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CONFRONTING A PHENOMENON OF IMPUNITY AND DENIAL: CONTEMPORARY EUROPEAN TRENDS IN DEALING WITH ALLEGATIONS OF ILL-TREATMENT BY LAW ENFORCEMENT OFFICIALS

The article is largely based on findings of the project titled 'Civilian Oversights of Police, Lessons for Slovenia' which is run by Amnesty International Slovenia with the support of the Dutch Section of Amnesty International and which full report will be released in autumn 2004.
The paper – building on the reports of international monitoring institutions – argue that police ill-treatment and often inadequate response of the government and the established criminal justice institutions to this phenomenon remains o serious problem even in established democracies in Europe, and more so in new democracies. On the other hand, international human rights instruments and in particular the jurisprudence of the European Court of Human Rights have set rather clear international benchmarks in the area of State accountability for acts and omissions of law enforcement officials which result in ill-treatment of individuals. Investigations into such events must be effective, initiated and conducted even in the absence of a formal complaint (ex officio), free of any undue influence and partiality, open to public scrutiny, and prompt. Consequently, authors explore contemporary European trends in dealing with those issues in particular by highlighting the failure of internal accountability in many countries and by pointing to the external oversight mechanisms for dealing with misconduct as a possible solution to the problem. Finally, the authors argue for a need to strengthen the civilian oversight in addition to established internal and external criminal justice mechanisms as a part of the complex and multifaceted system of accountability of criminal justice actors.

INTRODUCTION

This paper explores positive impacts of civilian oversight over the resolution of the complaints against the police for violations of individual's rights as an additional mechanism for ensuring accountability for police violations. The authors will argues that while this approach is rather new and uncommon to criminal justice systems of Continental Europe (as opposed to common law / Anglo-Saxon criminal justice systems) it is not an idea which could/should be dismissed as incompatible with underlying philosophy of policing and criminal justice systems in most of Europe. Rather the opposite — it is increasingly a necessary option of the State to fulfil its obligations under different international and regional Human Rights instruments. The article draws on the findings of the project *'Civilian Oversights of Police, Lessons for Slovenia'* which is run by Amnesty International Slovenia with the support of the Dutch Section of Amnesty International. The project primarily focuses on the question of mechanisms for dealing with complaints against the police and on the mechanisms for monitoring the police cells (in the light of the Optional protocol to the UN Convention against Torture- (G.A./RES/57/199, 18. Dec. 2002). The part of the report that considers complaints mechanisms includes evaluation of the existing (recently changed) complaints system and short-term and long-term recommendation for improve-

ment based on professional and legal standards and international experiences. The report of the project with recommendations for improvements in the area of the civilian oversight of police in Slovenia will be released in autumn 2004.

Police has always been a crucial actor in formal social control, and modern liberal democracies are no exception to this rule. The behaviour, performance, responsibility, accountability and the respect for the Rule of Law by the police organisation and individual police officers remain a prime factor of whether human rights in an established democracy, and even more in an emerging democracy (e.g. transitional countries), will be respected, protected, or violated. Discussion about the police and human rights has always been accompanied by a paradox that has been described by Crawshaw as the fact that human rights are protected by law and yet at risk from law enforcement. The rights of every individual to live in a free ("liberty friendly") as well as secure environment (provided by a number of international human rights instruments such as Article 28 of the Universal Declaration of Human Rights and Article 1 of the European Convention of Human Rights), is an obligation of the State. One of the primal tools at the disposal of the State to meet this obligation is policing. On the other hand the police organisation is a State institution by which these same rights can be grossly violated.

In this paper we will deal with the issue of state obligation under international law to deal with allegations of ill-treatment by law enforcement officials (e.g. effective investigations), and the impediments that occur in the practical implementation of this obligation. Deriving from the Slovenian experience one can identify a number of deficiencies, which uphold the claim that the Slovenian state falls short of meeting international standards in the area of ensuring accountability of those police officers responsible for ill-treatment. At the same time, it should be underlined that ill-treatment or even torture by the police is not a widespread phenomenon in Slovenia, and does not fall outside the European "average"; the real problem lies, as said above, in the fact that when violations occur, the response of the state is inadequate. And this creates a fertile and dangerous ground for police impunity for human rights violations.

Reports of different international and non-governmental organisations, particularly the UN Committee against Torture, confirm that the problem observed in Slovenia is actually a predominant problem regarding violations of the prohibition of ill-treatment in most democratic countries. Although the problem is the same, the approach to addressing it, especially in cases of complaints against police brutality, varies greatly. A superficial insight alone reveals a basic difference in dealing with such complaints between Continental Europe and Anglo-Saxon countries (we could also use another distinction: civil v. common law jurisdictions). Such difference cannot, of course, be taken from the historical, cultural, legal and political context, which resulted in two rather distinct models of policing (centralised v. decentralised). While in most Continental countries (with the exception of The Netherlands) complaints against police are processed by the police and within the criminal justice process, the USA, United Kingdom, Canada and some other countries have special bodies (special commissions, ombuds-persons, committees, agencies) which are not a part of the police organization or the competent ministry (e.g. Ministry of Interior, Ministry of Justice). These bodies as instruments for civilian oversight of police have the authority to resolve complaints and, in some cases, even to monitor the police in the field of human rights. Their indirect mission is also to strengthen the public confidence in the police in general.

POLICE ACCOUNTABILITY AND OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

In terms of police ill-treatment in modern democratic countries, which generally does not reach the point of torture, the first question that needs to be considered is whether or to what extent police interference with the individual's psychological or physical integrity could fall within the scope of Article 3 of the European Convention of Human Rights (hereinafter: the Convention): *"Article 3 – Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment."* The European Court of Human Rights (hereinafter: the Court) and the European Commission for Human Rights (hereinafter: the Commission) adopted the so called "three in one" approach (Evans and Morgan, 1998: 79) understanding Article 3 as embracing three separate concepts: torture, inhuman and degrading treatment, and punishment; all of them are prohibited. The Court and the Commission have developed a rather flexible and inclusive attitude to the issue of what constitutes inhuman and degrading treatment. In the case of Assenov v. Bulgaria (Judgment, 28 October 1998, no. 24760/94) for example, the Court has decided that the degree of bruising found by the doctor who examined the applicant (mostly haematomas, bruises and grazes - injuries that are commonly sustained by police ill-treatment) indicates that the injuries, regardless of the question who caused them, were sufficiently serious to amount to ill-treatment within the scope of Article 3 (§95 and §11).

Jurisprudence of the Court unequivocally shows that Article 3 of the Convention has a much deeper meaning than the mere prohibition of torture, inhuman and degrading treatment or punishment. The Court and the Commission have established positive obligations for the State parties which need to provide for effective protection from torture and other forms of ill-treatment (Cooper, 2003: 33). Besides the obligations that are aimed at preventing ill-treatment, the State is also obliged to ensure accountability for it. *The breach of the obligation under Article 3 of the Convention is therefore not constituted just by the act of one of the forms of ill-treatment per se, but also (together or without the established ill-treatment) by the failure of the State to ensure an effective official investigation into the alleged violation.*

In the case of Assenov the Court considered that *"where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 (…), requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible"* (§ 102). The Court failed to establish with certainty whether or not the plaintiff's injuries were caused by police ill-treatment (the Court decided that the level of injuries — bruising and grazes — stated in medical reports were serious enough that regardless of the perpetrator they fall within the ill-treatment under Article 3 of the Convention), but was of the opinion that the applicant presented arguable claim that he had been beaten by police officers which the State failed to investigate effectively and thoroughly, what constitutes a violation of Article 3 of the Convention (see §100 and §106).

The *Assenov* case highlight another problem related to police ill-treatment. *The duty of the State to conduct an effective investigation stems from the problem of evidence.* This issue is present in most cases of police ill-treatment, especially during detention. A majority of ill-treatment cases happen in isolated conditions with no witnesses present, and the victim's injuries that can occur as a result of violations of Article 3 are often vehemently explained by the police as consequences of use of legitimate force due to re-

sistance or other 'wrong' types of behaviour by the victim. The police have the power over detainees and are thus mainly responsible for securing evidence of ill-treatment. As it is practically impossible for the individual, taking into account the State's unwillingness and non-cooperation, to prove that he or she has been ill treated, the Court decided that the state has to provide a plausible explanation for the injuries of the detainee. In other words, the burden of proof lies with the state. In the case of *Ribitsch v. Austria* (Judgement, 14 December 1995, no. 18896/91; see also *Shanaghan v. the United Kingdom*, 4 August 2001, no. 37715/97), the Court also stated that even though the police officer accused of ill-treatment was acquitted of all charges in the criminal procedure the state is still under the obligation to provide a plausible explanation of how the detainee's injuries were caused (§ 34). The conduct of an effective investigation therefore forms the basis of proving that there was no violation of Article 3 (by giving a credible explanation regarding the injuries - in the case of *Rehbock v. Slovenia* (Judgement, 28 November 2000, no. 29462/95) for example, Slovenia failed to provide such an explanation) and as such is also an obligation per se.

Considering the adequateness of the investigation, the Court often resorted to jurisprudence in connection with Article 2 (Right to life) of the Convention but did not address specific methods and manners that would make the investigation effective and thorough. In the case of *Shanaghan v. the United Kingdom* the Court stated (usage of Article 2 of the Convention but the position can also be applied to Article 3) that its role does not include defining the type of procedure that needs to be adopted by the state in order to conclude an effective investigation into the circumstances of death that could have been caused by state officials, and that it is not necessary that this investigation be one unified procedure. As is common in the implementation of international principles, the state makes that decision, yet such investigation must, regardless of who carries it out or how, meet the standards for effectiveness and thoroughness in ascertaining facts and accountability for the violations. Some of the principles establishing the course of the investigation can be taken from the Court's jurisprudence regarding Articles 2 and 3 of the Convention. Due to their mutual reference, however, these principles are valid for investigations based on both articles (*General principles* in the cases *Shanaghan v. the United Kingdom*, § 86, 88 – 92; *Kelly and Others v. the United Kingdom*, 4 August 2001, no. 30054/96, § 92, 94 – 98; *Mc Kerr v. the United Kingdom*, 4 August 2001, no. 28883/95, § 109, 111 – 115):

- *EFFECTIVENESS:* The effectiveness criterion can be derived from the demand stated by the Court in the *Assenov* case – that investigation into allegation of ill-treatment should be capable of leading to the identification and punishment of those responsible (§ 102). The Court also explained that if this were not the case, the general legal prohibition of torture and other forms of ill treatment (Article 3), despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (ibid.). *"This is not an obligation of result, but of means. ... Any deficiency in the investigation which undermines its ability to establish the cause or the person responsible will risk falling foul of this standard." (Shanaghan,* § 90:*).* The effectiveness criterion is also related to the right to effective remedy, meaning that the complainant must have effective access to the investigatory procedure and the payment of compensation (*Assenov*, §117).
- *EX OFFICIO: "However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention."* (*Shanaghan,* § 88). They cannot leave it to the initiative of the victim or their family either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (ibid.)
- *INDEPENDENCE:* In the *Kaya v. Turkey* (Judgment, 19 February 1998, no. 22729/93) the Court stated that effective protection of the right to live is condi-

tioned by the accountability of state officials regarding the use of lethal force by using certain forms of independent and public investigations (§ 87, 89, 91). The Court demanded that the people responsible for conducting investigations must be independent from those implicated in the events. By independence the Court meant not only a lack of hierarchical or institutional connection but also a practical independence, which can be seen during the investigation or in reports, if they are based mainly on statements from one (official) side and state evidence to this side's benefit. (*Shanaghan,* § 89; see also *Ergi v. Turkey,* 28. July 1998, no. 23818/94, § 83, 84).

– *OPENNES:* The investigation and its results must include a sufficient element of public scrutiny. The investigation must allow the victim or the victim's family to participate in order to ensure the safeguard of their legitimate interests (*Shanaghan*, § 92).
– *PROMPTNESS:* A prompt response by the authorities when conducting investigations into the use of lethal force (as well as into violations of Article 3) is imperative if the public is to remain confident that authorities can ensure the Rule of Law and prevent illegal conduct by state official (*Shanaghan,* § 91).

Thoroughness, effectiveness, independence, public control, rapidity and ex officio principles form the base of investigation adequacy regarding articles 2 and 3 of the Convention. This claim can be further supported by the fact that a majority of "investigations" for which the Court considered that they were not sufficient or in compliance with the standards mentioned above, were evidently partial and without the real intention to scrutinize the acts of the state agents (see for example *Rehbock v. Slovenia*). Although the Court has developed standards considered above they are, to some extent, still open for interpretation. Justification is therefore important in regard to the question of the effective investigation and accountability which will always be judged ex post on case by case basis by the Court, as there is no specific pre-established recipe which would grant the adequacy of the investigation.

THE REALITY OF POLICE ILL-TREATMENT – THE PHENOMENON OF IMPUNITY AND DENIAL

The Rule of Law requires that no one is above the law and everybody is equal under the law. This simple formulation becomes very complicated when police are held accountable for violations. Police powers, police discretion (Lewis, 1999: 10-16), the phenomenon of denial and the code of silence (Walker, 2001: 139, 140)Šin addition to the code of silence Walker lists the following inherent problems in investigating complaints against the police: work in pairs without present witnesses, the element of violence — used by the police as well as the person in the proceedings —, possibility to justify the use of force, etc.Ć have all been dealt with in many theoretical works and make police work and accountability stand apart from the work of all other state bodies and services. The characteristics of police work are not just a product of the modern world but also a consequence of the uniqueness of the police profession and its status in the society.

This specific status contains many aspects that constitute threats to the functioning of accountability mechanisms (judicial, administrative-judicial, and disciplinary) of public-powers holders. Moore and O'Rowe (1997: 97) state that one of the aspects of such a status is the process of denial of police ill-treatment. This aspect is so common that it has been named as the *"Contempt of Cop"* phenomenon in the judicial process and manifests itself in the inclination of the courts to trust the statements made by the police more than the statements made by even the most respectable middle-class

suspects or witnesses (Chevigny, 1996, cited in Moore and O'Rowe, 1997: 98). The same is true in cases when the police are suspected of committing criminal acts, especially if such acts are alleged to have been committed against a suspect in police proceedings.

Some reasons for what some authors have called 'a culture of denial' are well described by Evans and Morgan in Preventing Torture (1998) They argue that the problems lie in the fact that torture as such is not acknowledged as it used to be in ancient times and in the Roman-canonical tradition when it was an accepted and normal part of the judicial process. Nowadays torture and its discussions are taboo, except by official condemnation, and so allegations of torture are generally dismissed as propagandist disinformation (Evans and Morgan, 1998: 56).

Cohen (1995), who has studied the practice of denial, schematises the different methods applied by governments (police) accused of human rights violations (literal, interpretive and implicatory denial, partial acknowledgment...). The implicatory denial is the most sophisticated way to deflect the attention from the case of police ill-treatment to the victim as the guilty party (and if we refer back to the Slovenian experience, a very common one). There are different ways for achieving this effect. One is to deny any illegality in the process of law enforcement and to maintain (without any real examination of the event) that injuries resulted from the aggressive behaviour of the victim and his or her resistance to the arrest. Another is an explanation given by the authorities that the victim has intentionally injured herself or himself to discredit the police. Another approach, aimed at intimidating and discrediting the victim and deflecting the attention from the alleged violation of ill-treatment, is to issue a criminal complaint against the victim on the ground of the alleged falseness of the complaint initially lodged by the victim of police ill-treatment. The findings of Paul Chevigny (1996, cited in Moore and O'Rowe, 1997: 98) are similar, namely that complaints against police frequently result in a charge against the complainant, since they can be portrayed as vexatious or a result of 'anti-police' bias.

The failure of the state to meet its obligation to ensure effective investigation in an alleged ill-treatment is not accidental. Regretfully, quite the opposite seems to be the case. It is becoming a trend that appears in societies worldwide (Moore and O'Rowe, 1997: 97-100). Police and government authorities are more likely to deny wrongdoing, particularly when ill-treatment is in question, than ordering a fully impartial and thorough investigation and give a credible explanation of the controversial event. And this is not simply a violation of Article 3 of the Convention, but has deeper negative consequences for the erosion of the Rule of Law itself and indicates a failure of the legal (administrative and judicial) system to protect citizens from the illegal acts of state officials. The 'privileged relationship' between the police and government, as we tried to prove above, enables police and police officers to maintain a powerful position in the context of legal accountability. The symptom of protecting this relationship is also the Government's resistance to the idea of effective civilian oversight independent of the government. This issue has been explained by Lewis (1999: 31-58) through the privileged position of the police and the *"governments' reluctance to act against the wishes of the police."* Lewis (1999: 52) argues that this special position (relationship) is protected by the role of the police *"as the enforcement arms of the state" and "indeed privileged as they are essential to the state's very existence (…), without power of coerce, governments cannot govern."*

On the other hand, an often echoed claim ('defence') of the government of any given state that can not avoid the issue of torture or ill-treatment, is that they are not a struc-

tural issue in its country; it is merely a rare and regretful product of the occasional rotten apple in an otherwise "clean" law enforcement (Evans and Morgan, 1998: 57) and therefore can be dealt internally (Lewis in Goldsmith and Lewis, 2000: 22). Regarding the problem of insufficient investigations of ill-treatment and lack of accountability of law enforcement officials, the problem that remains is that there are probably more 'bad apples' that merely those found guilty of ill-treatment by the courts. The impunity is a logical consequence of the state's resistance to deal with alleged cases of ill-treatment and this certainly is a structural issue that should be addressed instead of denied.

THE FAILURE OF INTERNAL INVESTIGATIVE MECHANISMS AND DEVELOPMENT OF CIVILIAN/EXTERNAL OVERSIGHT MECHANISMS FOR DEALING WITH MISCONDUCT

A number of studies (see for example Lewis (1999) - citing also other scholars, Goldsmith and Lewis, 2000, Walker 2001), findings of reform commissions and commissions of inquiry (particularly from English speaking countries, e.g. *Fitzgerald Inquiry or Patten Commission*) and reports of international (e.g. UN Committee Against Torture - CAT, European Committee for Prevention of Torture - CPT) and non governmental organizations (such as Amnesty International - AI) have shown that internal systems designed to deal with complaints failed to ensure effective investigations into allegations of police ill-treatment in countries all around the world. In Central and Eastern Europe the approach to this problem, in contrast to Anglo-Saxon countries, seems to end in the governments' explanation about the concerns of human rights organizations and results in no radical changes (see for example: Uildriks and van Reenen (2003) that examine the police control and accountability in post communist societies (Lithuania, Russia, Romania, Bulgaria, Poland, Mongolia)).

Austria and Germany, where the criminal justice system (public prosecution through *Legalitaetprincip*) is similar to Slovenian, have been, despite their expressed beliefs about ensuring effective system of legal (judicial) protection to victims of ill-treatment, seriously criticized by human rights institutions in this area of human rights protection (*State Party Reports: Austria, 15/12/98, CAT/C/17/Add.21, § 4; Germany, 30/07/97, CAT/C/29/Add.2*). In the case of Austria, AI has repeatedly expressed concern that, when formal complaints have been lodged and judicial investigations opened in cases of alleged police ill-treatment, in Amnesty International's experience they have been slow, frequently lacking in thoroughness and often inconclusive. The organization has also stated that the impartiality of a number of criminal investigations into allegations of ill-treatment has also been questioned, with claims that prosecution authorities frequently view the evidence presented in favour of the suspected police officer as more credible than that supporting the victim (*Austria before the UN Committee against Torture: allegations of police ill-treatment, p. 9. AI Index: EUR 13/01/00*). Following its first visits to Austria, the CPT was critical of the police disciplinary procedure in instances where ill-treatment occurred and so concluded that it should be examined whether an independent person should take part in the disciplinary procedure in order to improve the intrinsic quality of the procedure and enhance public confidence regarding its fairness (*CPT/Inf (91) 10 – § 97*). In its report to the Austrian government, published in October 1996, the CPT requested explanation from the Austrian authorities on the apparently lenient attitude of the Ministry of the Interior with regard to disciplining police officers for behaviour, which constituted a serious infringement of a person's fundamental rights (*CPT/Inf (96) 28 – § 26*.). In the light of these concerns the CPT requested Austrian authorities to comment on the possibility of having complaints of police ill-treatment investigated by persons with appropriate qualifications and skills from outside the police service (*CPT/Inf (96) 28 – § 25*).

Germany also was the target of similar criticism by the UN Human Rights Committee, which voiced its concerns over the fact that Germany does not have an independent mechanism for investigating complaints of police ill-treatment and recommended the formation of independent bodies to carry out this function. (*UN Doc. CCPR/C/79/Add. 73, 18 November 1996, § 11.*) CAT (UN Doc. CAT/C/SR.329, 14 May 1998, § 10) and AI also voiced their disappointment regarding a high number of reports about police ill-treatment and "apparently low rate of prosecution and conviction in the alleged incidents of ill-treatment by the police, especially of people of foreign descent". In its detailed report on complaints about police ill-treatment in Germany, titled *"The Wrong Side of the Law?"*, AI warned about the high number of incidents of police counter-charges. (*The Wrong Side of the Law? Allegations of Police Ill-treatment and Excessive Use of Force in Germany. AI Index: EUR 23/003/2003.*) Due to the problems recognized already by AI (i.e. ineffective investigations, counter charges) the European Commission against Racism and Intolerance (ECRI) in its last report on Germany, reiterates its call for *"establishment of an independent body entrusted with the investigation of allegations of ill-treatment by police officers."* (CRI (2004) 23, § 80, 81 and 85).

Slovenia faces problems similar to those encountered in Austria, Germany and many other European countries, as the existing criminal and complaint mechanisms and their functioning do not always ensure independent investigations of ill-treatment by the police and there are still a number of cases of alleged police violations that have not been adequately investigated. This is also confirmed by international monitoring organisations such as the UN Committee against Torture - CAT (see report *on Slovenia CAT/C/CR/30/4*); European Committee for the Prevention of Torture - CPT (see *Report on Slovenia: CPT/Inf (2002) 36*) and Amnesty International - AI (see reports on Republic of Slovenia, *Briefing to the Committee against Torture, April 2003, AI Index: EUR 68/001/2003, AI's Letter to Ministry of the Interior of RS, 21 May 2002, Ref.: EUR 68/2002.01 and AI's Annual report 2004 – report on Slovenia*). This has often been due to the fact that the police itself (frequently the same police unit), similarly as in the *Rehbock* case, carried out the investigations into police ill-treatment and that, if the victim did not file information, the prosecution rarely doubted police findings, which were according to AI reports almost always in favour of the police. The complaints procedure, which existed in Slovenia but was handled by the police, proved to be a part of the problem not a part of its solution.

The failure of the prosecution to provide adequate investigations within the frame of the criminal justice system and the failure of the internal complaints mechanisms, are related to the abovementioned phenomenon (phenomenon of denial, code of silence exc.) that create a basis for impunity. As a response to these problems and as a reflection of the democratic idea of civilian oversight of the police, that is the agency with the most profound impact on civil rights, many Anglo-Saxon countries established external complaint bodies. The development of civilian oversight over complaints procedures was frequently the result of the society's dissatisfaction with and resistance to the police treatment of minorities. Civilian oversight became the 'right' of the society to monitor the implementation of powers given to the police by the constitution and law. By the end of the 1970s, 7 American cities implemented a form of citizen participation in the complaints procedure, while by the end of 1991 the number rose to 30 (Walker and Bumphus, 1992: 2, cited in Lewis, 1999: 53) and in 1995 Walker and Wright (1995: 1 cited in Lewis, 1999: 53) counted a total of 66 bodies that include citizens in the complaints solving procedures in the USA (Lewis, 1999: 53, Walker, 2001: 19 – 45). Until 1985 in Australia all police organizations were controlled by the 'citizen' body (Lewis, 1999: 53). At that time (in 1985) England got its external body

for dealing with complaints – Police Complaints Authority, substituting the Police Complaints Board established in 1976 – and on 1 April 2004 a special independent commission with extended powers for solving complaints, the Independent Police Complaints Commission. In 1998 Northern Ireland named a Police Ombudsman to deal with complaints, followed by the Republic of Ireland which is currently in the phase of establishing a new complaints body Garda Síochána Ombudsman Commission, which will substitute the Garda Síochána Complaints Board.

The development of civilian oversight was typically not welcomed by the police that often resorted to different forms of pressure to prevent its functioning. In her study on complaints against police (1999: 26) Colleen Lewis states that police arguments against civilian oversight, namely that it undermines the authority of police leadership, police moral and police effectiveness, were never supported by reasonable and objective evidence. On the other hand some pro-civilian oversight authors define the role of police in the complaints process as important from the viewpoint of reducing mistakes and as a great chance for learning, maintaining good relations with citizens as well as for effective and rapid carrying out of complaints investigations – and these seems to be all solid arguments (e.g. Perez, 1994). Establishing an external body doesn't necessary imply a complete exclusion of the police from the complaints process. In almost all systems that have an external complaints body the police retains a role in investigating complaints, informal resolutions of less serious complaints and deciding on disciplinary measures. However, the cooperation between the external body and the police must be balanced in a way that enables the external complaints body to function efficiently and at the same time prevents the police from abusing its role in the procedure to cover up violations and prevent accountability.

THE ROLE OF CIVILIAN OVERSIGHT OF THE POLICE IN THE ACCOUNTABILITY FOR POLICE ILL-TREATMENT

Civilian oversight of complaints against the police is usually carried out through external complaints bodies (e.g. Police Complaints Commission in the Amsterdam-Amstelland region, Deputy Ombudsman Victoria, Independent Police Complaints Commission in England, Police Ombudsman for Northern Ireland, Criminal Justice Commission in Queensland, Garda Síochána Complaints Board in Ireland) whose purpose is not solely ensuring accountability (reactive competencies) but increasingly also constructive powers with the aim of removing causes of police violations - s.c. proactive competencies (Miller, 2002: 5, Lewis,1999: 79, Perez: 1994: 76, Walker, 2001: 86). In the following pages we will focus mainly on the question how civilian oversight can contribute to:

- accountability of police officers to respect human rights in police procedures;
- accountability of police leadership and competent state bodies responsible for ensuring the qualifications and working conditions that enable professional and lawful police work;
- accountability of competent bodies to investigate complaints in accordance with national law and international standards.

The external complaints authority cannot in itself provide accountability for violations of rights by the police because its decisions, as we will see further on, generally have no direct legal consequences (such as a criminal, disciplinary or civil liability procedures). Regardless of that it can, through its public and when necessary critical reports and releases, inform the public about police violations and reasons for it (e.g. inadequate training) and/or the success of investigations into alleged violations. By this the citizens are given democratic mechanisms to call the state to account.

Informing the public depends on the ability of the complaints mechanism to access relevant information. A body, however independent it may be, without sufficient means and powers (the following have often proved essential: the competencies to investigate or at least monitor the investigation, research competencies and capacities that allow for discovering patterns and trends in violations, the possibility of carrying out investigations on its own initiative, collecting data on measures implemented on the basis of complaints body's recommendations, etc) for carrying out its tasks cannot be effective and quickly loses public confidence. It is important to stress that in dealing with individual cases, even though complaints bodies have certain investigative powers they do not interfere with the competencies of public prosecution while prosecuting police officers suspected of criminal offences and, generally, do not interfere with competencies of police leadership regarding disciplinary measures. Their primary role is resolving individual complaints and informing (also in the form of recommendations) competent bodies such as public prosecution and disciplinary bodies as well as the public, about their findings. Various systems of civilian oversight differing in the abovementioned powers have already been developed in theory as well as in practise. We will try to summarize some of the key ones (Goldsmith, 1988, Walker, 2001, Lewis, 1999) that include civilian oversight on different levels and with different intensity (we will leave out the both extreme variants: completely external and completely internal procedure).

A. Citizens are involved in resolving complaints or monitoring complaints handling by the police (The 'Civilian In-house' model by Goldsmith).

The complaints procedure is internal, i.e. takes place within the police force, but includes citizens on different levels, all with the purpose of ensuring objectivity and impartiality (e.g. as the jury while deciding). The Slovenian regulation on the resolution of complaints against police could fall under this model as it is a sort of an internal procedure – within the Ministry of Interior (hereinafter the Ministry) – where citizens take part in the so-called monitoring role when they evaluate the complaint on the basis of report by the police or the Ministry and their competencies end with the option to ask a question to the rapporteur and, if he or she is present at the session, complainant and the police officer.

B. External complaint authority review the complaint procedure at the police

This type includes a special independent body that monitors the resolution of complaints against the police and often issues recommendations regarding disciplinary sanctions (e.g. 'Class II' model by Walker). A possible version of this model is the 'Class III' model by Walker, which refers to appeal proceedings where the complaints are investigated and solved by the police, while the complainant can appeal to the external complaints body against the police decision. If the complaints body does not agree with the decision taken by the police it can reinstate the case, but has no competencies to adopt a decision substituting the police decision in the case (according to Walker this model has the weakest public role.)

'Civilian External Supervisory' model (Goldsmith; this category could also include Goldsmith's External Civilian Agency, where the complaints are investigated by the police while the external body monitors the procedure and the final decision on the complaint; the questions raised with this model are mainly about the place of employment of police officers conducting the investigation and their accountability (to the police or to the external body) (Lewis, 1999: 68)) still leaves the complaint investigation and deciding on disciplinary measures in the hands of the police with a separate external body monitoring the procedure. The external body can demand that police carry out appropriate proceedings but the outcome of the proceedings and disciplinary measures still depend on the police. Lewis (1999: 65) says that such a procedure (ad

hoc facto review) has a very slim chance of being effective in practice as the external body has no means for their own investigation. The Commentary to the European Code of Police Ethics also adopts a critical view of this model, stating that the fact of police investigating police usually raises doubts about impartiality.

External bodies, which do not have investigative competencies or adequate capacities for investigating, have in many cases proven to be ineffective and have thus lost public confidence. For example, this happened to the Police Complaints Tribunal in Queensland, the Irish Garda Síochána Complaints Board and the Police Complaints Authority in England. As CPT warned in its report on the latter about its limited competencies which later led to the establishment of the Independent Police Complaints Commission (*CPT/Inf (2000) 1*): "From the very beginning of the complaints process, at which stage the police retain sole discretion as to whether to record a complaint, through an investigation conducted and controlled by police officers, to the moment at which a police officer is required to assess the criminal and/or disciplinary implications of that investigation, the police themselves maintain a firm grip upon the handling of complaints against them (§ 48). The CPT found that "in its present form the Authority appears ill-equipped to carry out the watchdog role in which it has been cast. The Authority's current functions are very tightly circumscribed and, perhaps in consequence there is so little public confidence in the PCA's independence (50)." Therefore the CPT expressed doubts that increasing the powers of the PCA alone will be sufficient to restore public confidence in the efficacity of police complaints and disciplinary procedures as legal remedies for police misconduct (ibid.).

C. External complaints authority review and resolves complaints, gives recommendations on disciplinary measures and is included in the complaints investigation

Within this model, which is seen in view of current trends as a more or less optimal variant for dealing with complaints, there are several possible levels of public involvement.

The 'Civilian External Investigatory' model by Goldsmith includes the public in the procedure of investigating complaints with the investigatory function being exclusively in the hands of the external body or carried out jointly with the police. Its major deficiency, however, is the lack of any competencies of the external body regarding disciplinary measures. Also questionable in terms of effectiveness is the fact that certain external bodies get included into the investigation later, after the initial investigation has already been carried out by the police (Lewis, 1999).

The 'Civilian External Investigatory/Adjudicativ' model, also by Goldsmith, removes the deficiencies of systems where the complaints body has no competencies regarding the complaint outcome and no influence regarding disciplinary measures against police officers indicted in the complaint. It does so by including the public in monitoring the complaints procedure by the police, investigating the complaint, deciding on the complaint and determining sanctions.

Complaint investigations are usually reserved for the most serious complaints and cases that the police are obliged to pass on to the complaints body (e.g. use of firearms, use of force with serious consequences). Regarding other cases that are not settled by the informal procedure, the complaints body can monitor, manage or is included in the investigation, otherwise conducted by the police. In England for example, the police has to pass on to the Independent Police Complaints Commission (IPCC) only the complaints that include serious police violations. With such complaints the IPCC then decides between four types of proceedings: (1) independent police investigation, (2)

police investigation supervised by IPCC, (3) police investigation under IPCC direction and (4) IPCC investigation. In case of complaints where the IPCC chooses a police investigation and in cases where the complaints are not passed on to the IPCC as they do not include serious police violations, the complainant, if unsatisfied with the findings of the police investigation, has the right to appeal to the IPCC, which in turn examines the investigation and can order a renewed investigation, by the police or by the IPCC (United Kingdom, Police Reform Act 2002).

It is unrealistic to expect the complaints body to be able to conduct investigations into all complaints. Nevertheless we must highlight the danger of police ignoring many seemingly less serious cases which could include elements indicating serious violations by the police (e.g. discriminatory treatment of a specific social or ethnic group). The principle of independence in solving the 'less serious' complaints requires the so-called backup system which motivates police to adequately handle such complaints as well (Uildriks in Reenen, 2003: 115). Thus the complaints are not necessarily investigated by independent external experts but by the police, with the complaints body having the possibility to direct, monitor, revise the procedure as well as an ex *officio* possibility to investigate potential irregular patterns in police work, even if they do not result in serious complaints.

The competency of the complaints body to recommend disciplinary measures or to even take part in assigning disciplinary measures against indicted police officers is regarded by many experts as imperative for its effectiveness. Competencies of complaints bodies in this field range from the option to (after the complaint proceedings have been finished) recommend a disciplinary procedure, to the possibility to demand that such a procedure be initiated and in several exceptional cases (mainly in USA) independently imposing disciplinary sanctions. Even though it may seem that imposing disciplinary sanctions by the complaints body would allow for the most suitable sanctioning policy and prevent impunity, Walker (2001: 76, 77) warns that such a power would mean an encroachment on the internal hierarchy and management of the police, while at the same time relieve it of an important responsibility and allow it to evade public criticism by citing lack of competencies regarding measures against police officers. Walker thus states that the complaints mechanism should mainly increase, not lessen, the accountability of the police management. The complaints body can ensure such a course of events by giving additional information to and creating attention and pressure on the decision-making police leadership, and by leaving the deciding in its hands. (Lewis (1999: 76) though argues that the authority should have the possibility to object to the disciplinary body's decision).

CONCLUSION

It is an undisputed fact that police ill-treatment and often inadequate response of the government and the established criminal justice institutions to this phenomenon remains o serious problem in Europe (even in established democracies). This runs in the face of the fact that international human rights instruments and in particular the jurisprudence of the European Court of Human Right have set rather clear international benchmarks in the area of State accountability for acts and omissions of law enforcement officials which result in ill-treatment of individuals. Investigations into such events must be effective, initiated and conducted even in the absence of a formal complaint (ex officio), free of any undue influence and partiality, open to public scrutiny, and prompt. This paper has outlines some of the underlying reasons for this uneasy dichotomy — specificities of police work, organisation and culture which often directly or indirectly promotes (or at least provides a fertile grounds) for impunity of

law enforcement officials for violations of human rights. The bottom line, however, is States' clear obligation under international law to strive continuously to meet the above mentioned criteria. And indeed there seems to be progress in Europe in this area. This paper has tried to explore contemporary European trends in dealing with allegations of ill treatment by law enforcement officials in particular by highlighting the failure of internal accountability in many countries and by pointing to the external oversight mechanisms for dealing with misconduct as a necessary element of any reasonable solution to the problem. Civilian oversight over the police in general and over complaints procedures in particular should as it was argued in the paper gradually become an important part of otherwise complex and multifaceted system of accountability of criminal justice actors and a necessary addition to established internal and external mechanisms for oversight over the implementation of criminal justice.

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REFERENCES

A new Beginning: Policing in Northern Ireland, The report of the Independent commission on policing for Northern Ireland: 'Patten Report', September 1999.

Chevigny, P. (1995). Edge of the Knife : Police violence in the Americas, New York: The New Press.

Cooper J. (2003). Cruelty – an analysis of Article 3, London: Sweet & Maxwell.

Cohen, S. (1995). State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past, 20 Law and Social Inquiry 7.

Crawshaw, R., Human Rights and the Theory and Practice of Policing, Papers in the theory and practice of human rights, no. 10, Human Rights Center – University of Essex.

Evans, M. and Morgan, R. (1998). Preventing Torture, Oxford: Clarendon Press.

Goldsmith, A. J (1988). New directions in police complaints procedures: Some conceptual and cooperative departures, Police Studies, volume 11, no. 1, p. 60-71.

Goldsmith, A. J and Lewis, C. (2000). Civilian Oversight of Policing: Governance, Democracy and Human Rights, Portland (Oregon): Hart Publishing.

Lewis, C. (1999). Complaints Against Police – The Politics of Reform, Sydney: Hawkins Press.

Miller J., Civilian Oversight of Policing: Lessons from the Literature, Global Meeting on Civilian Oversight of Police, Vera Institute of Justice, Sept. 2002. www.vera.org

Moore, L. and O' Rawe, M. (1997). Human Rights on Duty, Belfast: Committee on the Administration of Justice. www.caj.org.uk

Perez, D. W. (1994). Common Sense about Police Review, Philadelphia: Temple University Press.

Police Reform Act 2002, United Kingdom.

Report of a Commission of inquiry into possible illegal activities and associated police misconduct - The Fitzgerald report, 1989.

Uldriks, N. and Van Reenen, P. (2003). Policing Post–communist Societies: Police-Public Violence, Democratic Policing and Human Rights, Intersentia.

Walker, S. (2001). Police Accountability: The Role of Citizen Oversight, Belmont: Wadsworth.

Walker, S. and Bumphus, V. W (1992). The effectiveness of civilian review: Observations on recent trends and new issues regarding the civilian review of the police, American Journal of Police , vol XI, st. 4, 1992, p. 1-26. Cited in Lewis (1999), p. 53.

Walker, S in Wright, B. (1995). Citizens review of the police, 1994: A national survey, fresh perspectives, Police Executive Research Forum, p. 1-15. Cited in Lewis (1999), p. 53.

Assenov and others v Bulgaria, Judgment, 28 October 1998, no. 24760/94.

Ergi v. Turkey, Judgment, 28. July 1998, no. 23818/94.

Kaya v Turkey, Judgment, 19. February 1998, no. 22729/93.

Kelly and Others v. the United Kingdom, Judgment, 4 August 2001, no. 30054/96.

McKerr v. the United Kingdom, Judgment, 4 August 2001, no. 28883/95.

Rehbock v. Slovenia, Judgment, 28 November 2000, no. 29462/95.

Ribitsch v. Austria, Judgment, 14 December 1995, no. 18896/91.

Shanaghan v United Kingdom, Judgment, 4 August 2001, no. 37715/97.

Amnesty International: Austria before the UN Committee against Torture: Allegations of police ill-treatment, 24 March 2000, p. 9. AI Index: EUR 13/01/00.

Amnesty International: The Wrong Side of the Law? Allegations of Police Ill-treatment and Excessive Use of Force in Germany. AI Index: EUR 23/003/2003.

Amnesty International: Republic of Slovenia, Briefing to the Committee against Torture, April 2003, AI Index: EUR 68/001/2003.

Amnesty International: Annual report 2004, report on Slovenia. www.amnesty.si

European Commission against Racism and Intolerance: Third report on Germany, Adopted on 5 December 2003 and made public on 8 June 2004. CRI (2004) 23.

European Committee for the Prevention of Torture (CPT): Report to the Slovenian Government on the visit to Slovenia carried out by (CPT) from 16 to 27 September 2001. CPT/Inf (2002) 36.

European Committee for the Prevention of Torture (CPT): Report to the Austrian Government on the visit to Austria carried out by CPT from 20 May 1990 to 27 May 1990. CPT/Inf (91) 10.

European Committee for the Prevention of Torture (CPT): Report to the Austrian Government on the visit to Austria carried out by CPT from 26 September to 7 October 1994. CPT/Inf (96) 28.

European Committee for the Prevention of Torture (CPT): Report to the Government on the visit to the United Kingdom and the Isle of Man carried out by the CPT from 8 to 17 September 1997. CPT/Inf (2000) 1.

UN Committee against Torture (CAT): Second periodic reports of States parties due in 1992: Austria. 15/12/98. CAT/C/17/Add.21. (State Party Report).

UN Committee against Torture (CAT): Second periodic reports of States parties due in 1995: Germany. 30/07/97. CAT/C/29/Add.2. (State Party Report).

UN Committee against Torture (CAT): Conclusions and recommendations: Slovenia. 27/05/2003. CAT/C/CR/30/4. (Concluding Observations/Comments).

UN Commitee againts Torture (CAT): Summary record of the public part of the 329th meeting: Germany. 14/05/98. CAT/C/SR.329. (Summary Record).

UN Human Rights Committee: Concluding Observations: Germany. 18/11/96. CCPR/C/79/Add.73. (Concluding Observations/Comments).