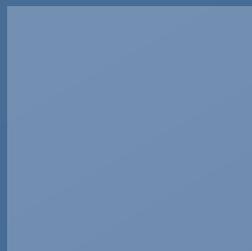
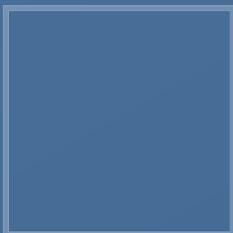


RESEARCH

on the Implementation by Armenian Courts of the
UN Convention against Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment



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պաշտպան



Yerevan 2009



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Acknowledgements

In 2008 the UNDP Armenia office in close collaboration with the RoA Human Rights Defender's Office started analysis of the application of the UN Human Rights Treaties in the Armenian Courts. UNDP National Experts: Ph.D. Davit Hakobyan, Ph. D. Tigran Serobyan and Ph.D. Artur Ghambaryan, conducted the analysis. In the framework of the current project the application by Armenian courts of the "Right to work and of the rights to enjoyment of just and favorable conditions of work" secured by the UN Covenant on Economic, Social and Cultural Rights and of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment was analyzed and two separate reports prepared. The Reports were updated based on the recommendations of the RoA Judicial Department and the UN Office of the High Commissioner for Human Rights

UNDP Armenia Office expresses its deep gratitude to all the organizations and experts supporting the analysis, with special thanks to the Human Rights Defender's office of the RoA and to the Judicial Department of the RoA, for their professional support and materials provided, as well as to the UN Office of the High Commissioner for Human Rights for the expert-review and recommendations provided.

Disclaimer

The report is prepared and published in the framework of the United Nations Development Programme (UNDP) Armenia office "Protecting Human Rights and Promoting Human Rights and Human Rights Education" and "Strengthening the Human Rights Capacity of the Human Rights Defender's Office" projects with financial support of UNDP and Swedish International Development Agency (SIDA). The views expressed in this Report are those of the authors and do not necessarily represent those of the United Nations, including UNDP, and of SIDA.

The report was prepared in January 2008.

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■ | Abbreviations

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	the Convention
the UN Committee against Torture	the Committee
the RoA Criminal Procedure Code	the RoA CrimPC
the RoA Civil Procedure Code	the RoA CivPC
the RoA Criminal Code	the RoA CC



■ | Introduction

a) Standing of the Convention in the law-enforcement field

The Republic of Armenia (RoA) acceded to the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 1993. The Convention is one of those unique international legal instruments that entail a number of reporting obligations for the States Parties with the view to making the implementation of its provisions even more effective. It is incumbent on the State Parties to report to the Committee on the measures that they have taken to give effect to their undertakings under the Convention, within one year after the entry into force of the Convention for the State Party concerned and then once every four years. The Committee considers the submitted reports and states its concerns and recommendations in its observations. It should be noted in that respect that the RoA submitted its report to the Committee in 1995 and only in 1999, thereby defaulting on its obligation to submit a periodic report once every four years¹.

Article 1 of the Convention provides the following definition of the term "torture": "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." This definition does not encompass pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Having considered, given that circumstances established by the Convention are present, the complaints submitted by individuals or States, the Committee may register violation of an obligation set by the Convention. Furthermore, if the Committee receives reliable information to the effect that torture is being systematically practiced in the territory of a State Party, it may designate, in conformity with the procedure established by the Convention, its members to make a confidential inquiry, including, in agreement with that State Party, a visit to the latter's territory. It should be observed that not a single non-governmental organization has gone to the Committee claiming that torture is systematically practiced in the RoA, say, in police departments, military units, penal institutions, etc., which would warrant the launching of an inquiry by the Committee, even though claims about practice of tortures are made by mass media. Such a passive stand is rather evidence of a low level of public awareness about the Convention.

The RoA has directly assumed a number of obligations (appropriate consideration of complaints, the right to compensation, etc.) under the Convention and each instance of the violation of the rights set forth in the Convention will, regardless of the violation of a concrete norm of domestic legislation, give legal grounds for imposition of appropriate international sanctions. In other words, a number of self-executing provisions provided for by the Convention, which set certain obligations for the States Parties and certain rights for individuals, are directly applicable regardless of their implementation in domestic legislation. Yet, the study of the judiciary practices of the RoA Court of Cassation shows that there has not been a single case, when the Court would invoke the Convention. In general, it is an extremely rare occurrence, when competent State bodies make a mention of this international legal instrument. For example, in its 25 July 2007 ruling on holding a judge administratively responsible the Council of Justice pointed out² that the judge violated, *inter alia*, the requirements of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punish-*

1 The RoA Ministry of Foreign Affairs is preparing to submit a report to the Committee within 2009.

2 The RoA did not recognize (opt in) the competence of the Committee as set forth by Article 21 and Article 22 of the Convention.

ment ratified by the RoA. However, the ruling did not specify which provision was violated by the judge³. In his *Ad-Hoc Public Report* on the 2008 presidential election and post-election developments the RoA Human Rights Defender (Ombudsman) declared that numerous individuals had been subjected to tortures during the 1 March morning police operation on Liberty Square. He quoted verbatim Article 2 of the Convention stressing that no exceptional circumstances whatsoever, whether internal political instability or any other public emergency, may be invoked as a justification of torture⁴.

Instances of the implementation of the *Convention for the Protection of Human Rights and Fundamental Freedoms* [European Convention on Human Rights] by the RoA courts have become widespread. One of the underlying reasons of why that is the case is that Article 15.4 of the RoA Judicial Code and Article 8.4 of the RoA Criminal Procedure Code recognize the significance only of the European Court judgments as precedents.

Neither is the Convention regarded as authority by defense attorneys. The research has shown that, as a rule, defense attorneys do not invoke the Convention in the complaints and motions which they lodge with regard to tortures that their clients are subjected to by the bodies conducting investigation. At best, they limit themselves to invoking Article 3 of the *European Convention on Human Rights* and to the case-law of the European Court. For example, in Levon Gulian's high-profile case in the RoA (according to Gulian's legal successors, he was subjected to torture in Shengavit police department in Yerevan), the defense attorneys submitted a 12-page complaint to the court appealing against the prosecutor's decision to terminate criminal investigation. The Convention is not invoked at all in that complaint, while at the same time numerous precedents from the judicial practice of the European Court of Human Rights are analyzed in detail with regard to the Gulian's case⁵.

Thus, the Convention is not regarded as authority by the RoA judiciary and defense attorneys.

b) Subject matter of the research

Even though public awareness of the Convention is quite at a low level and it is almost not invoked at all in the enforcement of law, a number of legal norms set by the Convention have a direct legal effect as it sets a number of specific obligations for the States Parties. This fact makes it possible to study virtual compliance with and implementation of the said norms by the RoA judicial bodies. In the course of the present study the research was focused on the Convention implementation practice by the RoA Court of Cassation due to a new constitutional status granted to the RoA Court of Cassation. This Court is an entity that formulates the judicial policy and its decisions have a profound impact on the law-enforcement practice of lower courts. Its Acts provide or can provide guidance for lower courts with regard to interpretation and implementation of the international legal norms⁶. Besides, under Articles 185 and 263 of the RoA Criminal Procedure Code, the decisions to reject opening a criminal case, to dismiss an already opened criminal case or to stop criminal prosecution can be appealed against in a competent court. Therefore, the judgments, which are related to the issues in question and which were handed down by courts of original jurisdiction, are noteworthy, especially the analysis of

3 This mechanism specified by Article 20 of the Convention is applicable to the RoA since at the time of acceding to the Convention the RoA did not make a reservation (opt out) in accordance with Article 28 of the Convention.

4 RoA Human Rights Defender. *Ad-Hoc Public Report on the 2008 February 19 Presidential Elections and the Post-Electoral Developments*. Yerevan, 2008, p. 34.

5 <http://www.levon-gulyan.info/>

6 Under the RoA Constitution (Article 92.2) the RoA Court of Cassation shall not only address issues of the constitutional justice but shall also ensure the uniform application of law. This norm that conferred the said constitutional status on the RoA Court of Cassation predetermined the legal nature and significance of the Acts of the RoA Court of Cassation as (mandatory) precedents. This is also laid down by Article 15.4 of the RoA Judicial Code, which states that the substantiation (including the interpretations of the law) in the judicial Act of the Court of Cassation on the case with certain factual situation shall be mandatory for the court hearing the case with similar factual situation, except when the court substantiates, noting powerful arguments, that the said substantiation is not applicable to the given factual situation.



compliance with the provisions of the Convention while upholding or overturning the judgments that have been appealed against.

True, the Convention provides for a number of self-executing provisions; however, inadequate implementation of the provisions of the Convention or lack thereof impede RoA citizens or defense attorneys or, in some cases, deny them an opportunity to demand that provisions of the Conventions be enforced rigorously. The matter concerns specifically the conformity of the *corpus delicti* of torture as defined in the RoA Criminal Code to the Convention.

Taking into consideration what has been stated above, the present study will focus mainly on examining and analyzing the following from the perspective of the implementation of the international legal instrument in question:

- the implementation of the UN Convention in the domestic legislation to the extent that it has an impact on the application of the Convention by courts;
- the RoA courts' compliance with the requirements for the protection or enjoyment of certain rights spelled out in the UN Convention; in particular, the most common violations and legislative gaps will be identified and the ways to remedy them will be outlined.

It should be noted that the present study is conducted exclusively with a view to exploring the application of the Convention by courts. Therefore, a number of the Convention Articles, which are not in any way related to courts or with regard to which the court practice is non-existent (e.g. extradition of a foreign national), will not be subjected to a detailed analysis.

The present analysis addressed Articles 1, 3, 4, 10, 11, 12, 13 and 15 of the Convention.

c) Methodology

The analysis was made through the study of documents, meetings held with the stockholders and visits to courts where some criminal cases were heard.

Within the framework of this study the following documents/databases were researched:

- the examination of the Convention application fields and the analysis of international standards and criteria,
- the analysis of recommendations provided for the RoA by various international organizations, including the UN, and of the RoA Government's stance with regard to those recommendations,
- the study of the operation of mass media,
- the study of the practices of the Cassation Court, Courts of Appeal and courts of initial jurisdiction,
- the examination of the information base of the Office of the Human Rights Defender,
- the examination of the curricula of the RoA School for Court Officials, of the School for Prosecutor's Office Employees and of Law Departments in institutions of higher education.

The meetings, which are mentioned below, helped us to better define the range of cases of interest for us thereby leading to the selection of the most controversial cases:

1. Meetings in the RoA Prosecutor's Office, in the *School for Prosecutor's Office Employees* and in the *School for Court Officials* State non-commercial organizations.

Discussed were the *corpus delicti* of torture as defined by the RoA Criminal Code, the practice of extorting testimonies in the course of the criminal investigation, the legislative problems that arise when an action is to be taken on those *corpora delicti*, the legal means for checking the *use of torture* communications within the framework of prosecutor's control over legality in the course of inquiry and the pre-trial investigation as well as the opportunities provided by the amended procedural legislation to prosecutors for the prevention of tortures. Besides, we looked at how the international legal instruments that prohibit tortures are presented during the professional development courses for prosecutors and we scrutinized the curricula of the professional development courses for prosecutors.

2. Meetings with the staff of the Office of the Human Rights Defender.

3. Attendance at the court sessions where criminal cases were heard.

The visits aimed to evaluate the working style of judges and to analyze the relations between the judge and the litigant parties.

4. Meetings with human rights non-governmental organizations:

Sakharov Human Rights Armenian Center, Helsinki Association, Helsinki Committee, Vanadzor Office of Helsinki Citizens Assembly and *Against Arbitrary Enforcement of Law* NGOs that take part in legal proceedings as experts or representatives of plaintiffs or respondents or act in an *amicus curiae* capacity. The information that they provided made a considerable impact on the cases that constitute the subject matter of our study.

5. Meetings in the Chamber of Defense Attorneys.

Discussed were principal trial-related issues that arise, when defense attorneys submit communications about tortures and when those communications are discussed and a decision is made with regard to them. Presented were the issues related to the introduction of the institutional system for the professional development of defense attorneys.

6. Meetings with accredited defense attorneys.

Discussed were issues of fair trial and the most frequent erroneous applications of the substantive law or of the procedural law with regard to tortures as well as information concerning grounds for accepting or rejecting complaints lodged by accredited defense attorneys.

7. Cooperation with the RoA Judicial Department with the purpose of receiving court Acts and findings of the studies that have been conducted.

■ | 1. Implementation of the Convention in the RoA domestic legislation

Under Article 4 of the Convention, the States Parties shall ensure that all acts of torture are qualified as criminal offences. Furthermore, in its November 2007 General Comment on the implementation of Article 2 of the Convention by States Parties the Committee emphasized that States Parties must make the offence of torture punishable as an offence under their criminal law, in accordance with the elements of torture as defined in Article 1 of the Convention⁷.

The *corpus delicti* defined as torture is set forth in Article 199 of the RoA Criminal Code. Under that Article, torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, unless it has led to the consequences specified by Articles 112 and 113 of that Code (harm of utmost or medium gravity intentionally caused to person's health). Such act is punishable by imprisonment for up to 3 years. The definition of torture given by the RoA Criminal Code does not include harm of medium gravity intentionally caused to person's health, thereby making torture look a lesser public threat, as it qualifies torture as a crime of medium gravity.

This *corpus delicti* is spelled out in the section dealing with crimes against person (but not in the section dealing with crimes against public service) and is punishable by a less strict penalty than, say, harm of utmost gravity intentionally caused to person's health. The *corpus delicti* of the offence of torture as described by Article 119 of the RoA Criminal Code contains features that are qualitatively different from those in the definition of torture given by the Convention. To begin with, specific actor is not required for the *corpus delicti* to emerge, i.e. infliction of severe pain or suffering, whether physical or mental, by or with the consent of a public official. Nether is a specific purpose required, i.e. obtaining from the person subjected to torture or from a third person information or a confession, intimidating or punishing for a certain action, etc. In fact, under Article 119 of the RoA Criminal Code the *corpus delicti* of the offence of torture emerges when one person inflicts severe pain or suffering on another person. It is not merely that the said *corpus delicti* fails to incorporate all the aspects of the definition of torture contained in the Convention but that it is construed as a qualitatively different offence, as a crime committed in a private realm. In that respect, as far back as November 17, 2000 in paragraph 37 of its Concluding observations with regard to Armenia's Report the Committee expressed concern over the fact that the draft Penal Code does not include some aspects of the definition of torture contained in Article 1 of the Convention and recommended to adopt a definition of torture which is fully in keeping with Article 1 of the Convention⁸. Besides, under Article 12 of the Convention, each State Party has to ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is a reasonable ground to believe that an act of torture has been committed. However, Article 183 of the RoA Criminal Procedure Code applies the regime of opening a criminal case in private prosecution to the *corpus delicti* of "torture", in which case the victim's complaint is required for starting a criminal case and in the event of reconciliation between the suspect, the accused or the defendant and the victim the case is closed.

Actually, the attributes of torture as defined by Article 1 of the Convention are reflected in Article 341, paragraph 2 of the RoA Criminal Code. As per the Article, an act of torture on the part of a judge, prosecutor, investigator or a person conducting inquiry... coercing a witness, suspect, accused or victim to testify, or an expert to give a fraudulent conclusion as well as an interpreter to give wrong interpretation, shall be punishable by imprisonment for 3 to 8 years. In fact, the RoA Criminal Code criminalized as torture the instances of coercion through torture to give testimony or desired conclusion only during the trial, thereby excluding the use of torture in the sense given to the

⁷ Committee against Torture. General Comment No. 2. Implementation of Article 2 by States Parties. http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP1.Rev.4_en.pdf

⁸ Concluding observations of the Committee against Torture: Armenia. 17/11/2000. A/56/44, paras.33-39. Committee against Torture. Twenty-fifth session. 13-24 November 2000.

term by the Convention when acts of torture are perpetrated by or at the instigation of a public official in numerous other spheres such as acts of torture during rallies (e.g. policeman vs. demonstrator), in detention facilities, armed forces, etc. Those are the spheres where the acts of violence or other actions committed by a public official for the purpose stated in Article 1 of the Convention should be qualified unequivocally by the RoA Criminal Code as torture. Even not every act of violence committed by the body conducting criminal prosecution can in theory give rise to the *corpus delicti* of torture in conformity with the RoA Criminal Code. Severe pain or suffering inflicted by investigator or policeman with the purpose of getting a testimony from a third person or the use of torture by them to obtain an explanation, information or confession through coercion are left out by policy in the criminal justice field. In all such cases the public official will be criminally prosecuted on the grounds of the crime of abusing his powers in conjunction with the crime of causing serious harm to person's health. It is strange, although it is a fact, that torture set forth in Article 119 cannot be invoked in conjunction since Article 309, paragraph 2 specifies the use of violence as aggravating circumstances in the misuse of powers. According to the logic inherent in the RoA Criminal Code, the use of violence encompasses all cases of violence (including torture) besides serious harm caused to person's health. The Code establishes the same penalty for all acts of violence and that does not reflect the danger posed to public by torture as construed by the Convention. It should be noted with regard to this matter that in its November 2007 General Comment on the implementation of Article 2 of the Convention the Committee has emphasized that it would be a violation of the Convention to prosecute conduct as solely ill-treatment, in other words as a crime containing lesser *corpus delicti*, where the elements of torture are also present. The analysis of the court practices in this country demonstrates that the absence of the proper *corpus delicti* of torture results in prosecution of the perpetrator of the acts, which fall under the definition of torture given by the Convention, for assault and battery or for misuse of powers or for causing medium gravity harm to person's health, thereby precluding effective control by non-governmental organizations and public at large over legal proceedings in criminal cases involving acts of torture as defined by the Convention. It should be stressed that perpetrators of these crimes sometimes avoid criminal prosecution or punishment through amnesty or pardon. That, however, goes against the established trend that any amnesty or pardon should be ruled out for perpetrators of tortures. The Committee pointed that out in its General Comment on the implementation of Article 2.

Article 341, paragraph 2, qualifies torture as an aggravating circumstance of an unlawful conduct of a judge, prosecutor, investigator or a person conducting inquiry aimed to coerce a witness, suspect, the accused or a victim to give evidence, an expert to give a fraudulent conclusion and an interpreter to give wrong interpretation⁹. Furthermore, paragraph 3 of the same Article qualifies "... the same actions that have led to grave consequences" as aggravating circumstances. A number of questions arise. *Why the action accompanied by torture does not bring forth grave consequences? Or, what are the grave consequences referred to in that paragraph of the Article that differ significantly in their attribute from torture?*

The Government of the RoA has not taken a comprehensive approach to the implementation process of the Convention. An example of a successful partial implementation is a provision in Article 16, paragraph 3 of the RoA Criminal Code, which states that a person shall not be handed over to a foreign State where he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment.

Individual provisions of the Convention have not been detailed in the RoA Criminal Code since they are grouped among the general categories of the latter. Thus, as per Article 47, paragraph 2 of the RoA Criminal Code, person who has committed a premeditated crime following explicitly unlawful orders or instructions shall be held responsible as any other perpetrator of the same crime. This provision is in fact congruent with Article 2, paragraph 3 of the Convention, under which an order from a superior officer or a public authority may not be invoked as a justification of torture. However, in practice there was a case, when evidence extracted through torture not only was not dismissed by the

⁹ Torture is qualified as an aggravating circumstance in a crime against the administration of justice. The action specified in Article 341, paragraph 1 of the RoA Criminal Code entails the use of threat or other lawful actions but not torture.



judge as evidence obtained with the violation of law but was even legalized since "[the action] aimed to discover the truth"¹⁰. Thus, an absolute necessity arises to set a particular norm with a view to ruling out the legalization of torture.

Complying with the requirements of the Convention, the RoA Criminal Code recognizes universal competence in regard to all acts of torture, including the cases when those were committed outside the RoA territory by foreign nationals or Stateless persons¹¹. Article 14, paragraph 4 of the RoA Criminal Code sets forth that criminal law shall be applied, if a foreign national has not been sentenced for a given crime in the territory of another State. Considering the fact that acts of torture as defined by the Convention are usually seen in the RoA as containing *corpus delicti* of the misuse of official powers, the criminal law may not be used against a given person, if the latter was subjected to criminal prosecution for the misuse of his or her official powers. What is more, the law does not make any exceptions; in particular, in case the trial held in a given State was not fair (it was an imitation of a fair trial) or it had a clear goal of freeing an alleged perpetrator from criminal prosecution or punishment or the said person was granted a pardon, etc.

The absence of a *corpus delicti* in the RoA Criminal Code that would be adequate to the term "torture" in the UN Convention significantly precludes effective public control over the obligations assumed by the RoA with regard to the UN Convention. There is no uniform definition of a *corpus delicti* of torture that would be congruent with its interpretation by the Convention and by the international law.

Furthermore, neither is the so-called passive manifestation of torture criminalized by the RoA Criminal Code, when there are reasonable grounds to believe that the person is subjected to torture by a private individual, while a public official does not take measures to prevent torture or to conduct a proper investigation because his aim is to exempt private persons from criminal persecution. The Committee believes that in such cases the public official should be brought to criminal justice as perpetrator or accomplice. The acts that constitute torture as defined in the Convention are included in the Armenian Criminal Code in numerous *corpora delicti*, thus making public control over trials more difficult.

Without having the *corpus delicti* of torture as defined by the Convention it is impossible to clarify the issue of compensation to victims of torture. According to the official data, last year no criminal case was heard in court with charges brought as per Article 341-2 of the RoA Criminal Code. Even though under the RoA legislation the State is liable for the damage caused by unlawful acts of public officials, however, the absence of legal cases makes it impossible to find out whether compensation is fair and adequate. Similarly, it becomes impossible to set non-governmental foundations for the purpose of providing compensation to victims of torture. At present a large part of those cases are reflected in different Articles of the RoA Criminal Code.



Conclusion.

In its November 2007 General Comment on the implementation of Article 2 of the Convention by States Parties the Committee stressed that States Parties have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with Committee's concluding observations and views adopted on individual communications¹². The corpus delicti that contains elements of torture as defined by the Convention is not reflected in a comprehensive and holistic manner in the RoA Criminal Code.

¹⁰ RoA State Registry 25.07.07./37(561).

¹¹ As per Article 15, paragraph 3 of the RoA Criminal Code, foreign nationals and stateless persons who do not have permanent residence in the RoA and who committed a crime outside the RoA territory are subject to criminal prosecution in line with the RoA Criminal Code for the criminal acts that are specified in the international treaties of the RoA.

¹² Committee against Torture. General Comment No. 2. *Implementation of Article 2 by States Parties*. http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf



■ | 2. Appropriate review of communications about tortures

The analysis of the practice of the use of tortures demonstrates that victims of torture include for the most part persons prosecuted within the framework of certain criminal cases, persons serving their sentence in penal institutions, persons under arrest, politicians, participants of political actions, etc. That is the reason why individual articles and recommendations of the Convention address concrete acts of torture and specify measures to be taken to secure their prevention and effective prosecution. In particular, it gives an "advice" to the States to establish an appropriate process for the prompt investigation of complaints of suspects, detainees and prisoners¹³, to consider setting up a national system to review all places of detention and cases of alleged abuses of persons while in custody, to facilitate visits by independent monitors to all places of detention¹⁴ and to ensure protection for persons who submitted communications and for witnesses, etc. The RoA legislative body assigned the following involvement for the judiciary within the framework of these procedures. The judiciary shall:

- identify in the course of the trial the possible instances of the use of torture and in that connection shall submit a motion to the criminal prosecution body to open a criminal case,
- ensure inadmissibility or limits for the use of evidence obtained through torture,
- assess whether the check on the received communication about the act of torture has been duly conducted and shall do that while reviewing the issue of overturning or sustaining the decision on dismissing a criminal case,
- assess whether investigation has been conducted properly and shall do that while overturning or sustaining the decision on terminating the proceedings in a criminal case,
- take measures to protect witnesses and victims who submitted communications with regard to tortures.

a. Court as an entity that identifies torture

In the course of the criminal proceedings statements about the use of torture for extorting evidence are made by the accused or by his or her legal counsel more often during the hearing of the case. The person in a prisoner's box makes a statement to the effect that law-enforcement agencies subjected him or her to torture and brings facts that support the statement such as, for instance, traces left by tortures, bodily injuries, protocols drawn up at the time of detention or of a transfer to a detention facility, etc. The court should not leave such statements without a response and should express a clear, well-founded and well-reasoned position with regard to those statements. In fact, the court is faced with two issues:

- a. checking on the communication about crime,
- b. making sure that evidence obtained through the use of torture is inadmissible.

In its 2 November 2001 decision the RoA Court of Cassation Chamber on Criminal & Military Cases stated, "Instead of taking necessary measures to check the validity of the statement about the use of unlawful means of investigation with respect to A. Hovanissian and interrogating concrete police officers, the Court of Appeals

¹³ Concluding observations of the Committee against Torture: Russian Federation. 14/11/96. A/52/44, paras.31-43. Conclusions and recommendations of the Committee against Torture. November 14, 1996.

¹⁴ COMMITTEE AGAINST TORTURE. 37th session, 6 – 24 November 2006.



assigned this task to the body of pre-trial investigation."¹⁵ Actually, the position of the RoA Court of Cassation in this case is that validity of statements about the use of torture has to be checked in the course of trial through the analysis of evidence and collection of new proofs. Furthermore, the court should perform the two above-mentioned tasks simultaneously since while reviewing the admissibility of proofs *prima facie* addresses the fact of torture. The position taken by the RoA Court of Cassation in its 8 February 2001 decision is different in this respect, "In the complaint submitted to the Court of Cassation the defense attorney of A., the prisoner at the bar in this case, pointed out that no proof had been obtained to accuse and convict his client and "what passed for the "proof" was but evidence extorted from witnesses through violence..." The RoA Court of Cassation responded thus, "the reasons stated in the complaint that evidence had been extracted from witnesses during the pre-trial investigation by subjecting them to violence not only were not proven by the materials of the case but, vice versa, it was established that A.'s relatives tried to use methods of persuasion and intimidation to witnesses so that the latter change their pre-trial testimonies or retract them."¹⁶ The position taken by the Court of Cassation in this case, viz. that "witnesses had not been subjected to violence since such allegations were not proven by the materials of the case", cannot be considered substantiated and well-grounded. The content of the court decision clearly shows that the fact has not been checked properly. Moreover, the fact was ignored that the witnesses are military servicemen and therefore are in a very vulnerable position. The substantiation by the Court of Cassation that A.'s relatives tried to intimidate and persuade the witnesses to change their testimonies does not provide sufficient grounds to contend that body in charge of criminal investigation could not use violence against them. The court should have checked whether A.'s relatives indeed took such actions and if the allegations were proved, the court should have made a motion demanding that a criminal case be started. Even though the Court of Cassation regarded as proved the contention that A.'s relatives used intimidation methods with regard to the witnesses, nevertheless, it follows from the content of the decision that this fact had no consequences.

The Court of Cassation should stick to the position that it was first to assume, i.e. the validity of statements about the use of torture should be checked through the analysis of proofs and the collection of new proofs. In one of the above-mentioned cases the Court of Cassation simply noted that the convict's reasoning that testimonies were extracted from witnesses was unfounded and was not supported with the materials of the case¹⁷. In another case, in its 13 June 2003 decision the Court of Cassation states, "The arguments given by convict L. Yakovlev about having been subjected to unlawful methods of investigation were checked in the course of the pre-trial investigation; however, they were not confirmed." First, it should be noted that the content of the decision does not make it clear how the statements made in the course of the pre-trial were checked and whether they were checked at all. If the bodies conducting the pre-trial investigation checked the statements made by the defendant, the prosecutor was required by the RoA Prosecutor General's order, which was effective at the time, *On the procedure for the RoA prosecution bodies to review applications and complaints and to receive citizens* to check the facts immediately upon the receipt of applications or complaints about the use of violence or of other unlawful acts against a detained or an arrested person and to take, if necessary, appropriate measures within his powers. The decision made by the Chamber of the RoA Court of Cassation did not mention what action was taken in the aftermath of the check of that statement and what decision was made refuting the accused person's statement about the crime of torture. The examination of the materials showed that on the day following the detention of the accused Yakovenko the police officers on duty drew up a protocol about bodily injuries. According to the protocol, there were bruises and red-color traces on the accused person's legs, back and hands. By that time the accused person had already made a confession. Even though it is mentioned in the same protocol that the accused person allegedly said that he had got injuries before the detention, that state-

15 Collection of decisions of the RoA Court of Cassation Chamber on Criminal & Military cases (2001), p. 482.

16 See Collection of decisions of the RoA Court of Cassation Chamber on Criminal & Military cases (2001), Vol. 3, p. 11.

17 See Collection of decisions of the RoA Court of Cassation Chamber on Criminal & Military cases (2001), Vol. 3, p. 145.

ment was not verified by a separate investigation. During additional interrogations in the course of the pre-trial investigation as well as in the course of the trial the accused person mentioned many times that he had been subjected to torture. However, those statements drew no response. The injuries on the body of the accused person were confirmed by the above-mentioned protocol and by medical documents, thereby providing sufficient grounds to suppose that he had been subjected to torture and to check his statement. However, both the Court of Appeals and the Court of Cassation made no response to the statement about the use of torture and regarded evidence obtained through torture as principal evidence for indictment.

Such substantiations reflect an inconsistent approach on the part of the court to the communications about the use of torture; in particular, the presumption of libel is prevalent. It is necessary that the judicial bodies should rely on concrete facts when refuting statements about the use of torture and should indicate the absence of those grounds, which would provide evidence of the use of torture or of other unlawful methods.

With a view to preventing any cases of torture, Article 11 of the Convention establishes that States Parties shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment. In its turn, the RoA legislation declared fundamental principles for interrogation, trial-related actions and custody and then set guarantees to secure those principles¹⁸. The establishment of norms for conducting the trial does not in and of itself rule out the possibility of the use of unlawful methods of interrogation, in particular torture. Each instance of the breach of the rules indicated below should be regarded by court as an additional signal, while reviewing an issue of a possible act of torture/violence.

1. Under Article 205.1 of the RoA Criminal Code, interrogation may not last more than four hours without a break and not more than two hours in case of a minor or of a person having mental or some other serious disease. Interrogation may be resumed after allowing at least one-hour break for the person under interrogation, which is necessary for getting some rest and a meal. The overall duration of interrogation during one day may not exceed 8 hours or 6 hours in case of a minor or of a person having mental or some other serious disease.
2. Under the RoA legislation on legal proceedings, the right to have a lawyer present during an interrogation is granted not only to the suspect and to the accused. Under Article 86, paragraph 5.10 of the Criminal Procedure Code, witness, too, has a right to have his or her lawyer present, when he or she gives evidence to the body that conducts criminal investigation. When we talked to lawyers, they pointed out that investigators do not notify in advance the participants of the court examination that they have the right to have their lawyer present at the interrogation or else investigators impose a prospective lawyer on them. It is obvious that if a person has been interrogated in the presence of the lawyer "offered" by the body of criminal prosecution, the statement by the body of pre-trial investigation that the lawyer authorized the protocol should not be given credibility and, besides, it should serve as a suspicion-raising signal. We would like to point out a legislative gap in terms of confrontation being essentially very similar to interrogation. It stands to reason that the RoA Criminal Procedure Code should state clearly that a witness shall be entitled to have his or her lawyer present also at confrontation interrogation.
3. The participants in the trial should be notified about the right to have their lawyer present during an interrogation. If the materials of the case do not contain a statement that the party concerned has been informed

¹⁸ Under Article 9, paragraphs 3 and 4, of the RoA Criminal Code, during criminal proceedings no one shall be subjected to degrading treatment or held in humiliating conditions. Person may not be coerced into participating in degrading trial-related actions. Under Article 11, paragraphs 7 and 8, of the RoA Criminal Code, during criminal proceedings no one shall be subjected to torture or unlawful physical or mental violence, including the use of medications, starvation, exhaustion, hypnosis, denial of medical assistance, as well as other forms of cruel treatment. It is prohibited to extort evidence from persons taking part in criminal proceedings through violence, intimidation, deliberate deception, violation of their rights, as well as other unlawful acts. It is prohibited to involve a person in investigation experimentation and other trial-related actions that are long-term or entail physical suffering or pose a health hazard to the person or to those around him.



about his or her right to have their lawyer present during an interrogation, and the lawyer of their own choosing at that, the judge should regard that fact as an alarm signal.

4. If the charges are based only on the accused person's confession, which he or she disavows during the trial, the confession has to be examined by the court in minute detail.

5. In general, the results of the actions of the investigation are put down in a protocol. In reality, sometimes field officers from the inquiry body are too present at an interrogation. Even though this practice is not in a conflict with the RoA Criminal Procedure Code, in such cases, nevertheless, the provision of Article 209, paragraph 6 of the RoA Criminal Procedure Code should be complied with and the protocol should include data on the person who has taken part in the interrogation. That piece of information is of great significance for an appropriate review of statements about the acts of torture. The participants-related incorrect information in the protocol should be regarded as a fact that raises suspicions.

Whenever the judge finds that there are sufficient grounds to assume that torture has been employed, it is incumbent on him or her to address a motion to a prosecutor so as a criminal case be opened. That function of a judge deprives the prosecutor's office of the opportunity to leave statements about the acts of torture without response, since lawyers complain that in many instances their statements and/or statements by the accused receive no response in contravention to the requirements of the law. On the other hand, even if the prosecutor rejects the judge's motion to open a criminal case, then a decision has to be made about the rejection of the motion to open a criminal case and that decision can be appealed against in court.

During our meetings with lawyers the latter pointed out that it is not infrequent that defendants have bruises when they make their appearance at court sessions. To our question of whether any judge has ever addressed the issue and has tried to ascertain what caused those bruises, the lawyers' answer was always in the negative. In a situation like that judges should not wait till the defendants declare that they have been subjected to torture but should try to ask and find out the causes of the bruises. This issue is also of utmost importance from the perspective of inadmissibility of evidence obtained through torture. As regards this issue, Article 15 of the Convention sets forth that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made¹⁹. Our conversations with lawyers, judges and prosecutors showed that rare are cases, when it is officially recognized that evidence has been obtained as a result of torture and these findings are then used as grounds for indictment in a criminal case. One of such rare cases is that of Misha Harutiunian, where the defense attorney challenged the evidence given by M, the accused and by G and K, the witnesses in the case. The defense attorney contended that the latter had given that evidence as a result of torture that they had been subjected to by officers from the Military Police Department and that the Military Police had notified the court about the criminal case opened with regard to those acts of torture. Evaluating the motions submitted by the defense and evidence given by witnesses, the judge stated in the justification part of the judgment, "Evaluating contradicting testimonies given by G. and K. during pre-trial investigation and inquiry, the court finds that indeed the body that conducted the inquiry resorted to the use of violence in the Military Police Department for the purpose of finding out the truth." By giving such an evaluation, the court accepted the evidence obtained as a result of torture and based the charges on the basis of the testimonies, thereby justifying the torture used against those persons. The judgment was appealed against in the Court of Appeals and in the Court of Cassation, which sustained the judgment²⁰.

19 This Article is reflected also in Article 105 of the RoA Criminal Procedure Code, under which the materials that have been obtained through violence, intimidation, deliberate deception and subjecting a person to derision as well through other unlawful actions may not be used as grounds for charges and invoked as evidence in the trial of a criminal case.

20 In regard to this case the European Court of Human Rights indicated a violation of Article 6 of the Convention, while a disciplinary action was taken against the judge of the first instance court by the decision of the RoA Justice Council.

In terms of ensuring inadmissibility of evidence obtained as a result of torture the position of the Court of Cassation is particularly important, when the Court reviews the issue of accepting for entertaining the complaints evoking similar cases. Even though the RoA legislation made a provision that a complaint to the Court of Cassation can be submitted by accredited lawyers, nevertheless, the submission of the complaints does not entail mandatory acceptance for review²¹. The legislative body established a double substantive filter, thereby coming into conflict with the constitutional principle of accessibility of justice²².

The examination of the practice in the aftermath of the granting of a new constitutional status (on November 27, 2005) to the RoA Court of Cassation in its capacity of the body that ensures uniform application of law demonstrates that the RoA Court of Cassation did not reconsider criminal cases that fall under Article 341 of the RoA Criminal Code. While reviewing other criminal cases, the RoA Court of Cassation did not raise the issues related to the use of torture against the parties to the lawsuit²³. Numerous complaints to the Court of Cassation point out the fact that confessions have been extorted through the use of violence. However, the Court refuses to review them since "the fact that grave consequences ensued has not been corroborated." Even more surprising is the rejection by the Court of Cassation of the complaint concerning the case, where charges were based on two proofs, *viz.* a witness' testimony and a defendant's confession. Furthermore, from the very beginning the defendant declared that he had made a confession as a result of battery and duress, while the witness declared at the trial that his "testimony" was dictated by the body conducting the pre-trial investigation and that in fact he had never bought drugs from the accused. Here another signal that triggers suspicion arises. As a rule, primary importance in the charges of obtaining drugs in especially large quantities for the purpose of selling them is assigned to material evidence, *i.e.* to the presence of drugs in especially large quantities at the disposal of the person in question. However, in this case the person was sentenced to 9 years in prison because someone declared that he had bought drugs from the said person but then retracted his testimony during the trial. The court concluded that the witness reached an ill-intentioned agreement with the accused and relied exclusively on the testimony of the accused person who had made a confession. It remained unclear how the court became convinced that the matter concerned drugs in especially large quantities. Besides, while in custody, the accused person was taken to a hospital by an ambulance.

While prior to the 27 November 2005 amendments to the RoA Constitution and to the ensuing legislative reform it was incumbent on the Court of Cassation to review the complaints submitted to it, as a result of which it had to respond to the statements about the use of torture, at present the Court of Cassation does not accept for review the complaints that do not have proper substantiation since it is at its discretion to accept or not to accept complaints for review. Let us add that so far a disciplinary action has never been taken yet against a Cassation Court judge for arbitrarily refusing to accept an explicitly well-substantiated complaint to the Court.

If an individual lodging a complaint with the Court of Cassation indicates in the complaint the reasonable facts, which give grounds to suspect that the participants in the trial were subjected to torture and which were not assessed by a lower court, such a complaint has to be accepted for review on the grounds that as a result of the violation of the procedural or substantive law by a lower court, a possible judicial error can bring about grave consequences. The Chamber of the Cassation Court should pay close attention to those cases, when medical documents confirm the detained or arrested persons' bodily injuries.

21 Under Article 414.2 of the RoA Criminal Procedure Code, the Court of Cassation shall accept the complaint for review, if: 1) a judicial Act to be issued by the Court of Cassation in regard to this case can have great significance for the uniform application of law, 2) the judicial Acts under review conflicts with the decision made earlier by the Court of Cassation, or 3) as a result of the violation of the procedural or substantive law by a lower court, a possible judicial error can bring about grave consequences.

22 Currently an issue of constitutionality of the institution of accredited lawyers is being reviewed by the RoA Constitutional Court.

23 In its 22 December 2006 decision the RoA Court of Cassation noted with regard to the issue raised in the complaint to the Court of Cassation concerning the statement that the participants of the lawsuit had been subjected to torture in the course of pre-trial investigation, "It is necessary to check in detail also the arguments contained in the complaints submitted by the defense about the accused R. Sargsian, M. Serobian's and A. Zalian's having been subjected to violence and torture in those days."



b. Court as a guarantor of an appropriate review

Under Articles 12 and 13 of the Convention, any individual who has been subjected to torture shall have the right to complain to and to have his or her case promptly and impartially examined by competent authorities. The Convention urges competent authorities to take a practical approach, i.e. to proceed to an investigation, whenever there is reasonable ground to believe that an act of torture has been committed. The examination of the Committee's court practices demonstrates that the Committee can "refrain" from declaring whether or not there has been an act of torture. Based on separate signals the Committee first draws a conclusion that there are sufficient grounds to believe that acts of torture have been committed, then points out, say, that law-enforcement agencies did not take an action, albeit required to do so by the legislation, on the questionable complaint lodged by an arrested person, did not act properly in conducting an investigation and did not use the investigation to identify the causes of injuries sustained by persons while they were held in police custody, etc., the Committee states that Article(s) 12 and/or 13 of the Convention were violated and an appropriate investigation was not conducted. In the Republic of Armenia, the court is competent to reverse a decision of the criminal prosecution body to refuse opening a criminal case or to dismiss an already opened criminal case.

Institutional problems of an appropriate investigation of statements about acts of torture

While evaluating the quality of a check on and of an investigation of the received communications, the court has first of all to take into consideration institutional specifics of their investigation, an evidential force of this or that conclusion in practice and the relationship between disciplinary and criminal liability. In that respect, the requirement of a proper investigation of communications about tortures is from the very beginning imperiled by such arrangements in the law-enforcement system that communications about tortures are investigated within the framework of the same entity, whose official has allegedly committed an act of torture. The investigations department was removed from the system of the RoA prosecutor's office in the course of the judicial and legal reforms currently underway in the Republic of Armenia. Henceforth the prosecutor's office can exercise an uninhibited control over the legality of pre-trial investigation and inquiry. At the same time, the 18 December 2007 amendments to the RoA Criminal Procedure Code stripped the prosecutor of the powers to get an explanation from the complainant for the purpose of checking various received applications and complaints about the investigator's actions. In the event a party to the trial points out in his complaint addressed to the prosecutor that during an interrogation the investigator resorted to unlawful means, the prosecutor is denied the minimum opportunity of checking the validity of information mentioned in the complaint, for instance, of getting an explanation from the participant of the interrogation or from his lawyer about the facts stated in the complaint. In that situation the prosecutor is required to regard every statement about torture, regardless of its validity, as communication about a crime and to send it to a designated entity. Under Article 190, paragraph 6 of the RoA Criminal Procedure Code, pre-trial investigation of crimes committed by persons performing a special State service or of situations where those persons became accomplices in connection with their official position shall be conducted by investigators from the Special Investigations Service. Hence, cases of investigators' criminal acts, including acts of torture, are investigated by the Special Investigations Service²⁴. Taking into consideration the unwritten law that judge and prosecutor supplement one another while exercising control over the legality, it can be presumed that the reduction in the powers of the prosecutor should be compensated with a more active stance of the court. Therefore, while reversing a decision to refuse opening a criminal case, the judge must take into consideration the fact that the prosecutor did not have a chance to get explanations, let's say about investigator's unlawful actions, and to take additional measures to

²⁴ Under Article 6, paragraph 26.2 of the RoA Criminal Procedure Code, police, national security, tax and customs bodies' officers, too, are regarded as persons performing a special State service.

assess the quality of the check on the communication. In the course of criminal proceedings, with a view to checking promptly and effectively the validity of the issues raised in the applications and complaints, which are addressed to the prosecutor's office and which are about the use of unlawful methods used by the investigator or the body conducting an inquiry against the party to the trial, and to taking appropriate measures prescribed by the procedural criminal law, the power to get explanations from the said persons and from police officers should be reserved for the prosecutor's office²⁵. If in the course of the check of the issues raised in the application the prosecutor finds out that unlawful methods employed by the investigator or by the officers of the body conducting the inquiry contained elements of the *corpus delicti*, the prosecutor has to send the materials to the Special Investigations Service for the purpose of conducting an investigation owing to the fact of the crime.

In-service investigation as a form of investigation of statements about torture

Upon the receipt of an application stating that participants in the trial have been subjected to torture or other unlawful methods, with a view to checking the issues raised in that application and conducting an appropriate investigation the heads of the law-enforcement agencies order the so-called in-service investigation instead of sending it to the prosecutor or to the Special Investigations Service. For instance, by his 25 April 2007 Order the RoA Minister of Justice launched an in-service investigation with regard to the statement that security personnel subjected G. Bghdoyan, a defendant in a criminal case of employees of *Sincrystal* public corporation, which was heard by the first instance court of Aragatsotn region, and a detainee held in *Yerevan-Kentron* penal institution of the RoA Ministry of Justice, to violence. The investigation did not confirm the fact that G. Bghdoyan was subjected to violence and sustained bodily injuries.

The in-service investigation as a specific form of activity is not regulated by law. The ministerial Acts that regulate in some way the procedure for conducting the in-service investigation are not accessible and public²⁶. The "in-service" investigation is essentially an intra-ministerial check, the results of which provide grounds for a disciplinary action against a State employee. The existing practice of replacing the investigation of torture-related statements conducted within the framework of the trial, as established by the RoA Criminal Procedure Code, with an in-service investigation is inadmissible. The prosecutors' numerous decisions to refuse opening a criminal case or to dismiss an already opened criminal case mention without fail that an in-service investigation has been conducted, the results of which have not confirmed the fact of torture. The ministerial Act drawn up by the results of the in-service investigation acquires an irrefutable evidential force. It is, in fact, not subject to disaffirmance and is not checked through comparison with other proofs and investigation. The in-service investigation in relation to Bghdoyan's case established that "at the time of detention and then of arrest and, accordingly, at the time of admittance and transportation to the detention facility and a penal institution Bghdoyan was subjected to a medical examination, in the course of which no traces of injuries were discovered on his body. He did not complain of the state of his health. Several days later Bghdoyan's health deteriorated dramatically and he was diagnosed with spontaneous right-side pneumothorax. In the course of the pre-trial investigation G. Bghdoyan testified that the disease was a result of punch given by investigator of particularly important cases A. to his armpit in the RoA Prosecutor General's Office on the day of his detention; he, however,

25 For example, a person accused in a criminal case made a confession and then submitted the following application to the prosecutor's office, "I was forced by the circumstances to sign under the confession that does not correspond to reality and that was written by the investigator. I explain that there were serious reasons to sign the confession as not only the investigative body but also officers from the criminal investigations department flagrantly violated the constitutional norms. The reasons why I signed under the wrong testimony I will indicate thoroughly in the course of the subsequent investigation." In a case like that the prosecutor should have an opportunity to hear the accused person immediately and to compare the obtained information with the materials of the case and then to make a decision about further action with regard to the application.

26 These Acts are not placed in *IRTEK* system of legal information, where all officially published Acts are placed.



did not notify anyone about the incident." In order to substantiate the absence of a *corpus delicti*, the document for the court stated that:

1. The investigator testified that he had never got into an argument with G. Bghdoyan, had not insulted and had not hit him and that Bghdoyan's statement is groundless;
2. A forensic medical examination was prescribed within the framework of the criminal case for the purpose of clarifying whether G. Bghdoyan had been subjected to violence and had sustained a bodily injury and a number of related facts. G. Bghdoyan refused to undergo examination by medical experts. The expert conclusion reached on the basis of the documents concerning his disease (his medical case history, X-ray, etc.) rejected the claim that the disease had been caused by the use of violence. This is a classic case, when prosecutor relies exclusively on the conclusion reached by an in-service investigation and does not address the issues of *why* the accused person refused to undergo a medical examination (the reason is he did not trust the appointed experts), of *whether* it is possible to reach a given conclusion solely on the basis of a medical case history and of *how* come no traces of violence had not been registered, when G. Bghdoyan was brought to a penal institution, etc.

Likewise, as regards accidents that occur in police departments the lawyers and human rights organizations declare that as a rule the body of criminal prosecution is from the very beginning inclined to prove that what happened was indeed an accident. As a result, it tends to disregard or dismiss both *other interpretations* that stand to reason and that are brought forth by a victim's legal successor and the latter's representatives and the *proofs* that support those interpretations.

Head of the Vanadzor Office of Helsinki Citizens' Assembly A. Sakunts informed us that in January 2008 he submitted a communication to the Office of the RoA Prosecutor General alerting the Prosecutor about the acts of torture that law-enforcement officers resorted to in the course of investigation of a number of criminal cases. Among those particularly much-talked-of were acts of violence committed during an investigation of the case of assassination of the prosecutor of Lori region and of the case of theft in a trade center in Vanadzor (Vanadzor Office of Helsinki Citizens' Assembly and Helsinki Association). The response received from the Prosecutor's Office says again that "an in-service investigation was conducted by the officers from the RoA Police Internal Security Department with regard to acts of violence committed during the investigation of the criminal case. The police operative was subjected to a disciplinary fine, while the issue of two other officers was reviewed in the Lori regional department of the RoA Police. As regards the use of violence, additional information was not obtained." As regards another case, the Prosecutor's Office notified Mr. Sakunts that a criminal case was opened under Article 341, paragraph 2 of the RoA Criminal Procedure Code (a *corpus delicti* of the extraction of testimony through the use of torture). However, in the course of the investigation a decision was made to dismiss an already opened criminal case on the grounds of the absence of an act of crime. Besides, a great part of the statements about torture have no consequences and appropriate investigations are not conducted²⁷. In one instance the decision to refuse opening a criminal case and in another instance the decision to dismiss an already opened criminal case were not appealed against in court.

During the interview, the human rights organizations raised two issues:

²⁷ Statements about torture are often made in media. Under the RoA Criminal procedure Code, those statements are regarded as grounds to open a criminal case. By paragraph 1.10 of the 2 October 2007 decision *On making changes in the decisions of the RoA Board and in the orders issued by the RoA prosecutor General and his Deputies*, the prosecutors of the regions, city of Yerevan, communities and military garrisons were instructed to immediately notify the RoA Prosecutor General about media reports on committed crimes and violations of legality so that he takes an appropriate action. The prosecutors were also instructed to check regularly the implementation of those instructions and once every six months to report the results of the analysis to the RoA Prosecutor General. On 5 May 2008, the RoA Prosecutor General again gave instructions to immediately submit reports to him with regard to media accounts about violations of law.

1. Lack of trust in courts. A great part of the victims avoid law-enforcement agencies, while the RoA judicial system is perceived not as a separate branch of government but rather as a Government's judicial department.
2. Human rights organizations cannot lodge an appeal against, say, the decision to dismiss an already opened criminal case, since they are not a victim and therefore they are not granted such powers.

Based on the cases reviewed by the Committee as well as on the analysis given to us in the course of this study we can single out the following facts (signals) that the court should pay close attention to. The presence of one or more signals can be regarded as grounds to assume that acts of torture have been committed and give grounds to the court to conclude that the received communication have not been checked properly or that an appropriate investigation of the incident has not been conducted as a result of which an already opened criminal case has been dismissed:

- Medical documents (medical case history) as well as any medical conclusion that the alleged victim should receive medical treatment in a hospital.
- Material evidence, such as, for instance, photographs showing the person in question has been battered.
- Other people's testimonies to the effect that the person in question was subjected to torture. In case medical conclusion is non-existent, a written testimony has been submitted by a mother, sister or another person stating that the "victim" was in a normal physical state before going to the police department but that he returned with traces of violence²⁸.
- Circumstantial evidence, in particular statements by human rights organizations which conducted unofficial investigation and talked to victims and witnesses. The testimonies provided by these organizations have great significance since victims and witnesses frequently avoid going to the police on their own initiative²⁹.
- Interrogation without a lawyer. It needs to be clarified whether a person was notified about his right to be interrogated in the presence of the lawyer of his own choosing. In general, lawyer's presence reduces a likelihood of their clients or defendants to be subjected to violence or tortures during the pre-trial investigation. However, the lawyer's presence in and of itself does not rule out the acts of torture. For example, the Chamber of the Court of Cassation pointed out, "The substantiation used in the complaint that confession was extorted through the use of unlawful methods of investigation is groundless and is not supported with the materials of the case since both Piliposian and Sargsian were provided with lawyers from the very beginning of the investigation and they gave their testimonies in their defense attorneys' presence. The latter took part also in investigation experimentation and they made no indication whatsoever that their clients had been subjected to violence³⁰." In another case the Chamber of the Court of Cassation pointed out that the court was right to regard as legitimate the testimony given by V. Margarian during the pre-trial investigation since he had given it during the entire period of the investigation, including in the presence of his defense attorney³¹. It is indisputable

28 *Mr. Dragan Dimitrijevic vs Serbia and Montenegro*, CAT/C/33/D/207/2002, 29 November 2004.

29 http://www.hahr.am/index.php?option=com_content&task=view&id=86&Itemid=40

Human rights defender Mikayel Danielian made a statement to mass media that within the framework of the case of the Vanadzor prosecutor's assassination scores of people had been forcibly brought to the prosecutor's office and held there for 3-4 days. In his statement M. Danielian announced that he has photographs of 29-year-old K.D. which show that that person had been beaten. The human rights defender also spoke with 21-year-old waiter A.N. who, too, had been beaten in the prosecutor's office and who would burst into tears out of fear when talking to the human rights defender. Waitress A.P. had not been beaten; however, she had been subjected to verbal abuse and intimidation. She had been held from 11 p.m. till 1 a.m. Another waitress S.P. had been beaten. The President of the Helsinki Association also added that she had been beaten by Vanadzor prosecutor's office investigator Marzpet Khachatryan.

30 See *Collection of decisions of the RoA Court of Cassation Chamber on Criminal & Military cases (2000-2001)*, Vol. 2, p. 196.

31 See *Collection of decisions of the RoA Court of Cassation Chamber on Criminal & Military cases (2000-2001)*, Vol. 2, p. 180.



that the right of the accused person (suspect) to have a defense attorney is the most fundamental one among the procedural rights granted to him. However, we believe that the fact of the defense attorney's presence in the pre-trial investigation should not be overestimated, thereby absolutely ruling out the possibility that the participants of the trial were subjected to acts of torture. It should be noted particularly that if an accused person or a suspect has been detained or arrested, he can be subjected to acts of torture also before or after the procedural actions are taken, i.e. when the defense attorney is not present. The problem is that unlawful methods are, as a rule, used not by investigators but by police operatives, not in the course of investigation actions but before or after them. The issue of appropriateness and admissibility of non-procedural meetings of police operatives and investigators with the accused persons and suspects who are in custody or are free is still controversial.

- The alleged victim was unlawfully held in the police department without any status and without any procedural document or the time limit for keeping in custody has been exceeded³².
- Policeman's unlawful actions; for example, policemen make an entry into an apartment without having a search warrant and the suspect "throws himself out of the window"³³.
- Absence of a witness who would confirm that the person dies in an accident³⁴.
- Mainly in case of an "accident" the dead person's pre-accident conduct should be taken into consideration, particularly cooperation with law-enforcement agencies, reporting to regular interrogations, which to some extent rule out the hypothesis that the victim tried to escape or to commit suicide, etc.
- The police failed to interrogate all witnesses of the accident.
- Police operatives took part in the interrogation, even though their presence is not required by the procedural law.
- The statements about the use of torture and violence often incriminate the same law-enforcement officers.
- Names of individuals that have used acts of torture are given in the statements³⁵.
- The prosecutor's decision is based solely on the conclusion drawn up as a result of an in-service investigation. Not all the proofs in the case have been examined thoroughly and comprehensively.
- The in-service investigation was conducted with delays.
- As a result of the in-service investigation a disciplinary fine is imposed on individuals that from the very beginning had no relation at all to the violence in question. That in itself is evidence that the in-service investigation aimed to absolve the officials in responsible positions.

In some cases a number of the above-mentioned signals can be present at one and the same time. The police put forth the following explanation concerning the death of Gulian in a police department: he died trying to escape through the second-floor window in the building of the police. However, the analysis of the circumstances of the case reveals the practical manifestation of the above-mentioned circumstances. Thus, prior to the "accident" the witness cooperated actively with the law-enforcement agencies and several times he came for interrogation. He was held unlawfully in custody; he even had to spend a night in the police department. The relatives testify that he was subjected to violence. They give the names of police officers. No witness was present to see how he threw

32 *Mr. Danilo Dimitrijevic vs Serbia and Montenegro*, CAT/C/35/D/172/2000, 29 November 2005.

33 *Mr. Slobodan Nikolić; Mrs. Ljiljana Nikolić vs Serbia and Montenegro*, CAT/C/35/D/174/2000, 9 December 2005.

34 *Mr. Slobodan Nikolić; Mrs. Ljiljana Nikolić vs Serbia and Montenegro*, CAT/C/35/D/174/2000, 9 December 2005.

35 http://www.hahr.am/index.php?option=com_content&task=view&id=86&Itemid=40,www.panorama.am

himself out of the window. He was interrogated without a lawyer. All that notwithstanding, the prosecutor's office dismissed the criminal case.

While assessing the quality of investigation, the court should pay attention to the above-mentioned issues. Those are the signals that the judge should bear in mind while submitting a motion to the body of criminal prosecution to open a criminal case because of the acts of torture and while reversing the decisions of refusing opening a criminal case or of dismissing an already opened criminal case with regard to acts of torture.



Conclusions

- 1. Often, when there are objective indications that a party to the trial has been subjected to torture (for instance, injuries on the face of the accused person), the courts do not take the initiative in bringing up the issue for the discussion.***
- 2. In reality there are instances, albeit rare, when it is officially recognized that evidence has been obtained as a result of the act of torture; nevertheless, the obtained evidence is used for indictment.***
- 3. In the law-enforcement practice a presumption of libel has emerged with regard to statements that testimonies have been extorted through torture from witnesses or other participants in the trial; as a result, the statements about the use of torture are dismissed without cogent arguments.***



■ | 3. Presentation of the Convention in the professional development courses for judges and law-enforcement personnel

Under Article 10 of the Convention, States Parties shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. Each State Party shall include the prohibition against torture in the rules or instructions issued in regard to the duties and functions of any such person.

In the Republic of Armenia legal education is provided in two kinds of institutions of higher education:

1. general institutions of higher education (Yerevan State University, Russian-Armenian /Slavonic/ State University, French University in Armenia, etc.),
2. special institutions of higher education (RoA Police Academy, etc.).

The examination of the syllabi of the subjects taught in Law Departments in institutions of higher education has revealed that curricula at the bachelor-level studies in those institutions incorporate a special *Human Rights* course. The topic of prohibition against torture is included in its syllabi in the theme of "personal rights". As a rule, 2-4 academic hours are allocated for this theme. The small quantity of hours allocated for this theme does not make it possible to present comprehensively the main issues of the prohibition against torture. Bridging this gap in the education process is more than necessary, when the matter concerns *training* of candidates aspiring for the positions of a judge or a law-enforcement officer as well as *professional development* of judges and law-enforcement officers.

In the course of the second stage of the judicial and legal reforms, the *School for Court Officials* and the *School for Prosecutor's Office Employees* State non-commercial organizations were established for efficient professional development of judges and prosecutors. The examination of the curricula of these institutions has shown that they do not include a special course on the fight against torture. Besides, while the said curricula include courses on Articles 5 and 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the special course on Article 3 of the European Convention (prohibition of torture) is non-existent. Neither are the UN documents on the prohibition of torture and the comments on them taught at those schools, even though an adequate implementation of the provisions of Article 10 of the Convention requires a transfer of theoretical and practical knowledge about the Convention in the professional development courses for judges (and candidates).

It is suggested that a course titled *Prohibition of torture in the international law* be included into the professional development courses for judges and law-enforcement officers. The course will present all principal documents on the prohibition of torture and the case law of courts and competent authorities. The introduction of such a course acquires even greater significance given incorrect implementation of the Convention as it will clearly show to judges the ways how to apply the Convention directly, for instance, while showing inadmissibility of evidence, exercising control over investigation to ensure it is appropriate, determining compensation for victims, etc.

In the course of the second stage of the judicial and legal reforms, investigation divisions and departments were set up in a number of Ministries and Agencies (e.g. in the Tax Service, in the RoA Ministry of Defense). The Special Investigations Service was founded as a separate State body. The institutional problems of professional development of investigators from those entities in the field of the fight against torture have not

been solved yet. For example, the RoA Law *On Special Investigations Service* spells out the requirement of professional development of investigators; however, at present the said State entity lacks an institution that would provide professional development.



Conclusion

Insufficient quantity of academic hours allocated in the Law Departments of institutions of higher education to the topic of prohibition of torture does not make it possible to address in depth the problems of the topic, while the curricula of professional development for judges and law-enforcement officers does not include a separate course on prohibition of torture.



■ | Recommendations

To the Legislative bodies:

1. A comprehensive and systemic approach to the Convention implementation process should be displayed ruling out a fragmented inclusion of its provisions in the RoA domestic legislation.
2. Such a *corpus delicti* of torture in the *Crimes against State Service* Chapter of the RoA Criminal Procedure Code should be spelled out that would contain attributes of torture as defined by the Convention. Close attention to the use of categories "violence," "serious damage to health" and "torture" in the Criminal Code should be paid to and differentiated sanctions and the crimes-related policy adequate to their gravity should be ensured.

To Courts:

3. A pro-active (practical) approach should be taken, and whenever there are sufficient grounds to assume that the person has been subjected to torture, that case should become a matter for review. Charges grounded on evidence obtained through torture should be ruled out, except when used against a person accused of torture.
4. A clear, well-founded and well-reasoned position with regard to statements about torture should be articulated. The validity of those statements should be checked in the course of trial through the analysis of evidence and collection of new proofs.
5. Statements about tortures should be refuted only with the most concrete facts pointing out the absence of those grounds that could evidence the use of torture or of other unlawful methods.
6. While evaluating the quality of a check on and of an investigation of the received communications, the institutional specifics of their investigation, an evidential force of this or that fact in practice and the relationship between disciplinary and criminal liability should be taken into consideration. The existing practice of replacing the investigation of torture-related statements conducted within the framework of the trial, as established by the RoA Criminal Procedure Code, with an in-service investigation should be regarded as inadmissible.
7. Measures should be taken for the protection of witnesses and victims of the use of torture;
8. While resolving the issue of accepting the complaint to the Court of Cassation for review, close attention should be paid to those complaints that raise legitimate suspicions about the extortion of evidence as a result of torture, particularly if such a complaint includes concrete information about torture (first and last names of the perpetrator, description of the form of torture or the existence of bodily injuries of the detained or arrested persons supported by medical documents, etc.).
9. If an individual lodging a complaint with the Court of Cassation indicates in the complaint the reasonable facts, which give grounds to suspect that the participants in the trial were subjected to torture and which were not assessed by a lower court, such a complaint has to be accepted for review on the grounds that as a result of the violation of the procedural or substantive law by a lower court, a possible judicial error can bring about grave consequences.

To International organizations:

10. Efforts to raise the awareness about the Convention both on the part of the law-enforcement agencies and of the civil society should be promoted.

11. Efforts to organize discussions on the necessity of recognizing the competence of the Committee (Articles 21 and 22 of the Convention) and on the correct implementation of the Convention should be promoted.

12. Professional development of judges (candidates) should be supported with regard to the content of the Convention and to the Committee's law-enforcement/law-making practices as well as to those circumstances, the absence or presence of which are an additional signal about the use of torture and about inadequate check and investigation of the received statements about torture. Close attention should be paid to building special skills of judges as actors that identify tortures.

Quantity 250, paper size 190x260 mm, 28 pages
Design and printing by
"Time to Print" salon of operative printing
15/55, Khanjyan str., Yerevan, tel.: (374 10) 54-76-56, e-mail: info@task.am
www.task.am

Cover page picture was taken from www.christ-umc.org