with medical certificate of the injuries, for the ECHR it had been sufficient to admit that the relevant authorities of the state had been informed about the case, and that the case must have resulted in at least founded suspicion that the applicant's injures might have resulted from the treatment during the police custody. The Public Prosecutor had an obligation to carry out a procedure for establishing whether the criminal offence had been or had not been committed, which he in the given case had failed to do. The competent authorities did not carry out a procedure to establish who of the police officers at the time when the injuries had been inflicted had been present in the police station, or interrogate the witnesses and the doctor who had certified the injuries. The Public Prosecutor had failed to collect evidence to support or deny the criminal complaint for ill-treatment in the police station.

Inactivity (failure to act) of the Public Prosecutor in the given case prevented the applicant from taking over a subsidiary complaint and had limited his possibility for access to subsequent proceedings before the court of competent jurisdiction.[93] The Public Prosecutor neither dismissed nor act upon the filled criminal complaint by the applicant.

In the assessment for efficient legal remedies, ECtHR has assessed not only the formal existence of such legal remedies, but the general context in which they had been implemented in any concrete case. The applicant did everything that was in his power to exhaust the legal remedies available in the given case, but he had been prevented from doing so. With regard to the initiation of proceedings before the body for internal control of MoI, the ECtHR found that such proceedings may be accepted as efficient legal remedy in the given case, when such a body would have been independent. Also, the Court found that the Ombudsman may not consider

[92] Corsacov v. Moldova, no. 18944/02, Â§ 68, 4 April 2006; Labita, cited above, Â§ 131, ECHR 2000 IV; McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A no. 324, p. 49, Â§ 161; Kaya v. Turkey, judgment of 19 February 1998, Reports 1998 I, p. 324, Â§ 86; YaÅŸa v. Turkey, judgment of 2 September 1998, Reports 1998 VI, p. 2438, Â§ 98

[93] Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI, Â§ 98

what kind of efficient legal remedy that the applicant had at disposal, as the Ombudsman was not authorised to make binding decisions, except to indicate possible violations of the rights.

The Court in Strasbourg held that the investigation in the case of the applicant had not been efficient, and as consequently the violation of his rights from the Convention had continued.

2. Amdi Dzeladinov and Others v. The Republic of Macedonia
(Application no. 13252/02)

2.1. Facts of the case

The applicants complained under Article 3 of the Convention. They claimed that they had been subjected to acts of police brutality amounting to torture, inhuman and/or degrading treatment in the restaurant and in police custody. They also complained under Article 3 of ECHR about the national authorities' failure to carry out an effective official investigation capable of leading to the identification and punishment of the police officers responsible.

The applicants also complained under Article 14 in conjunction with Articles 3 of the Convention that the failure of the national authorities to carry out official effective investigation represents serious violation of these articles. They believed that the ill-treatment they had suffered and the national authorities' subsequent refusal to carry out an effective official investigation were in part due to their ethnic origin. They based their allegations on the nature of the incident (a brutal police assault on Roma men, women and children gathered in the restaurant) and the explicit racist language used by the officers during the raid and subsequently at the police station. According to the applicants, these allegations had to be examined in the context of the national authorities' repeated reluctance to remedy instances of police brutality against Roma.

The Government considered that the applicants had not exhausted domestic remedies in respect of their complaints of ill-treatment. To support this, the Government of RM pointed out that the MoI had issued regulations governing the use of force and had monitored compliance. According to these rules an investigation is carried out and disciplinary sanctions are imposed on offending officers, as well as for compensation to be paid to the injured party. The applicants had not, however, made any written or oral complaints to the chief of police or directly to the MoI or SICPS. If they had raised the matter before the chief of police, there would have been some prospect of their allegations being investigated speedily.

The Government of RM pointed to the fact that the applicants had failed to bring their complaints for alleged police brutality to the attention of the Ombudsman, who was empowered to propose the initiation of disciplinary proceedings and to lodge criminal complaint with the public prosecutor. The Government further maintained that the applicants had not filed a civil lawsuit claiming damages.

According to the applicants none of the domestic remedies suggested by the Government of the RM could be regarded as effective within the meaning of the ECHR. Concerning the proceedings before the MoI, they referred to the Report to the Government by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 21 to 26 October 2001, in which it had been noted that proceedings before the SICPS were not transparent because complaints against the police are investigated by their fellow officers, apparently without any form of external supervision or control. In this context the applicants referred to the statistical data regarding the trend of cases of alleged police brutality on Roma, received by some local NGO. In this context it was indicated that SICPS carried out actions

upon complaints only in three cases, out of total 23 filed in 2004. During the period 2004 – 2005 MoI established violation of the right only in 3 out of 71 submitted complaints. The applicants further maintained that even though they had not notified the local police of the alleged police brutality, they had filed a criminal complaint with the public prosecutor eight days following the incident. They argued that they could not be held responsible for the Ministry's failure to take action following their allegations brought to attention by the public prosecutor. They referred to the Standards on Human Rights which provided that a disciplinary procedure could not replace the need for an investigation carried out by an independent prosecutor.

As regards the Government's affirmation concerning the effectiveness of the remedy available to the applicants, in particular the procedure before the Ombudsman, the applicants noted that seeking redress from the Ombudsman could not provide appropriate redress as his decisions were non-binding. Since they already filed a criminal complaint, there had been no point in initiating same procedure before the Ombudsman who would have taken the same action as the public prosecutor.

2.2. The Court' Assessment (Decision)

In the Court's decision on the case, the Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available in the domestic legal system to enable them to obtain redress. The existence of the remedies must be sufficiently certain, in practice as well as in theory, as failing the criteria on accessibility and effectiveness would not have been met. Article 35 § 1 requires that the complaints intended to be brought before the ECtHR should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but there is no obligation to have recourse to remedies which are inadequate or ineffective. The ECtHR emphasizes that the application of the exhaustion of domestic legal remedies must be applied in the context of machinery for the protection of human rights and that it must be applied with some degree of flexibility and without excessive formalism. According to ECtHR the principle of domestic legal remedies exhaustion is neither absolute nor capable of being applied automatically. The ECtHR is realistic not only of the existence of formal remedies in the legal system of the Contracting States concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust all available legal remedies.

For ECtHR it is undisputable that the possibility of initiating a disciplinary or internal inquiry into alleged ill-treatment cannot generally be regarded as an effective remedy in this context. In the present case, special departments such as the SICPS of MoI or institutions hierarchically linked to the alleged perpetrators lack the necessary independence. Concerning the possibility that the case be referred to the Ombudsman, the ECtHR reiterated the arguments in the *Jašar* case, that: "in principle the Ombudsman cannot be considered as an effective remedy, in particular due to the non-binding nature of his decisions."

By filing a criminal complaint with the public prosecutor, the applicants initiated a procedure that was to lead to the identification and prosecution of the alleged perpetrator violating article 3. They therefore brought to the attention of the authorities the alleged police brutality, believing that they would carry out an appropriate investigation. As the public prosecutor did not formally reject the applicants, they could not take over a subsidiary complaint. Through such arguments, ECtHR accepted the application as admissible.

3. Conclusion

In the context of the matter of efficient control in cases of police brutality of RM, ECtHR holds that where an individual ascertains that his right was violated according to Article 3 of ECHR, at the hands of police or other agent of the state that have similar authorisation, the state is liable to carry out efficient official investigation. The aim of investigation is to identify and sanction one who violated the rights of the ECHR, in the given case right to freedom of torture. Without such investigation, the protection of this right would be inefficient in practice, and would make possible in some cases for state officials to abuse the right of those under their control with impunity.[94] **The Court requires the state to carry out expeditious investigation, which implies prompt response by the state regarding alleged violation of the right of freedom of torture**.

Through the analysis of the cases Jasar and Dzeladinov v. RM, for the ECtHR it is indisputable that the possibility for initiating disciplinary procedure or internal inquire into alleged ill-treatment by the police, could not be considered efficient legal remedy available to the person whose right was violated. The Court holds that SICPS in MoI or institutions hierarchically linked to the alleged perpetrators lack the necessary independence. Also, the Court hold that **the Ombudsman may not consider what kind of efficient legal remedy that the person that was a victim of a police brutality had at disposal, as the Ombudsman is not authorised to make binding decisions, except to indicate possible violations of the rights.**

[94] Corsacov v. Moldova, no. 18944/02, Â§ 68, 4 April 2006; Labita, cited above, Â§ 131, ECHR 2000 IV; McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A no. 324, p. 49, Â§ 161; Kaya v. Turkey, judgment of 19 February 1998, Reports 1998 I, p. 324, Â§ 86; YaÅŸa v. Turkey, judgment of 2 September 1998, Reports 1998 VI, p. 2438, Â§ 98

Appendix 2

Istanbul Protocol
Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Legal investigations of torture

The fundamental principles of any viable investigation into incidents of torture are:

- Competence
- Impartiality
- Independence
- Promptness and
- Thoroughness.

These elements can be adapted to any legal system and should guide all investigations of alleged torture.

Where investigative procedures are inadequate because of a lack of resources or expertise, the appearance of bias, the apparent existence of a pattern of abuse or other substantial reasons, States shall pursue investigations through an independent commission of inquiry or similar procedure. Members of that commission must be chosen for their recognized impartiality, competence and independence as individuals. In particular, they must be independent of any institution, agency or person that may be the subject of the inquiry.

Purposes of an investigation into torture

The broad purpose of the investigation is to establish the facts relating to alleged incidents of torture, with a view to identifying those responsible for the incidents and facilitating their prosecution, or for use in the context of other procedures designed to obtain redress for victims.

Those carrying out the investigation must, at a minimum, seek to obtain statements from the victims of alleged torture; to recover and preserve evidence, including medical evidence, related to the alleged torture to aid in any potential prosecution of those responsible; to identify possible witnesses and obtain statements from them concerning the alleged torture; and to determine how, when and where the alleged incidents of torture occurred as well as any pattern or practice that may have brought about the torture.

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The following principles represent a consensus among individuals and organizations having expertise in the investigation of torture. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as torture or other ill-treatment) include the following:

- Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families

- Identification of measures needed to prevent recurrence
- Facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

States must ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, must be competent and impartial. They must have access to or be empowered to commission investigations by impartial medical or other experts. The methods used to carry out these investigations must meet the highest professional standards, and the findings must be made public.

The investigative authority shall have the power and obligation to obtain all the information necessary for the inquiry. The persons conducting the investigation must have at their disposal all the necessary budgetary and technical resources for effective investigation. They must also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill treatment to appear and testify. The same applies to any witness. To this end, the investigative authority is entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence. Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families must be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses or their families, as well as those conducting the investigation.

Alleged victims of torture or ill-treatment and their legal representatives must be informed of, and have access to, any hearing as well as to all information relevant to the investigation and must be entitled to present other evidence.

The commission must have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these principles. A written report, made within a reasonable time, must include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, this report must be made public. It must also describe in detail specific events that were found to have occurred, the evidence upon which such findings were based and list the names of witnesses who testified with the exception of those whose identities have been withheld for their own protection. The State must, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

Medical experts involved in the investigation of torture or ill-treatment should behave at all times in conformity with the highest ethical standards and, in particular, must obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations must be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials. The medical expert should promptly prepare an accurate written report.

The report should be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report. The report should be provided in writing,

where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that the report is delivered securely to these persons. The report should not be made available to any other person, except with the consent of the subject or when authorized by a court empowered to enforce the transfer.

Procedures of a torture investigation

Determination of the appropriate investigative body

In cases where involvement in torture by public officials is suspected, including possible orders for the use of torture by ministers, ministerial aides, officers acting with the knowledge of ministers, senior officers in State ministries, senior military leaders or tolerance of torture by such individuals, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise or the impartiality of the investigators is called into question.

Factors that support a belief that the State was involved in the torture or that special circumstances exist that should trigger the creation of a special impartial investigation mechanism include:

- Where the victim was last seen unharmed in police custody or detention;
- Where the modus operandi is recognizably attributable to State-sponsored torture;
- Where persons in the State or associated with the State have attempted to obstruct or delay the investigation of the torture;
- Where public interest would be served by an independent inquiry;
- Where investigation by regular investigative agencies is in question because of lack of expertise or lack of impartiality or for other reasons, including the importance of the matter;
- Apparent existence of a pattern of abuse, complaints from the person or the above inadequacies or other substantial reasons.

Several considerations should be taken into account when a State decides to establish an independent commission of inquiry. First, persons subject to an inquiry should be guaranteed the minimum procedural safeguards protected by international law at all stages of the investigation. Second, investigators should have the support of adequate technical and administrative personnel, as well as access to objective, impartial legal advice to ensure that the investigation will produce admissible evidence for criminal proceedings. Third, investigators should receive the full scope of the State's resources and powers. Finally, investigators should have the power to seek help from the international community of experts in law and medicine. The alleged torture victim should be regularly informed of the progress of the investigation. The alleged victim should also be notified of all key hearings in the investigation and prosecution of the case. The investigators should inform the alleged victim of the arrest of the suspected perpetrator. Alleged victims of torture should be given contact information for advocacy and treatment groups that might be of assistance to them. Investigators should work with advocacy groups within their jurisdiction to ensure that there is a mutual exchange of information and training concerning torture.

Defining the scope of the inquiry

States and organizations establishing commissions of inquiry need to define the scope of the inquiry by including terms of reference in their authorization.

Recommendations for defining terms of reference are as follows:

- They should be neutrally framed so that they do not suggest a predetermined outcome. To be neutral, terms of reference must not limit investigations in areas that might uncover State responsibility for torture;
- They should state precisely which events and issues are to be investigated and addressed in the commission's final report;
- They should provide flexibility in the scope of inquiry to ensure that thorough investigation by the commission is not hampered by overly restrictive or overly broad terms of reference. The necessary flexibility may be accomplished, for example, by permitting the commission to amend its terms of reference as necessary. It is important, however, for the commission to keep the public informed of any amendments to its mandate.

The power of the commission

Principles should set out the powers of the commission in a general manner. The commission specifically needs the following:

- Authority to obtain all information necessary to the inquiry including the authority to compel testimony under legal sanction, to order the production of documents including State and medical records, and to protect witnesses, families of the victim and other sources;
- Authority to issue a public report;
- Authority to conduct on-site visits, including at the location where the torture is suspected to have occurred;
- Authority to receive evidence from witnesses and organizations located outside the country.

Membership criteria

Commission members should be chosen for their recognized impartiality, competence and independence as individuals as defined as follows:

- **Impartiality:** Commission members should not be closely associated with any individual, State entity, political party or other organization potentially implicated in the torture. They should not be too closely connected to an organization or group of which the victim is a member, as this may damage the commission's credibility. This should not, however, be an excuse for blanket exclusions from the commission, for instance, of members of large organizations of which the victim is also a member or of persons associated with organizations dedicated to the treatment and rehabilitation of torture victims.
- **Competence:** Commission members must be capable of evaluating and weighing evidence and exercising sound judgement. If possible, commissions of inquiry should include individuals with expertise in law, medicine and other appropriate specialized fields.
- **Independence:** Members of the commission should have a reputation in their community for honesty and fairness.

The commission's staff

Commissions of inquiry should have impartial, expert counsel. Where the commission is investigating allegations of State misconduct, it would be advisable to appoint counsel outside the Ministry of Justice. The chief counsel to the commission should be isolated from political influence, through civil service tenure or as a wholly independent member of the bar. The

investigation will often require expert advisers. Technical expertise should be available to the commission in areas such as pathology, forensic science, psychiatry, psychology, gynaecology and paediatrics. To conduct a completely impartial and thorough investigation, the commission would almost always need its own investigators to pursue leads and develop evidence. The credibility of an inquiry would thus be significantly enhanced to the extent that the commission would be able to rely on its own investigators.

Protection of witnesses

The State shall protect complainants, witnesses, those conducting the investigation and their families from violence, threats of violence or any other form of intimidation. If the commission concludes that there is a reasonable fear of persecution, harassment or harm to any witness or prospective witness, the commission may find it advisable to hear the evidence in camera, keep the identity of an informant or witness confidential, use only evidence that will not risk identifying the witness and take other appropriate measures.

Proceedings

It follows from general principles of criminal procedure that hearings should be conducted in public, unless in-camera proceedings are necessary to protect the safety of a witness. In-camera proceedings should be recorded and the sealed, unpublished record kept in a known location. Occasionally, complete secrecy may be required to encourage testimony, and the commission may want to hear witnesses privately, informally or without recording testimony.

Notice of inquiry

Wide notice of the establishment of a commission and the subject of the inquiry should be given. The notice should include an invitation to submit relevant information and written statements to the commission and instructions to persons willing to testify. Notice can be disseminated through newspapers, magazines, radio, television, leaflets and posters.

Receipt of evidence

Commissions of inquiry should have the power to compel testimony and produce documents, plus the authority to compel testimony from officials allegedly involved in torture. Practically, this authority may involve the power to impose fines or sentences if government officials or other individuals refuse to comply. Commissions of inquiry should invite persons to testify or submit written statements as a first step in gathering evidence. Written statements may become an important source of evidence if their authors are afraid to testify, cannot travel to proceedings or are otherwise unavailable. Commissions of inquiry should review other proceedings that could provide relevant information.

Rights of parties

Those alleging that they have been tortured and their legal representatives should be informed of and have access to any hearing and all information relevant to the investigation and must be entitled to present evidence. This particular emphasis on the role of the survivor as a party to the proceedings reflects the especially important role his/her interests play in the conduct of the investigation. However, all other interested parties should also have an opportunity to be heard. The investigative body must be entitled to issue summonses to witnesses, including the officials allegedly involved, and to demand the production of evidence. All these witnesses should be permitted legal counsel if they are likely to be harmed by the inquiry, for example, when their

testimony could expose them to criminal charges or civil liability. Witnesses may not be compelled to testify against themselves. There should be an opportunity for the effective questioning of witnesses by the commission. Parties to the inquiry should be allowed to submit written questions to the commission.

Evaluation of evidence

The commission must assess all information and evidence it receives to determine reliability and probity. The commission should evaluate oral testimony, taking into account the demeanour and overall credibility of the witness. The commission must be sensitive to social, cultural and gender issues that affect demeanour. Corroboration of evidence from several sources will increase the probative value of such evidence and the reliability of hearsay evidence. The reliability of hearsay evidence must be considered carefully before the commission accepts it as fact. Testimony not tested by cross-examination must also be viewed with caution. In-camera testimony preserved in a closed record or not recorded at all is often not subject to cross-examination and, therefore, may be given less weight.

Report of the commission

The commission should issue a public report within a reasonable period of time. Furthermore, when the commission is not unanimous in its findings, the minority commissioners should file a dissenting opinion. Commission of inquiry reports should contain, at a minimum, the following information:

- The scope of inquiry and terms of reference;
- The procedures and methods of evaluating evidence;
- A list of all witnesses, including age and gender, who have testified, except for those whose identities are withheld for protection or who have testified in camera, and exhibits received as evidence;
- The time and place of each sitting (this might be annexed to the report);
- The background of the inquiry, such as relevant social, political and economic conditions;
- The specific events that occurred and the evidence upon which such findings are based;
- The law upon which the commission relied;
- The commission's conclusions based on applicable law and findings of fact;
- Recommendations based on the findings of the commission.

The State should reply publicly to the commission's report and, where appropriate, indicate which steps it intends to take in response to the report.

Appendix 3

UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(The Commission on Human Rights, in its resolution 2000/43, and the General Assembly, in its resolution 55/89, drew the attention of Governments to the Principles and strongly encouraged Governments to reflect upon the Principles as a useful tool in efforts to combat torture).

States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.

The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.

Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.

Alleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and shall be entitled to present other evidence.

In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

A **written report**, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations

based on findings of fact and on applicable law. Upon completion, the report shall be made public. It shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

Medical expert involved in the investigation of torture or ill-treatment shall behave at all times in conformity with the highest ethical standards and, in particular, shall obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.

The medical expert shall promptly prepare an accurate written report, which shall include at least the following:

- Circumstances of the interview: name of the subject and name of those present at the examination; exact time and date; location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g., detention centre, clinic or house); circumstances of the subject at the time of the examination (e.g., nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner or threatening statements to the examiner); and any other relevant factors;
- History: detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, times when torture or ill treatment is alleged to have occurred and all complaints of physical and psychological symptoms;
- Physical and psychological examination: record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
- Opinion: interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination shall be given;
- Authorship: the report shall clearly identify those carrying out the examination and shall be signed.

The report shall be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process shall be solicited and recorded in the report. It shall also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that it is delivered securely to these persons. The report shall not be made available to any other person, except with the consent of the subject or on the authorization of a court empowered to enforce such a transfer.

Annex 1

Concept paper

In democratic societies where the rule of law prevails, the police are a public service undertaking the traditional functions of preventing, detecting and combating crime, preserving public peace and order, enforcing the law, protecting the fundamental rights of the individual.

Policing in democratic societies is based on public consent, trust and co-operation in order to be effective. Accountability is a vital component of democratic policing. The public needs to have confidence in the government's system of "policing the police". They must be able to scrutinize what the police do and how they do it. Only in this way will the public trust the police to uphold the law, maintain peace and order, and ensure that all citizens are able to live and work in a safe and secure environment. Independent and effective oversight of law enforcement bodies is one of the key measures to ensure democratic policing.

Independent, effective and timely mechanisms of police oversight are also a requirement under the ECHR and its case law, as well as the Council of Europe recommendations and a host of other international standards. Such mechanisms must be practically and hierarchically independent of those whose conduct is being investigated, open to some public scrutiny, and be able to lead to legally binding decisions.

Reports on the human rights situation in the host country, those of European Committee for the Prevention of Torture (CPT), the Ombudsman, OSCE, Helsinki Committee, Amnesty International, the US State Department, as well as the reports of domestic human rights NGOs handling police abuse complaints suggest strongly that the control mechanisms over law enforcement bodies are not at a level adequate for an EU aspirant country.

One of the major sources of concern for the CPT following the 2004 visit, but ever since the October 2001 visit, is the system of accountability for law enforcement officials in cases of alleged ill-treatment. One conclusion drawn by that body is that judges and prosecutors continue to display little interest even when there is prima facie evidence of ill-treatment, and there is no guarantee that they will thoroughly investigate. The CPT observed a tendency among the relevant authorities to avoid taking the steps necessary for an effective investigation, and that they display an inclination to protect law enforcement officials subject of allegations.[95]

In addition, the European Commission in its 2006 progress report on the host country noted that mechanisms for investigating degrading treatment need to be strengthened, including through the co-operation between the Ombudsman and the Ministry of Interior.

The Rule of Law Department of the OSCE Mission to Skopje conducted background research and carried out a preliminary needs assessment. The compatibility of the host country's system for investigation of complaints against the police with the requirements of the ECHR, its case law, and the emerging obligations under international standards and recommendations were assessed[96].

[95] Report on the visit to "the former Yugoslav Republic of Macedonia" carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), from 12 to 19 July 2004, CPT/Inf (2006) 36. The report can be found at: http://www.cpt.coe.int/documents/mkd/2006-36-inf-eng.htm

[96] Please see: Requirements of the European Convention on Human Rights as Regards the Investigation of Death or Serious Injury at the Hands of State Officials.

One key finding concerning the host country's legal and regulatory framework of the existing mechanisms of control over law enforcement bodies is that they run short of the principles of impartiality, effectiveness, and transparency required by the applicable international and European standards. The ECHR and its case law require that an independent and impartial body, without hierarchical, institutional or practical links to the officials whose conduct is being investigated, investigate serious complaints against the police. Such a body shall have the power to compel witnesses, especially those involved in the incident, and issue a binding decision. The investigation must be expedient and effective, meaning it is capable of determining the cause of death or injury, and whether the used force was justified. It should be further capable of leading to the identification and punishment of responsible individuals, and of course be subjected to public scrutiny.

Among the various mechanisms operational in the Macedonian context, the Sector for Internal Control and Professional Standards within the Ministry of Internal Affairs lacks the necessary hierarchical and practical independence to conduct effective investigations, at least according to the ECtHR.[97] The Ombudsman's office is also not considered an effective remedy under its current legislative framework due to the non-binding character of the decisions and its inability to access key witness in the Ministry of Interior. The Parliamentary Standing Inquiry Committee does not have investigative powers. The CPT, following the 2004 visit, but ever since the October 2001,[98] has expressed concern whether judges or prosecutors conduct effective investigations upon citizens' criminal reports implicating law-enforcement officials.[99] Moreover, the CPT has noted that the inaction of those authorities has fostered a deep-rooted and widespread practice of abuse in police custody and impunity with regard to law-enforcement officials who perpetrated such acts.

As part of the needs assessment process, the RoLD identified a group of relevant interlocutors who were individually approached for the purposes of their familiarization with the RoLD's initiative and to garner their views on external oversight[100] In the course of these meetings, interlocutors were consistently in favor of strengthening mechanisms of external control, over law enforcement bodies. When the question of what such model should look like, there opinions differed widely.

Under the auspices of the RoLD, *Strategic Marketing and Media Research Institute,* a prominent research agency will carry out a public opinion survey with questions on this topic[101]. The survey will evaluate the public's level of trust in the current system of control of law-enforcement officials, and ascertain whether they favour additional external oversight. In addition the survey will assess citizens' confidence in referring a case to the existing system of

[97] Case of Pejrusan Jashar vs. FYROM, Application no. 69908/01, and more recently the case of Demir Sulejmanov vs. FYROM, Application no. 69875/01

[98] All host country CPT reports can be found at: http://www.cpt.coe.int/EN/states/mkd.htm
CPT/Inf (2003)3 can be found at: http://www.cpt.coe.int/documents/mkd/2003-03-inf-eng.pdf

[99] According to the United Nation's Code of conduct for law enforcement officials, adopted by General Assembly Resolution 34/169 of 17 December 1979, all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention are ***"law enforcement officials"***.

[100] The OSCE RoLD met representatives of: Ministry of Justice, Open Society Institute SOROS, Standing Inquiry Committee for Protection of Civil Freedoms and Rights, Ombudsman's Office, Ministry of Internal Affairs, judiciary, human rights NGOs handling complaints against the police (Helsinki Committee, Human Rights Support Project, Mesecina), the international community present in the country, and academics, mostly law professors.

[101] The survey will be administered in the course of November, via phone, to a representative segment of the population, 1200 citizens, randomly selected to be representative for the target audience – sample stratified by gender, age (18 and older), ethnicity, urban and rural, throughout the country. The sample would be also regionally differentiated, and by the educational background.

control over law-enforcement bodies, as well as their perception in relation to its effectiveness and efficiency.

The Rule of Law Department will organize one-day round table discussion in late 2006. An international and domestic expert will present on the needs of independent external oversight in line with international standards as well as on various models of oversight.

Should the participants at the round table reach consensus on the need of strengthening independent external oversight of the law-enforcement bodies, the Rule of Law Department will support the establishment of an expert working group composed of governmental officials, academics (law professors), parliamentarians, representatives of the NGO sector (domestic human rights NGOs handling cases of police misconduct and ill-treatment) as well as the international community present in the host country. The working group will undertake the development of the model for external oversight of the law-enforcement bodies.

Annex 2

Results of the conducted public opinion survey

During the course of November 2006 (23rd-27th), under the auspices of the OSCE Mission's Rule of Law Department a public opinion survey in relation to the familiarity of the citizens with the current system for investigation of allegations of abuse of power by law-enforcement officials, was conducted by Strategic Marketing and Media Research Institute. The survey was administered via phone to a representative segment of the population, 1220 citizens, randomly selected to be representative for the target audience – sample stratified by gender, age (18 and older), ethnicity, urban and rural, throughout the country. The sample was also regionally differentiated, and by the educational background.

The goal of the survey was to evaluate the public's level of trust in the current system of control of law-enforcement officials, and to ascertain whether they favour additional external oversight. In addition the survey assesses the citizens' confidence in referring a case to the existing system of control over law-enforcement bodies, as well as their perception in relation to its effectiveness and efficiency.

Personal experiences, behaviour, and attitudes of the surveyees

Considering the citizens' attitudes based on their personal experiences from the communication with the police officials in the country, one could notice that the opinions are divided: while a larger number of citizens (40%) believe that police officers are following the professional standards, the others, also a large number of the citizens (33%) do not agree with the above-stated.

Significant differences regarding this question have been noticed regarding several of the major socio-demographic characteristic of the population. So, even 60% of the Albanians were not satisfied with the adherence to the professional standards by the police officials, while the percentage of the Macedonians was only 24% and the percentage of the other ethnic communities, 34%. It implied the highest percent of dissatisfaction in the region Northwest Macedonia and Kumanovo (45%) where the majority of the ethnic Albanian population lives.

The percentage of the citizens who believe that the police is following the professional standards had a noticeable trend of increase, depending on the age of the citizens. Thus, while 31% of the citizens between 18 and 29 age old believe that the police is following the professional standards, the percentage of the citizens between 30 and 40 age old was 39%, for the citizens from 45 and 65 old increases to 42%, and for the senior citizens over 61, to 54%.

A considerable part of the citizens, according to their statements, very often hear (or witness) unprofessional or illegal conduct of the police officials. While 59% of the citizens state that they have never seen or witnessed unprofessional or illegal conduct of the police officials, 44% state that they have witnessed it. Almost half of those who have heard/witnessed (which represents 20% of the whole population) state that they hear or witness unprofessional or illegal conduct of the police officials at least several times a month (5% state that they hear/witness it every day, 5% - several times a week, 3% once a week and 7% several times a month).

For the majority of cases of unprofessional or illegal conduct of police officials, the citizens have been informed by the media (the citizens have seen/heard on media in 59% of all mentioned cases). Still in 40% of the mentioned cases, the citizens had personally or closer witnessed unprofessional or illegal conduct of the police officials (16% of the mentioned cases

were personally connected, 15% with their relatives/friends, 9% was incidental witnessing). Expressed in percentage, 19% of the whole population had personally or closer witnessed unprofessional or illegal conduct of the police officials.

From the mentioned 44% of the citizens who have heard or witnessed unprofessional or illegal conduct of the police officials only 15% (which is 7% of the whole population) have reported the case. The majority of them (79%) reported the case at the police: to the local police station - 42%, to the MoI's Sector for Internal Control and Professional Standards - 24%, 9% called 192 and 5 % reported directly to the police officer. 9% have contacted the Ombudsman's Office, 5% the Investigative Judge, 3% the Public Prosecutor and 2% OSCE.

Those who didn't report the case of unprofessional or illegal conduct of police officials didn't do so because mainly they found out about it from the media. Still, 8% from those who witnessed such a case and didn't report it, claim that there won't be any effects from reporting the case, the police is always right and nothing will ever change. 3% didn't report the case because they didn't know to which institution to report it, 3% were afraid to report it, and 5% didn't want to get involve because it didn't happen personally to them.

The largest part of the citizens (65%) knew that unprofessional or illegal conduct of police officers can be reported directly to the police: 26% of the citizens considered that such a case can be reported at the local police station, 25% at MoI's Sector for Internal Control and Professional Standards, and 14% on the number 192. 8% of the citizens consider that they can address the Ombudsman's office, 2% named The Helsinki committee of human rights. Public prosecutors, Investigative judges or projects that support human rights were mentioned by 1% of the citizens each. A high percentage of the citizens (22%) don't know to which institution they can report unprofessional or illegal conduct of police officers.

- The highest percentage of the citizens who do not know to which institution to report unprofessional or illegal conduct of police officers belongs to the citizens of Macedonian ethnicity (28%), while among the citizens of Albanian ethnicity this percentage is only 4%.
- Considering the above-mentioned topic, one of the most significant differences which occurred was regarding the ethnicity of the population. Namely, 24% of the Albanian ethnicity named the Ombudsman's office, while this percentage for the Macedonians is 3%, and for other ethnic groups 9%.

Level of confidence of the surveyees towards the current system for investigations

With reference to the citizen's confidence and their attitudes in relation to the performance of the institutions responsible of sanctioning unprofessional or illegal conduct of police officers, most of them (57%) believe that an external oversight mechanism could professionally and objectively conduct an investigation.

From the current institutions the citizens give their biggest trust to the MoI's Sector for Internal Control and Professional Standards (50%) and the Ombudsman's office (49%), while the Public prosecutors and the Investigative judges take the last spot - in their work they have the trust of less than 37% of the citizens.

MoI's Sector for Internal Control and Professional Standards, according to more than 50% of the citizens, professionally and objectively conducts investigations of reported misconduct by police officers (more than 20% somewhat believe this institution and almost 30% strongly believe it).

Almost an equally large degree of trust falls to the Ombudsman's office. 19% of the citizens somewhat believe, and 30% strongly believe that the Ombudsman's office professionally and objectively conducts the investigations of reported unprofessional or illegal conduct of police officers.

- The population that has personally or closer witnessed an unprofessional or illegal conduct of police officers believes the institution of the Ombudsman to a greater extent than the MoI's Sector for Internal Control and Professional Standards. The Ombudsman's office has the trust of almost 40%, while MoI's Sector for Internal Control and Professional Standards has 29%.
- The population that personally or closer has witnessed an unprofessional or illegal conduct of police officers named to a great extent the need of an external oversight mechanism, to which 65% of them would trust.

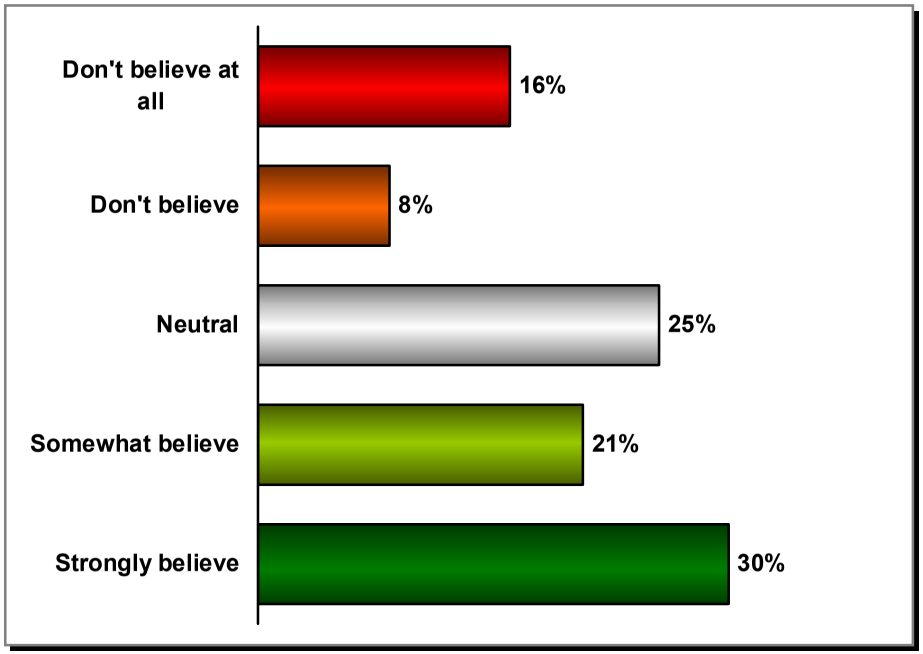
Almost 37% of the citizens believe in the professional and objective work of the Public prosecutors and Investigative judges. The greatest level of trust in the PPO was noticed in rural areas (46%), among the population with primary education or less (44%), i.e. among the population of Albanian ethnicity (46%), while the lowest level of trust was noticed in the Skopje region (28%).

- The population that personally, or closer, witnessed unprofessional or illegal conduct of police officers has even lesser level of trust towards this institution: only 22% of them consider that the Public prosecutors and Investigative judges professionally and objectively conduct investigations of reported misconduct of police officers.

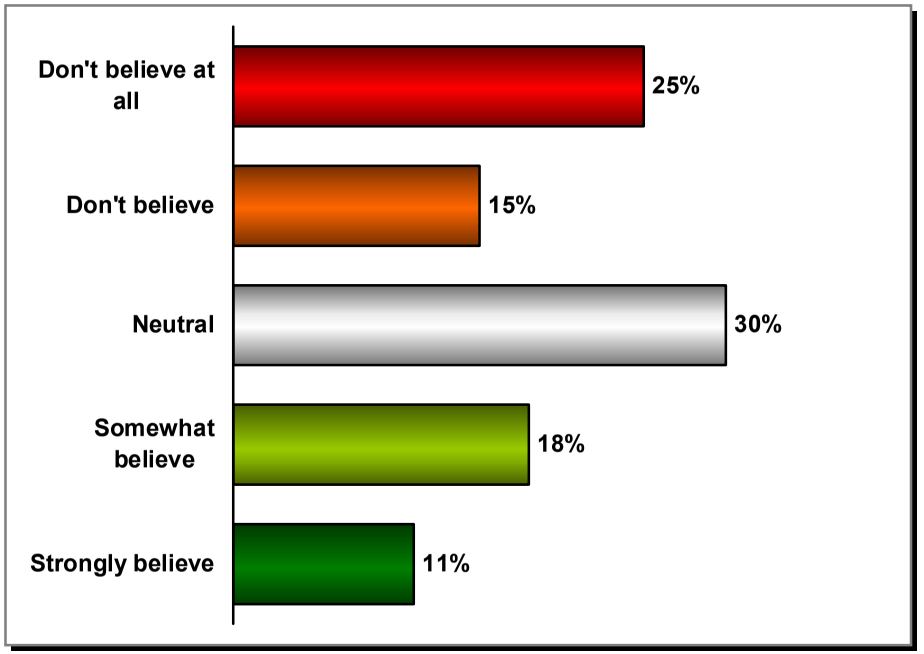
If an independent external oversight mechanism existed, 81% of the citizens declared that they would feel comfortable to report the case to that institution.

Do you believe that the MoI's Sector for Internal Control and Professional Standards is professionally and objectively conducting the investigation for reported alleged misconduct by the law-enforcement officials?

Base: Total population – 1,497,000 citizens

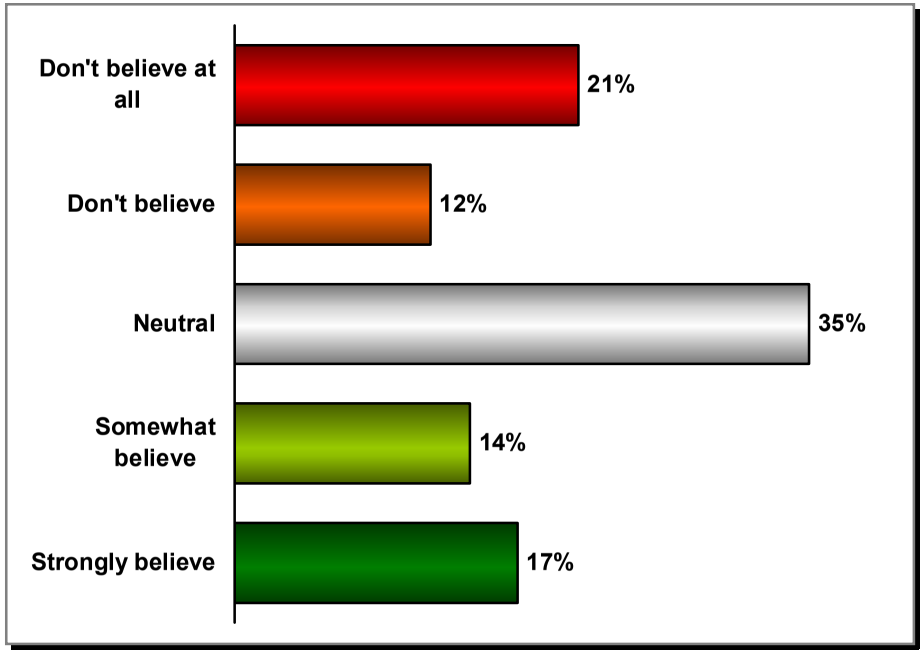


Base: Population that have witnessed unprofessional and/or illegal conduct of police officials (19% of total population – 280,000 citizens)



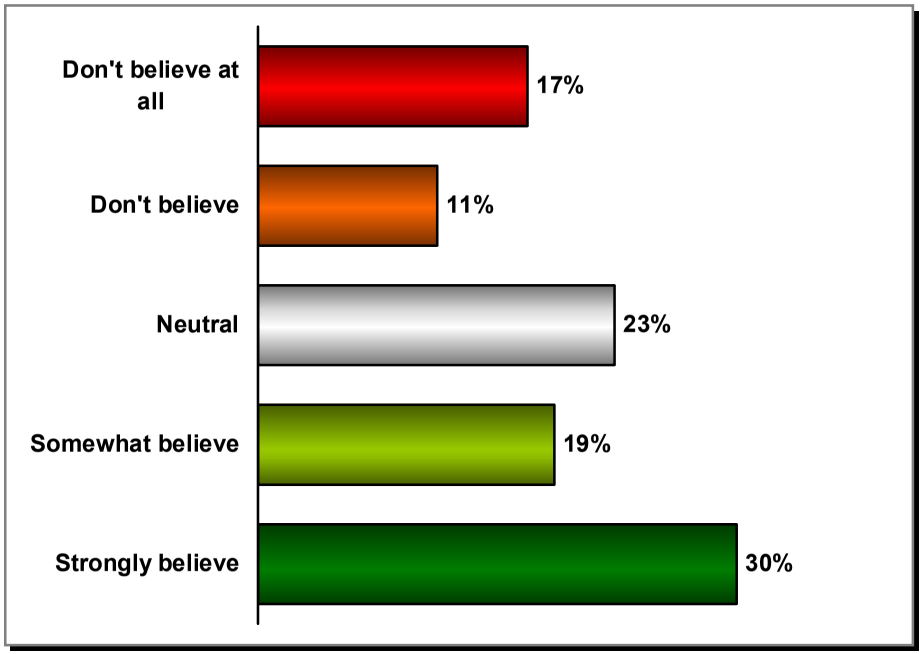
Do you believe that the Sector for Internal Control and Professional Standards of the Ministry of Interior is professionally and objectively conducting an investigation for reported alleged misconduct by the law-enforcement officials?

Base: Population that have heard about or witnessed unprofessional and/or illegal conduct of police officials at least a few times a month (20% of total population – 300,000 citizens)

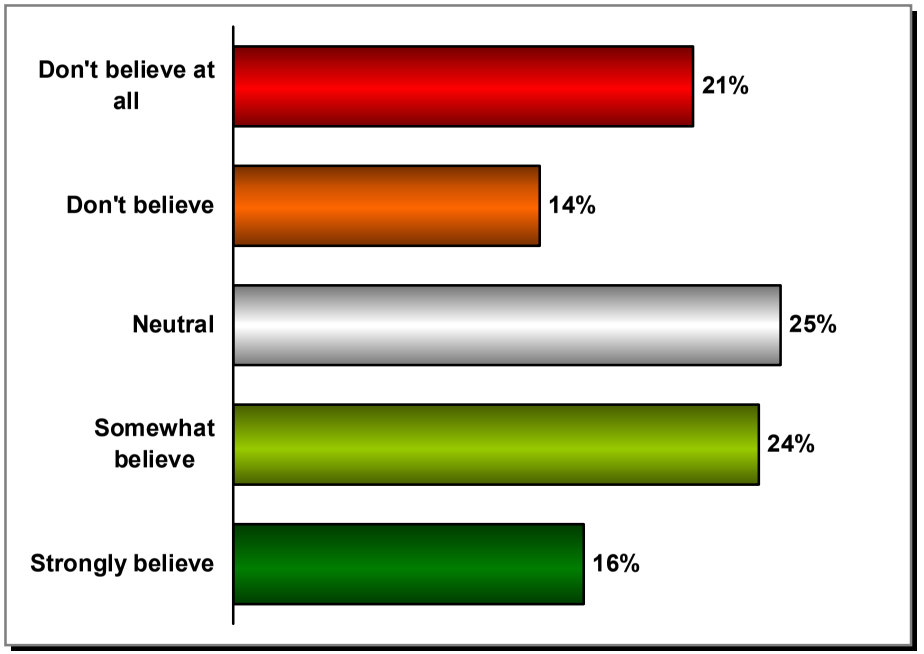


Do you believe that the Ombudsman Institution is professionally and objectively conducting an investigation on alleged misconduct by law-enforcement officials?

Base: Total population – 1,497,000 citizens

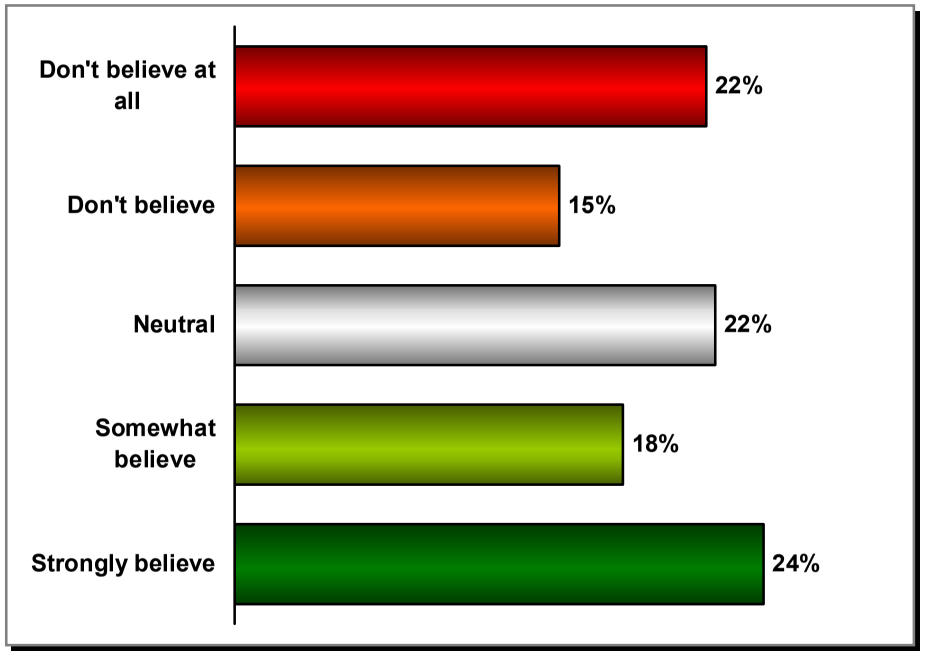


Base: Population that have witnessed unprofessional and/or illegal conduct of police officials (19% of total population – 280,000 citizens)



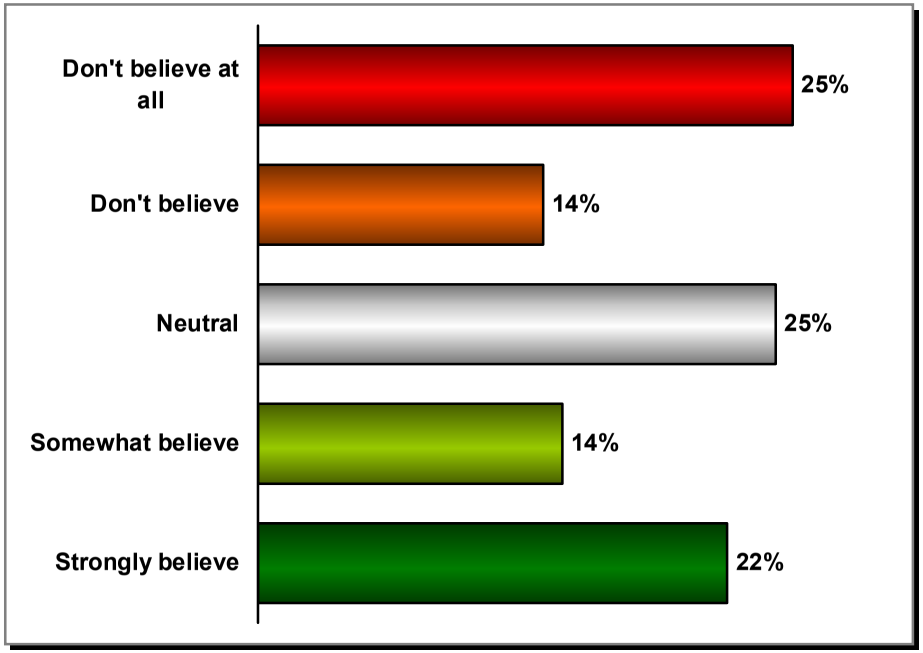
Do you believe that the Ombudsman Institution is professionally and objectively conducting an investigation on alleged misconduct by law-enforcement officials?

Base: Population that have heard about or witnessed unprofessional and/or illegal conduct of police officials at least a few times a month (20% of total population – 300,000 citizens)



Do you believe that the public prosecutors and investigative judges are professionally and objectively conducting the investigative proceedings upon reported criminal acts committed by law-enforcement officials?

Base: Total population – 1,497,000 citizens



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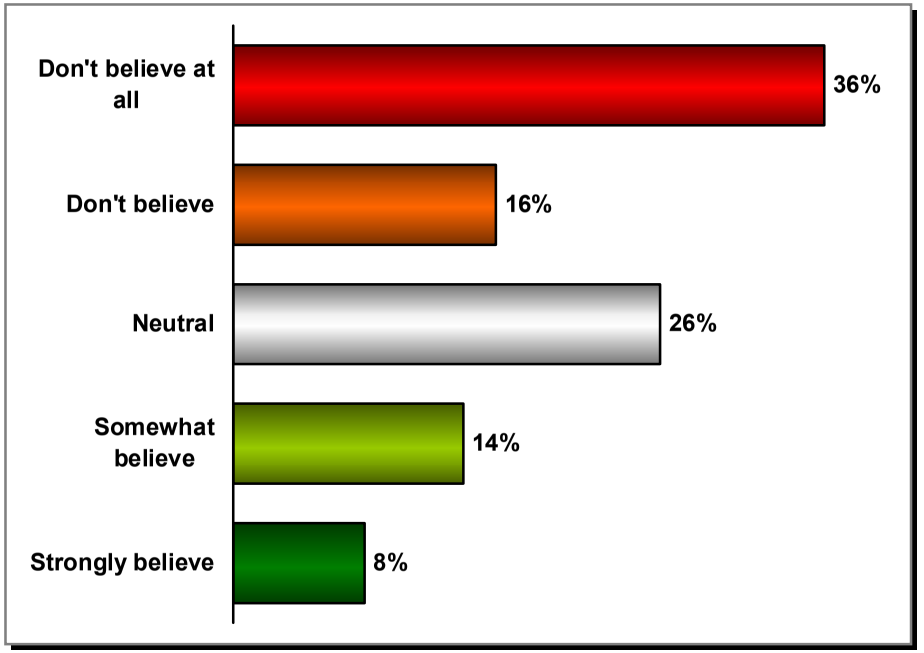

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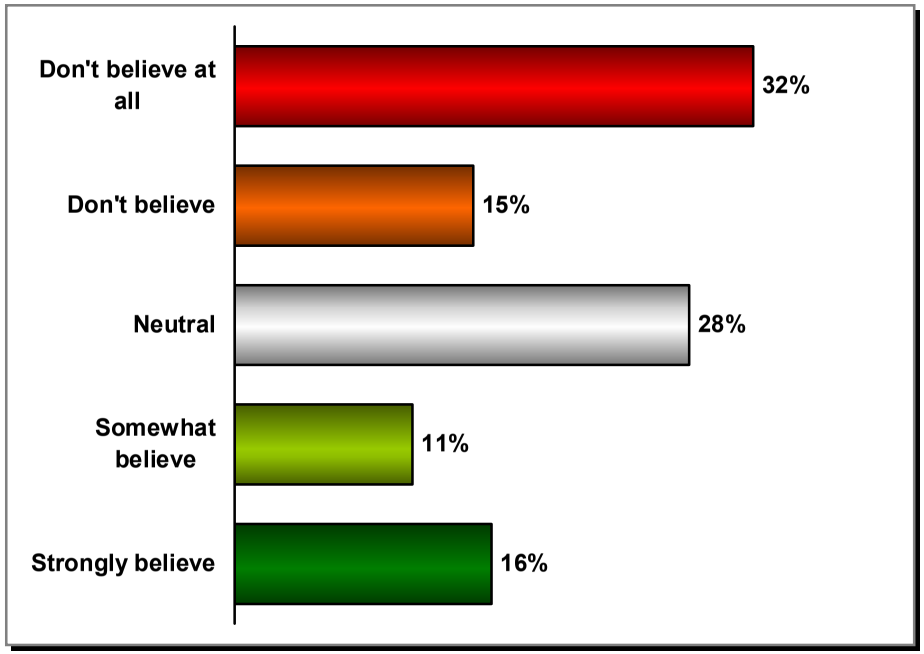

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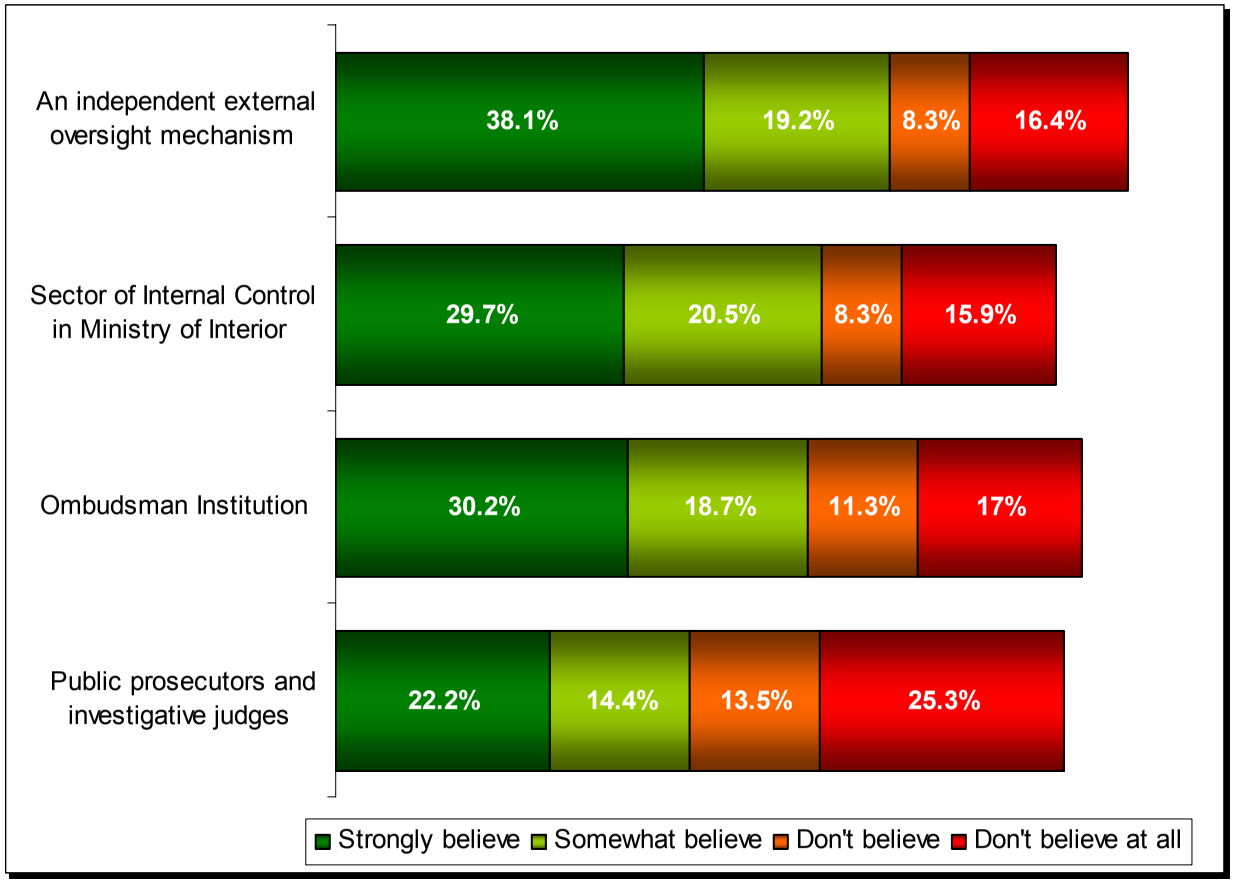
Base: Total population – 1,497,000 citizens



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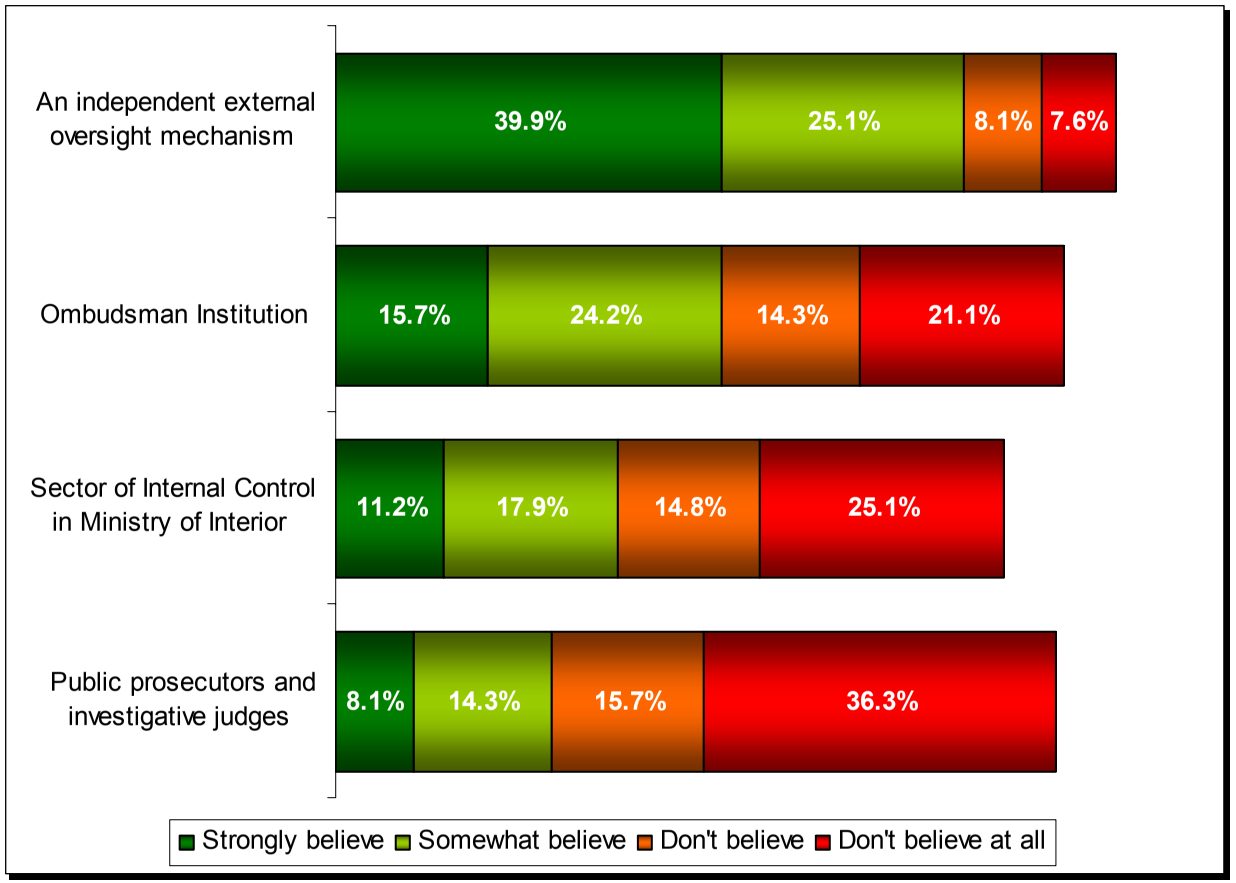

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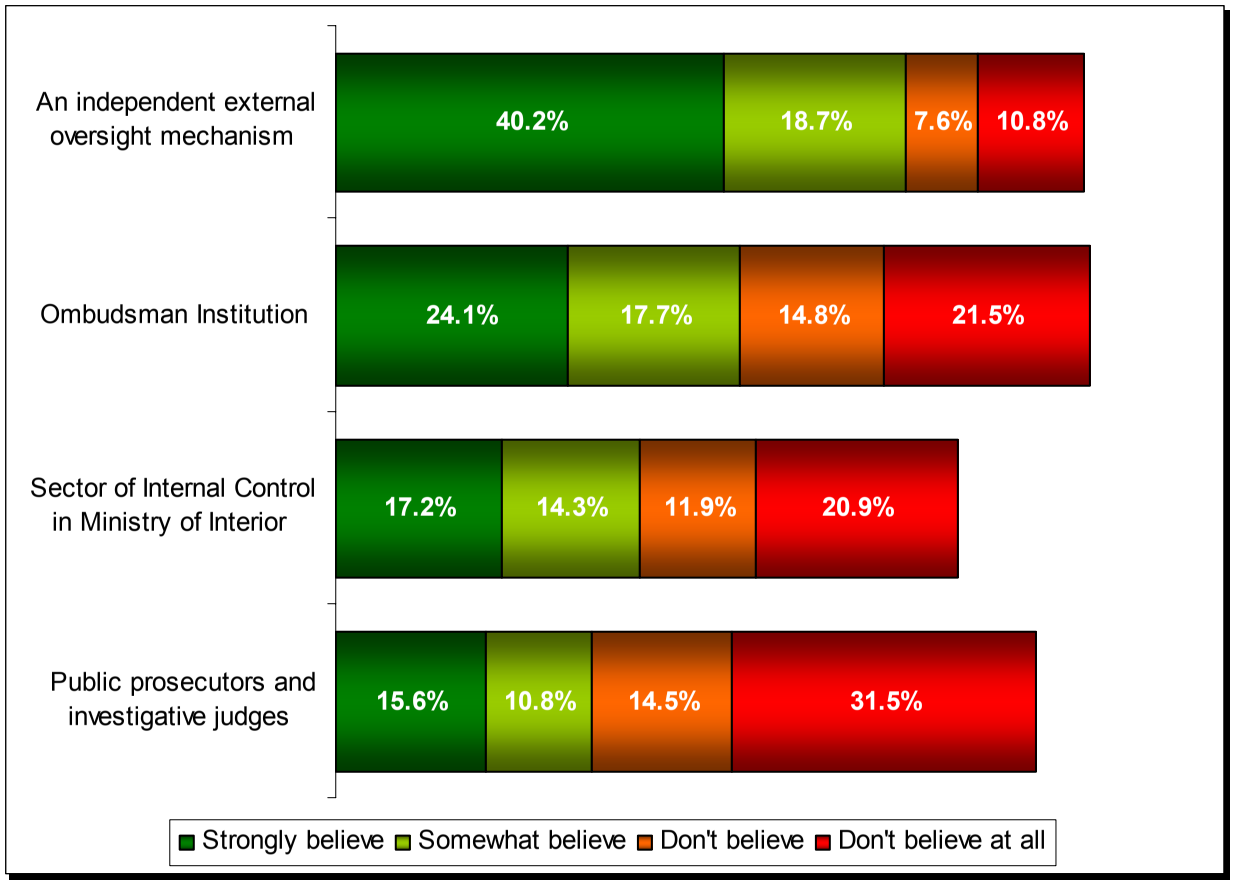
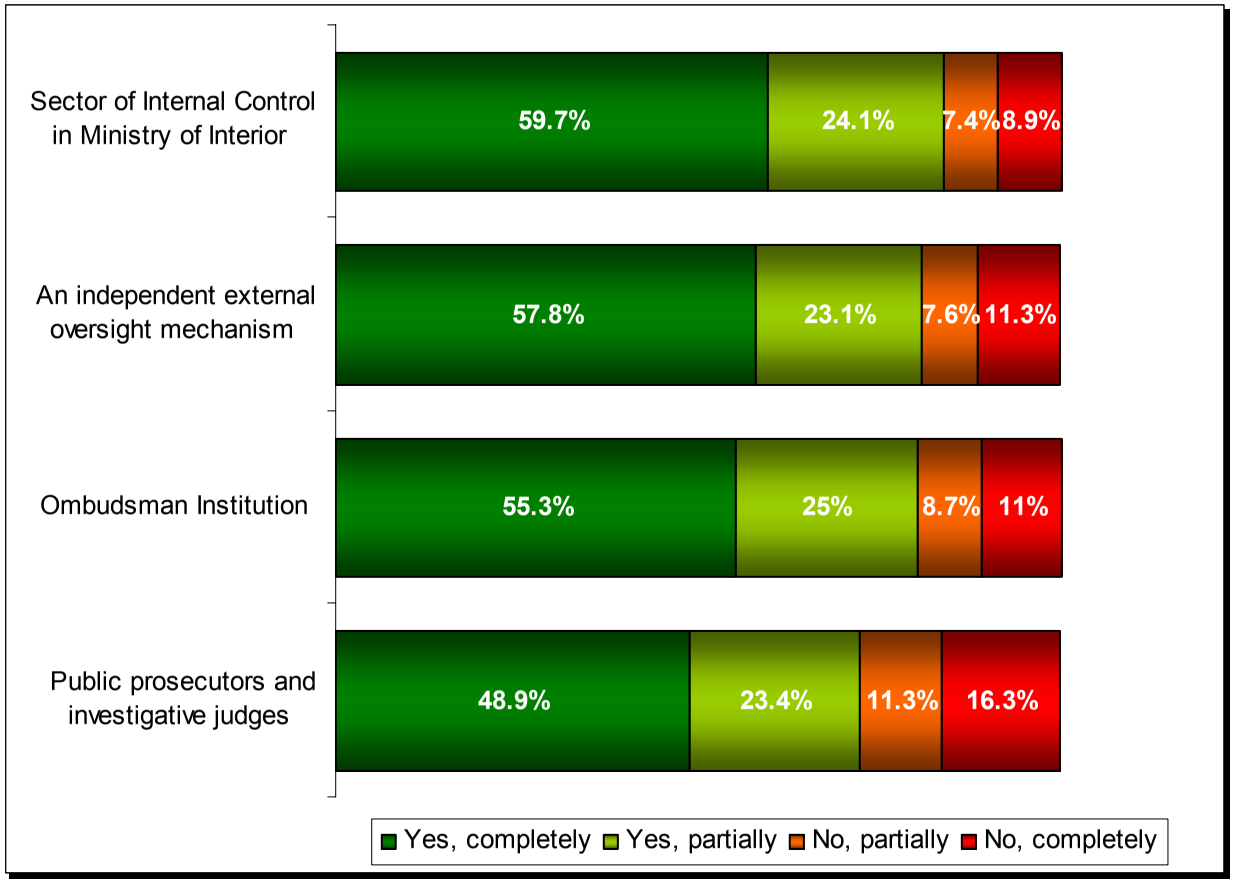


If you become a victim of police misconduct or ill-treatment, would you feel comfortable to report such a case to some of the following institutions?

Base: Total population – 1,497,000 citizens



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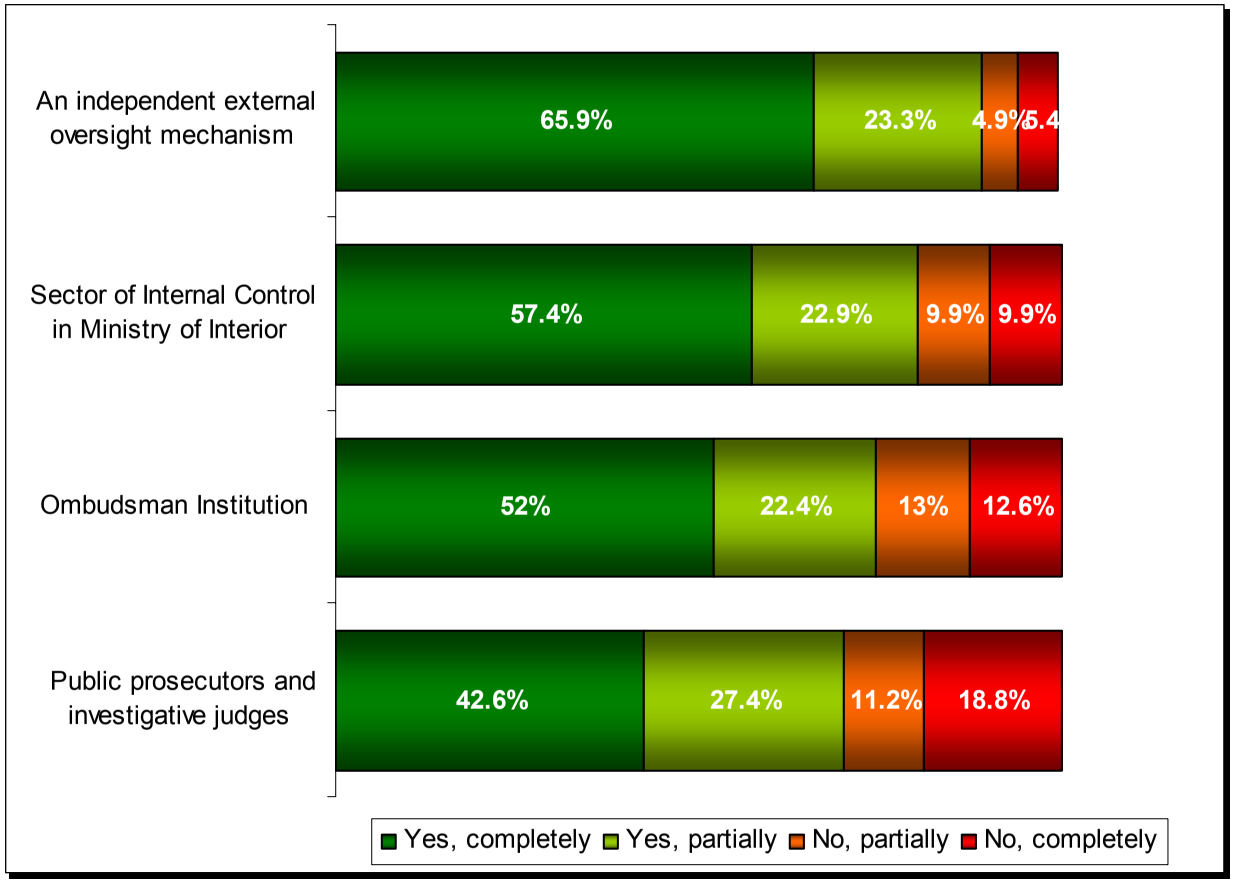

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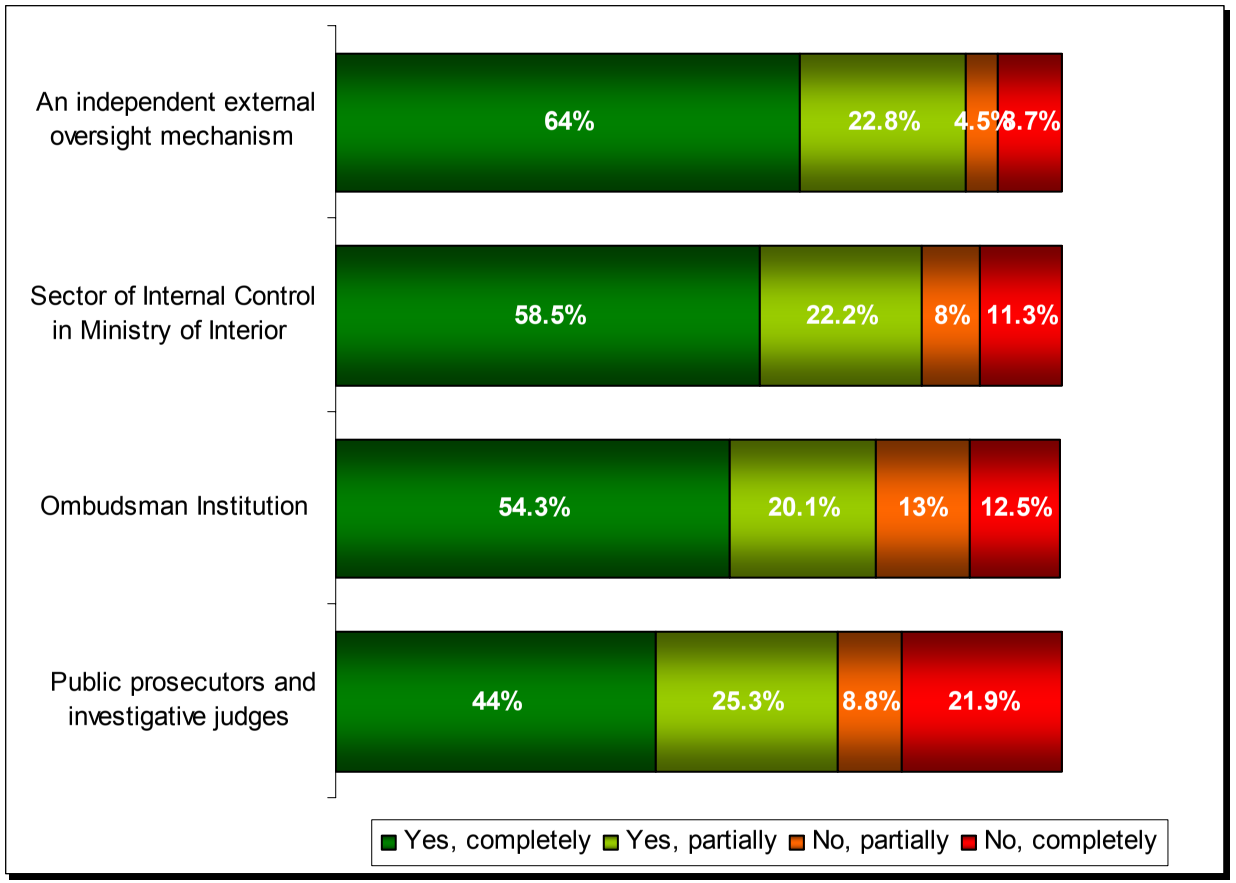

Annex 3

Conclusions from the Round Table "External Oversight of Law-Enforcement Bodies"

04 December 2006
Holiday Inn Hotel, Skopje

The participants at the round table discussion on external oversight of the law-enforcement bodies unanimously concluded:

1. Independent external control of the law-enforcement bodies to be established in the host country in order to enhance the trust between the police, other law-enforcement bodies and the citizens.

2. Working group involving professionals and experts that have input on this topic to be created. The OSCE SMMS will provide logistical and secretarial support to the working group. The expert working group is to be comprised of 11 members, including:
   - ✓ 2 members of the Parliament (representative of a governing political party and representative of the opposition)
   - ✓ 2 representatives of civic organizations
   - ✓ 2 representatives of the Government (Ministry of Justice, Ministry of Internal Affairs)
   - ✓ 2 academics (human rights law professor and professor of criminal procedure)
   - ✓ 2 representatives of the international community present in the host country (OSCE, UN, EU, USA), and
   - ✓ Representative of the Ombudsman Office.

   While creating the expert working group gender and ethnic balance are to be taken into consideration.

3. Model that will satisfy the needs and the legally binding documents, and that will oversee the police and other law-enforcement bodies to be developed. The oversight body inter alia will cover the following fields:
   - ✓ Investigation of death or severe bodily injuries at the hands of law-enforcement officials
   - ✓ Review of complaints and analysis of relevant legislation
   - ✓ Human rights monitoring and education

Different models can be applied for the purposes of addressing these issues, such as Human Rights Commission, Police Ombudsman, Advisory committees, etc.

Regardless of the institution/model that is to be established it should involve links and correlations with existing institutions such as the Public Prosecutor's Office, investigative judges, internal control, etc. and it should be based on the principles of competence and professionalism. While creating this body the Optional Protocol to the UN's Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment should be taken into consideration. In addition, special emphasis should be placed to the costs related to the creation of the model, its structure, and appointment of the members.

Annex 3.1

List of Participant at the Round Table on External Oversight of the Law Enforcement Bodies

Parliament

- Meri Mladenovska-Georgievska, Standing Inquiry Committee for Protection of Civil Freedoms and Rights
- Esad Rahic, Committee for Supervision the work of Security and Counterintelligence Directorate and the Intelligence Agency
- Blerim Bedzeti, Committee for Supervision the work of Security and Counterintelligence Directorate and the Intelligence Agency

Ministry of Interior

- Vasile Janevski, Head of the MoI Sector for Internal Control and Professional Standards
- Kire Rusevski, Deputy Head of the MoI for Internal Control and Professional Standards
- Voislav Zafirovski, MoI Reforms Team
- Trpe Stojanovski, MoI Sector for International Cooperation and European Integration
- Tihomir Klimovski, Police Trade Union

Ministry of Justice Representative

- Zorica Ilic, State Councillor

General Secretariat of the Government

- Doksim Dirlev, State Councillor

Judiciary

- Naser Hadziahmetagic, Basic Court Skopje I, Investigative Judge
- Gordana Sajkovksa, Basic Court Skopje I, Criminal Department

Ombudsman Office

- Dragi Celevski, Deputy Ombudsman

NGOs

- Petar Jordanovski, Coalition “All for Fair Trials”
- Muhamed Toci, Mesecina
- Neda Korunovska, Foundation Open Society Institute Macedonia
- Suad Misini, Civil Society Resource Centre
- Mirjana Najcevska, Helsinki Committee for Human Rights

Academics

- Prof. Gordan Kalajdziev, Law Faculty Skopje
- Prof. Vlado Kambovski, Law Faculty Skopje
- Prof. Oliver Bacanovic, Police Academy Skopje
- Prof. Zvonimir Jankuloski, Institute for Sociological and Legal Researches

Forensic Institute

- Prof. Aleksej Duma, Director

International Community Representatives

- Michael Rivollier, Council of Europe
- Danica Stosevska, European Agency for Reconstruction
- Giorgio Butini, Mission of the European Union
- Silva Pesic, OHCHR
- Philip Tolson, OSCE Head of PDD
- Pierre Chassagne, OSCE Deputy Head of PDD
- Victor Ullom, OSCE Head of RoL Department
- Jovdat Mammedov, OSCE Deputy Head of RoL Department
- Johnathan McCaskill, OSCE RoL Department
- Donce Boskovski, OSCE RoL Department
- Zehra Ibraim, OSCE RoL Department
- Venera Limani, OSCE RoL Department

Annex 3.2

Working Methodology of the Working Group for development of a model for external oversight of the law-enforcement bodies

Introduction

Decisions emanating from the European Court of Human Rights make clear that investigations undertaken upon allegations of serious misconduct by law-enforcement officials[102] must meet a requisite standard. Those standards include a necessary level of independence, effectiveness (including thoroughness), efficiency (including timeliness), public scrutiny, and an ability to lead to a binding decision.

Therefore, the Rule of Law Department of the OSCE Mission to Skopje, during the course of the second half of 2006, undertook a preliminary needs assessment of the domestic system for investigation of complaints against the law-enforcement bodies. The current mechanisms were examined for their compatibility with the requirements of the ECHR, its case law, and the emerging obligations under other international standards, recommendations and principles. The Mission found that part of the host country's existing legal and regulatory framework of control over law enforcement bodies run short of the applicable international and European standards.[103]

On 4th of December 2006, the Rule of Law Department supported one day round table discussion on the need to develop external oversight of law-enforcement bodies. All relevant stakeholders from the Parliament, the General Secretariat of the Government, the Ministry of Interior, the Ministry of Justice, the judiciary, the forensic institute, the Ombudsman's Office, and NGOs handling police abuse complaints, as well as academics and representatives of the international community present in the country attended the round table.

The participants unanimously concluded that there is a need to reconfigure the external control of law-enforcement bodies in order to comply with international standards, as well as to enhance the trust between the police, other law-enforcement bodies and the citizens. As a conclusion, the

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[102] Pursuant to the UN Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979, commentary to article 1, the term ***"law enforcement officials'***, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In addition, it stipulates that in countries where police powers are exercised by ***military authorities,*** whether uniformed or not, or by ***State security forces***, the definition of law enforcement officials shall be regarded as including officers of such services.
The Law on Internal Affairs, article 24, paragraph 2, stipulates that law enforcement officials are:

4. employees of the Police and operational employees;
5. employees who perform activities directly linked with police or operational matters;
6. the Minister, his/her Deputy, Heads of specific organizational units.

Pursuant to article 145 of the Criminal Procedure Act, the authorized persons from Custom administration of Republic of Macedonia and the financial police are having the same authorizations which the Ministry of Interior is having in the pre-investigative procedure and in the investigation, in the cases when they work on disclosing of criminal acts and their perpetrators and for gathering evidence necessary for criminal prosecution of the perpetrators of criminal acts.

[103] This finding is supported by reports on the human rights situation in the host country, especially those of the European Committee for the Prevention of Torture (CPT), the Ombudsman, the OSCE, the Helsinki Committee, Amnesty International, and the US State Department, as well as the reports of domestic human rights NGOs handling police abuse complaints, all of whom indicate that control mechanisms over law enforcement bodies are not at a level adequate for an EU aspirant country.

participants agreed that a separate working group on expert level should be created to move forward with the conclusions of the round table.

The Rule of Law Department of the OSCE SMMS has undertaken to support the working group. The OSCE will provide expertise, secretarial and logistical support throughout the whole process aimed at developing the mandate, structure and the competences of whatever external oversight model the working group chooses to put forward. The OSCE will facilitate further steps as necessary and as agreed, upon the conclusion of the working group.

The text below sets out the methodology of the working group.

1. Goal and tasks of the working group members

1.1. The goal of the working group is to develop an external oversight model by the end of June 2007, which will satisfy the country's obligation vis-à-vis the European Convention of Human Rights and other international standards and documents in the field of law-enforcement oversight.

1.2. The working group members will develop a model mechanism competent for investigation of cases of death or severe bodily injuries at the hands of law-enforcement officials. The group may include in the mechanism review of other serious or less serious complaints, as well as analysis of relevant legislation, other human rights monitoring and appropriate training or education.

1.3. While developing the model, the working group members will place particular emphasis to the independence and the structure of the model, costs related to the establishment and the sustainability of the body, the appointment procedure, etc.

1.4. The working group members will ensure that the developed model involves links and correlations with existing institutions such as the Public Prosecutor's Office, investigative judges, internal control, the Ombudsman, etc.

The outcome of the experts working group will be presented at a high level round table for governmental officials and other relevant decision-makers when further steps are agreed as appropriate. That event will be supported and organized by the OSCE Rule of Law Department.

2. Organization and Structure of the Working Group

2.1. The working group includes professionals that have expertise in the domestic legal system and legislative and regulatory framework of the existing mechanisms of control as well as on the international standards and requirements in the field of oversight of the law-enforcement bodies..

2.2. The working group is to be comprised of 11 members and could include deputy members and observers.

2.3. The structure of the working group is as follows:

- ✓ 2 parliamentarians (representing the "position" and the "opposition");
- ✓ 2 representatives of prominent NGOs;

- ✓ 3 governmental officials (Ministry of Justice, Ministry of Internal Affairs, General Secretariat of the Government)
- ✓ 3 law professors
- ✓ 2 representatives of the international community present in the country (OSCE, EAR, EU, UN, possibly USDOJ),
- ✓ 1 representative from the Ombudsman's Office and
- ✓ 1 representative of the Public Prosecutor's Office.

2.4. Each working group member is authorised to appoint a deputy, who will have full insight into the activities of the working group, as well as to be provided with the materials of the meetings in timely manner and to be included in the regular communication. Deputy members are entitled to attend meetings of the working group in case the member s/he represents is prevented to do so. The deputy can also attend as an "observer" on those occasions when the actual member is present. Solely based on authorization of the working group member, the deputy will be authorized to participate in the decision making processes of the working group, i.e. to decide on behalf of the working group member.

2.5. For additional expertise, permanent and ad hoc domestic and international observers can be included in the working group, but only with consensus of the working group. An "observer" is entitled to attend the meetings of the working group, and to be provided with conclusions of the meetings of the working group. However, observers can not participate in the discussions of the working group meetings without the consensus of the group. Observers do not participate in decision making.

2.6. The membership and the structure of the working group can be changed (expanded and/or reduced) only by consensus of the working group members.

2.7. A "Secretariat" will be established with the purpose of providing secretarial and logistical support to the working group throughout the whole process. The Secretariat of the working group will be comprised of Rule of Law Department representatives.

2.8. The Secretariat will disseminate relevant materials and information prior to and after the meetings of the working group.

2.9. The Secretariat will schedule the meetings of the working group, take minutes and compile conclusions.

2.10. The Secretariat will keep track of the attendance and the individual contribution to the process, based on which the working group members are to be reimbursed.

3. Working methodology

3.1. The meetings of the working group will be chaired on a monthly rotation basis by the working group members – following alphabetical order.[104]

[104] **Note:** Ms. Silva Pesic, National Human Rights experts, will facilitate the meetings of the working group until the establishment of the working group structure and composition, the working methodology, the time-table of activities, and regular communication.

3.2. The meetings of the working group will be held once per month. If needed, the working group members can agree to meet more frequently, however, due to cost considerations, such additional meetings require the consent of the Secretariat.

3.3. The venue of the meetings is to be determined by the Secretariat of the working group.

3.4. For the purposes of developing the model the working group members may undertake analysis, produce papers and documents on the relevant subject matter – as agreed by the group. The completed documents will be provided to the Secretariat prior the subsequent meeting for distribution to the other members.

3.5. During the meeting the Secretariat takes minutes and compiles any relevant conclusions. The Minutes will be shared to the working group members prior to the subsequent meeting.

3.6. For the purposes of undertaking certain specific activities that require particular expertise, the working group members can establish and work in subgroups that will have thematic approach. The subgroups will meet on ad hoc basis and the same operational rules developed for the working group will apply.

3.7. The working group members will attend a two-day facilitated workshop for the purpose of identifying, prioritizing and grouping the activities necessary for the development of the oversight mechanism.

3.8 Following the workshop, the group will meet regularly (at least monthly) to address outstanding issues necessary to develop the mechanism and move forward with completion of the model.

3.9. The working group shall adopt conclusions by consensus.

4. Honoraria of the working group members

4.1. If they choose, and if their employer allows, working group members can be compensated for their participation in the meetings and for their individual (specific) contribution in the external oversight mechanism development process.

4.2. The members of the working group who do get such compensation will be reimbursed pursuant to the OSCE Rules and Regulations.

Annex 4.1

Notes from the first regular coordination meeting of the members of the working group for development of the oversight model

16 February 2007
Holiday Inn hotel, Skopje

The first meeting of the working group for development of the oversight model was facilitated by Silva Pesic, National Human Rights Expert. The goal of the firs meeting was to agree upon the draft working methodology paper proposed by the Rule of Law Department of the OSCE Mission to Skopje, and to agree on the further steps, i.e. participation in a two day facilitated workshop.

The attendees were introduced to the proposed draft goals, tasks, composition and working methodology. In addition they were informed on the idea for the two day facilitated workshop with main aim they to identify, prioritize, and group the activities that are to be undertaken for development of the oversight model, and to develop action plan with tame frame. At the end of the meeting the working group members accepted the proposed working methodology document, and committed to participate in the workshop during the period 05-07 March 2007.

Additional proposals made by the working group members on the overall process

1. While developing the oversight model the ongoing reforms in the country as well as the judicial and the internal control to be taken into consideration. It should be just controlling model in cases when the existing system fails.

2. To analyze CPT recommendation, to assess their practical application, and to identify and overcome the shortcomings and omissions in their application.

3. The working group members to be provided with basic materials, and guidelines in order to start the process aimed at the development of the model.

4. The working group members to be provided with relevant materials referring to the existing mechanisms for control over the lawful performance of the activities of the law-enforcement bodies as well as with the CPT reports, cases investigated by the MoI's Sector for Internal Control and Professional Standards, cases in front of the ECtHR, criminal reports submitted with the PPO, and whether court proceedings have been initiated, cases investigated by the Ombudsman's Office, comparative materials related to experiences of other countries

5. To conduct analysis of the domestic legislation, to evaluate the position of the existing mechanisms of control and their efficiency and effectiveness, so that the developed model could be positioned in the existing system.

6. To ensure that the developed model, its scope of activities will satisfy the requirements set for the country with the euro-integrative processes.

7. The final recommendations of the working group to be directed towards identification of the weaknesses in the functioning of the current system, the existing legislative framework, and consequently the existing system to be upgraded with a new body or only to be improved.

8. Possibility for second phase of this initiative during which study visit will be organized for the working group members and international experts will be hired for purposes of exchange of opinions in regards to the functioning and/or weaknesses of the models identified by the working group as applicable in the country.

Annex 4.2

Notes from the second regular coordination meeting of the working group for development of a model of external oversight of the law-enforcement bodies

03 May 2007
Parliamentarian club, Skopje

Following the two day workshop, the regular monthly coordination meeting of the working group was held on 03 May 2007, in the Parliamentarian club, Skopje, and it was facilitated by Aleksandar Kržalovski, Senior Project Officer at the Macedonian Centre for International Cooperation (MCIC).

Eighteen members of the working group, representing various stakeholders: governmental officials, academics, representatives of the domestic human rights NGOs, and the international community present in the country attended the meeting.

During the introductory part the meeting objective and agenda were presented.

The objective of this coordination meeting was to present, and to gather comments in relation to the analysis of international standards, principles and practice conducted by the subgroup members as well as to agree on the future steps in the process.

The working group members were introduced with the current achievements and developments in the process. Namely, they were briefed on activities implemented by the Secretariat and the subgroups members as well as on the ongoing activities and future responsibilities of the working group members and the Secretariat.

Prof. Trpe Stojanovski, presented the Analysis of the document ”Requirements of the European Convention on Human Rights as Regards the Investigation of Death or Serious Injury at the Hands of State Officials”, analysis of the CPT’s reports made during the visits to the country in the period 1998 – 2006 Period as well as the Report on the study visit to Slovenia.

Prof. Zvonimir Jankuloski, presented the International Standard on adequate investigation into cases if death under dubious circumstance, and Analysis of the Optional Protocol to the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

Summary of the comments and recommendations:

Members of the working group, contextually, found the analysis on the CPT’s reports on the visit to the country in the period 1998 – 2006 as incomplete.

In regards to the decentralization of the police and the recommended two-instance complaint system, the working group members requested additional clarification and in depth explanation from the expert that conducted the analysis. In this regard, Prof. Trpe Stojanovski emphasised the remarks on the existing domestic system by giving the example of the procedure when the public prosecutor rejects the complaint and the victim has no right to appeal. This shows the inadequate level of harmonisation of the Macedonian legislation with the requirements and recommendations of ECHR.

In addition, several working group members consider that additional comparative analyses should be made.

It was concluded the the next coordination meeting to be scheduled for the period between 10 and 15 June where it is expected the members of the working group to nominate members of a smaller group that would undertake the practical defining and formulation of the oversight model.

Annex 4.3

Notes from the third regular coordination meeting of the working group for development of a model for external oversight of the law-enforcement authorities

June 14, 2007
ARKA hotel, Skopje

The third coordination meeting of the working group for development of a model for external oversight of the law-enforcement bodies was held on June 14, 2007. The meeting was facilitated by Ms. Silva Pesic, National Human Rights Adviser, Office of the UN Resident Coordinator.

The meeting started with presentation of its purposes and agenda, and afterwards several presentations followed. Namely, presentation of:

- Legal analysis, "Domestic mechanisms, institutions, and practice for investigation of cases of abuse of power by law-enforcement officials";
- Main findings of the domestic cases at the European Court of Human Rights with regard to the article 2, 3 and 13;
- Results of the administered public opinion survey - "Citizens' knowledge and perception of the current system for investigation of allegations of ill-treatment or abuse of power by law-enforcement officials".

CONCLUSIONS

1. To disseminate to the relevant institutions the legal analysis paper - "Domestic mechanisms, institutions, and practices for investigation of cases of abuse of power by law-enforcement officials".
2. To expand the mandate of the oversight model to other cases of abuse of power by law-enforcement officials, such as ill-treatment, misconduct and other forms of serious abuse of power.
3. The Secretariat of the working group to obtain information about the state of the ratification of the Optional Protocol to the UN's CAT.
4. The working group Secretariat to contact relevant members of the working group in order to establish a subgroup, which will work on the practical development of the proposed models.

5. In order to ensure the compliance of the domestic system with the requirements of the international standards, including those of the ECHR, the following "model solutions" have been proposed by the working group members:
   - Development of a model of internal restructuring of the Ombudsman, its specialization, personnel recruitment, involvement diverse expertise of relevant fields, as well as modification of its working methodology;
   - Development of a model of a separate agency, commission, committee or a council, authorized to oversee the investigation of the cases of dubious, controversial situation, resulting by use of force and/or other means of coercion by law-enforcement officials as well as other forms of abuse of authorizations;
   - Enhancement of the powers of the PPO.

Abbreviations:

Agency	Intelligence Agency
APPO	Appellate Public Prosecutor's Office
CPT	Committee on Prevention of Torture
CC	Criminal Code
Directorate	Security and Counter-Intelligence Directorate
DLPP	Draft Law on Public Prosecutor's Office
ECHR	European Convention on Human Rights
CoE	Council of Europe
ECtHR	European Court of Human Rights
EU	European Union
HRSP	Human Rights Support Project
LC	Law on Courts
LCP	Law on Criminal Procedure
L.E.O.	Law Enforcement Officials
LFP	Law on Financial Police
LPPO	Law on Public Prosecutor's Office
LP	Law on Police
MoI	Ministry of Interior
OSCE	Organisation for Security and Cooperation in Europe
PPO	Public Prosecutor's Office
RM	Republic of Macedonia
SICPS	Sector for Internal Control and Professional Standards
U.K.	United Kingdom of Great Brittan and Northern Ireland
UN	United Nations

Annex 1

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- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- Standard Minimum Rules for the Treatment of Prisoners
- Code of Conduct for Law Enforcement Officials
- Convention on the Elimination of all Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment
- International Convention on the Elimination of all Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Universal Declaration of Human Rights

Council of Europe
- Declaration on the Police
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- European Code of Police Ethics
- Convention for the Protection of Human Rights and Fundamental Freedoms and protocols to the said Convention