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THE ROLE OF JUDICIAL EXAMINATION IN THE INVESTIGATION OF THE FACTS OF TORTURE

Abstract. The Istanbul Protocol has only been partially implemented in Ukraine. In its reports on the results of its visits to Ukraine, the European Committee for the Prevention of Torture called on the government to declare a policy of "zero tolerance" of torture and ill-treatment. [6] In April 2017, the National Preventive Mechanism against Torture announced its intention to promote the implementation of the document. This decision was made during a preparatory meeting before strategic planning. In the summer of 2017, the Ministry of Health announced the establishment of a working group to develop a medical standard.

Keywords: *Istanbul Protocol, torture, torture investigation, crime prevention.*

Relevance of the study. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Criminal Code of Ukraine describe the concept of "torture" as the deliberate intentional infliction of severe pain or physical or moral suffering on a person. Severe physical pain or physical or moral suffering is known to be a subjective manifestation/reaction of a person's trauma [4].

Objective signs of this condition are injuries or traces of injuries. Investigation of the nature and extent of bodily harm inflicted on a person is part of the procedure for investigating the alleged use of torture, as regulated by the Istanbul Protocol, and plays a very important role as a source of objective information about the circumstances of a possible crime. The Istanbul Protocol is the abbreviated title of the document "Guidelines for the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", submitted to the United Nations on 9 August 1999.

About 40 organizations took part in its development. The document defines the procedures and standards for recording injuries, the procedure for conducting psychiatric examinations, the algorithm of interrogation of victims and witnesses, the sequence of evidence collection, ethical principles and principles of effective investigation of cases of torture.

Resent publications review. The theoretical basis of the study were the works of Ukrainian and foreign scientists: O. Bandurka, V. Bakhin, R. Belkin, P. Bilenchuk, O. Vasiliev, V. Veselsky, A. Volobueva, T. Volchetskaya, I. Gerasimova, M. Danshina, V. Drozd, V. Zhuravlya, S. Zdorovko, V. Karagodina, O. Kolesnichenko, V. Kolmakova, R. Shevchuk, and others.

The article;s objective is to study the mechanism of effective investigation, which leads to adequate punishment and, accordingly, compensation to victims.

Discussion. Investigation and expert assessment of bodily injuries inflicted on a person within the pre-trial investigation of the facts of their infliction is carried out during a forensic examination in accordance with the Law of Ukraine "On Forensic Examination". According to Article 242 of the Criminal Procedure Code of Ukraine, the examination is conducted by an expert institution, expert or experts on behalf of the investigating judge or court, provided at

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the request of a party to criminal proceedings or if special knowledge is required to clarify the circumstances relevant to criminal proceedings [2, 3].

Article of the Law of Ukraine "On Forensic Examination" entrusts the performance of forensic medical examinations exclusively to state forensic specialized institutions of the Ministry of Health [1, 3].

When conducting a forensic medical examination of bodily injuries, the fact of infliction of bodily injuries, their nature, mechanism and prescription of infliction, the possibility of their occurrence in specific circumstances, as well as the degree of their severity shall be established. In this case, the rules of forensic determination of the severity of injuries, one of the criteria for their assessment is the infliction of mental illness. The document in which the forensic expert formulates his conclusions in the form of reasonable answers to the questions is the expert's opinion.

The expert gives an opinion on his behalf in writing and is personally responsible for it. The expert's opinion is not binding on the person or body conducting the proceedings, but disagreement with the expert's opinion must be motivated in the relevant resolution, decision, and sentence. The current legal framework does not provide for any peculiarities in the appointment and execution of forensic medical examination on the facts of torture and ill-treatment, which would be different from other cases of infliction of bodily harm.

Special Report of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine Article 126 of the Criminal Code of Ukraine and may be manifestations of torture and ill-treatment), stipulate that the forensic expert does not qualify the injury as torture and slaughter, as it is not within his competence.

In such cases, the forensic expert must establish the presence, nature, location, number of injuries, simultaneity or timeliness of their formation, features of damaging objects, the mechanism of their action, as well as the severity of injuries. The decision of the Plenum of the Supreme Court of Ukraine also emphasizes that determining the presence of signs of special cruelty, torture, slaughter and torture is the competence of the court. Therefore, the decision on the presence of these signs in bodily injuries does not belong to the competence of a forensic expert. In his opinion, the expert can only indicate the possibility of causing the identified injuries in specific circumstances [4].

It should be noted that the Istanbul Protocol is not a mandatory document. But international law obliges governments to use it to investigate and document cases of torture and other ill-treatment in order to effectively investigate such cases and punish those responsible.

The European Union refers to the Istanbul Protocol in its 2001 resolution, which states that States must conduct prompt, impartial and effective investigations into all allegations of torture in accordance with the Principles set out in UN Commission on Human Rights resolution/2000/43 and must establish and use effective domestic procedures for responding to complaints and investigations and reports of torture and ill-treatment in accordance with the Istanbul Protocol. [5]

We will not go into a historical digression and consider the evolution of the system of international norms to combat torture and other forms of inhuman treatment, but only in fairness will note that there has been a transition from general to individual, from protection of human rights in general to the right to protection from torture, and other forms of inhumane treatment. This trend can be seen not only in the protection of torture, but also in the protection of property rights, the right to respect for private and family life, freedom of expression.

Concerning the prohibition of torture and other cruel punishment in the case law of the European Court of Human Rights (hereinafter - the ECtHR). Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. This is a negative obligation of the High Contracting Party to the Convention, which obliges the state to refrain from any act - torture or treatment, which is prohibited by the above article [5-6].

The case law of the ECtHR, guided by the principle of effective and dynamic interpretation, has expanded the safeguards of the Convention, finding that the effectiveness of investigations into ill-treatment is one of the "positive responsibilities of the State" under Article 3 of the Convention. For example, in "Kobzar v. Romania", application № 48254/99, the ECtHR concluded that there had been a violation of Article 3 of the Convention, both procedurally and substantively.

In particular, the ECtHR concluded that there had been a violation of Article 3 of the Convention because the bruises received by the applicant and the injuries he had received

while in police custody were serious enough to constitute a violation of Article 3 of the Convention. However, the ECtHR acknowledged that the Government had failed to provide evidence to the contrary, in particular by pointing out that any bodily injury caused during a person's stay in a police station or within the jurisdiction of the police must be explained by law enforcement officials.

The ECtHR also determined that the responsibilities of the law enforcement authorities in this case should have included taking the applicant to a doctor or his medical examination. That is, the applicant's treatment was "inhuman or degrading". Moreover, the ECtHR acknowledged that the investigation of the case by the national investigative bodies was not effective and had a number of shortcomings [6, 7].

That is why Article 3 of the Convention contains both procedural and substantive aspects of this provision, which are reflected in the positive and negative obligations of the State, respectively. If the negative obligations of the state do not raise questions about their implementation, as they consist in the obligation of the state only to refrain from torture or ill-treatment prohibited by Article 3 of the Convention, then the positive obligations, with the possible introduction of medical documentation of torture or inhuman or degrading treatment. degrading treatment or punishment under the Istanbul Protocol raises a number of questions about the additional obligations of the state that will be imposed on it.

To date, the number of ECtHR judgments against Ukraine that violate Article 3 of the Convention in terms of effective investigation and positive obligations of the state is 166. While against Poland there are only 29 similar decisions, against France – 4, and against Germany in general only 3. Although all these countries are commensurate in the number of citizens. These statistics show that Ukraine lacks effective tools in the fight against torture that could in practice guarantee the quality of investigations and the accuracy of documenting torture and other ill-treatment.

Thus, in the ECtHR judgment in Korobov v. Ukraine, application no. 39598/03, § 69, the court found that the evidence obtained during the forensic examinations played a key role in the investigation of the detainees, and in cases where the latter file complaints of ill-treatment. From this point of view, one of the tasks of the ECtHR is to determine whether the national authorities have ensured the effective functioning of the system of medical examinations of persons detained by the police.

It should be noted that in the national criminal procedure legislation there are still certain provisions and requirements for recording any bodily injuries or deterioration of the detainee's health, but their implementation and effectiveness cause great skepticism among both lawyers and victims. Therefore, official public investigations into torture and ill-treatment aimed at identifying and punishing those responsible can hardly be called effective within the meaning of Article 3 of the Convention.

But the Istanbul Protocol is useful for judges, prosecutors, lawyers and health professionals primarily because it contains unified legal aspects of the investigation of torture, including:

a) a description of the common purpose of the investigation into the use of torture;

b) basic principles concerning the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment;

c) Procedures for investigating allegations of torture. At the beginning, it is a question of deciding on the appropriate investigative body, and then guidelines are proposed concerning the taking of oral testimony from alleged victims and other witnesses, as well as the collection of physical evidence;

d) the general principles to be followed in setting up a special independent commission of inquiry. These principles have been based on the experience of a number of countries, where independent commissions have been set up to investigate alleged gross human rights violations, including extrajudicial killings, torture and disappearances.

Among other things, the protocol reveals new practical aspects that can be taken as a basis in Ukraine, which include - general considerations concerning the conduct of interviews, physical and psychological evidence of torture.

Conclusions. Establishing an effective system for investigating crimes related to torture, cruel, inhuman or degrading treatment or punishment, including enforced disappearance, is already part of the action plan to implement the National Strategy for Human Rights until 2020 year, approved by the order of the Cabinet of Ministers of Ukraine of November 23, 2015 № 1393-r.

Therefore, the development and implementation in Ukraine of a medical standard for documenting torture or inhuman or degrading treatment or punishment, based on the principles and procedures of the Istanbul Protocol, which will become part of criminal procedure law, will facilitate the investigation of inhumane treatment and punishment of investigators as guilty of such offenses. The introduction of such a medical standard at the national level will also demonstrate the need for full restoration of rights and compensation to the victim by the state, including full and adequate compensation and provision of funds for medical treatment and rehabilitation.

Conflict of Interest and other Ethics Statements
The author declares no conflict of interest.

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РОЛЬ СУДОВОЇ ЕКСПЕРТИЗИ У ДОСЛІДЖЕННІ ФАКТІВ КАТУВАНЬ

Анотація. Конституція України закріплює, що людина, її життя і здоров'я, честь і гідність, недоторканність і безпека визнаються в Україні найвищою соціальною цінністю. Для забезпечення реалізації вказаних положень у нашій країні встановлено кримінальну відповідальність за катування. Проте заборона катувань обумовлює необхідність боротьби з ними не лише формальним прийняттям відповідних нормативних актів, але і реальним притягненням правопорушників до відповідальності. Покарання винних залежить від ефективної діяльності правоохоронних органів щодо виявлення та розслідування зазначених кримінальних правопорушень.

Боротьба з указаним видом злочинів є досить складним напрямком діяльності правоохоронних органів, що обумовлюється кількома чинниками. По-перше, виявлення злочинів ускладнюється їх латентністю, оскільки катування нерідко вчиняють працівники правоохоронних органів і досить кваліфіковано приховують такі факти. По-друге, розслідування катувань може супроводжуватись значною протидією з боку корумпованих службових осіб [2]. По-третє, жертви катувань, вчинених близькими особами, часто замовчують чи перекручують обставини злочину через родинні стосунки та з інших причин. Вищевказане викликає неабияке занепокоєння, зважаючи на збільшення кількості заяв та повідомлень про жорстоке поводження та нелюдське насилля над особою. Половина кримінальних проваджень або закривається, або рішення залишається неприйнятим. Це викликає необхідність посилення боротьби з вказаним видом злочинів на практичному рівні, а також розроблення теоретичних положень щодо їх розслідування.

Ключові слова: *Стамбульський протокол, катування, розслідування катувань, профілактика злочинів.*