

# **Migrant ill-treatment in Greek law enforcement – Are the Strasbourg Court judgments the tip of the iceberg?**

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## **Introduction**

Greece holds an unenviable record in Strasbourg case law concerning ill-treatment, being the first European state found, by a final decision of the former European Commission of Human Rights in the *Greek case* (1969), to have violated the European Convention on Human Rights (ECHR) due to numerous political detainees' torture by the security police during the first years of the 1967-1974 dictatorship.<sup>1</sup> Despite the systematic use of torture and other forms of ill-treatment by state security officers during that dark period of modern Greek history, the prosecutions and torturers' trials that occurred after 1974 were largely the result of private litigation initiated by former political prisoners.<sup>2</sup>

Ill-treatment, including torture, has been traditionally prohibited by the country's constitutions while the introduction of statutory legislation was provided for by Article 7§2 of the 1975 Constitution which considers such acts as affronts to human dignity.<sup>3</sup> However, they remained unregulated by the criminal code until 1984 when Law 1500 was adopted. Arguably this legacy contributed to the imposition of relatively light sanctions on a limited number of the military junta's torturers, and the unfortunate missing by Greece of a big opportunity to break the torture structure that had been embedded in its law enforcement system and tolerated by governments even before 1967.

As a consequence, in all visits since 1993 and reports on Greece by the European Committee for the Prevention of Torture (CPT) numerous cases of torture and other forms of ill-treatment have been recorded (see section IV.2). In its 2015 visit report on Greece,<sup>4</sup> CPT noted that infliction of ill-treatment by law enforcement agents, particularly against foreign nationals, including for the purpose of obtaining confessions, continues to be a frequent practice. This reconfirmed the particular risks of ill-treatment that migrants run, as members of a social group that is often marginalised and particularly vulnerable to ill-treatment especially when in detention.<sup>5</sup> The 2015 CPT visit report clearly identified a Greek police culture under which it is not considered unprofessional to resort to ill-treatment, although its prohibition is enshrined in the unqualified and non-derogable Article 3 (prohibition of torture) ECHR and in the non-revisable Article 7§2 of the Greek Constitution.

As the European Court of Human Rights ('the Court' or 'the Strasbourg Court') has underlined on numerous occasions,<sup>6</sup> Article 3 ECHR enshrines one of the most fundamental values of democratic

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<sup>1</sup> See D. J. Harris et al., *Law of the European Convention on Human Rights*, 3<sup>rd</sup> edition, Oxford, OUP, 2014, p. 238.

<sup>2</sup> See Amnesty International, *Torture in Greece – The first Torturers' Trial 1975*, London, 1977, pp. 58-64, available at: <https://www.amnesty.org/download/Documents/204000/eur250071977eng.pdf>.

<sup>3</sup> See Greek Constitution in English at: <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggluko.pdf>.

<sup>4</sup> CPT report published on 1 March 2016, available at: <http://www.cpt.coe.int/documents/grc/2016-04-inf-eng.pdf>.

<sup>5</sup> See UN Committee against Torture, General Comment No. 2, "Implementation of article 2 by States parties", 24 January 2008, para. 21, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=1&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=1&DocTypeID=11); see also UN Special Rapporteur on torture, report of his 2010 visit to Greece, 21 April 2011, para. 27 ff, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/129/68/PDF/G1112968.pdf?OpenElement>.

<sup>6</sup> See, *inter alia*, *Galotskin v. Greece*, judgment of 14 January 2010, para. 32. All judgments by the Strasbourg Court are available at: [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. In addition, the Court has noted that in respect of a person deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of Article 3 ECHR.

One of the major root causes of widespread ill-treatment in Greece lies with the culture of impunity that pervades parts of the law enforcement sector, especially police and coast guard forces, as well as of the prosecutorial and judicial authorities. This requires a drastic overhaul of law enforcement overseeing and redress mechanisms, of the Greek criminal law itself, and of the awareness-raising and sensitisation of all actors of the national justice system.

As regards migrants in particular, a number of international human rights reports, like those of CPT and of international NGOs,<sup>7</sup> have recorded numerous cases of ill-treatment, including torture, suffered by migrants while under the control of Greek law enforcement officials. The continuous reporting of such incidents though was not accompanied by any major cases before the Strasbourg Court until 2003 when the first major application concerning a migrant's ill-treatment by the police (*Alsayed Allaham*, see next section) was lodged. The 2007 judgment in *Alsayed Allaham* was followed by another judgment against Greece in 2012 in a more serious, factually, case, *Zontul* (see next section), concerning a migrant detainee's torture through rape with a truncheon by a coast guard officer, and the lodging of a number of other similar applications by migrants that, as of early 2017, are pending in Strasbourg.

The present paper aims to provide an analysis of the above first major judgments of the Strasbourg Court which usefully shed light on the underlying, long-standing systemic failures of the Greek rule of law. The author argues that these judgments are in fact only the tip of the iceberg. For this the paper looks into the process of supervision of these judgments' execution by Greece, which is pending before the Council of Europe Committee of Ministers, as well as into alarming reports issued notably by CPT as well as by the Greek Ombudsman.

The paper also highlights the question of racial violence that has not been so far the subject of analysis in the Court's judgments concerning ill-treatment in Greece. However, a number of reports, especially the annual reports of the Greek Racist Violence Recording Network since 2012, record numerous cases of racist violence by law enforcement officials targeting migrants and the ineffective responses by the administrative and judicial authorities.

Racial violence by state officials is not simply an affront to the victims' human dignity but additionally to the fundamental principles of a European, democratic state like Greece whose primary obligation, under its own Constitution (Article 2§1), is "respect and protection of the value of the human being". The situation represents a serious threat to the foundations of the rule of law and social cohesion in the country, given that law enforcement forces perform core state functions by upholding the law, and, at the same time, perform vital social and service functions.<sup>8</sup> The paper concludes by certain major lines of thought and action which are required in order to effectively combat and eradicate migrant, but also nationals', ill-treatment in Greek law enforcement.

## **I. Strasbourg Court judgments indicating the systemic nature of migrant ill-treatment and lack of adequate redress in Greece**

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<sup>7</sup> See, *inter alia*, Amnesty International, *A law unto themselves: A culture of abuse and impunity in the Greek police*, 2014, available at: <https://www.amnesty.org/en/documents/EUR25/005/2014/en/>.

<sup>8</sup> See Council of Europe Committee of Ministers, Recommendation Rec(2001)10 on the European Code of Police Ethics, preamble, recital 7, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e297e](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e297e).

As of early 2017 the Strasbourg Court has delivered two major judgments against Greece finding violations of Article 3 ECHR, due to ill-treatment of migrants by law enforcement agents, which are analysed below.

1. *Alsayed Allaham v. Greece, judgment of 18 January 2007*

The facts of the case date back to 1998 when the Syrian applicant, legal resident in Greece, was severely beaten by a police officer in a police station in Athens where he had gone to report a robbery. As a consequence, the applicant's eardrum was perforated and he suffered from hearing loss in both ears and vertigo while his working capacity diminished by 80%. Following the applicant's complaint and police disciplinary proceedings the Head of the Greek police fined the aforementioned policeman, as well as another one who acted as his accomplice, to 100,000 drachmas (293 euros) and to 50,000 drachmas (147 euros) respectively.

Following criminal proceedings, initiated again by the applicant, in 2002 the three-member Athens Court of Appeal, sitting as a first instance court, found the policeman who ill-treated the applicant guilty of serious bodily harm and sentenced him to four months' imprisonment. Following an appeal the same year, the five-member Athens Court of Appeal overturned the first instance judgment and acquitted the defendant. It found that it had not been established that the defendant had beaten the applicant, taking into account statements made by the defendant's colleague and accomplice, the chief of the police station and three other eye-witnesses one of whom was another policeman. A subsequent request for appeal to the Court of Cassation, which was filed by the applicant with the Public Prosecutor, was dismissed. In addition, an action for damages filed by the applicant was rejected in 2004 by the Athens Administrative Court.

The Strasbourg Court's finding of a violation by Greece of Article 3 ECHR was based on two major lines of reasoning. The first one concerned the examination and verification of the applicant's ill-treatment at the hands of the police. Having noted that Article 3 enshrines one of the most fundamental values of democratic societies, prohibiting "in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct", the Court proceeded to reiterating some fundamental evidentiary rules applied by it in such cases:

First, in assessing evidence, the standard of proof is "beyond reasonable doubt". Secondly, such proof may be based on "the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact". Thirdly, in cases where the events in issue lie, wholly or partly, within the authorities' exclusive knowledge, as is the case of persons in custody or in the authorities' control, "strong presumptions of fact will arise in respect of injuries occurring during such detention". The Court underlined that in such cases the burden of proof may rest on the authorities "to provide a satisfactory and convincing explanation". Thus when one is injured while in detention or under the control of the police, "any such injury will give rise to a strong presumption that the person was subjected to ill-treatment".

The Strasbourg Court went on and clarified the state's obligation of factual verification in this context: the authorities are bound to make a serious attempt to find out what happened. A possible acquittal of the police officers by a criminal court does not automatically discharge the respondent state from the onus, under Article 3 ECHR, of proving that the alleged ill-treatment did not originate in acts of police officers.

2. *Major shortcomings of judicial proceedings highlighted in Alsayed Allaham*

This judgment is important primarily because it highlighted the above factual verification obligation that is borne not only by the administration but also the courts that may be involved in these cases. Thus in *Alsayed Allaham*, the Strasbourg Court identified two major flaws in the acquittal judgment of the appeal court: First, the appeal court based itself essentially on testimonies of five eye-

witnesses, three of them being police staff members, and gave no credit to medical reports establishing the applicant's injuries. Secondly, no weight was given to the fact that the Head of the Greek police himself had found against and sanctioned the two policemen involved in the applicant's ill-treatment, or to the opposite first instance judgment that the appeal court overturned. In view of the above, the Court concluded that the Greek government did not prove that the applicant's injuries were caused otherwise than by the ill-treatment he suffered while under police control.

The second line of the Court's reasoning concerned the level of severity that an instance of ill-treatment should reach in order to fall under the scope of application of Article 3 ECHR. The Court reiterated its standard case law under which this assessment is relative and depends on the cases circumstances, such as the duration of the treatment, its physical and/or mental effects, the victim's sex, age and state of health. As regards in particular the assessment whether a treatment is "degrading" under Article 3 ECHR, the Court examines whether the purpose is "to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3". Unlike the domestic appeal court, the Strasbourg Court reached the conclusion that the applicant's treatment by the police constituted inhuman and degrading treatment and a violation of Article 3 ECHR. It based this finding on the physical harm that the applicant had suffered by the police officers and the feelings of fear, anguish and inferiority which were produced by this ill-treatment.

### 3. *Zontul c. Grèce, judgment of 17 January 2012*

The case concerns a Turkish asylum seeker who, while in detention on Crete in 2001, was forced by two coastguard officers to undress and then one of them raped the applicant with a truncheon. Following the initiation of disciplinary proceedings the rapist coast guard officer was sanctioned by 30 days' confinement. This decision was preceded by a coast guard report that was based on the coast guard officer's statement according to which he had "struck lightly the [applicant] on the buttocks with his truncheon but he did not report the incident, which he regarded as insignificant".

Criminal proceedings that were initiated in 2001 were ended in 2006 with a judgment of the Naval Appeals Tribunal according to which the rapist coast guard officer had inflicted bodily injury and impaired the health of a person under his authority, had engaged in unlawful physical violence against that person and had seriously undermined his sexual dignity with the aim of punishing him (Article 137A §3 of the Greek criminal code). The sentence imposed was a suspended term of six months' imprisonment, which was commuted to a fine of €4.40 per day of detention. The other coast guard officer who admitted aiding and abetting the offence, was sentenced to a suspended term of five months' imprisonment, also commuted to a fine of €4.40 per day of detention.

As noted also by the Greek Ombudsman (see section IV.3), migrants' ill-treatment by coast guard officers has not been uncommon in Greece. This is linked to the fact that the latter are often on the front line receiving irregular migrants when arriving by sea.<sup>9</sup> What is also noteworthy is the particular gravity of some of the reported cases involving coast guard officers. Apart from *Zontul*, another widely publicised, due to its cruelty, case is the 'Chios submarino' case. It concerns the interrogation and alleged submission by two coast guard officers of a Moroccan migrant to, *inter alia*, torture by mock execution and 'wet and dry submarino' (simulation of drowning and suffocation), upon the latter's arrival, aboard a navy vessel near Chios island in 2007.<sup>10</sup>

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<sup>9</sup> In 2016 a total of 173,450 migrants arrived by sea in Greece which is 80% lower than in the same period in 2015 (856,723) see UNHCR, *Refugees & Migrants Sea Arrivals in Europe*, monthly data update, December 2016 at 4, available at: <http://data2.unhcr.org/en/situations/mediterranean?id=2388>.

<sup>10</sup> The facts of this case are described in the report by Pro Asyl, *The Truth may be bitter, but it must be told*, October 2007, pp. 10-11, available at: [https://www.proasyl.de/wp-content/uploads/2015/12/Griechenlandbericht\\_The\\_Truth\\_may\\_be\\_bitter\\_2007\\_Engl.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/Griechenlandbericht_The_Truth_may_be_bitter_2007_Engl.pdf).

#### 4. *Zontul* as a leading judgment identifying systemic flaws in Greek administrative and judicial proceedings

In *Zontul* the Strasbourg Court found seriously flawed both the investigation that was carried out by the coast guard as well as the criminal proceedings that followed. Among the major shortcomings identified by the Court in the coast guard investigation was the non-examination of the victim by a medical doctor despite the former's request after his rape, and the falsification of the victim's statement given that his rape was recorded as a "slap" and "use of psychological violence".

As for the shortcomings of the Greek criminal law system the Strasbourg Court highlighted two major issues: on the one hand, the clemency of the criminal sanction imposed on the rapist coast guard officer was manifestly disproportionate to the gravity of the ill-treatment. Thus, the criminal system did not show capable of having a dissuasive preventive effect or of providing an adequate remedy to the victim. On the other, the Court noted the impossibility for the victim, who had joined the criminal proceedings as a civil party but lived in London, to be kept properly informed by the authorities about the progress of these proceedings and effectively participate therein as a civil party, despite his efforts through the Greek embassy and the judicial authorities in Greece.

As regards the threadbare procedures of investigation and the totally inadequate sanctioning of the law enforcement officers (procedural aspects of a violation of Article 3 ECHR), the Court recalled the following notable principles:

First, states have a positive obligation under ECHR to put in place a system of protection that is sufficiently dissuasive with regard to violations covered by Article 3 ECHR.

Secondly, in cases of ill-treatment by state agents there are two major measures necessary for providing adequate reparation. First, the authorities should carry out a "thorough and effective" investigation able to lead to the identification and sanctioning of those responsible. It is to be noted that under the Court's case law, for an investigation to be effective in practice the state should have enacted criminal law provisions penalising practices that are contrary to Article 3.<sup>11</sup> This is an important requirement given that it imposes upon states the obligation to enact criminal legislation that is in accordance with the European and international standards and able to lead to the effective, dissuasive sanctioning of persons responsible for ill-treatment. As shown in following sections, this is one of the major flaws of current Greek law and practice.

The thoroughness and effectiveness of an investigation may be gauged by several criteria such as: the promptness with which this is initiated and carried out; the outcome of the investigation and the criminal proceedings that it leads to, including the sanction imposed and the disciplinary measures taken. In this context it is usefully recalled that the Court has stressed that in cases where state agents are charged with offences involving ill-treatment, they should be suspended from duty while being investigated or tried and should be dismissed if convicted.<sup>12</sup>

Thirdly, states, under Article 3 ECHR, should impose adequate and dissuasive penalties. Even though the Court acknowledges the role of the national courts in the choice of appropriate penalties for ill-treatment by state agents, it retains its supervisory function and intervenes in cases of manifest disproportion between the gravity of the act and the punishment imposed.

Fourthly, in addition to disciplinary and criminal sanctions that should be imposed on perpetrators of ill-treatment, the victim should receive a compensation where appropriate, or, at least, to have the possibility to request and to obtain damages for the harm caused by ill-treatment. However,

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<sup>11</sup> *Gäfgen v. Germany*, GC, judgment of 1 June 2010, para. 117.

<sup>12</sup> See, *inter alia*, *Gäfgen v. Germany*, GC, judgment of 1 June 2010, para. 125.

under the Court's case law in cases of a person's ill-treatment while in detention, or wilful ill-treatment contrary to Article 3 ECHR, adequate means of remedy is the one provided by criminal law. Due to their seriousness and impact on human dignity and the rule of law, this kind of violations cannot be remedied exclusively through an award of compensation.<sup>13</sup>

*Zontul* is a major judgment notably because it shed light on a major, persisting flaw of the Greek law and practice concerning the definition of torture in the Greek criminal code and the domestic courts' case law.<sup>14</sup> The Court reconfirmed that the rape of a detainee by a state agent must be considered as a particularly grave and abhorrent form of ill-treatment, given the easiness with which the aggressor may take advantage of the victim's vulnerability and weakened resistance. It recalled that rape leaves deep psychological scars on the victim, which do not respond to the passage of time as quickly as other forms of physical and mental violence. As a consequence, the Court found fault with the Greek courts' decisions, stressing that, on the basis of its own case law and of that by other international courts, such as the International Criminal Tribunal for the former Yugoslavia, rape with an object constitutes an act of torture and consequently a clear, substantive violation of Article 3 ECHR, as was the case in *Zontul*.

One of the major problems in this context is Article 137A§2 of the Greek criminal code that defines torture as the "planned" (μεθοδευμένη) infliction by a public official on a person of severe physical, and other similar forms of, pain and is punishable, as a felony, to at least five years' imprisonment. The condition of planning does not exist in the internationally established definition of torture contained in Article 1 of the 1984 Convention against Torture.<sup>15</sup> In fact this additional condition makes prosecution and sanctioning extremely difficult, if not impossible. In *Zontul*, the naval tribunals, both in first instance and on appeal, did not qualify the applicant's rape with a truncheon as torture but as an affront to the victim's sexual dignity, an offence that, under Article 137A§3 of the criminal code, is sanctioned with a lighter form of imprisonment of at least three years. As noted earlier, in fact in *Zontul* the actual penalties that were finally imposed on the main perpetrator and his accomplice were six and five months' imprisonment, which were also suspended and commuted to fines.

In his 2013 report on Greece the Council of Europe Commissioner for Human Rights<sup>16</sup> noted that, since 1984 when Article 137A was introduced into the Greek criminal code, only one police officer had thus far been convicted of torture, in 2011 (case of *Sidiropoulos and Papakostas*). That conviction to a six years' imprisonment concerned torture in 2002 by electric shocks of two young Greek men. However, after an appeal to the Athens Mixed Jury Appeal Court, the final sentence imposed in 2014 was five years' imprisonment which was converted into a fine of five euros daily, payable in 36 monthly instalments.<sup>17</sup> Reportedly, as of early 2017 this was the sole case where a criminal sanction on the ground of torture was upheld on appeal in Greece. The case has been brought before the Strasbourg Court.<sup>18</sup>

In this context it is noted that under Article 137B of the criminal code the use of systematic means of torture, such as electric shocks or *falanga*, constitutes an aggravating circumstance and such

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<sup>13</sup> *Zontul*, para. 72. See also *Gäfgen v. Germany*, GC, judgment of 1 June 2010, para. 119.

<sup>14</sup> See N. Sitaropoulos, "The Incompatibility of the Definition of Torture in Greece with International Law" 19/01/2017, available at: <http://verfassungsblog.de/the-incompatibility-of-the-definition-of-torture-in-greece-with-international-law/>.

<sup>15</sup> See text at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>16</sup> See report by the Council of Europe Commissioner for Human Rights following his visit to Greece from 28 January to 1 February 2013, 16 April 2013, para. 107, available at: <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2306182&SecMode=1&DocId=2024918&Usage=2>.

<sup>17</sup> See Greek Helsinki Monitor et al., Contribution to the list of issues, UN CAT, 21 February 2014, p. 2, available at:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GRC&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GRC&Lang=EN).

<sup>18</sup> *Sidiropoulos et Papakostas c. Grèce*, application lodged on 17 May 2010, communicated to the government on 21 April 2016.



acts of torture should be sanctioned with at least ten years' imprisonment. The non-use by Greek courts of Article 137B and the imposition of non-dissuasive penalties on law enforcement officials was also brought forward in a case concerning alleged ill-treatment, including *falanga* and 'Palestinian hanging', of members of a group of Afghan nationals by police officers in the police station of Aghios Panteleimonas, Athens, in 2004. In this case, the Athens Mixed Jury Appeal Court, disregarding the prosecutor's proposal, did not accept that torture had occurred and convicted the two incriminated police officers to suspended 20 and 25 months' imprisonment for inflicting unintentional bodily harm. This case also was subsequently brought before the Strasbourg Court.<sup>19</sup>

According to information available, in all cases so far, except in the aforementioned case of *Sidiropoulos and Papakostas*, all penalties for torture imposed in first instance have been overturned on appeal. A noteworthy case is the above-mentioned 'Chios submarino' one where the two incriminated coast guard officers were convicted by the Piraeus Naval Tribunal in 2013 to, *inter alia*, suspended three and six years' imprisonment for complicity to aggravated torture and aggravated torture respectively.<sup>20</sup> In 2014 the convictions were overturned on appeal, primarily on evidentiary grounds, and the defendants were acquitted. Reportedly during the trial the prosecutor called for the officers' acquittal claiming, *inter alia*, that there was no evidence adduced showing that the latter were trained in torture methods.<sup>21</sup>

## **II. The absence of reference to the question of racially biased ill-treatment in *Alsayed Allaham and Zontul***

A striking element of the Strasbourg Court judgments in *Alsayed Allaham and Zontul* is the absence of applicant complaints, or of *proprio motu* evaluation by the Court, about the possible existence of racial bias in the migrants' ill-treatment by law enforcement officers.

In fact such a claim, under Article 14 ECHR (prohibition of discrimination), was put forward unsuccessfully in another case concerning substantive and procedural violations of Article 3 ECHR due to ill-treatment by the police in Thessaloniki in 2001 of a Greek citizen of Russian-Pontic origin (*Zelilof v. Greece*, judgment of 24 May 2007). In this case the Court made it clear that its task in this context is to "establish whether or not racism was a causal factor in the impugned conduct of the police officers", which may lead to a violation of Article 14 in conjunction with Article 3 ECHR.

In *Zelilof* the Court followed the wording and reasoning of the 2005 Grand Chamber judgment in *Nachova and Others v. Bulgaria* (judgment of 6 July 2005) concerning the killing by military police of the Roma applicants' relatives. After recalling that in assessing evidence it has adopted the standard of proof "beyond reasonable doubt" it added that in certain cases of alleged discrimination the Court may require the respondent state to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 ECHR.

However, in cases where it is alleged that a violent act has been racially motivated, such an approach would amount to requiring the respondent state to prove the absence of a particular subjective attitude on the part of the person concerned. The Court continued saying: "While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the

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<sup>19</sup> *Ahmad Sarwari et autres c. Grèce*, Application lodged on 19 June 2012, communicated to the government on 21 April 2016. See also press release on this case by the Lawyers' Group for the Rights of Refugees and Migrants, 23 March 2012, in Greek, [http://omadadikigorwn.blogspot.fr/2012/03/blog-post\\_27.html](http://omadadikigorwn.blogspot.fr/2012/03/blog-post_27.html).

<sup>20</sup> Judgment 365/2013, 25 November 2013, on file with the author. See press release on this case by Lawyers' Group for the Rights of Refugees and Migrants, 26 November 2013, in Greek, [http://omadadikigorwn.blogspot.fr/2013/11/blog-post\\_26.html](http://omadadikigorwn.blogspot.fr/2013/11/blog-post_26.html).

<sup>21</sup> D. Mac Con Uladh, "Why did you annoy them? Coastguard officials acquitted of torture convictions", 12 November 2014, available at: <https://damomac.wordpress.com/2014/11/12/why-did-you-annoy-them-coastguard-officers-acquitted-of-torture-convictions/>. Judgment 167/2014 was delivered by the Naval Appeal Court on 6 November 2014, on file with the author.

provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated". Thus, in *Zelilof* the Court found that it was not established beyond reasonable doubt that racism played a role in the applicant's ill-treatment by the Greek police.

Despite this restrictive construction by the Court concerning substantive violations of Article 3 (and Article 2), in conjunction with Article 14 ECHR, it is to be noted that under the Court's established case law a state is under a *procedural* obligation, under the above provisions of ECHR, to investigate possible racist bias in such cases, as was argued by the applicants in *Nachova and Others*, and was accepted by the Court's Grand Chamber (§§160-161). Therein the Court underlined the following major points:

- When investigating violent incidents and, in particular, deaths at the hands of state agents, state authorities have the duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights;
- A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 ECHR. In order to maintain public confidence in their law enforcement machinery, states must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing.
- The respondent state's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.

To date this case law has been applied by the Court also in Greek cases concerning procedural violations of Article 3 and Article 14 ECHR linked to ill-treatment by the police of Roma, but not migrant, applicants.<sup>22</sup>

#### *Reports on and authorities' action against racist violence by Greek law enforcement agents affecting migrants*

Although the question of racially motivated migrant ill-treatment in Greek law enforcement has not been tackled to date by the Court, a plethora of data indicate clearly that this is a crucial element to be taken into account in the examination of these cases. In his 2013 report on Greece the Council of Europe Commissioner for Human Rights noted, *inter alia*, that certain migrants he met and discussed during his visit to Greece informed him of their attempts to contact the police to report racist attacks, which had been met with insults and ill-treatment by the police.<sup>23</sup> Of particular concern to the Commissioner were reports indicating that more than half of the police officers who had voted in the special polling stations during the June 2012 parliamentary elections had cast votes for the neo-Nazi political party Golden Dawn well-known for its involvement in, *inter alia*, very violent attacks and ill-treatment of migrants. The Commissioner was alarmed by this data and called

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<sup>22</sup> *Bekos and Koutropoulos v. Greece*, judgment of 13 December 2005; *Petropoulou-Tsakiris v. Greece*, judgment of 6 December 2007.

<sup>23</sup> See the Commissioner's report, noted above, para. 123.



on the authorities to be vigilant, to sanction and remove from their posts law enforcement officers who are motivated by racism.

Equally alarming has been the continuous recording by the Racist Violence Recording Network (RVRN)<sup>24</sup> since 2012 of numerous incidents concerning hate crime, including racist attacks, in Greece, involving law enforcement officials:

In 2012 RVRN recorded<sup>25</sup> 25 incidents where police and racist violence were interlinked. In seven of them migrants were allegedly ill-treated while in police detention; in 17 of these reported incidents law enforcement officials were involved in racist attacks while carrying out routine controls; in another case a law enforcement official allegedly cooperated with members of extremist groups in an assault against a migrants' house.

The following year RVRN recorded<sup>26</sup> 31 racist crime incidents where law enforcement officials were involved. In its 2013 annual report RVRN underlined the urgent need for Greece to deal effectively with reports indicating unlawful practice by law enforcement officers, including acts which appear to be racially or otherwise biased. The two major recommendations made by RVRN in this context were: first, that state authorities unconditionally condemn all acts of police brutality and arbitrariness; secondly, the need to establish an effective police complaint mechanism. Both recommendations were shared by the Council of Europe Commissioner for Human Rights in his aforementioned 2013 report on Greece as well as in a relevant letter he sent to the Ministries of Interior and of Justice in 2016.<sup>27</sup>

In 2014 RVRN recorded 17 racist violence incidents involving law enforcement officials.<sup>28</sup> In these cases law enforcement officials were reportedly involved in inflicting notably bodily harm and in verbal abuse of the victims on the ground of the latter's ethnic origin, skin colour or religion.

In 2015 RVRN received 11 complaints concerning unlawful violence involving law enforcement agents against refugees and immigrants.<sup>29</sup> In most of these cases law enforcement officials were reported having being involved in arbitrary acts and violence against the non-nationals during the exercise of their duties. Characteristically, only in two out of the 11 cases the victims wished to report the incidents.

The existence of cases of racially biased ill-treatment of migrants, among others, by police officers has not really been denied by the leadership of the Greek police. On 24 May 2006 the Head of the Greek police issued a circular<sup>30</sup> that appears to be a consequence of the 2005 judgment by the Strasbourg Court in the above-mentioned case of *Bekos and Koutropoulos v. Greece*, concerning police ill-treatment of the Greek Roma applicants and lack of an effective investigation, including the non-examination of the impugned policemen's racial bias. After making reference to the above judgment the Head of the Greek Police noted that the duty of examining the possible existence of racial motivation, ethnic hatred or intolerance concerns all cases, including those emanating from

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<sup>24</sup> RVRN is a network of Greek NGOs that was established in 2011 by UNHCR and the Greek National Commission for Human Rights; more information is available at: [www.rvrn.org](http://www.rvrn.org).

<sup>25</sup> RVRN 2012 Annual Report, 16 April 2013, available at: <http://rvrn.org/2013/04/2012-annual-report/>.

<sup>26</sup> RVRN 2013 Annual report, 2 April 2014, available at: [http://rvrn.org/wp-content/uploads/2014/04/Report2013\\_EN.pdf](http://rvrn.org/wp-content/uploads/2014/04/Report2013_EN.pdf).

<sup>27</sup> See Commissioner's letter to Alternate Minister of Interior Toskas and to Minister of Justice Paraskevopoulos, 25 July 2016, available at: [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2016\)29&Language=lanEnglish&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2016)29&Language=lanEnglish&direct=true).

<sup>28</sup> RVRN 2014 Annual Report, 6 May 2015, available at: [http://rvrn.org/wp-content/uploads/2015/05/Report\\_2014eng.pdf](http://rvrn.org/wp-content/uploads/2015/05/Report_2014eng.pdf).

<sup>29</sup> RVRN 2015 Annual Report, 19 April 2016, available at: [http://rvrn.org/wp-content/uploads/2016/04/Report\\_2015eng.pdf](http://rvrn.org/wp-content/uploads/2016/04/Report_2015eng.pdf).

<sup>30</sup> Circular 7100/4/3, "The handling of racism, xenophobia, and intolerance during police action", 24 May 2006, on file with the author.

police acts that run counter to the police ethics. Particular mention was made to such acts that target “vulnerable ethnic, religious or social groups or non-nationals”.

In his circular the Head of the Greek police stressed that racist violence is a special affront to human dignity and that given its dangerous repercussions it requires the police services’ alert and dynamic reaction. He also underlined the need for continuous training, guidance and control of police personnel by the heads of all police services. The above circular contains four useful criteria that should lead police investigators to examining possible racial bias in alleged offences: the confession of the alleged offenders; statements by victims or witnesses; indications on the basis of elements provided for by the code of criminal procedure; the fact that the alleged offenders and the victims determine themselves or belong to “different racial, religious and social groups”.

The above major positions and guidance were reiterated by the Head of the Greek police in his circulars of 24 October 2012<sup>31</sup> and 8 November 2014<sup>32</sup>, according to which all cases concerning complaints about ill-treatment of non-nationals by police officers while on duty should be given high priority by the Internal Affairs Directorate. This directorate must immediately investigate all offences perpetrated by police officers of all grades, border guard officers and special guard officers.

Phenomena of ill-treatment of migrants and nationals by state, including law enforcement, officials had been the subject also of a number of circulars issued by the Prosecutor of the Supreme Court (*Areios Pagos*) (PSC), at least since 2002, and addressed to prosecutors all over the country. In a circular of 31 October 2002<sup>33</sup> the PSC noted that in all cases concerning allegations of ill-treatment by state officials of nationals or non-nationals, prosecutors should immediately act demonstrating “appropriate firmness” in order to prevent or suppress these phenomena. In another circular<sup>34</sup> issued on 4 June 2008 the PSC instructed the country’s prosecutors to record all these cases, to immediately order the examination of alleged victims by a coroner and to carry out promptly the necessary investigations.

Notwithstanding, in 2013 the PSC disseminated once again the above two circulars, a fact indicating that the reporting of cases of ill-treatment by state, including law enforcement, officials had not subsided. In fact by his circular<sup>35</sup> of 22 April 2013 the PSC re-disseminated the 2002 and 2008 circulars, instructing at the same time the country’s prosecutors to report to him at the end of every semester information on all relevant case files. The repetitive issuance of such circulars both by the Head of the Greek police and the PSC are clear indications that ill-treatment is a systemic human rights issue in the country’s law enforcement sector which requires far-reaching administrative and legislative measures.

### **III. Major challenges facing the implementation by Greece of *Alsayed Allaham and Zontul* and the eradication of ill-treatment by law enforcement officials**

#### **1. The need for an effective complaint mechanism covering law enforcement**

The Strasbourg Court’s judgments are, in principle, essentially declaratory, creating thus “obligations of result” on the part of the respondent states that may decide the means by which adequate, effective redress may be attained for the Convention violations found. Execution by respondent states of the Court’s judgments, as provided for by Article 46 ECHR, should be “full, effective and prompt”.<sup>36</sup> At the same time, states are bound by ECHR to ensure the effective

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<sup>31</sup> Circular 6004/1/182.

<sup>32</sup> Circular 7100/25/14-δ, “The handling of racism, xenophobia and discrimination during police action”, on file with the author. This circular refers, *inter alia*, to the 2012 circular 6004/1/182.

<sup>33</sup> Circular 2834/εγκ.4, in Greek, available at : <http://eisap.gr/?q=node/445>.

<sup>34</sup> Circular 2294/εγκ.6, in Greek, available at : <http://eisap.gr/?q=node/393>.

<sup>35</sup> Circular 3/13, in Greek, available at : <http://eisap.gr/?q=node/88>.

<sup>36</sup> See, *inter alia*, preamble of the 2015 “Brussels Declaration”, adopted at the High-level Conference meeting in Brussels on 26 and 27 March 2015 at the initiative of the Belgian Chairmanship of the Committee

implementation of the Convention at national level and take effective measures to prevent violations,<sup>37</sup> including their recurrence. In view of this, a respondent state, following a Court's judgment finding violations of the Convention, is obliged to adopt "individual measures" for providing redress to the individual victim, as well as "general measures" to prevent recurrence of similar violations.

As of early 2017 the execution by Greece of both *Alsayed Allaham* and *Zontul*, dating from 2007 and 2012 respectively, was still supervised by the Council of Europe Committee of Ministers (CM), under Article 46 ECHR. The cases have been part of a group of 11 cases (*Makaratzis* group of cases)<sup>38</sup> which are examined by the CM and concern mainly excessive use of force, ill-treatment of nationals and migrants by law enforcement (police and coast guards) officers, and lack of effective investigations.

As regards individual measures, full redress of the applicant victims could have happened by the reopening of the relevant criminal proceedings against the law enforcement officers, which is not possible, according to the Greek authorities.<sup>39</sup> This is because Article 525§§1 and 5 of the code of criminal procedure provide for case reopening following a Strasbourg Court's judgment finding a violation only if that reopening would be in favour of the convict. On the other hand, reopening against a person who has been acquitted by a final court decision is possible, under current Article 526 of the same code, in rare cases where it is proven that the decision had been substantially influenced by falsified evidence, bribery or other abusive behaviour by a judge or jury.

Concerning possible reopening of disciplinary proceedings against the law enforcement officers concerned, according to the Greek government information provided to the CM and publicly available as of early 2017,<sup>40</sup> this would be possible only in the case of *Zontul*. However in practice even this reopening has so far stumbled on the non-operation of the law enforcement agent complaints Office that was established in the Ministry of Public Order and Citizen Protection under Law 3938/2011 (see below).

What is striking is that the operation of the aforementioned complaints Office has been in fact the main focus of the CM supervision of the general measures required in order to prevent recurrence of similar violations. In fact the operationalization of the above complaints Office was expected by the CM for five years, until the end of 2016 when a new complaint mechanism was established by a new law (see below). The complaints Office provided for by Law 3938/2011 was meant to be headed by a three-member committee composed of an honorary judge, one honorary prosecutor and a legal adviser to the above Ministry.

However, even if it had managed to become operational, this mechanism was not up to the international standards concerning effectiveness for two major reasons: first, the Office and its three-member executive committee could not be considered to be independent given that they were set to function under the direct control of the Ministry of Public Order and Citizen Protection. Secondly, as a matter of principle, the above Office was not empowered by law to investigate cases. It was primarily designed to record and assess complaints and then forward the cases to the competent law enforcement authorities for investigation.<sup>41</sup>

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of Ministers of the Council of Europe, available at:  
[http://www.echr.coe.int/Documents/Brussels\\_Declaration\\_ENG.pdf](http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf).

<sup>37</sup> Ibid, part B1(e).

<sup>38</sup> Information on these judgments and their execution by Greece is available at:  
<http://hudoc.exec.coe.int/ENG?i=004-15563>.

<sup>39</sup> Ibid. "Status of Execution".

<sup>40</sup> Idem.

<sup>41</sup> See also comments in the above-mentioned 2013 report on Greece by the Council of Europe Commissioner for Human Rights, paras 118-119.

In this context it may be usefully noted that the five principles of effective complaints investigation mechanisms have been elaborated upon by the Council of Europe Commissioner for Human Rights in his 2009 Opinion concerning independent and effective determination of complaints against the police,<sup>42</sup> reflecting primarily the Strasbourg Court's case law. These fundamental principles are the following:

*Independence*: there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence;

*Adequacy*: the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible;

*Promptness*: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;

*Public scrutiny*: procedures and decision-making should be open and transparent in order to ensure accountability; and

*Victim involvement*: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.

Law 4443/2016 of 9 December 2016 defined the Greek Ombudsman as the new national complaint mechanism covering all law enforcement and detention facility agents. The Ombudsman was given the competence for collecting, registering and investigating (also *ex officio*) individual complaints and accorded the power of issuing a report with recommendations addressed to the disciplinary bodies of the law enforcement authorities concerned. However, the Ombudsman's reports have no binding effect. Under the new law the relevant authorities may diverge from the Ombudsman's reports by setting out specific reasons for doing so.

It is noteworthy that under Law 4443/2016 the Greek Ombudsman also deals with cases that are adjudicated upon by the Strasbourg Court and violations of ECHR are found due to shortcomings of disciplinary proceedings or new elements were highlighted which had not been earlier evaluated by disciplinary organs or the domestic courts. In case the Ombudsman decides that a reopening of the investigation is necessary the relevant domestic authorities are bound to proceed accordingly. The Ombudsman has also the possibility of investigating the case himself and producing a non-binding report. Even though the new mechanism is an improvement, compared to that of Law 3938/2011, the limiting of the Ombudsman's competence to the issuing of non-binding reports is a major shortcoming that adversely affects the new mechanism's adequacy and effectiveness.

## *2. Substantive criminal law issues that need to be addressed in the context of the execution of Alsayed Allaham and Zontul*

As mentioned already, under the Strasbourg Court's case law and internationally established principles, in cases of a person's wilful ill-treatment adequate means of remedy is the one provided by criminal law. As shown above, the Greek law and practice in this domain leave a lot to be desired. Apart from the operation of an effective complaint mechanism, in order to achieve full and effective reparation and prevention or recurrence of such serious human rights violations one major condition should be fulfilled: the existence of an adequate legal framework that makes possible the effective prosecution and dissuasive sanctioning of ill-treatment by law enforcement officials.

As regards Greek criminal law, the following major issues need to be examined in this context: the Strasbourg Court's judgment in *Zontul*, where domestic courts failed to qualify the migrant detainee's rape with a truncheon as torture because the infliction of pain was not "planned", showed clearly that there exists a serious issue of the definition of torture in Greek law. The extremely rare (reportedly only one as of early 2017), final conviction for torture by Greek courts appears to be due to the fact that torture is defined in Article 137A§2 of the criminal code as the "planned"

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<sup>42</sup> CommDH(2009)4, 12 March 2009, available at: <http://www.coe.int/en/web/commissioner/opinions>.

(μεθοδευμένη) infliction on a person of severe physical, and other similar forms, pain. Under the established Greek case law and doctrine in order for the infliction of pain to be planned it must be repeated and have a certain duration.<sup>43</sup>

However, the condition of a planned act finds no ground in ECHR and the Strasbourg Court's case law that has defined torture as "a deliberate inhuman treatment causing very serious and cruel suffering".<sup>44</sup> In the same vein, the 1984 Convention against Torture (CAT) defines torture as an act by which severe pain or suffering is "intentionally inflicted".

As noted by the Court in *Zontul* (§47), the draft text of CAT in fact provided the basis of Law 1500/1984 that introduced into the criminal code Article 137A. It is also to be noted that Greece ratified CAT by Law 1782/1988, without any substantive reservations to that treaty.<sup>45</sup> Law 1782/1988 constitutes in fact a literal transposition into Greek law of CAT, including the definition of torture contained in Article 1 CAT. By this ratification CAT, under Article 28§1 of the Greek Constitution, became an integral part of domestic law and prevails over any contrary provision of domestic law. In order to eliminate this legal conflict the Greek criminal code needs to be amended. In addition, the word "planned" is a vague term from a legal point of view that may ignite various interpretations. In 2012 the UN Committee against Torture called on Greece to amend the torture definition in the criminal code so that it is "in strict conformity with and covers all the elements" provided for by Article 1 of the 1984 Convention against Torture and meets "the need for clarity and predictability in criminal law".<sup>46</sup>

A second major problem in this context is the enactment in recent years of a number of laws that aim to decongest Greek prisons by modifying Article 82 of the criminal code and expanding the possibility of converting custodial sentences into pecuniary penalties and community service. For example, Law 3904/2010 provided for the obligatory conversion of all sentences from two to three years' imprisonment, except in cases where the court considers incarceration to be imperative to prevent reoffending. Law 4093/2012 expanded this rule to sentences from two up to five years' imprisonment.

Regrettably these laws have been applied indiscriminately to cases of ill-treatment, including torture, by law enforcement officials. This happened, for example, in the above-mentioned case of *Sidiropoulos and Papakostas* which led to the reportedly first final conviction of a police officer in 2014 by the Athens Mixed Jury Appeals Court for torture in 2002 by electric shock during interrogation.<sup>47</sup> Even though under Article 137B of the Greek criminal code, the use of electric shock is an aggravating circumstance that renders torture punishable by at least ten years' imprisonment, the final 2014 sentence, taking into account mitigating circumstances, was five years' imprisonment. This sentence was converted by the same court into a daily fine of five euros to be paid by the convict over a period of three years.

Such laws and practice raise serious issues of compatibility with international standards, including the Strasbourg Court's case law, according to which penalties imposed in this context should be adequate and dissuasive. In the aforementioned 2010 case of *Gäfgen v. Germany*, concerning the applicant's subjection to a *threat* of torture by police officers during his interrogation, the latter had

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<sup>43</sup> See, *inter alia*, Leonidas Kotsalis (ed), *The European Convention on Human Rights and Criminal Law*, Athens, Nomiki Vivliothiki, 2014, in Greek, at 97.

<sup>44</sup> *Ireland v. United Kingdom*, judgment of 18 January 1978, para. 167; *Gäfgen v. Germany*, GC, judgment of 1 June 2010, para. 90.

<sup>45</sup> See UN treaty collection, CAT, at:  
[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=IV-9&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-9&chapter=4&clang=en#EndDec).

<sup>46</sup> UN CAT Concluding Observations on Greece, 27 June 2012, para 9, available at:  
[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GRC&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GRC&Lang=EN). A similar recommendation was made by CPT in its 2015 visit report on Greece, noted above, para. 43.

<sup>47</sup> Judgment 80,81,82/2014, 14 February 2014, on file with the author; see summary of case in Greek Helsinki Monitor et al., Contribution to the list of issues, UN CAT, 21 February 2014, p. 2, available at:  
[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GRC&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GRC&Lang=EN)



been sentenced by a domestic court to suspended fines of 60 and 90 daily payments of €60 and €120 respectively. The Grand Chamber of the Strasbourg Court (§124) noted that such sentences are not an adequate response to a breach of Article 3 ECHR. It added that such punishment is manifestly disproportionate to a breach of one of the core rights of ECHR and has no deterrent effect to prevent further violations of the prohibition of ill-treatment in future difficult situations. To this end they should be commensurate to the gravity of ill-treatment.<sup>48</sup> To avoid and eradicate impunity for serious human rights violations, such as physical ill-treatment, reduction and conversions of sentences of imprisonment to pecuniary penalties need to be proscribed by law.

A third major issue raised by Greek criminal law is that offences concerning ill-treatment, including torture, by state officials are subject to the ordinary prescription provisions provided for by the criminal code (felonies as a rule are subject to a 15 years' prescription and misdemeanours to a five years' prescription). As a consequence, even where the Strasbourg Court finds a violation of Article 3 ECHR for torture that occurred more than 15 years earlier (as in *Zontul*), reinitiating prosecution, in order to provide full redress to the victims, is foiled by prescription. Apart from the hurdle of prescription though, as noted earlier, reopening of such cases is not possible for one more reason. Under Article 525§5 of the code of criminal procedure reopening of a case following a judgment by the Strasbourg Court finding a violation of the Convention is possible only if that reopening would be in favour of the convict.

This state of affairs disaccords with international standards aiming to prevent torture and eradicate impunity for serious human rights violations. The UN Committee against Torture (UN CAT) in its General Comment No. 3 (2012) has stressed that “on account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation and rehabilitation due to them.”<sup>49</sup> Although priority is given to acts of torture, UN CAT has added that states should ensure that all victims of ill-treatment, not only torture, can enjoy their right to remedy and to obtain redress. In the same vein, the Strasbourg Court has repeatedly noted that “when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible”.<sup>50</sup>

#### **IV. Why *Alsayed Allaham* and *Zontul* are the tip of the iceberg**

*Alsayed Allaham* and *Zontul* are the tip of the structural problem concerning migrant ill-treatment in Greece. This section provides an overview of a number of subsequent, similar applications lodged with the Strasbourg Court, as well as of reports by CPT and the Greek Ombudsman which indicate the institutionalised character of migrant ill-treatment in Greek law enforcement.

##### **1. Subsequent similar applications lodged with the Strasbourg Court**

Between July 2011 and April 2016 four more applications were lodged with the Strasbourg Court concerning, *inter alia*, migrant ill-treatment by Greek law enforcement agents. Three of these cases concern in fact groups of 16, 10 and nine migrants.

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<sup>48</sup> See also Council of Europe Committee of Ministers, Guidelines on Eradicating impunity for serious human rights violations, 30 March 2011, section X on sentences, available at:

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cd111](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cd111).

<sup>49</sup> UN CAT, General Comment No. 3 (2012), “Implementation of article 14 by States parties”, 13 December 2012, para. 40, available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=1&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=1&DocTypeID=11).

<sup>50</sup> See, *inter alia*, *Yeter v. Turkey*, Strasbourg Court's judgment of 13 January 2009, para. 70.



The first case is *Ilyas Andersen c. Grèce*.<sup>51</sup> It concerns the Norwegian applicant's arrest and alleged ill-treatment while in police detention in the area of Thessaloniki in 2008, and the alleged lack of an effective investigation into the case by the administrative and prosecutorial authorities.

The second case is *Ehsanullah Safi et autres c. Grèce*.<sup>52</sup> Also known as the 'Farmakonisi case', this case concerns a group of 16 Afghan, Syrian and Palestinian migrants who in 2014 were rescued by the Greek coast guard near the isle of Farmakonisi in the Aegean Sea. The applicants claimed notably that during this operation some of their relatives lost their lives because of an attempt by the coast guard to forcibly return them to the Turkish coast. Additional claims were made about the applicants' ill-treatment by coast guard officers on the isle of Farmakonisi.

The third case is *Ahmad Sarwari et autres c. Grèce*.<sup>53</sup> It concerns alleged ill-treatment, including one applicant's torture ("Palestinian hanging"), which the 10 Afghan migrants suffered at the hands of two Athens policemen in 2004, the lack of effective administrative investigations and of adequate sanctioning by the domestic criminal court. Interestingly, in its communication of the case to the Greek government the Court poses a question to the parties whether the Greek administrative and judicial authorities complied with their obligations under Article 14 in conjunction with Article 3 ECHR which prescribe an investigation of possible discriminatory attitudes on the part of the police officers concerned.

The fourth similar case pending before the Strasbourg Court is *H.A. et autres c. Grèce*.<sup>54</sup> The application was lodged by nine unaccompanied migrant children, aged between 15 and 18, who after an attempt they made to exit Greece in 2016 they were arrested and detained by the Greek police in Idomeni and Kilkis, northern Greece. Some of the migrant children claimed that in both towns' police stations they have been ill-treated by police officers while their request to be examined by a medical doctor was rejected by the police.

## 2. *Migrant ill-treatment in Greek law enforcement through the reports of the European Committee for the Prevention of Torture (CPT)*

CPT has been carrying out monitoring visits to Greece since 1993. In the course of the visits that took place between 1997 and 2015 CPT recorded numerous cases of ill-treatment, including torture, of migrant detainees by law enforcement officers, especially policemen. Regrettably the series of reports on Greece issued by CPT from 1994 to 2016 and its repetitive remarks and recommendations indicate a serious lack of progress and willingness by the authorities to fully align domestic law and practice with European human rights standards.

As noted in the 2015 CPT visit report on Greece,<sup>55</sup> in defiance of the overwhelming evidence to the contrary, the national authorities consistently refuse to consider ill-treatment by law-enforcement officials as a serious, systematic problem requiring resolute action. As a consequence, despite the continuous recommendations by CPT, the authorities have not taken adequate measures to combat this phenomenon and eliminate impunity for serious human rights violations.

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<sup>51</sup> Application lodged on 5 July 2011, communicated to the government on 2 September 2015.

Communicated cases are available at: [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

<sup>52</sup> Application lodged on 21 January 2015, communicated to the government on 22 February 2016.

<sup>53</sup> Application lodged on 19 June 2012, communicated to the government on 21 April 2016.

<sup>54</sup> Application lodged on 13 April 2016, communicated to the government on 25 November 2016.

<sup>55</sup> Above-noted CPT report published on 1 March 2016, para. 12.

Actually in its second, 1997 visit report on Greece, CPT recorded allegations of police ill-treatment suffered mainly by migrant detainees of Albanian origin who were suspected of criminal offences.<sup>56</sup> During its subsequent 2001 visit to Greece CPT characteristically observed the “disrespectful attitude” displayed by some law enforcement officers towards detainees, especially those of Albanian origin.<sup>57</sup> During its 2007 visit CPT recorded, *inter alia*, several accounts of ill-treatment suffered by migrants at the Athens airport after failed deportation attempts, as well the lack of guidelines concerning the use of force in deportation procedures.<sup>58</sup> Similar complaints concerning migrant ill-treatment by police officers during deportations were recorded in the course of the 2009 visit of CPT. CPT reiterated its concern about the lack of guidelines to police officers, which are necessary in this specific context.<sup>59</sup>

It is noteworthy that in the course of its 2013 visit to Greece CPT recorded many cases of migrant detainees who complained about having been subjected to racist insults by police officers during arrest or detention in police stations, especially in the region of Attica. The recorded verbal abuse concerned primarily the migrants’ skin colour and was accompanied by messages that they were unwelcome in the country. According to CPT, frequently verbal abuse was accompanied by physical ill-treatment.<sup>60</sup>

In its 2015 visit report CPT noted that it “appears that the infliction of ill-treatment by police officers at the Security Departments particularly against foreign nationals, including for the purpose of obtaining confessions, continues to be a frequent practice – notably at Agios Panteleimonas Police Station in Athens and at Demokratias Police Station in Thessaloniki”.<sup>61</sup> It added that almost none of the detainees met who alleged police ill-treatment had filed a complaint, due to notably fear of retribution or harsher sentences, and lack of information and of legal advice (in particular non-national detainees).<sup>62</sup>

The 2015 visit report by CPT is particularly important because it relates, possibly in the clearest manner so far, a disturbing picture of a Western European state where ill-treatment by the police is manifestly a widespread and deep-rooted problem. In that report CPT noted that it considers essential for the Greek authorities to promote a “culture change where it is regarded as unprofessional to resort to ill-treatment”. To this end the authorities were also called on to actively promote a culture change with the Greek police and adopt protective measures for whistle blowers.<sup>63</sup>

As regards administrative investigations, CPT noted the following major shortcomings: Firstly, under the 2008 Disciplinary Code, investigation procedures are to be initiated *ex officio* but they are carried out by the local police service to which the suspected police officer is attached. However, in practice most investigations occur in first instance as preliminary inquiries and are initiated following a written complaint. Secondly, in the few cases where indications are found pointing to a serious disciplinary offence and a ‘sworn administrative inquiry’ is opened, in practice these investigations may still be carried out by a police officer belonging to the same police service as the officer who is subjected to investigation. Investigations by members of different police services may be carried out only in cases of allegations of torture and other offences against human

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<sup>56</sup> CPT report published on 13 September 2001, para. 14, available at: <http://www.cpt.coe.int/documents/grc/2001-18-inf-eng-2.pdf>.

<sup>57</sup> CPT report published on 20 November 2002, para. 14, available at: <http://www.cpt.coe.int/documents/grc/2002-31-inf-eng.pdf>.

<sup>58</sup> CPT report published on 8 February 2008, para. 16, available at: <http://www.cpt.coe.int/documents/grc/2008-03-inf-eng.pdf>.

<sup>59</sup> CPT report published on 17 November 2010, para. 21, available at: <http://www.cpt.coe.int/documents/grc/2010-33-inf-eng.pdf>.

<sup>60</sup> CPT report published on 16 October 2014, para. 18, available at: <http://www.cpt.coe.int/documents/grc/2014-26-inf-eng.pdf>.

<sup>61</sup> Above-noted CPT report published on 1 March 2016, p. 5 and para. 21.

<sup>62</sup> Ibid. para. 25.

<sup>63</sup> Ibid. para. 23.

dignity covered by Article 137A of the criminal code. Thirdly, under the Disciplinary Code, the officer who has been charged with ill-treatment is not automatically suspended from service during the administrative or even the criminal proceedings. This law and practice in fact provides ample leeway to offenders to repeat acts of ill-treatment while remaining still in service<sup>64</sup>.

In view of the above, CPT underlined that this kind of administrative investigations should preferably be conducted by a “fully fledged independent investigation body” (a complaint mechanism, see also section III). Such a body should be empowered to carry out investigations that are comprehensive, prompt and reasonably expeditious, and transparent.<sup>65</sup>

With regard to criminal investigations, they can run in parallel with the administrative ones and be initiated *ex officio* by the public prosecutor or at the police investigator’s request. Notwithstanding, CPT has witnessed serious flaws in criminal investigations that have been carried out by public prosecutors, demonstrating, *inter alia*, the latter’s lack of human rights sensitisation and/or training. One of the two most serious cases mentioned in the 2015 visit report is one concerning allegations by a group of migrants under deportation of inhuman treatment, including torture, by police officers in 2013 in Athens. The allegations included ill-treatment with an “electric shock device” and insults by police officers due to the migrants’ Muslim faith. Despite the existence of very concrete evidence (such as identification of police officers in photographs and forensic medical report) contained in the file, the public prosecutor summarily dismissed the complaints and closed the file.<sup>66</sup>

Another major shortcoming that was reconfirmed by CPT in its 2015 visit report is the systemic lack of adequate, dissuasive sanctioning of ill-treatment by Greek law enforcement officers (see also section III). For example, between 2009 and 2013 from the approximately 140 cases of ill-treatment investigated by the Internal Affairs Directorate of the police 30 were forwarded to prosecutors. In eight of these cases police officers were prosecuted for torture under Article 137A of the criminal code. Four of them were finally acquitted while the four other cases were pending.<sup>67</sup>

The problem is that bluntness towards ill-treatment, including torture, by police officers has been encountered even at the highest judicial level, that of the Greek Court of Cassation (*Areios Pagos*). A characteristic example is the case of *Kouidis v. Greece*,<sup>68</sup> where in 2006 the UN Human Rights Committee (HRC) found the first violation by Greece of the International Covenant on Civil and Political Rights (ICCPR). This was the consequence of the fact that *Areios Pagos*, in a criminal case decided upon in 1998, did not take into account the applicant’s claims that his confession to the police was obtained under duress (serious ill-treatment including the use of *falanga*) during his interrogation in the Athens police headquarters.

In two subsequent cases brought before the UN HRC, concerning physical ill-treatment by police officers of Greek nationals of Roma origin, the UN HRC found anew violations by Greece of the ICCPR taking into account, *inter alia*, serious shortcomings of the relevant judicial investigations. In *Kalamiotis*<sup>69</sup> the magistrate who had been charged by the Athens Misdemeanours Prosecutor in 2001 to conduct a criminal investigation declined to investigate for lack of competence without explaining though his decision. In *Katsaris*<sup>70</sup> the first instance prosecutor in Nafplio, notably in the context of an *ex officio* investigation that started in 2000, ignored the victim’s earlier criminal complaint and noted that all police officers at issue had testified that the alleged victim and his family did not raise any complaint, nor did he explain why he did not report the incident after his departure from the police station.

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<sup>64</sup> Ibid. paras 27-28.

<sup>65</sup> Ibid. paras 29-30.

<sup>66</sup> Ibid. paras 34-37.

<sup>67</sup> Ibid. para. 43.

<sup>68</sup> Communication No. 1070/2002, Views adopted by the UN Human Rights Committee on 28 March 2006.

<sup>69</sup> Communication No. 1486/2006, Views adopted by the UN Human Rights Committee on 24 July 2008.

<sup>70</sup> Communication No. 1558/2007, Views adopted by the UN Human Rights Committee on 18 July 2012.

### 3. *Law enforcement and migrant ill-treatment through the prism of the Greek Ombudsman's reports*

In his 2007 annual report the Greek Ombudsman noted that he continued to register a flow of complaints concerning violations of the liberty of person in the context of police activities. This was accompanied by certain improvements in the administrative investigations but also by setbacks such as instances where the investigations were concluded without receiving the complainants' statements.<sup>71</sup>

As regards migrant ill-treatment, the Ombudsman in the same report underlined that similar problems, less frequent but occasionally more serious, were encountered in cases where irregular migrants were arrested or detained by Greek coast guard officers. The Ombudsman noted a number of cases of grave ill-treatment including torture, and collective expulsions ('push backs') by the coast guard which were recorded by the refugee NGO Pro Asyl and in the media. Although he conceded that investigations into such cases are extremely difficult due to the very nature of the events, the Ombudsman expressed his concern at the fact that, as a rule, these complaints were summarily rejected by the authorities. He added that even where disciplinary procedures had been initiated they were flawed giving the impression that the authorities were unwilling to effectively tackle this phenomenon.

The Ombudsman made specific reference to the aforementioned case of *Zontul*, concerning the migrant's rape with a truncheon by a coast guard officer, which had been brought also before the Ombudsman. He noted that this was a characteristic case indicating the continuous refusal of the coast guard leadership, including the relevant Ministry, to accept the Ombudsman's proposal of sending to the victim a letter of apology. This was considered the least that the authorities could have done in order to demonstrate that they denounce such phenomena and that they undertake work towards preventing recurrence. In this context it is noteworthy that the Greek authorities in their reply to the 2013 country visit report by the Council of Europe Commissioner for Human Rights<sup>72</sup> contained no substantive comment on the report's section III.1 on ill-treatment by law enforcement officials.

In a special report<sup>73</sup> on racist violence in Greece issued in 2013 the Ombudsman noted that in 2012 she had received 17 complaints concerning inappropriate attitude of police officers which appeared to be racially biased. All complaints were based on the alleged victims' nationality and/or racial characteristics. Most of them came from African countries while the others came from Albania, Moldova, France, the Netherlands, as well as a Greek national of African origin. The incidents at hand varied from police officers' refusal to investigate complaints about ill-treatment or threats by organised groups, to arbitrary police controls and arrests, and verbal and physical violence by police officers. Upon the Ombudsman's request the Greek police carried out disciplinary investigations in nine out of these 17 cases. Only in one of the nine cases it was found that the impugned police officer should be subject to disciplinary measures without though noting any racial bias.<sup>74</sup>

It is noteworthy that the Greek Ombudsman in the same report underlined, as has CPT, that according to his knowledge many victims of racist violence hesitate to lodge complaints. The Ombudsman highlighted four major underlying reasons: First, the victim's vulnerable position vis-à-vis the police that represents the state and is in a position of power. Secondly, most of the victims

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<sup>71</sup> Greek Ombudsman, Annual Report 2007, pp. 46-48 (in Greek), available at: [https://www.synigoros.gr/resources/docs/6adik\\_anth.pdf](https://www.synigoros.gr/resources/docs/6adik_anth.pdf).

<sup>72</sup> The Greek government's reply is available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2306215&SecMode=1&DocId=2024954&Usage=2>.

<sup>73</sup> Greek Ombudsman, Special Report, *The phenomenon of racist violence in Greece and the way it is handled*, September 2013 (in Greek), available at: <https://www.synigoros.gr/resources/docs/eidikiethesiratsistikivia.pdf>.

<sup>74</sup> Ibid. pp. 22-24.

belong to vulnerable groups and live in a state of insecurity, especially the migrants with no residence permit. Thirdly, lack of information and the existence of hindrances to contacting institutions able to provide migrant victims with counselling and protection. The last and most important reason, according to the Ombudsman, is the victims' "established belief that they have no chance of finding justice".<sup>75</sup> She added that the lack of faith in the prevalence of the rule of law in these cases is in fact linked to the existence of an ineffective police complaint mechanism. Most of the cases are examined superficially by the police and investigations are stop at an early stage. As a consequence, according to the Ombudsman, all persons or organisation concerned regard these investigations as cover ups.

This bleak picture transpires also from the Greek Ombudsman's 2015 annual report that refers to two cases concerning five migrants' ill-treatment by Athens police officers during the former's arrest, detention or control by the latter. Notably in one of these cases concerning four EU citizens, the complainants were allegedly arrested without any justification and were fully stripped for control in an Athens police station. The police carried out a preliminary administrative investigation without taking statements by the complainants, an omission that made the Ombudsman request the reopening of the investigation.<sup>76</sup>

### **Concluding observations**

Ill-treatment by state officials not only is a violation of the victim's human dignity and rights but also shakes the foundations of every rule-of-law based democratic state which are deeply affected by such perverse abuse of power. It is for this reason that the criminal offences of "torture and other affronts to human dignity" find themselves in the first section of the Greek criminal code covering offences against the state's political order. As regards in particular cases where victims of ill-treatment are migrants, they are indicative of an even more alarming state of affairs, given that the way in which a state treats non-nationals is indeed a litmus test for that state's level of adherence to the rule of law and human rights standards.

*Alsayed Allaham* and *Zontul* are the tip of the iceberg. Ill-treatment by law enforcement officials of migrants constitutes a systemic problem in Greece which calls for systematic and determined action by the authorities on three basic levels. The first one lies with the need to establish an effective administrative mechanism able to examine all cases of alleged ill-treatment by law enforcement agents and to lead to the provision of adequate redress to victims. The latest complaint mechanism established by Law 4443/2016 is certainly a positive step but falls short of fulfilling the condition of effectiveness given that the Ombudsman is empowered to issue non-binding reports.

Secondly, there is a need for a holistic overhaul of criminal law and practice concerning torture and other forms of ill-treatment, as well as of the relevant sentencing policy. The definition of torture contained in the Greek criminal code is at variance with international and European standards and is one of the major reasons for the long-standing state of impunity for these serious human rights violations in the country. At the same time, the criminal law provisions on prescription, conversion of custodial sentences and reopening of cases after Strasbourg Court's judgments finding violations of Article 3 ECHR need to be reviewed and amended so that victims of ill-treatment may be afforded full redress. The on-going supervision by the CM of the execution by Greece of the *Makaratzis* group of cases presents a good opportunity for such structural changes that would enhance human rights protection and the rule of law.

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<sup>75</sup> Ibid. p. 27.

<sup>76</sup> Greek Ombudsman, Annual Report 2015, p. 84 (in Greek), available at: <https://www.synigoros.gr/resources/docs/ee2015-09-nomos.pdf>.

Thirdly, particular attention needs to be given by the authorities to the cases involving migrants who are much more easily subject to abusive behaviour, including ill-treatment, by law enforcement officials and are very often voiceless victims. This has been in effect acknowledged by the 2006 and 2014 circulars of the Head of the Greek police according to which racial motivation should always been thoroughly examined by the police investigating cases where the alleged offenders and the victims determine themselves or belong to “different racial, religious and social groups”. Circulars though, albeit very useful, do not suffice if they are not backed by statutory legislation and sound policy making.

As recommended by the European Commission against Racism and Intolerance (ECRI),<sup>77</sup> it is highly advisable to place the law enforcement agencies under a statutory obligation to promote equality and prevent racial discrimination, including racist violence, in carrying out their functions. Enshrining this obligation in law would oblige these agencies to draw up and implement specific programmes, such as systematic training and awareness-raising, aimed at promoting equality and preventing all forms of discrimination. Equally important is to recruit members of under-represented social groups, such as migrants, in the law enforcement agencies, and ensure that they have equal opportunities for progression in their careers. In addition, it is necessary to establish frameworks for dialogue and co-operation between the law enforcement agencies and members of minority groups.

In all rule-of-law based democracies law enforcement forces should be organised and function in a manner that they earn the public’s respect as “professional upholders of the law and providers of services to the public”.<sup>78</sup> While the Strasbourg Court has acknowledged the complex nature of and difficulties in law enforcement in modern societies, it has underlined that when maintaining and enforcing the law it is always “the duty of police officers to act with professionalism and due respect to the dignity of the person in their charge”.<sup>79</sup>

Key for achieving these goals is the existence and maintenance of accountability and control of the law enforcement professionals. To this end, it is necessary to have in place efficient external state control which, in a democratic society, may be divided among the legislative, the executive and the judicial powers.<sup>80</sup> A vital role is played by the prosecutors, and especially the courts that usually constitute the *ultimum remedium* for victims and are endowed with institutional guarantees of independence and impartiality.

Notwithstanding, the previous analysis shows that international and European human rights norms and standards have not as yet been fully embedded in the Greek national legal, especially the judicial, system. As noted in an incisive 1987 study by Adamantia Pollis,<sup>81</sup> albeit the judiciary in this country has been structurally independent, it has rarely acted as a separate and autonomous branch of government. This has been a consequence of an ‘organic’ conception of the Greek nation which is embodied in the state, and its institutions, reinforcing its power. Pollis’ research has demonstrated that Greek judicial institutions have remained committed to a legal philosophy that supports legal restrictions of rights in the name of higher state interests.

In order to overcome these structural shortcomings, the establishment of an effective system of administration of justice and systematic human rights training are needed. This should empower prosecutors and courts to apply domestic anti-torture law in line with the state’s human rights law

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<sup>77</sup> ECRI General Policy Recommendation No. 11, On combating racism and racial discrimination in policing, 2007, section IV, available at: [http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N11/e-RPG%2011%20-%20A4.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/e-RPG%2011%20-%20A4.pdf).

<sup>78</sup> See para. 12 of European Code of Police Ethics, 2001, noted above.

<sup>79</sup> See, *inter alia*, *Galotskin v. Greece*, Strasbourg Court’s judgment of 14 January 2010, paras 36 and 38.

<sup>80</sup> See section VI of European Code of Police Ethics, 2001, noted above.

<sup>81</sup> Adamantia Pollis, “The state, the law, and human rights in modern Greece”, *Human Rights Quarterly* 9 (1987) 587-614.



obligations. Under the Strasbourg Court's jurisprudence states have a positive procedural obligation, deriving from Article 3 ECHR, to conduct a thorough and effective investigation in all cases that raise an arguable claim of ill-treatment. In view of this, in the course of the examination of all such cases the Strasbourg Court has imposed on itself the obligation to "apply a particularly thorough scrutiny". In fact, this is the level of scrutiny that is required also from prosecutors and courts at domestic level.

In the 1975 "first torturers' trial" in Greece targeting officers of the Greek military police (ESA) involved in torture during the 1967-1974 dictatorship,<sup>82</sup> the court-martial prosecutor posed a fundamental question that is still echoing: "How could Greek officers sink to this moral degradation? Who are those responsible?" In a characteristically frank statement, probably prompted by the post-dictatorship atmosphere reigning then in Greece, the prosecutor added that "those morally responsible are not in this court. They are those who used the defendants...who, for many years, have given thousands of hours instruction on the fighting of communism without sparing even one hour to the defence of democracy".<sup>83</sup>

Regrettably these phrases are still of relevance today and call for reflection. Unlawful violence and impunity in Greek law enforcement are decades-old long and derive from a long, sad tradition of state repression and disregard of human dignity and civil rights. As Pollis observed, despite the post-1974 legal and institutional changes in Greece, the underlying world view of the earlier decades persists. This is why the culture of impunity still constitutes the mind frame of many state institutions and is tolerated. It is indeed high time for the national authorities to cross the Rubicon and act with determination to redress this situation where human rights standards and the rule of law cannot but buckle.

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<sup>82</sup> See Amnesty International, *Torture in Greece – The First Torturers' Trial 1975*, London, 1977, noted above.

<sup>83</sup> *Ibid.* at 21.