STUDY

Criminal offences of torture, inhuman and degrading treatment and the practice of investigation and trial in judical districts of Tirana and Elbasan

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INTRODUCTION

One of the fundamental human rights is the right to not be subjected to torture, inhuman and degrading treatment, which is sanctioned by the Constitution, domestic penal legislation, as well as by article 3 of the European Convention of Human Rights (ECHR). Based on the legal and doctrinal meaning of this right, but also on the practice of the European Court of Human Rights (ECtHR), it results that this right tasks member countries with positive and negative obligations. The states have the obligation and responsibility to create, within their countries, an efficient system for the prevention of such phenomena, to guarantee penal prosecution of cases of torture, or of inhuman and degrading treatment, as well as the judicial review – impartially and effectively – of cases of this nature.

Since its foundation, the Albanian Helsinki Committee (AHC) has devoted special attention to the sensitization and monitoring with regard to respect for this right, especially for citizens deprived of their liberty (those accompanied, arrested/detained, inmates, persons with problems of mental health or other disabilities), because of the higher risk they bear in terms of the violation of this right. For this purpose, with its own initiative, or based on the complaints addressed to it, AHC has organized a continued monitoring of prisons, pre-trial detention facilities, police commissariats and psychiatric hospitals, for the purpose of verifying respect for fundamental rights in these institutions, with special focus particularly on cases of torture, inhuman and degrading treatment.

With regard to the right for protection against torture, inhuman and degrading treatment, AHC has been engaged to render its contribution also through research studies; through pursuing and evaluating working practice of the justice bodies; through the organization of training programs for judges, prosecutor's office, staff of state police and officers of prisons and pre-trial detention centers; and through the use of judicial cases for concrete cases of the violation of this right.

The above interventions have been deemed necessary after noticing a lack of proper sensitivity for respect for this right, by the public administration, as well as the inaccurate and non-unified understanding of this concept of the

law by employees of the justice system. AHC has found that in the course of their activity, justice bodies have manifested: lack of complete investigations; disputable categorization of penal offenses; favoring of perpetrators accused of such offenses, thus alleviating their penal responsibilities; the frequent application of punishment under the minimum prescribed by law, etc. On the other hand, we have found that although the Committee for the Prevention of Torture (CPT), the Ombudsman, AHC and other domestic and foreign organizations, find and make public numerous violations of the freedoms and rights of persons deprived of their liberty, which contain elements of torture or inhuman and degrading treatment, the cases pursued by justice bodies are very minimal.

AHC also wishes to underscore the fact that in some cases, ECtHR has found the violation of article 3 of the ECHR by the Republic of Albania and has issued punishments for this reason. Based on the above factors, AHC has undertaken the initiative to realize this research study focusing on the practice created by justice bodies in the context of investigations and adjudications of the penal offense of torture, inhuman and degrading treatment, for a definite period of time.[1]

The ***purpose*** of this research is to analyze the practice of the work of justice bodies, the prosecutor's office and the courts, with regard to the investigation and adjudication of cases of torture and inhuman and degrading treatment and to encourage the establishment of international and democratic standards in legislation and in the practice of justice bodies, particularly to align them with the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights.

The ***object*** of this research is to highlight the problems encountered in the acts issued by the Prosecutor's offices and judicial bodies of the districts of Tirana and Elbasan, with regard to the understanding and application of articles 86 and 87 of the Penal Code, comparing the practice of these bodies with the standards promoted by the ECtHR, as well as the evaluation of our domestic legislation in terms of its compatibility with the principles and substantial provisions of the ECHR and other international acts in this field.

Beside presenting the situation regarding the understanding and correct application of legislation in this regard, the research study also aims at proposing the improvement of encountered shortcomings, in accordance with the best international standards, in order to improve the level of respect for this right and to improve the activity of justice bodies in this area.

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1 The research has been conducted in the framework of the project "Together against torture in police institutions and prisons," supported financially by the European Commission.

The rule of law should create effective possibilities for citizens to reinstate every violated right. In this context, it is of special importance to hold accountable and punish officials and public employees who, in the course of exercising their functions, violate the law and infringe upon the fundamental rights of citizens. Failure to properly evaluate facts that indicate a violation of the right for protection from torture, inhuman and degrading treatment, incomplete investigation of filed reports by the prosecution office, bias in investigations or judicial review, the application of sentences that are not commensurate to the damage caused to the victims and public interest, all of these are positions that violate the principles of the rule of law, reduce public trust in the public administration and the country's democratic development.

Pursuant to this goal and in the context of the initiative for justice reform, AHC deems as indispensable the qualitative review of the Penal Code and the Penal Procedure Code of the Republic of Albania. The issues addressed by this research study, as well as others, are important for encouraging discussions among professionals, in order to ensure an increasingly better alignment of domestic legislation with international democratic standards, particularly aligning them with the ECHR and the rich jurisprudence of the ECtHR.

For the realization of this research, we focused our work on several directions. It was of interest for us to, first, become familiar with the practice created by justice bodies in the context of investigations and adjudications of denunciations for torture and inhuman and degrading treatment. For this purpose, we requested the possibility to become familiar with the investigative files and especially decisions of the prosecutors of the districts of Tirana and Elbasan, which belonged to the period 2011-2012, for penal offenses envisaged by articles 86 "Torture," 87 "Torture with serious consequences," 248 "Abuse of office," 250 "Commission of arbitrary actions," 314 "Use of violence during investigations" of the PC. As may be noticed, we have expanded the scope of penal offenses that we reviewed because reports by the Ombudsman, with regard to the phenomenon of torture, had given us clear indications that justice bodies made mistaken qualifications of penal offenses that contained clear elements of torture or inhuman and degrading treatment. We also studied the judicial files, together with final decisions, issued by the first instance of the judiciary and the Courts of Appeals in the districts of Tirana and Elbasan, for the same mentioned period. The analysis of cases in this research study focused also on the penal lawsuits that were suggested or denounced by state institutions such as the Ombudsman and other public bodies that bear the functional duty of finding and pursuing these cases, or by non-profit organizations that operate in this area.

We did not find any research study with regard to the practice of the investigation and adjudication of penal offenses of "Torture," conducted by

justice bodies, and it resulted that the High Court has not issued any unifying decision in this regard, which we could have taken into consideration during the compilation of our research. However, we used the partial standards created by the Decision of the Constitutional Court no. 3, dated 11.02.2004.

Methodology. In this research we addressed extensively the meaning and composing elements of the penal offense of torture, seen both from the doctrinal standpoint, domestic legislation, domestic penal and penal procedural laws, ECHR and other international acts, ratified by the Republic of Albania. In this regard, we also kept in mind the jurisprudence of the ECtHR, which has extensively addressed the composing elements of the violation of the right to protection from torture and inhuman degrading treatment, as well as other international principles and standards created in this area.

Aside from the above, our research work was conducted by applying elements of methodology that exploit aspects of the practice created by justice bodies, different law enforcement bodies, as well as bodies that oversee respect for human rights and freedoms. The research contains an analysis of the main findings and reaches conclusions and provides concrete recommendations for the improvement of the situation in this regard.

In terms of its reach, the research study covers the activity carried out in the Prosecutor's Offices and Courts of the Judicial Districts of Elbasan and Tirana, for the period 2011-2012 and beyond. We analyzed the statistics, acts of penal files of 649 penal reports and 338 penal proceedings and we studied all the judicial files for the above-mentioned charges, which were reviewed during the years 2011-2012 by the Courts of Tirana and Elbasan. In particular, we analyzed about 200 decisions by the prosecutors and judges of these districts.

The study of the files was preceded by strong preparatory work with the group of experts who, as individuals who know the field quite well, determined the main directions on which our attention should focus during the research of the acts of the prosecutor's offices and courts that were going to be part of the review.

This study also keeps in mind the views expressed about this topic by experts of the area, judges and prosecutors, during a session for continued training at the School of Magistrates, in the context of the implementation of the project by AHC.

The penal policy pursued by justice bodies toward torture, inhuman and degrading treatment for the districts of Tirana and Elbasan, during the years 2011-2012, has been looked at in comparison to the spread of the

these negative phenomena, which results from reports by domestic and international bodies that monitor this situation.

In order to respond to the need for specific knowledge in various areas of law, besides AHC staff, we also engaged specialists of the penal procedural field and the constitutional field as well as experts with extensive practice at the ECtHR.

We would hereby like to thank the Head of the Tirana Judicial District Court Mr. Fatri Islamaj, the Head of the Judicial District Court of Elbasan Mr. Arben Vrioni, the Head of the Judicial District Prosecutor's Office of Tirana Mr. Petrit Fusha and the Head of the Judicial District Prosecutor's Office of Elbasan Mr. Eugen Beci, as well as the administration personnel of these institutions that provided us with access to all the files that were of interest to the research study.

We would also like to thank the personnel of the Ombudsman for the cooperation provided to us as well as the European Union Delegation in Albania, the donor that supported and enabled financially the conduct of this research.

I. LEGAL BASIS

1.1 Torture according to International Law applicable in the Republic of Albania

The extent of the obligation of State Parties for the prevention of torture, as well as for numerous fundamental human rights and freedoms, depends widely on international treaties and the bodies that interpret them. International standards for the protection of this right are treated extensively by the United Nations Committee for Human Rights and the Committee against Torture, which interpret the obligations of States according to the International Convention on Civil and Political Rights and the Convention against Torture. The For the State Parties, these bodies may take under review petitions by individuals who claim a violation of their right. Committees are not courts but semi-judicial bodies, which indicates that their decision, although important for the interpretation of treaties, are not directly legally enforceable. There are also three regional systems for the protection of Human Rights, in Europe, Americas, and Africa. All three systems have adopted a two-body mechanism for the protection of human rights, which consists of a Commission that is a semi-judicial body with the right to issue decisions and recommendations as well as a Court with the right to issue legally enforceable decisions.

1.2 Treaties of the United Nations Organization[2]

The prohibition of torture in international law, just as the prohibition of slavery and genocide, has an absolute character. Torture is not allowed in any circumstance, including war, public emergency or terrorist threats. The absolute and all-accepted prohibition of torture represents a fundamental principle of international law.

2 The Republic of Albania was admitted to the United Nations Organization on December 14, 1955

In a chronological order, after World War II, the **Universal Declaration of Human Rights**[3] represents the first international act that talked about the prohibition of torture. More concretely, article 5 states: *"No person shall be subjected to torture, cruel, inhuman or degrading punishment or treatment."*

Within the United Nations system, the prohibition of torture, cruel, inhuman or degrading punishment or treatment is expressly prohibited on the basis of a number of treaties that are legally binding for the States that have ratified them. Many treaties create Committees that are mandated to monitor the compliance of State Parties with the obligations of these Treaties by issuing General Comments or Recommendations, which envisage detailed interpretations on specific acts of the treaty.

1.3 International Convention of Civil and Political Rights[4]

This Convention expressly sanctions the prohibition of torture, cruel, inhuman or degrading punishment or treatment, for the purpose of temporarily protecting the dignity, physical and mental integrity of individuals. Article 7 of the International Convention on Civil and Political Rights envisages that, *"Nobody shall be subjected to torture, cruel, inhuman or degrading punishment or treatment. In particular, nobody should be subjected, without free consent, to any medical or scientific experiment."*

According to a General Comment,[5] the Committee on Human Rights did not consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between torture and the other forms of ill-treatment, though such *"distinctions depend on the nature, purpose and severity of the treatment applied."* The definition of such treatment as a violation of article 7 will depend on all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. Elements such as the victim's age or mental health may therefore aggravate the effect of certain treatment thus leading to a violation of article 7.

The second sentence of Article 7, which has to do with the prohibition of medical or scientific experimentation, conducted without the free consent of the subject, was a response to the atrocities committed by doctors in

3 Approved and proclaimed by the General Assembly of the United Nations Organization (UNO) with its resolution 217 A (III) of December 10, 1948.

4 Approved and open for signature, ratification and adherence by the UN General Assembly through its resolution 2200 A (XXI) on December 16, 1966, and entered into effect on March 23, 1976. The Republic of Albania approved it by Law no. 7510, dated 08.08.1991.

5 "Torture in International Law- A guide to jurisprudence", APT, CEJIL, 2008, Chapter 1, page 7.

Nazi concentration camps during World War II. In this regard, the special protection is for persons not capable of giving valid consent, in particular those deprived of their liberty, who should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

Article 10, item 1, of the International Convention on Civil and Political Rights states: *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,"* establishing the prohibition of torture and ill-treatment for those persons deprived of their liberty. Not only may such persons not be subjected to treatment contrary to article 7, but they also have a positive right to be treated with respect.

The prohibition of torture and ill-treatment according to this Convention is applicable independently from whether the actions have been committed by *"public officials"* or *"other persons acting on behalf of the State"* or *"private persons"* and *"whether by encouraging, ordering, tolerating or perpetrating prohibited acts."* Thus, **the prohibition of ill-treatment does not merely create a negative duty on State agents not to engage in such treatment. The State also has positive duties to protect persons under its jurisdiction form acts of private individuals.**

1.4 Convention against torture or other cruel, inhuman or degradingtreatment or punishment[6]

The Convention against torture and other cruel, inhuman or degrading treatment or punishment represents the specific international act that attempts to define torture. Article 1, item 1, sanctions: ***"For the purposes of this Convention, the term "torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."***

6 Approved and open for signing, ratification and adherence by the UN General Assembly with its resolution 39/46 of December 10, 1984 and entered into effect on June 26, 1987. The Republic of Albania adhered to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, with law no. 7727, dated 30.06.1993, announced by decree no. 592, dated 06.07.1993, of the President of the Republic. The Convention entered into effect in the Republic of Albania on May 11, 1994.

Article 16 of this Convention requires from State Parties to prevent *"other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…"* Although the Convention does not envisage definitions for actions qualified as *cruel, inhuman or degrading punishment or treatment,* **it does imply that the actions that are not included in the meaning of torture shall belong to this lighter category.**

The Convention establishes expressly in its Article 2 that there are no exceptional circumstances in which a state may use torture or other actions that represent cruel, inhuman or degrading treatment, without violating the obligations deriving from the treaty, thus reiterating **the absolute character of this prohibition**. In order to ensure the effective prevention of torture and other maltreatment, article 15 of the Convention emphasizes that any tendency for the use of such abuse for the purpose of helping investigations for unlawful acts should be eliminated because any statements made under such treatment, in any case, is not credible and therefore should be prohibited by law.

A common element of torture or cruel, inhuman or degrading treatment, according to this Convention, is the involvement in such acts of any public official or anyone acting in an official capacity. However, for the purposes of this Convention, cruel, inhuman or degrading treatment may not be classified as "torture" because it does not require intent as in torture and/ or pain and suffering is not "severe" according to the meaning of Article 1.

The intent mentioned expressly in Article 1 does not represent an exhaustive list because the phrase *"intentionally"* indicates that other similar intentions may be included. The common element of these intentions might be understood better as *"some connections to the interest of State police and its bodies."*[7]

According to this Convention, in order to qualify torture, or other cruel, inhuman or degrading treatment, *first*, the pain or suffering should be perpetrated with the action, encouragement, consent or acquiescence of the public official or other persons acting on behalf of the State. This requirement means that the State parties may not be responsible if actions of torture or other cruel, inhuman ordegrading treatment are perpetrated by persons who are beyond their control or authority. *Second,* State parties may be found responsible for acts of torture or other cruel, inhuman or degrading

7 Burgers and Danelius, *The United Nations Convention against Torture*, Martinus Nijhoff, Dordrecht, 1988, p.119.

treatment by private individuals in their territory if they fail to take general or specific measures for the prevention of the exercise of violence by them.

Beside the obligation to investigate and remunerate in cases of torture or cruel and degrading treatment, according to the mentioned Convention and the International Covenant on Civil and Political Rights, State parties have the obligation to approve and implement legislation that criminalizes these acts. Namely, article 4 of the Convention against Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, sanctions: *"1.Each state party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature."*

The International Covenant on Civil and Political Rights, article 2, has provided almost the same sanctioning when it says: *"2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."*

Another important aspect on universal jurisdiction, as a normative capacity to investigate and adjudicate cases of torture, is envisaged in article 5 of the Convention against torture or other cruel, inhuman or degrading treatment or punishment: *"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;(b) When the alleged offender is a national of that State;(c) When the victim is a national of that State if that State considers it appropriate.2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."*

From this standpoint, the Convention demands that State Parties exercise their jurisdiction, criminally prosecuting an individual suspected of torture or cruel, inhuman or degrading treatment or to extradite that person to the country where the person shall be criminally prosecuted.

1.5 European Convention of Human Rights[8]

This is another important international convention ratified by the Republic of Albania and which is applicable in the regional European framework, for the purpose of protecting fundamental human rights and freedoms. Article 3 of that Convention sanctions: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."* The grammatical and logical analysis of the provision and the extensive jurisprudence of the European Court of Human Rights (ECtHR), it results that the terms *torture, inhuman* and *degrading treatment* differ from one another and have distinguishable connotations from one another.

Torture means the use of physical or psychological violence ***for the purpose*** of punishment or for extracting information, etc. *Cruel treatment* means the intentional infliction of physical and mental suffering on the body and emotions of human beings, without necessarily having a specific purpose. *Degrading treatment* means depriving the individual of his/her dignity, acts that lead to moral and intellectual decadence.[9] The treatment of the physical person, in order to be considered as violating article 3 of the ECHR, **should reach a minimal level of harshness,** taking into account the **duration, age, health condition and physical or mental effects that the victim undergoes, as well as any other specific circumstance of the situation.** The concrete acts of violence that may be considered in violation of article 3 of the ECHR are not exhausting; they are diverse and depend on the concrete circumstances of the incident.

This provision protects established juridical relations on the life, health and dignity of man. It prohibits the exercise of torture, inhuman or degrading treatment by any official person and private individual. In other words, the subject of these offenses is special and general.

Just like the aforementioned international acts, the ECHR grants an **absolute character** to this prohibition, as a universal and timeless standard. Article 3 of the ECHR is absolute, in spite of the conduct, circumstances of the victim, nature of an offense, or threat to national security.[10]

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8 Approved by Law no. 8137/ 31.07.1996 "On the Ratification of the European Convention for the Protection of Fundamental Human Rights and Freedoms"

9 Remarks by Mr. Arben Rakipi, delivered during a training program with judges and prosecutors in December 2014 at the School of Magistrates, in the context of AHC's activity, based on the EU-funded project on Torture

10 Remarks by Ms. Elira Kokona, delivered during the training with judges and prosecutors in December 2014 at the School of Magistrates, in the context of the AHC activity, based on the EU-funded project on Torture

The ECHR is a *"live"* right because of the dynamism and the binding power of ECtHR jurisprudence. It results from the extensive practice of this court that the state parties:

a) Should not use, through their agents, torture or inhuman or degrading punishment, as a negative obligation of the states;
b) Should ensure protection for citizens against such treatment through legislative, institutional and organizational developments, as well as
c) Should investigate such acts, as a positive obligation of the states.

In this sense, the state, in any circumstance, not only should not use its force to cause torture, inhuman or degrading treatment or punishment, but should also take every measure for the prevention or investigation and adjudication of persons, even private individuals, who cause such treatment.

The jurisprudence of the ECtHR has concluded that the investigation of such acts in violation of article 3 should be effective, by fulfilling some criteria, such as:

a) The investigation should be stretched out in time in order to ensure the possibility for discovering, preserving and identifying evidence and perpetrators;
b) It should collect all testimonies by witnesses and the law enforcement personnel, forensic evidence and should include the conduct of a medical expertise, which ensures a full and accurate record of the injury;
c) Fast adjudication of the perpetrators, and
d) Ensuring a reasonable approach to the investigation and claims of the victims or his/her relatives.[11]

1.6 The European Convention "On the prevention of torture, and other inhuman or degrading treatment or punishment"[12]

The European Convention "On the prevention of torture, and other inhuman or degrading treatment or punishment" is another international act ratified by the Republic of Albania for the purpose of protecting fundamental human rights and freedoms. The Convention envisages the creation of a Committee that has the competence to visit sites under the administration of public

11 Case Boicenco vs Moldova, no. 41088/05, June 11, 2006

12 Approved by Law no. 8135, dated 31.7.1996, "On adhering to the 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment"

authorities where those deprived of their liberty are kept. The Committee may make recommendations and suggestions for the improvement of the situation and for the protection of persons deprived of their liberty against torture and inhuman and degrading treatment or punishment. This Committee is composed of experts and its activity has a preventive and non-judicial character.

The Committee for the Prevention of Torture has conducted 11 visits, periodic or *ad-hoc,* to Albania. The recommendations of the Committee have served as a significant push for highlighting violations and for the taking of measures to improve respect for the rights of persons who are arrested/ detained, imprisoned or accommodated in psychiatric hospitals.

1.7 Torture in domestic law

As the act that has the highest juridical power in the country, the **Constitution of the Republic of Albania** sanctions in article 25 that: *"Nobody may be subjected to torture, or cruel, inhuman or degrading treatment or punishment."* Its content is almost identical to article 3 of the ECHR, with the characteristics of a blanket provision.

Law no. 7895, dated 27.1.1995, "Penal Code of the Republic of Albania," although approved after the Constitution, in Section III, article 86, which was titled **"Torture"**established: *"Torture, like any other inhuman or degrading act shall be punishable by five up to ten years of imprisonment,"* thus giving this provision the nature of a "blanket" provision that does not provide a definition or detailed establishment of the juridical concepts contained therein. Meanwhile, article 87 of this Law under the title **"Torture with severe consequences"** envisages that *"Torture, as well as any other inhuman treatment, when it causes the handicap, mutilation or any other permanent injury of the health of the person or death, shall be punishable by ten up to twenty years of imprisonment."*

Based on the need to provide the necessary definitions to the provision and expand it with the concepts developed in the rich jurisprudence of the ECtHR, article 86 on **"Torture"** was amended by **Law no. 9686, dated 26.2.2007 and by Law No. 23/2012, "On some additions and amendments to Law No. 7895, dated 27.1.1995 "Penal Code of the Republic of Albania"** into *"Intentional committal of actions, as a result of which a person was subjected to severephysical or mental suffering, by a person who exercises a public function or incited orapproved by him, openly or in silence, with the purpose:a) of obtaining from him or from another person information or confessions;b) of punishing him for an action committed or suspected to have been committed by him oranother*

person;c) of intimidating or pressuring him or another person;ç) of any other purpose based in any form of discrimination;d) of any other inhuman or degrading action; is punishable by imprisonment from four up to ten years".

Also, article 5/2, of **Law No. 7905, dated 21.03.1995, "Penal Procedure Code of the Republic of Albania,"** for the purpose of preventing any kind of maltreatment against persons being charged, stipulates: *"Nobody may be subjected to torture, degrading punishment or treatment."*

By means of these amendments, the principled obligation of penal law *"Nulla poena sine lege,"* envisaged in article 2 of the Penal Code, has been fulfilled.[13] The current provision of the prohibition of torture has been completed with objective and subjective elements, thus making it possible to be easily applicable by the bodies that conduct investigations and adjudications.

An analysis of this provision indicates that, among other things, torture differs from inhuman and degrading acts because it requires a special purpose, although this provision does not help qualify the penal offense but only the measure of the sentence. Moreover, the way that the provision has been formulated, item d) *"any other inhuman or degrading act"* is considered as one of the potential intentions of the commission of the penal offense of torture and not as a separate penal offense. Furthermore, another element of the provision is the special subject envisaged by article 86, which specifies that prohibited actions should be committed *"by a person who carries out public functions, or with his/her encouragement or consent…"***It is quite clear that our legislation does not reflect the jurisprudence of the ECtHR in this regard,** because that Court, whose practice is binding for our authorities, states that the **state has the obligation to prevent or punish perpetrators of torture, inhuman or degrading treatment or punishment, even when these individuals are not under its control.**

Although article 86 of the Penal Code is titled "Torture," the provision leaves open and includes also other elements of the penal offense (*see letter "d" of the article above)* and does not contain the elements of the intensity of violence exercised or other elements that are addressed on page 8 of this research study. In order to be coherent with and to reflect the jurisprudence of the ECtHR, article 86 might contain, in an obligating manner, the element of the **intensity** and the **minimal level of harshness,** taking into analysis the **duration, age, sex, health condition of the victim and the physical or mental effects that the victim undergoes as well as any other specific circumstance of the situation.**

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13 Remarks by Mr. Arben Rakipi, delivered during a training program with judges and prosecutors in December 2014 at the School of Magistrates, in the context of AHC activities, for the EU-funded project on Torture.

The current provision includes as an indispensable condition, *"causing severe physical or mental suffering…,"* although the intent of *"any other inhuman or degrading act"* does not require such equally severe consequences for the qualification of the offense. This gives birth to the need to regulate the provision in order to make a clear distinction between torture and other inhuman or degrading acts, for the purpose of qualifying certain acts that pose a societal threat and the degree of the pertinent sentence.

The compatibility of articles 86 and 87 of the Penal Code with the Constitution and international agreements, which are binding for Albania, has been part of the reasoned **Decision no. 3, dated 11.02.2004, of the Albanian Constitutional Court.** In this decision, the Court emphasized that, **both in international jurisprudence, and in the juridical doctrine, it is an indisputable fact that the state should ensure the protection of every individual from persons acting on behalf of the state, or private individuals, because the important thing is the prevention of torture and inhuman treatment toward anyone** and not who will be punished for perpetrating these acts. The Constitutional Court, referring to the Universal Declaration of Human Rights, article 1 of the Convention against Torture of December 1984, and to the practice of ECtHR argues in a convincing manner that the offense of torture (when proven) is committed *"not only by persons acting in an official capacity, but also beyond this capacity, i.e. by private persons."*

1.8 Other penal offenses, similar to Torture, in domestic law

In order for this research study to be as complete and comprehensive as possible, in terms of the investigation and adjudication of potential cases of torture, we also need to address other penal offences, which contain similar elements that may lead to an erroneous juridical qualification of the offense by bodies of penal prosecution and adjudication.

The penal offense of torture has been envisaged in article 86 and 87 of the PC, placed under the Special Part, Chapter II, Section III "Penal offenses perpetrated intentionally against health," of the Penal Code.

The same section, article 90, envisages the offense "Other intentional injuries," the content of which is: *"Beating, as well as any other act of violence represents a penal offense and is punishable by fine. This offense, when causing temporary incapacity for work up to 9 days, shall represent a penal offense and is punishable by fine or by up to six months of imprisonment."* An overview of this provision indicates that it envisages a light penal offense, with a general active subject. Although the penal offense, according to this provision, may become the object of review by the court only upon initiative of the accusing injured party, the use of *beating* and *any other act of violence* may have been

exercised to such extent, in such form and with such intensity, that it might eventually be qualified as a circumstance of the objective side of the penal offense of Torture.

Penal offenses such as "Abuse of office," "Commission of arbitrary actions," and "Use of violence during investigations," envisaged by Chapter VIII, Section II, of the Penal Code, that addresses *"Penal offenses against state activity committed by public officials or persons in public service,"* seemingly contain the elements that might have similarities with the elements of the figure of the penal offense of Torture.[14]

Article 248 of the PC sanctions that: "*Deliberate accomplishment or non-accomplishment of actions or failures to act, in violation of the law and constituting the failure of a person, who carries out public functions, to do his duties regularly, in cases when it has led to bringing him or other persons unjust material or non-material benefits or when it has brought damages to the legitimate interests of the state, citizens, and other legal entities, when it does not constitute another criminal offence, is punished with imprisonment up to seven years*". Article 250 of the PC states: "*Committing acts or giving orders that are arbitrary, by an official acting in a state function or public service while exercising his duty, which affect the freedom of citizens, is punishable by a fine or up to seven years of imprisonment."* Meanwhile, article 314 of the PC sanctions that: *"Use of violence by the person in charge of an investigation to force a citizen to make astatement, give testimony or confess his guilt or someone else's, is punishable by three to ten years of imprisonment."*

An analysis of the objective and subjective elements of these penal offenses creates the impression that there may be lack of clarity among investigation and adjudication bodies with regard to the legal qualification of the offense, including torture, especially since neither domestic judicial practice nor the penal law doctrine have addressed in detail the distinguishing elements of these penal offenses. Respectively, *"intent in the commission of actions or inactions in contravention of the law … by a person with public functions…, who have harmed the legitimate interests of citizens…,"* or *"the commission of actions or issuance of arbitrary orders… employees with state or public functions…,"* or *"the use of violence by the person tasked with the conduct of investigations…forced the citizen to make a statement, to testify or confess his or someone else's innocence…,"* envisaged in the relevant offenses, may be elements of the objective and subjective aspects of the penal offense of Torture, inhuman or degrading treatment (article 86 and 87). This points to another problem of penal legislation, which has undergone repeated amendments, adding new provisions, without fully evaluating existing penal offenses and without taking the necessary care so that no confusion would be created between them.

14 Indicates: articles 248, 250, 314 of the PC.

In particular, article 314 of the Penal Code is fully reflected in articles 86 and 87 of this Code.

The confusion between the Penal Code and the Constitution as well as ECHR comes especially from the fact that those provisions went into effect before the approval of the latter, without taking into consideration the standards established by these acts. Subsequent amendments to the Penal Code did not fulfill the standards established by ECtHR jurisprudence pursuant to the ECHR.

II. ANALYSIS OF DENUNCIATIONS INVESTIGATIONS AND ADJUDICATED CASES

2.1 Cases pursued by the Ombudsman

We chose to begin this analysis regarding penal prosecution of torture, inhuman or degrading treatment, with information coming from the activity of the Ombudsman because, in view of its mission, this constitutional body provides a rich source of information with regard to complaints that citizens have about violent behavior exercised by public officials in the course of exercising their duties. Based on a review of the Annual Reports of the Ombudsman for the years 2010-2012, it results that based on the complaints it received, the institution verified several cases that claimed illegal use of violence. **In the end, the institution presented numerous recommendations to the Prosecutor's Office for penal prosecution of public officials suspected of committing the penal offense envisaged by article 86 of the Penal Code.** We decided to start the analysis with information coming from the Ombudsman because it is the first public structure that has raised its voice against the erroneous qualifications that justice bodies make of cases of violence, to the detriment of citizens, by public officials in the course of the exercise of their duties. This was one of the factors that spurred us to undertake this research.

Referring to the afore-mentioned Annual Reports, but also on the basis of the review of decisions that were made available to us by the Tirana Judicial District Prosecutor's Office, we find that the prosecution body has rendered different legal qualifications for penal offenses recommended by the Ombudsman, although functioning at this institution is the National Mechanism against Torture, a structure specializing in the area of torture and inhuman and degrading treatment, with direct connections with the Committee for the Prevention of Torture, an international structure operating in this area.

Furthermore, referring to reports of the Ombudsman, below is a summarized outline of four cases that the institution addressed and suggested for follow up:

1. *A citizen had been signaled to stop on the street by a police officer. The petitioner, although he obeyed the order, was handcuffed and was maltreated by several police officers who were present and who then accompanied him to Commissariat no. 2 in Tirana, where there were allegations that his maltreatment continued. Due to strong blows, he fainted and lost his conscience. As soon as he came to his senses, the police officers hit him again until he passed out and this scene was repeated several times. Afterwards, he was transferred to the Tirana Regional Police Directory and was isolated in pre-trial detention facilities of this institution. A police doctor visited and medicated him.*

   The forensic expert found visible signs of violence on his head, face, and other parts of the body. Also, experts reviewed police documentation that reflected the medical visits that the police doctor had conducted on the petitioner. At the conclusion of the investigation of this petition and based on the administered evidence, it resulted that the claims of the petitioner for physical maltreatment by police officers were true. The investigation also identified two of the police officers – A.Gj. and K.B., who had committed the unlawful actions against the petitioner. For this case, the Ombudsman recommended to the Tirana Judicial District Prosecutor's Office to initiate penal proceedings toward the police officers for the penal offense of "Torture," envisaged by article 86 and 25 of the Penal Code, amended.

   In its decision on Tomas vs. France, August 27, 1992, ECtHR states: *"Although the injuries observed might appear to be relatively slight, they nevertheless constituted outward signs of the use of physical force on an individual deprived of his liberty and therefore in a state of inferiority. The treatment had therefore been both inhuman and degrading.....The medical certificates and reports, drawn up in total independence by medical practitioners attest to the large number of blows which are sufficiently serious to render such treatment inhuman and degrading."*

   In the above case, we are in a situation that is almost identical when the signs of violence (*in the head, face and other parts of the body)* toward a citizen have been confirmed also by forensic experts who visited the victim.

2. *Four citizens, namely B. K., M. K., J. T. and E. T. complained that around 01.00, they had been in an Internet-Café bar, which was beneath their apartment buildings, and were unjustly accompanied by the police patrol to the Police Commissariat No. 4 in Tirana. Two of these citizens had been maltreated by police officers and, because of sustained injuries, had been sent to hospital by the police for examination and medication; one of them who was in a worse condition had been hospitalized. The two petitioning citizens claimed also that police officers had filed fake criminal reports*

against them, claiming that the young men had opposed the police, using violence, insulting and threatening them. As a result of this fake criminal report, citizens B. K. and J. T. had been arrested while citizens M. K. and E. T. were being criminally prosecuted while at large.

At the end of the investigation of this petition and based on administered evidence, the staff of the Ombudsman reached the conclusion that there were strong indications that the claims of the petitioners for physical maltreatment, for illegal accompaniment to the police and for fake criminal reports against them were founded.

The Ombudsman prepared a recommendation, addressed to the Tirana Judicial District Prosecutor's Office, for the initiation of penal prosecution against 4 police officers of Police Commissariat No. 4 in Tirana, for the penal offenses of "Torture," envisaged by article 86 and 25 of the Penal Code, of "Commission of arbitrary actions," envisaged by article 250 and 25 of the Penal Code, and "Fake criminal report," envisaged by article 305 and 25 of the Penal Code.

At the time of the completion and dispatch of this recommendation, it resulted that based on the criminal report of the petitioners, the Prosecutor's Office had already begun penal prosecution for the issue. In these circumstances, given that the competent body had initiate a penal case on the same case, the Ombudsman made available to the petitioners all the evidence collected in the course of the administrative investigation for use during the penal investigation.

In the above case, we found that because of severe violence used during detention, two of the citizens were accompanied for specialized medication to hospital; it was decided that one of them needed hospitalization. On the other hand, the police officers who conducted the accompaniment presented a criminal report against these citizens for the penal offense of "Opposing a public order police officer," envisaged by article 236 of the Penal Code. According to the petitioners, the criminal report had been filed by the police officers in order to protect against the complaint that their relatives had made for the police officers' illegal actions and to justify the violence they had used and the consequences on the injured individuals.

In the ECtHR decision on *Aksoy vs. Turkey* of December 18, 1996, it results that although the citizen maltreated by police had been hospitalized because of physical injuries, the prosecutor's office had not deemed the initiation of penal prosecution as founded on the law. The ECtHR stressed that *where an individual is taken into police custody in good health but found to be injured on release …**it is incumbent on the***

State to provide plausible explanation, and failure to do so represents a clean case raised in the context of Article 3 of the ECHR.[15]

In the above case, in the circumstances when a criminal report was being reviewed, the state bodies had the legal obligation to verify all the circumstances of the incident and, upon administration of evidence (questioning of eyewitnesses, the suspected perpetrators, review of documents at the Police Commissariat and in the hospital where the citizens were examined and medicated, and the forensic documents on the two injured citizens), to initiate penal prosecution toward the responsible employees. The State Police had the obligation to prove the lack of a causal connection between their actions and inaction and the consequences on the health of the maltreated citizens.

3. *On 19.05.2011, at the "Zog I" boulevard in Tirana, in the vicinity of the Ministry of Justice, some citizens were stopped by about 30 police officers of the RENEA special forces, who had exercised violence toward them by hitting them on the head, in the face and in different parts of the body. Because of numerous and hard blows, they lost their consciousness. Afterwards, the petitioners were accompanied to the Tirana Regional Police Directory. Because their health condition was grave, they were transferred to the Tirana Military Hospital for examination and medical assistance. Due to the serious health condition, the two injured individuals had been hospitalized for examinations and medication. While in hospital, around 02.00 of 20.05.2011, the petitioners were arrested for the penal offenses of "Opposing police officers by violence" and "Insult because of the duty," envisaged by articles 236/2 and 239 of the Penal Code.Based on verifications conducted by the Ombudsman staff and the evidences administered by them, it resulted that the health condition of the petitioners was grave. There were clear signs of violence, such as wounds, hematomas, scratches and swollen parts on their bodies. The consequences of violence were proven also by the Forensic Examination Acts, conducted upon request of the Ombudsman; the petitioners did not possess arms or other items forbidden by law; they had not opposed police using violence or made any resistance toward the RENEA special police forces.*

The Ombudsman concludes that the petitioners had been physically maltreated without any reason by the police officers, causing them severe physical injuries and loss of consciousness and that their fundamental right guaranteed by article 25 of the Constitution and article 3 of the European Convention of Human Rights were violated.

15 Tomasi v. France, Decision of August 27, 1992; Ribitsch v. Austria, Decision of December 04, 1995

For the legal violations described above, the Ombudsman made three recommendations, among which: one for the Tirana Judicial District Prosecutor's Office, seeking the initiation of penal prosecution of State Police officers for the penal offense of "Torture," committed in collaboration with others, envisaged by articles 86 and 25 of the Penal Code, amended.

Further in its report, the Ombudsman explains that considering that no illegal items were found on the two maltreated citizens and their detention was done in the presence of a large number of RENEA special forces officers, the use of violence is considered to have surpassed the minimal level of harshness for their detention, compared to ECtHR practice and relevant manuals. The use of force and tools available to police should be done in the manner, at the time and with the reasonable proportional intensity.

In this case as well, it results that there clear medical documents that point to the use of torture because the two citizens were transferred to the Tirana Military Hospital for treatment due to their grave health condition. The disproportionate treatment, leading to serious consequences for the health of these citizens may have been committed as punishment for a committed action, for a suspected action, or for another purpose that leads to the degrading or inhuman treatment of them (letters "b" and "d" of article 86 of the Penal Code).

4. *The Ombudsman, on January 22 and 23, pursuant to the situation created by incidents that took place in the demonstration held in Tirana on January 21, 2011, conducted some inspections in Police Commissariats No. 1, 2, 3, 4 in Tirana, at the Tirana Regional Police Directory and in Prisons No. 313 and 302.*

The conducted inspections demonstrated that:

a. *On the day of the inspection at the Tirana Regional Police Director, there were 16 arrested persons. Their arrest had taken place for committing penal offenses envisaged by articles 236, 237, 238 and 239 of the Penal Code. The arrested persons claimed that physical violence had bene used on them by police officers at the time of the accompaniment to police premises as well as during their questioning in these premises. Two of them had visible signs of physical injuries in different parts of the body that were observed by the Ombudsman staff. They also found the presence of a police doctor who was checking and medicating the injured arrestees, but the 2 injured persons requested that forensic examination be conducted on them, which did not appear to have been provided by police. All 16 persons who were arrested claimed that they had been forced by police officers, through physical and psychological violence, to sign the process-verbals of their questioning and arrest.*

b. *In Commissariat No. 3, there were 19 persons who were detained and arrested, 4 of which were minors. Based on interviews with the detainees and arrestees, the following claims were presented: All claimed that physical violence had been exercised on them at the time of their detention by the police and during their accompaniment to the State Police commissariats. All claimed that judicial police officers had obtained statements from them in conditions of psychological violence. All claimed that although they had signed, they had not become familiar with the content of their statements and that they had been formal and biased actions by police. Although inspectors found that papers demonstrated that a lawyer had been present during the questioning, as proven by relevant signatures in the statements, all claimed that no lawyer had been present during the questioning and that their signatures had been given later. Although the staff of the Ombudsman found that the procedure papers showed the presence of a psychologist, as proven by the relevant signatures on the statements, the 4 minors claimed that there had been no lawyer and no psychologist during the questioning by judicial police and that the signature of the psychologist had been added later. The inspection of the detainees and arrestees showed that only one of them had a slit on his head and that medical treatment had been provided in the hospital. All detainees and arrestees admitted that they had not been maltreated during the time they were in the Police Commissariat No. 3 in Tirana.*

c. *The inspection conducted at Pre-Trial Detention Facility 313 in Tirana, inspectors found that 41 persons had been detained and arrested, of which 8 were minors and 1 was female. Procedural actions had been carried out and they expected to appear before the court for an evaluation or establishment of a security measure on them. Based on the interviews with detainees and arrestees and following an examination of the premises where they were accommodated, the following were observed: All claimed that police had used physical violence on them at the moment of detention by police and during their accompaniment to the State Police Commissariats. All claimed that judicial police officers had obtained statements from them in circumstances of psychological violence. All claimed that, although they had signed, they were not familiar with the contents of what they had signed and that they had been formal and unilateral actions of police. All claimed that during the statements, no lawyer had been present and that their signatures were put in later. The 8 minors claimed that aside from the lack of a lawyer, there had been no psychologist in attendance either during their questioning by judicial police and that any signatures of psychologists may have been done later.*

ç. *The inspection conducted at Pre-Trial Detention 302 in Tirana found that there were 34 persons who had been detained and arrested, of which 7 were minors. The interviewing of the detainees and arrestees and the observation*

of the premises where they had been accommodated found the following: All claimed that police had used physical violence toward them at the time of the arrest and while being accompanied to State Police Commissariats. All claimed that judicial police officers had obtained statements from them in conditions of psychological violence. All claimed that although they had signed, they had not seen the contents of the statements in advance and that they had been formal and unilateral actions by police. All claimed that no lawyers had been present during their questioning and that their signatures were put on the statements at a later time.

The report of the Ombudsman for 2011, with regard to the above case, concluded that: *"The Ombudsman began on its own initiative the review and investigation of cases when State Police officers or prison officers committed violent actions toward citizens or detainees, causing consequences to their health and then issued recommendations to the Prosecutor's Office for initiating investigations on the penal offense of "Torture;" however, Judicial District Prosecutor's Offices* ***changed the qualification of the offense to "Abuse of office" or "Commission of arbitrary actions," and in the end decided to drop the penal cases."***

As the Ombudsman observed, it results that in the above mentioned situations, we find ourselves in front of cases when some citizens, involved in a protest, are suspected of undergoing violence by the police during their detention and that their statements and affirmations were taken in the circumstances of psychological and physical pressure. It is also suspected that they have been forced to sign the process-verbal of the flagrant arrest, in serious violation of legal procedural guarantees, because of the absence of a psychologist and lawyer, who are suspected to have signed without being present during the conduct of these investigative actions. We think that all of these elements are sufficient for initiating investigations on the basis of article 86 of the PC, but the prosecution body conducted penal prosecution for the offenses of ***"Abuse of office"***or***"Conduct of arbitrary actions,"***which, as noted further down in this research, are inappropriate juridically for these cases if we were to refer to the extensive practice of the ECtHR.

On the other hand, the Report by the Council of Europe's Human Rights Commissioner[16] states: "*The Commissioner is very concerned at the long-standing problems of ill-treatment and of impunity forserious human rights violations committed by law enforcement officers, including those relating to theviolent events of 21 January 2011 in Tirana. The authorities are urged to take all necessary measuresto ensure that all allegations of unlawful acts, including ill-treatment, by law enforcement officerscommitted during and after the events of 21 January 2011 are promptly and effectively investigated and that those responsible are brought*

16 Report of the Council of Europe's Commissioner on Human Rights, following the visit to Albania on September 23 to 27, 2013

to justice. There is also a need to impose adequate, dissuasivepenalties on any law enforcement official involved in serious human rights violations, in line with therelevant 2011 Guidelines of the Council of Europe."

Further on, the Commissioner says in his report that he sees with concern reports that show that access of detainees/arrestees, including of minor ones, to a lawyer or doctor has been impeded or denied. The Commissioner calls upon authorities to implement all relevant recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) and encourages them to ensure that psychologists are always present during penal proceedings that involve minors.

2.2 About the position taken by the office of the Ombudsman regarding cases of torture and inhuman, degrading treatment

The Annual Reports of the Ombudsman for the years 2010-2011 address also cases followed by this institution and on which there has been an administrative investigation, based on complaints and verifications that it had carried out. The National Mechanism for the Prevention of Torture operates at this institution as a specialized structure whose duty it is to monitor, in all premises where individuals are deprived of their liberty, to verify the protection guaranteed against torture and inhuman, degrading treatment of citizens accommodated in them.During the years 2012-2014, the Ombudsman presented to the Prosecutor's Office recommendations for the initiation of penal prosecution for the crime of torture (in 2014 – two recommendations for the Lezhë and the Tirana Judicial District Prosecutor's Office; in 2013 – two recommendations for the Kavaja and Tirana Judicial District Prosecutor's Office; in 2012 – five recommendations for the Judicial District Prosecutor's Offices in Shkodër, Durrës and Tirana).[17]

The cases of violations of the law in the events of January 21, 2011, are mentioned in detail in the Report of the Ombudsman. Based on the way the violence is described, it results that there are strong suspicions and indications that the actions of police officers were not only arbitrary, but also contained elements of inhuman, degrading treatment (*physical violence at the moment of detention by police, in public, in the presence of other pedestrians as well as during their accompaniment to the Police Commissariats; the taking of statements and their signing by Judicial Police Officers in circumstances of psychological violence and pressure; the absence of lawyers and psychologists; failure to notify family members for the location of their members, etc.).* Among others, the Report states: *"…not*

17 Special Reports of the National Mechanism for the Prevention of Torture for the years 2012, 2013 and 2014

only those interviewed by us who were in the premises of specialized institutions (police commissariats or detention centers described in the report), but we also saw through the broadcast media cases of police using violence after the conclusion of the demonstration and when the protesters were leaving."

In conclusion of its report, the Ombudsman clarifies that:

- *We recommended to the General Director of State Police and informed the Minister of Interior to instruct all police officers to not use violence in unnecessary situations.*
- *Respect with correctness all procedural guarantees envisaged in the Penal Procedure Code and other legal acts toward accompanied, detained and arrested persons, etc.*

It is our opinion that the above recommendations are necessary, but insufficient and not commensurate to the situation that the inspections found. It is public knowledge that the above cases, suspected of torture or inhuman, degrading treatment, and which are presented by the report of the Ombudsman were never prosecuted or adjudicated. With regard to this situation, international bodies have also taken a stand. Also, 2 cases denounced by the Ombudsman for the penal offense of Torture (article 86 of the Penal Code) and dropped by the Tirana Judicial District Prosecutor's Office do not appear to have been appealed to the relevant court.

It is our judgment that public institutions such as the Ombudsman, when they encounter the commission of a penal offense (torture) should not confine themselves only to the "Recommendation" that they present to the Prosecutor's Office, but should follow the recommended issue even further after the Prosecutor's Office decides to not initiate proceedings, drop the case, or send the case to court. If the recommended case *(which in fact should be considered a criminal report or denunciation)* is not initiated or is dropped, this institution, like any other subject, should address the Court with a complaint.

Law no. 8454, dated 04.02.1999, "On the Ombudsman," amended, when it talks about competences, it stipulates that this institution **recommends** to the Prosecutor's Office if it finds that a penal offense has been committed.This competence is not compatible with what article 281/1 of the Penal Procedure Code states when it says: *"Public officials who, in the course of exercising their duties or services become aware of a penal offense that is prosecutable, **are obliged to file a criminal report** in writing even when the person that the penal offense is attributed to has not been individualized."*

We are of the opinion that this contradiction between the two legal provisions, which were approved by the same qualified majority in the Assembly, should be resolved in favor of the Penal Procedure Code, which is the more specific provision regarding the exercise of penal prosecution. The employees of the Ombudsman are public officials and may not avoid the obligation stipulated by article 281/1 of the PPC because only by taking the role of the individual filing a criminal report may that person be legitimized to follow the progress of the case through all the links of the justice system and protect, in a substantial manner, the rights of citizens, as established in the mission of this institution.

2.3 Data about cases addressed by the Tirana Judicial District Prosecutor's Office and Court and their analysis

AHC requested information from the Tirana and Elbasan Prosecutor's Office and Court about the penal offenses envisaged in articles 86, 87, 248, 250, and 314, of the Penal Code, for the years 2011-2012.

Based on the information provided by the Tirana Judicial District Prosecutor's Office for 2011, the data were:

Article 86	**Total**	**Not-initiated**	**Sent to court**	**Dropped**	**Suspended**
No. of recorded criminal reports	1	1			
No. of recorded proceedings					

Article 248	**Total**	**Not-initiated**	**Sent to court**	**Dropped**	**Suspended**
No. of recorded criminal reports	238	131			
No. of recorded proceedings	107		10	47	1

Article 250	**Total**	**Not-initiated**	**Sent to court**	**Dropped**	**Suspended**
No. of recorded criminal reports	11	4			
No. of recorded proceedings	7		3	3	

For 2012, the data were:

Article 86	**Total**	**Not-initiated**	**Sent to court**	**Dropped**	**Suspended**
No. of recorded criminal reports	1				
No. of recorded proceedings	1			1	

Article 248	**Total**	**Not-initiated**	**Sent to court**	**Dropped**	**Suspended**
No. of recorded criminal reports	300	162			
No. of recorded proceedings	138		8	58	5

Article 250	**Total**	**Not-initiated**	**Sent to court**	**Dropped**	**Suspended**
No. of recorded criminal reports	21	6			
No. of recorded proceedings	15		2	9	3

For year 2011, for charges of **article 86, of the Penal Code, there appears to be 1 criminal report for which it was decided to not initiate penal proceedings;** for article 248 of the Penal Code, there are 238 recorded criminal reports, of which 107 were registered as penal proceedings and of these recorded penal proceedings, only 10 were sent to court, while 47 were dropped and 1 was suspended. **Among the cases sent to court for adjudication with this charge, there was no case related to the use of physical or psychological violence of citizens, which might have contained elements of torture or inhuman, degrading treatment**; for the penal offense envisaged by article 250 of the Penal Code, there were 11 criminal reports, of which 7 were registered for penal proceedings, 3 were sent to court for adjudication, and 3 were dropped; there is no information on one case. Such information did not contain data about the use of physical or psychological violence by State Police officers or prison officers toward citizens deprived of their liberty, that might have contained elements of torture, inhuman or degrading treatment. **For articles 87 of the Penal Code and 314 of the Penal Code, there were no criminal reports registered.**

During this year, through its Legal Clinic, AHC addressed 53 complaints from penitentiary institutions and 1 complaint from the Police Commissariat in Tirana. In the circumstances when about 34% of the complaints by citizens deprived of their liberty deal with physical or psychological violence by police personnel in prisons and commissariats, the grave conditions in these premises, overcrowding, lack of health care services, etc., there were 18 citizens who during 2011 claimed a violation of article 3 of the ECHR, i.e. concerns about the presence of elements of torture, inhuman or degrading treatment. These circumstances were not reflected in criminal reports, penal proceedings or judicial decisions in the practice of the relevant bodies in Tirana.
For year 2012, for **article 86 of the Penal Code, there is 1 criminal report, recorded as a penal proceeding for which, it appears that a decision was taken to drop the penal proceeding**; for article 248 of the Penal Code, there are 300 recorded criminal reports, of which 138 were recorded as penal proceedings, and of these only 8 were sent to court for adjudication, 58 were dropped and 5 were suspended. **Among the cases sent to court for adjudication with this charge, there was no case related to the use of physical or psychological violence of citizens, which might have contained elements of torture or inhuman, degrading treatment**. For the penal offense envisaged in article 250 of the Penal Code, there appear to be 21 recorded criminal reports, of which 15 were recorded from penal proceedings and of these, 2 were sent to court for adjudication, 9 were dropped and 3 were suspended.Such information did not contain data about the use of physical or psychological violence by State Police officers or prison officers toward citizens deprived of their liberty, that might have contained elements of torture, inhuman or degrading treatment.**For articles 87 and 314 of the Penal Code, for the year 2012, there was no recorded criminal report.**

During this period, AHC continued to address 26 complaints received from penitentiary institutions and police commissariats in Tirana. Based on the fact that 22% of the complaints from inmates/detainees or arrested/detainees deal with the violation of article 3 of the ECHR, it results that there were 6 complaints from institutions that fall under the territorial competence of the Tirana Judicial District Court's Prosecutor's Office. In spite of the large number of criminal reports and proceedings in this office during one year, the above data showed that there was only 1 criminal report and penal proceeding for the violation of article 86 of the Penal Code, thus not reflecting to the same extent the concern about the circumstances of the penal offense of torture that had been presented to AHC.

The Tirana Judicial District Prosecutor's Office did not create the possibility for us to become familiar with all the materials of the above

cases. This institution officially sent to us 2 decisions, namely the decision to not initiate penal proceedings in year 2011 and the decision to drop the penal proceedings in year 2012, for the penal offense envisaged by article 86 of the Penal Code.

Criminal reports on these two decisions of the Prosecutor's Office had been filed by the Ombudsman, in 2011 and in 2012, respectively through No. 3329 and No. 2767, which appears to have been set to motion following complaints by the injured parties and their relatives. The events relate to allegations of violence during the accompaniment of a citizen by State Police officers and allegations of use of physical violence toward two citizens who were in pre-trial detention in IEPD "Jordan Misja" by Prison Police officers. Compared to the standards resulting from the practice of ECtHR with regard to the characteristics of penal investigations[18] in suspected cases of torture, inhuman or degrading treatment, we may conclude that:

a) The investigation by the Prosecutor's Office lasted about 2 months from the moment it received the criminal report from the Ombudsman and about 3 months from the incident in the case of 2011 and 22 days from the moment it received the criminal report from the Ombudsman and about 2 months from the incident in the case of 2012. These deadlines are relatively long in the first case, taking into consideration the fact that only two medical forensic acts, realized before the start of the investigation by the Prosecutor's Office and the testimonies of police officers who were at the site, had been found. Meanwhile, the time of 22 days for the investigation in the second case is relatively short, taking into consideration the fact that there had been administered a total of 11 statements by the reported individuals involved in the incident and the petitioners, convicted persons, and several logbooks and documents were examined as evidence from the incident in the penitentiary institution, including the medical forensic expertise papers.

The extension of the deadline for investigations while not so many investigation evidence were administered and the conduct of numerous investigative actions for a short period of time are not in keeping with ECtHR standards with regard to the proportionality of the duration of the process vis-à-vis the complexity of the circumstances of the case, in spite of the formal respect for the investigation deadline envisaged in the Penal Procedure Code.

b) In both cases, the studied decisions of the Prosecutor's Office resulted to have administered only the testimonies or statements by persons involved in the incidents (public order police forces and prison officers) and the injured

18 See page 10 of the Research Study.

parties, but there are no potential testimonies by other citizens, deprived of their liberty, who might have had knowledge of the circumstances of the incidents, nor any sequestration of video recordings of the institution for the time of the claimed violence.

In the case of 2011, the medical forensic examination of the injured person was conducted 6 days after the incident, thus reducing the possibility of finding "traces" although the expertise discovered *ecchymosis and swollen ankles,* while for the reported public order police officers, the medical forensic examination had been done only 3 days after the incident. Meanwhile, in the case of 2012, the file contained the medical report filled out by the institution's doctor one day after the incident and the medical forensic examination report conducted two days after the incident, which contradicted one another. The Report stated that the detained individual *did not have any health problems* while the forensic examination report stated that it found *ecchymosis caused by hard carving objects.*

The study of these decisions of the Prosecutor's Office did not indicate the conduct of any new medical forensic examination that would establish an accurate and full recording of the health conditions, given that previous medical forensic examination reports were in contradiction of one another. The need for the conduct of such investigative actions derives from the positive obligation of any state that adheres to the aforementioned international conventions for the protection of individuals against torture, inhuman or degrading treatment, from any member of the society, especially from state employees, through a full and effective investigation.

c) With regard to the obligation of the state, as it results from ECtHR practice, for a reasonable approach to the investigation of claims of victims or their relatives, this may not be confirmed definitely for the 2011 case, because the investigation did not take into consideration the statement of the "relative" of the victim with regard to the violence exercised by police officers, while only the testimonies of police officers involved in the incident had been administered. The relative's statements had been qualified as *"objectively biased"* and the arguments for the Prosecutor's Office dropping of the case consists of the *"logical"* connection of ecchymosis with those parts of the body where persons are grabbed for accompaniment by police officers, pursuant to their duties. The decision does not state the taking of the testimony of any person who might have been at the incident site, although it took place in the yard of his home, involving two police patrols, because of resistance on the part of the injured individual.

Furthermore, the Prosecutor's Office decision to drop the case of 2012 does not state the administration of testimonies by other citizens deprived of their liberty, who might have been present during the confrontation of

the injured individuals with the prison police officers.The sequestration of potential video footage as well as the investigation of the contradiction between the medical report and the forensic medical examination report, or the statements of one of the injured individuals, in the circumstances when only the testimonies of state officers in the institution and the documentation filled out by them had been administered, might represent more enhanced investigation actions in respect of the standard enhanced by the extensive ECtHR practice for the conduct of a full and credible investigation for the involved parties.

The decisions of the Prosecutor's Office state that penal prosecution was initiated on the basis of criminal reports or recommendations by the Ombudsman; these two decisions state: *"Notify of this decision the interested parties who have the right to file a complaint on it according to law"* and *"Notify of this decision the interested parties who have the right to file a complaint at the Tirana Judicial District Court or to the higher prosecutor."*

However, according to article 291, paragraph 2, of the Penal Procedure Code: *"The decision (to not initiate penal proceedings) is made known immediately to those who filed a report or complaint and who may oppose it in court, within 5 days from the notification of the decision."* Meanwhile, according to article 329, item 1, of the Penal Procedure Code: *"The injured party and the defendant may file a complaint with the judicial district court against the decision to drop the charges or the case."* As to which the "interested" parties are does not come out very clearly, because the decisions of the Prosecutor's Office do not mention either the Ombudsman or the persons who claimed that violence was exercised upon them or their relatives.

A review of the files in the Tirana Judicial District Court did not indicate that any complaint was filed against these two decisions of the Prosecutor's Office. AHC does not have any information with regard to the Ombudsman receiving any notification of these two decisions. Also, the Reports of the Ombudsman do not mention any complaint in court against the decisions of prosecutors to reject or drop penal prosecution, for the cases that were "reported" or "recommended"by the Ombudsman, based on article 86 of the Penal Code.

- **Research of judicial documentation in the Tirana Judicial District Court for 2011**

A review of documentation at the Tirana Judicial District Court indicated that, in general, during the investigation and adjudication, the incidents that involved the use of physical violence toward citizens by officers of prisons and pre-trial detention facilities, had been qualified according to article 250 of the Penal Code "Committing arbitrary actions." The two other cases had

been appealed to the higher judicial instances and their review had not been completed yet.

Based on the research of these files, we found that:

1) The Tirana Judicial District Court and Prosecutor's Office correctly understood and applied provisions 90 "Other intentional injuries" and 248 "Abuse of office" of the Penal Code because none of the cases addressed in these decisions contained objective and subjective elements of the penal offense of Torture, as envisaged by article 86 of the Penal Code.

In decisions on article 90 of the Penal Code, the active and passive subjects were general and the violence did not surpass the minimal harshness that is required for the qualification of a penal offense as Torture. The health condition and physical or mental effects on the injured individual had been evaluated up to 9 days of temporary incapacity for work because they were very light. Most of the cases had been dropped because the failure of the injured petitioning party to appear.

In the cases related to article 248 of the Penal Code, the circumstances of the fact did not have to do with the exercise of violence that caused severe health conditions or effects on the mental and physical health of the injured individuals, but with the abuse of competences of public officials, causing damage to the economic interests of other citizens;

2) In the cases related to article 250 of the Penal Code "Committing arbitrary actions," the prosecutor's office and the court did not carry out a full and comprehensive investigation, because the majority of witnesses who were questioned, both those who were present at the time of the exercise of violence and those who were not present (mostly police officers) **were biased and reserved to provide clear and complete clarifications about the circumstances of the incident.** The testimonies or statements by state employees involved in the incidents or their colleagues represent the majority of evidence administered in the adjudication, while the statements of other witnesses who were not involved in the incidents were missing in almost all of the researched cases;

3) The exercised violence caused **degrading of the dignity of the violated citizens and their physical injury, going beyond the minimal level of harshness, in the context of the principle of proportionality.** In some cases, the active actions of violence were

committed in public premises or in the presence of family members and other persons, *with batons and punches and kicks* by several state employees at the same time, i.e. in collaboration. The injured citizens suffered ecchymosis or edemas of different dimensions, up to over 10 cm, in different parts of the body, including the head and face, and, in some cases, caused problems with movement although the injured individual was at a young age. In general, signs were visible up to 10 days after the incident and during medical forensic examination reports were done during this time;

4) The **examinations conducted by the doctor or issued medical reports, we noticed delays, which varied between 4 and 10 days from the incident,** a fact that diminishes and impedes the accurate definition of injuries and of the health condition of the injured individuals;

5) Some defendants accepted the charges, with the intent to alleviate responsibility, or to ease their position, confusing this with the request for an abbreviated adjudication. They justified themselves with the "fact" that the stay, behavior of the injured individuals had not been correct, or had been provoking and had not obeyed their legal orders; however, as a matter of fact, this could not be proven by the evidence reviewed during the adjudication, in most of the cases;

6) The investigative process was shorter in terms of time than the judicial process, in spite of the fact that the adjudication only included as evidence only the circumstances and facts that were part of the prosecutor's office file. The average duration of the investigative process we found was 5-6 months and the duration of the judicial process appeared on average between 7 and 8 months, thus not reflecting the complexity of the case, circumstances and fact, or of the administered evidence.

7) The investigation and adjudication of the claims of the injured individuals or their relatives came as a result of reporting material by the Internal Control Service, which was set in motion by the injured individuals and, in some cases, by the Ombudsman; however, there was no case of investigations coming as a result of the initiative of the prosecutor's office. Looking at the facts that were investigated and administered as evidence in the adjudication, as well as at the sentence of the defendants, there is a lack of a complete and reasonable approach to the claims of the defendants in the process. The administration of the process through the statements of public officials accused of perpetrating the crime, the testimonies of their colleagues, the documentation kept by the institution they work in, as well as the emphasis on the alleviating circumstances for

the defendants, concluding with sentences by fines or alternative sentences, without obtaining testimonies or statements by witnesses not involved in the incident or the conduct of other medical forensic examinations, do not reflect with certainty a comprehensive and reasonable investigation;

8) We noticed a kind of unification of the attitudes of the Prosecutor's Office and the Court **especially with regard to the remand measures that were very light, which demonstrates a similar approach of these bodies to the threat posed by these penal offenses;**

9) There appear to be **very light sentences requested by the prosecutor and established by the court, generally under the minimum required by law.** The court decisions highlighted the level of risk of the penal offense *(in every case, the violence had been exercised by police officers, while citizens were deprived of their liberty)* but, while the level of the sentence envisaged by the law goes up to 7 years of imprisonment, the courts constantly argued in favor of alleviating the penal responsibility of the defendant. In more concrete terms, in the judicial decisions courts issued one of the following decisions:

-The defendant/s was declared guilty of the penal offense, envisaged by article 250 of the Penal Code and was given a sentence by fine, which varied, depending on the circumstances, from 80,000 ALL to 150,000 ALL, and a deadline for paying the fine was established;

- The court accepted the request for abbreviated adjudication, according to article 406 of the Penal Procedure Code; the defendant/s was declared guilty of the penal offense, envisaged by article 250 of the Penal Code and was given a sentence by fine, reducing 1/3 of the sentence, and a deadline for paying the fine was established;

- The court accepted the request for abbreviated adjudication, according to article 406 of the Penal Procedure Code; the defendant/s was declared guilty according to article 250 of the Penal Code, and was sentenced to imprisonment for a time that varied from 1 to 4 months; 1/3 of the imprisonment sentence was reduced, because of the abbreviated adjudication; the execution of the sentence of imprisonment was suspended according to article 63 of the Penal Code and the sentence was replaced by labor (hours of labor) for public interest;

- The defendant/s was declared guilty of the penal offense envisaged by article 250 of the Penal Code and an imprisonment sentence was issued; the execution of the imprisonment sentence was suspended and the perpetrator was put in the probation service, according to article 59 of the Penal Code;

2.4 Data about cases addressed at the Elbasan Judicial District Prosecutor's Office and Court and their analysis

We requested the same information for the years 2011-2012 from the Elbasan Judicial District Prosecutor's Office. **This institution, unlike the Tirana Judicial District Prosecutor's office, made possible for us the study of investigation files and provided the following information:**

Based on statistics provided by this prosecutor's office for 2011, we had the following data:

Article 248	Total	Not-initiated	Sent to court	Dropped	Suspended
No. of recorded criminal reports	36				
No. of recorded proceedings[19]	36		4	19	1

Article 250	Total	Not-initiated	Sent to court	Dropped	Suspended
No. of recorded criminal reports	4				
No. of recorded proceedings	4			4	

For articles 86, 87 and 314 of the Penal Code, for 2011, there were no criminal reports filed. In spite of these data, during this period, through its Legal Clinic, AHC addressed 24 complaints received from IEPD Peqin, about 34% of which (9-10 complaints) had to do with violence used in the prison by personnel, failure to provide health care services in cases of need, overcrowding, poor prison/detention facility conditions, etc., which potentially represent circumstances for the violation of article 3 of the ECHR, the ECtHR practice and article 86 of the Penal Code. However, based on information provided by the Elbasan Judicial District Prosecutor's Office, which has the territorial competence for this institution, there appears to be no criminal reports or penal proceedings for this offense, thus not reflecting the level of concern of this character in one of the country's most important penitentiary institutions.

19 In all of the verified cases, the penal offense did not contain elements of the exercise of violence

For year 2012, we received the following data:

Article 248	Total	Not-initiated	Sent to court	Dropped	Suspended
No. of recorded criminal reports	35	7			
No. of recorded proceedings[20]	28		4	17	

Article 250	Total	Not-initiated	Sent to court	Dropped	Suspended
No. of recorded criminal reports	2				
No. of recorded proceedings	2			2	

No criminal reports were recorded for articles 86, 87 and 314 of the Penal Code for the year 2012. For 2012, AHC continued to address 14 complaints from the Peqin IEPD, in the conditions when 22% of the complaints received from citizens deprived of their liberty had to do with violence exercised in the prison by personnel, failure to provide health care services in case of need, overcrowding, poor conditions in prison/pre-trial detention facilities, etc., which potentially represent circumstances for the violation of article 3 of the ECHR, ECtHR practice and article 86 of the Penal Code.

In all the cases recorded on charges per article 248 of the Penal Code, there were no elements of physical or psychological violence, nor other elements that could influence the qualification of the offense as torture or inhuman, degrading treatment.

Based on the contents of 6 investigation files that were made available to us by the Elbasan Prosecutor's Office, it resulted that the prosecution concluded as follows:

1) The case no. 1716, dated 12.12.2012 (no identified perpetrator), for the penal offense "Committing arbitrary actions," in collaboration with others, according to articles 250 and 25 of the Penal Code was dropped on 06.05.2013. The individual S.V. (a citizen serving an imprisonment term in the Peqin prison) had filed a criminal against three prison police officers for using violence against him. Both the police officers

20 In all of the verified cases, the penal offense did not contain elements of the exercise of violence

and other inmates denied maltreatment of the petitioner and the reason for the conflict was claimed to have to do with malfunctioning of the shower and not with what the petitioner claimed.

In this case, a Judicial Police Officer was delegated to carry out investigative actions by the relevant prosecutor. According to documentation in the investigation file, it resulted that the JPO questioned **3 months after the beginning of the investigation** the reported prison officers and their colleagues as persons with knowledge about the incident. The institution's cameras did not appear to have been sequestered, although that had been delegated as an investigative action by the case prosecutor and fulfillment was compulsory. The investigation began immediately after the criminal report (about 1 month from the incident) and lasted for 5 months, thus resulting in unreasonable duration given the evidence administered in the file.

In the course of the investigation, there was no entirely reasonable approach to the criminal report of the petitioning inmate because no other witnesses in the institution were questioned and video footage that could certainly verify the alleged incident were not sequestered. The active role of the investigation body is necessary to be in accordance with the ECtHR standards with regard to the "reasonable approach" to the criminal report of the inmate.

In spite of the fact that there is a medical forensic examination act that denies the visit of the petitioning inmate to the institution hospital and only confirms the taking of a paracetamol, without establishing whether there were physical injuries, being deprived of liberty in the conditions of a closed institution is a circumstance that should be taken into consideration for the conduct of such investigative actions that leave no room for the innocence or lack thereof of public employees, in cases when the use of violence is claimed.

2) Citizen R.M. had filed a criminal report for having been maltreated by police officers in Cërrik, causing some scratches on his face. In spite of the claims of the petitioner that he had been stopped by police officers when he had been traveling by car, other witnesses questioned about this case although admitting the fact did deny the maltreatment. The report of the doctor did not indicate that there was any temporary lack of capacity for work. The prosecutor's office had merged the case because, in advance, the police officer had filed a criminal report for "Offense because of the duty" while the citizen had filed another for maltreatment. In the end, it resulted that the police officer himself had withdrawn, based on article 284/1 of the

Penal Procedure Code, leading to the dropping of the penal case with regard to his criminal report; for the penal offense of "Committing arbitrary actions," prosecutors had decided to drop the case for failure to prove the maltreatment of the citizen by the police officer.

The medical forensic examination act did not indicate any surpassing of the minimal level of harshness that would be considered inhuman treatment, but the incident happened on the street, in a public place, in the presence of some acquaintances who were in his vehicle, one that could cause negative psychological consequences, but there is no examination act or any other investigative action in this regard, thus leaving shortcomings in compliance with ECtHR standards for the criteria of investigations of potential cases of torture, inhuman and degrading treatment.

Only the persons involved in this case were questioned about the incident and no other witnesses who could be objective in their statements; the complaint of the police officer was withdrawn, thus leaving suspicions about the understanding of the parties to end the case without a full investigation, in spite of *scratches in the face with a grating object,* found by the medical forensic examination act. The administration of such evidence could result in a more reasonable approach of the investigation to the claims of the citizen about the use of violence by police officers.

3) The petitioner, citizen A.A. claimed that on 09.05.2010, while he was with his friend, police forces arrived to the site when he was having a conflict with another person. The petitioner claims that he was maltreated by one of them and as comes out of the reviewed acts in the investigation file, *the claimed maltreatment was not observed.* On the contrary, the petitioner was accused and sentenced by the court for insult because of duties (article 239/1 of the Penal Code). This is one of the reasons why the penal case against the police officer who was accused of committing arbitrary actions was dropped.

   The previous judicial decision found marks on the head and arms of the petitioner, but they were considered consequences of the citizen's falling on the ground while being chased by police officers; also, there is no medical forensic examination act. The lack of such documentation that states the situation and of statements by other witnesses, after the incident has taken place in a populated neighborhood of the city, around midday, does not reflect a reasonable approach of the investigation on the claims of the petitioner for use of violence by police officers and has not managed to fully record the injury, which is an obligation established by ECtHR practice. In the circumstances

where the person is reliant on narcotic substances and the health condition is relatively poor, the risks of the use of violence is much higher, and as a result there is a need for more enhanced investigative actions to verify potential inhuman or degrading treatment.

The criminal report was filed about 10 months after the incident and the investigation of the case lasted for 3 months, administering an explanatory letter by the Police Commissariat, a document from 2003 that proves the petitioner's reliance on narcotic substances, a priori judicial decision that sentences the petitioning citizen for "Insult because of duties" for the same incident, and the reported police officer was questioned more than two months after the investigation had begun. Such duration does not appear to justify the scarce investigative actions, considering the evasive conclusion of the Prosecutor's Office that *"the version of falling and sustaining injuries because of that, rather than from the use of violence, is more credible."*

4) Three inspectors of the construction inspectorate, based on the criminal report filed by citizen R.Ç. were prosecuted for the offense envisaged by article 250 of the Penal Code. According to the materials in the file, it appeared that the inspectors had conducted an inspection inthe place where the petitioner (excavator driver) was working in a site. He had refused to present the documents but the inspectors did not admit maltreating him but rather said that they had only pushed him to avoid a conflict that the petitioner had started with one of them. The doctor's report, conducted only one day after the incident, had not found body injuries in the petitioner who claimed to be suffering from body and headaches. In these conditions, prosecutors decided to drop the penal case.

   The investigation lasted for about 4 months and featured mismatches with the scarce investigative actions, such as: obtaining statements from the petitioner, from the two construction inspectorate inspectors, from two citizens present at the site, as well as the report on the medical forensic examination conducted one day after the incident.

   Based on the examination report and the statements of persons involved in the incident, no marks were found on the body of the petitioner, no ecchymosis or edemas, thus leaving no doubts about any use of violence by the public employees, such as surpassing the minimum of harshness that would lead to its consideration as torture, inhuman or degrading treatment.

5) Citizen H.I. who was serving a sentence in the Lushnje prison filed a criminal report against a prison officer for inciting two other inmates

to use violence against him. This fact, following the conducted examinations, did not appear to be true and so the prosecutor decided to drop the case about the charges envisaged by article 250 of the Penal Code.

The duration of the investigation was 7 months, but the investigative actions included only two letters from the Peqin IEPD regarding the Service Reports of the two inmates accused of collaborating to violate the petitioner, the questioning of the petitioner and the administration of the psychiatric-legal examination of the petitioner, thus being disproportionate to the purpose of resolving the case, the potential perpetrators and the identification of evidence in as short and effective time as possible.

The psychiatric-legal examination act indicated that the petitioner was not suffering from any mental problems, while the IEPD letters provided information on the conduct of the two other inmates during a period that does not match the reported incident. The standards for state institutions that investigate claims of maltreatment, which have been established by the ECtHR practice, would require a more enhanced investigation into the diversity of administered evidence and their number, because of the deprived liberty of the petitioning citizen and his disadvantaged status vis-à-vis employees exercising state power. The sequestration of video footage or the questioning of other individuals deprived of their liberty could represent administered evidence in an investigative process that has a reasonable approach to the claims of the petitioning citizen.

6) On 08.11.2012, the citizen F.B. filed a criminal report for the commission of arbitrary actions by an employee of the local construction inspectorate of Elbasan Municipality. However, on 15.11.2012, another criminal report was filed by the inspector of the municipality inspectorate and by a petitioning neighbor for "intentional light injury" and "hitting because of duties." In the conclusion of investigations, it resulted that the employee of the Elbasan Municipality construction inspectorate had not used violence and, as a result, the case was dropped.

   The prosecutor's office investigated for about 5 months and administered the statements of the persons involved in the incident and the three medial forensic examination acts for the petitioner, her neighbor, and the Elbasan construction inspectorate employee. The duration of the investigation was sufficient for the conduct of investigative actions to obtain and administer evidence for the identification of the circumstances and the perpetrators of potential

penal offenses, but the number and diversity of evidence were relatively scarce for the investigation of three penal offenses at the same time.

The medical forensic examination act, conducted on the day of the incident, did not find any signs of violence exercised on the petitioner, thus making it possible to drop the case raised by her. To the contrary, her neighbor and the Elbasan inspectorate employee appeared to have been violated by her because of some marks observed on their bodies. In these circumstances, it is not possible to conclude about suspicions of use of violence that would surpass the level of harshness that would lead to consideration of torture, inhuman or degrading treatment, but the standard of ECtHR practice for a reasonable approach to the investigation could have been completed by administering other evidence, potential video footage given that the incident took place in a public place, statements by other witnesses who may have been present at the site. Taking into consideration the fact that the petitioner was female, actions that are not necessarily physically violent toward her in a public place by male citizens might be elements of degrading treatment and this would have required a detailed investigation based on some sources for the accurate establishment of the health condition, including mental.

The study of 6 investigation files on the penal offense of "Committing arbitrary actions," envisaged by article 250 of the Penal Code, which might contain elements of torture, inhuman or degrading treatment, resulted that they all had been dropped. In more concrete terms:

1) The criminal petitions came from citizens who are free or incarcerated who have been in conflicts and have claimed use of violence by state employees. The duration of investigations varied between 3 and 7 months, such that would enable the identification and preservation of evidence and suspected perpetrators; however, we found disproportions between the duration of investigations and the number and diversity of investigative actions;

2) The purported violence was not found to be of high intensity, with serious consequences on the health or with the intent of causing a feeling of inferiority, anxiety, etc., in the victim, but in the cases of petitioner A.A. who claimed *"to be massacred by police"* showing photos of himself bleeding, with movement problems, etc., as well as in the case of scratches on the victim's face violated by police officers in Cërrik, or claims of citizens deprived of their liberty, in order to prove whether the minimal level of harshness has been surpassed

requires more enhanced investigative actions on the statements of witnesses who are not involved in the incidents or the sequestration of possible video footage. The state of being deprived of liberty, being a female, being in a weak health condition due to the use of narcotic substances and the occurrence of the incident in a public environment, represent specific circumstances in which certain actions that do not necessarily have high intensity could lead to inhuman or degrading treatment;

3) The reasonable approach to the investigation on the claims of the petitioner is established by investigative actions measured in the duration in time and by their result. The prosecution office administered and conducted investigative actions such as: process-verbals of statements by petitioners and medical forensic examination acts for persons claiming violence, but not in every case. The criminal report of citizen A.A. was not accompanied by a medical forensic examination act because a long time had passed from the incident to the reporting, inspite of the existence of a photo that showed him bleeding and a previous judicial decision that found him guilty of "insult because of duties," that observed his problem with movement and marks on the head and legs.

   These investigative actions were delegated 100% to Judicial Police Officers and the letter did not always enforce prosecutor's office orders (for instance, failure to sequester camera footage in IEPD Peqin, for the conflict claimed by convict S.V. with three Prison Police officers). In every case, we encountered the need for obtaining other evidence, such as statements by witnesses who were not involved but present in the incident site, sequestration of video footage or the conduct of new forensic examinations, to balance the administration of the investigation process by ensuring impartiality and certainty in decision-making.

4) In all of the cases addressed above, we found that prosecutors classified and interpreted violence exercised by public officials, claimed by citizens and persons deprived of their liberty, as an element of the penal offense "Committing arbitrary actions," envisaged by article 250 of the Penal Code, although in all cases, there is a lack of the admission of the person's being deprived of liberty, caused by these penal offenses, which represents an essential element for the juridical qualification and the existence of this penal offense.

- **Based on the review of judicial documentation at the Elbasan Judicial District Court, we found that:**

1) Referring to the Register of Penal Decisions for the years 2011, 2012 and 2013, it resulted that during the period 2011-2013 no penal decisions had been taken for a violation of articles 86, 87, 250 and 314 of the Penal Code.

The reality reflects a different and disturbing picture based on AHC data. During the same period, the Legal Clinic of AHC addressed 20 complaints received from IEPD Peqin, an institution under the territorial competence of the Elbasan Judicial District Prosecutor's Office and Court, which dealt with violence used in prison by personnel, failure to provide health services in case of need, overcrowding, poor conditions in prison/pre-trial detention facilities, etc., which potentially represent circumstances for a violation of article 3 of the ECHR, ECtHR practice and article 86 of the Penal Code.

2) Out of a total of 110 decisions, the Elbasan Judicial District Court understood and applied correctly provisions 90 "Other intentional injuries" and 248 "Abuse of office" of the Penal Code, given that none of the cases addressed in these decisions contained any objective or subjective elements of the penal offense of Torture, envisaged by article 86 of the Penal Code.

3) In decisions regarding article 90 of the Penal Code, the active and passive subject were general and the violence did not surpass the level of minimal harshness required the by commission of the penal offense of Torture, as found in the medical forensic examination acts. The health condition and physical or mental effects on the injured individual had been evaluated up to 9 days of temporary incapacitation for work because they appeared very light. About 90% of the cases had been dropped because of the failure of the petitioning injured individual to appear.

4) In cases related to article 248 of the Penal Code, the circumstances did not have to do with the use of violence causing serious health conditions or effects on the mental and physical health of the injured individuals, but rather with the use of competences of officials, causing harm to the economic interests of other citizens.

III. ANALYSIS OF THE CONCEPTS AND PRACTICES WITH REGARD TO THE PENAL OFFENSE OF TORTURE, INHUMAN OR DEGRADING TREATMENT

3.1 Analysis of some concrete cases, beyond the investigative and judicial practice taken under review

As the above figures show, the country lacks a developed investigative and judicial practice with regard to the penal offenses envisaged by articles 86 and 87 of the Penal Code. For that reason, the Constitutional Court has deemed it reasonable to look at judicial practice in this regard in Decision No. 3, dated 11.02.2004. It draw attention with regard to the narrow concept that exists in the country's justice bodies with regard to the understanding of article 86 of the Penal Code, considering it a subject of this crime only when perpetrated by a public employee and not by individuals (*who do not act in a capacity of officials).*This decision of the Constitutional Court takes under review a penal case reviewed by all levels of the judiciary, with the object being the petition submitted by the High Court with regard to the compatibility with the Constitution of articles 86 and 87 of the Penal Code *(which deals precisely with torture and its consequences).*

Referring to the Universal Declaration of Human Rights, international conventions and the practice of the European Court of Human Rights, the Constitutional Court argues that the penal offense of Torture (*when proven)* is committed *"not only by persons acting in an official capacity but also beyond that capacity, i.e. by private persons."* The prohibition of torture in the context of sanctioning human rights in international acts represents a guarantee for citizens not only against state abuse but also against abuse by individuals. Therefore, it is the duty of every state to provide protection through legislation and other measures that may be considered necessary against actions that are prohibited by international acts *"…independently from whether they are caused by persons acting in an official capacity, beyond such official capacity or in a private capacity."* Furthermore, the honorable court cites the case of A. v. United Kingdom, whereby the ECtHR concludes that *"the obligation of state parties under article 1 of the Convention to ensure anyone under its jurisdiction*

the rights and freedoms expressed in the Convention combined with article 3 of it, requires state parties to take definite measures to ensure that individuals under their jurisdiction are not subjected to torture or inhuman, degrading treatment, including maltreatment perpetrated by private individuals."

The Constitutional Court concludes that, for as long as the prohibition of torture and maltreatment is established as a human right and as long as human rights are considered inseparable, inalienable and inviolable, every person shall have the right to not be subjected to torture or maltreatment, independently from whether the person is in the hands of a public official or an individual. The obligation of state parties in international agreements to respect and ensure the prohibition of torture and maltreatment consists not only in the obligation of the state to protect its citizens against torture or maltreatment by public officials, but also the obligation to take measures to protect citizens against acts of torture or maltreatment committed by individuals.

- **Based on such a conclusion, the failure that may be noticed in the domestic laws of different countries to ensure adequate protection represents a violation of article 3 of the European Convention on Human Rights.**

With regard to the above, time after time, our society experiences incidents in which ordinary citizens commit violent and severe acts toward other individuals and these actions may be qualified as torture or inhuman or degrading treatment. An article published in the print media[21] portrayed the case of a citizen (A.B.) who, in collaboration with others, had taken a person hostage, had tied him up with wire and had tortured him in an inhuman manner because he suspected the man had hidden a quantity of narcotic plants.

The orientation of domestic judicial practice toward the fulfillment of standards that have been set out by international applicable in our country with regard to the offenses of torture and inhuman and degrading treatment dictates the need to adjust relevant domestic legislation because it appears to have problems, overlapping and lacks necessary clarity. Also, there is a need to qualify justice system and law enforcement employees with the standards in this regard.

In order to continue this analysis, we will pause to address a concrete case, addressed by justice bodies, that AHC followed. On 23.07.2013, citizen H.T.

21 Panorama Newspaper, 08.07.2015

filed a criminal report in the internal Control Service of the Korça Regional Police Directory saying that his father, the injured Xh.T., suspected of committing robbery, was maltreated by two police officers of the Erseka Police Commissariat (citizens E.B. and F.S.). Penal proceedings began toward these persons according to article 250 of the Penal Code; the medical forensic examination act no. 500, dated 23.07.2013, reached the conclusion that the physical injuries of the injured individual were categorized as injuries that caused temporary incapacitation for work for up to 9 days (article 90/2 of the Penal Code). By decision no. 16.06.2014, the Prosecutor decided to drop this penal proceeding.

Responding to our inquiry, in October 2014, the prosecutor's office notified AHC that by decision of the senior official of the Korça Judicial District Prosecutor's Office, the decision for "Dropping the case" had been invalidated and the investigations on these penal proceedings would continue. Upon the conclusion of investigations, the case had been sent for adjudication to court with the charge "Committing arbitrary actions," according to article 250 of the Penal Code.

By Decision no. 155 (26), dated 13.01.2015, the Korça Judicial District Court decided to declare the two police officers guilty and sentenced them to 6 (six) months of imprisonment. Pursuant to article 406 of the Penal Code, the Court reduced 1/3 of the sentence, which was reduced to 4 months of imprisonment for each of them. Pursuant to article 63 of the Penal Code, the execution of the imprisonment sentence was cancelled and, in the end it was decided that they would carry out 60 hours of labor for public interest within two months. We would hereby bring to attention the fact that article 250 of the Penal Code, of which the two defendants were accused, envisages a sentence by fine or imprisonment up to 7 years.

While analyzing the acts of the adjudication, from the standpoint of indicators related to torture and inhuman treatment, as well as the criteria for the investigation and adjudication, which have been established by ECtHR (see above in pages 9-10 of this research), we reach the conclusion that:

First, it results that the unlawful actions of the defendants had been qualified as "Committing arbitrary actions," article 250 of the Penal Code, although they did not infringe upon the freedom of the injured person, which is a qualifying element of this penal offense. The injured individual was deprived of liberty at the time physical violence was used on him and the exercised violence seriously violated the physical and mental integrity and health, both of which are particularly protected by article 86 of the Penal Code. The evidence administered in court and the medical forensic examination report no. 500, dated 23.07.2013, showed that the offense committed by the police officers contained elements of inhuman treatment, per article 86 of

the Penal Code. The examination report states: *"On the body of the victim, we found several hematomas and ecchymosis of different forms and dimensions as well as in the lower eyelids, arms and chest and a hematoma on the left of the chest.We also found scleralhemorrhage of the left of the eye, a concussion of the head and body. 2. The injuries were caused by non-sharp objects. 3.The injuries described above are categorized as those of paragraph two of article 90 of the Penal Code, which require up to 9 days."* The contents of this Report verify that the victim had been maltreated in an inhuman manner during his accompaniment to the Commissariat.

Second, it results that the injured individual did not have any injuries until the moment he was taken from the Përmet Police Commissariat for accompaniment to the Erseka Police Commissariat. The injured individual was maltreated *(punches and kicks against the handcuffed injured individual)* at the time he was taken in custody by the defendants. Violence continued even after the injured individual was brought in the transport vehicle and along the way to Erseka. Citing the injured individual, the Court affirms that the defendants had made a stop on the way and had entered a bar in Leskovik claiming that he was the person who had stolen the animals, thus prejudicing the injured individual in order to lower his dignity in front of co-villagers. In these circumstances, the court should have oriented the judicial investigation by shifting the burden of proof to the defendants who would have to prove that the violence had not been exercised because of the charges that the victim was suspected of and his situation as a detained person. The court should also have manifested a reasonable approach to the investigation of the claims of the injured individual.

Third, with regard to the subjective aspect, the defendants acted intentionally and in collaboration with one another. There appears to have been no legal cause for exercising violence on the victim, while they were carrying out their duties to accompany him to the commissariat. This shows not only the high threat that the defendants posed, but also the wrong concepts they have regarding the exercise of police functions, which are in contravention of the principles of the democratic society and state.

Fourth, in the above circumstances, deciding on a final sentence of 60 hours of labor for public interest, for such a case, does not appear to match the threat posed by this penal offense or the need to prevent such phenomena that are quite spread in the country. In particular, what draws attention is the position of the prosecutor during the adjudication of this case who manifested striking bias in support of the defendants. In the final conclusions, the prosecutor agreed with the request of the defense lawyer of the defendants and together they requested the suspension of the imprisonment sentence and the obligation of the defendants to carry out labor for public interest, in the amount judged by the court. The court accepted this request and the

defendants were rendered the above-mentioned sentence.

3.2 Practical and legislative unclarity regarding the crime of torture

The work practice of domestic justice bodies indicate that in the case of the use of physical and psychological violence on citizens by official and public employees, their qualification according to article 250 of the Penal Code is considered the most accurate legal solution. This is the case for a number of reasons, but also because of the fact that investigation bodies do not pause to investigate in a comprehensive and objective manner the cause, circumstances, and reason why violence was used, its duration, the characteristics of the victim, the victim's health condition, the physical and psychological consequences suffered, etc. Based on the above, the review of cases recommended by the Ombudsman for the years 2010 and 2011, as well as the cases of violence addressed in this research study from the work practice of the Tirana and Elbasan Judicial District Prosecutor's Offices, it results that **investigations on these cases has been superficial and not profound enough as to determine the full circumstances of the cases**.The process did not take the necessary time to carry out the necessary investigations, **especially to obtain all testimonies that would help portray the situation in an impartial manner.** It results that in some cases, **the medical forensic examinations were not carried out in order to establish on time the injuries caused to the victims**. Investigative actions have always been realized by Judicial Police officers, delegated by the case prosecutor, thus demonstrating an underestimation of incidents of this nature. In other words, **the processes have not manifested a reasonable approach to verify and investigate the claims of the injured individuals in an objective manner.**

It is our opinion that penal offenses of torture and inhuman, degrading treatment are dangerous because they violate the very essence of the democratic state. They infringe upon not only the rights of the injured citizen, but also public interest, which requires official employees to fulfill their duties in respect of the rights of citizens. In these cases, the prosecutor should undertake all possible measures for the investigation of the case to be realized by persons with adequate professional capacities and that the investigation fulfill the standards established by ECtHR practice with regard to these penal offenses. In such cases, we would recommend that prosecutors, depending on the significance of the case, undertake investigations themselves or carry out frequent inspections regarding the investigation of cases and issue concrete instructions for objective and enhanced investigations, in accordance with the standards that have been established by the practice of ECtHR.

Referring to the jurisprudence of the ECtHR, **in any case when the violence is used by police officers to the detriment of accompanied, detained, arrested, those in pre-trial detention and persons serving imprisonment sentences, the burden of proof shall be on the state authorities, where the**

maltreated person is located, in order to prove that they are not guilty of exercising the violence and to document and alert competent authorities of the observed violence.[22]

During the monitoring, we noticed that police officers, accused of exercising violence, in order to justify themselves or to alleviate their responsibilities although they did not deny the committed actions, claimed to have been insulted by the victim, that the detained/arrested persons resisted and did not agree to be accompanied, and that the latter were the first to confront the police, etc.Without wanting to state that these claims were not true, during the study of the acts produced by justice bodies, we found that these claims were not accepted apriori and were not investigated in an objective manner. On the other hand, we noticed that the victims were not provided adequate possibility to oppose or clarify those claims by the police officers. It is our opinion that this is a problem that requires greater attention, both in preliminary investigations and in the adjudication of cases of this nature.

AHC finds that an erroneous practice has been created whereby the acts of reported maltreatments, including those containing visible elements of torture or inhuman, degrading treatment, are classified by justice bodies almost always as penal offenses of “Committing arbitrary actions,” per article 250 of the Penal Code.

Article 250 of the Penal Code states: *“Committing acts or giving orders that are arbitrary, by an official acting in a state function or public service while exercising his duty, **which affect the freedom of citizens**, is punishable by a fine or up to seven years of imprisonment.”*

As may be seen from its content, this provision targets juridical relations that regulate the orderly exercise of duties so that the freedom of citizens is not unjustly infringed upon. In other words, the penal provision has been envisaged as a protection measure for the right to individual freedom, envisioned by the Constitution. However, while looking at the work practice of justice bodies, we notice that the application of this provision, in many cases, is done in an erroneous way, for cases that are not related to the violation of the right to individual freedom of citizens. The impression is created as if this erroneous qualification is done in order to avoid the implementation of article 86 of the Penal Code. This fact has also noted by international bodies, which have cited it in their reports. Thus, **UN CAT, in its report of 2012 requested, expressly, from Albanian authorities that the above practice is no longer used.**

22 See Aksoy v. Turkey, December 18, 1996, ECtHR

Besides disputable work practices of justice bodies with regard to the penal offenses of torture, inhuman, degrading treatment, it appears that domestic legislation also presents some problems, which need to be improved. Article 86 of the Penal Code envisages that, *"Intentional committal of actions, as a result of which a person was subjected to **severe physical or mental suffering**, by a person who exercises a public function or incited or approved by him, openly or in silence, with the purpose: a) of obtaining from him or from another person information or confessions; b) of punishing him for an action committed or suspected to have been committed by him or another person; c) of intimidating or pressuring him or another person; ç) of any other purpose based in any form of discrimination; d) of any other inhuman or degrading action; is punishable by imprisonment from four up to ten years."*

On the other hand, article 314 sanctions that *"Use of **violence** by the person in charge of an investigation to force a citizen to make a statement, give testimony or confess his guilt or someone else's, is punishable by three to ten years of imprisonment."*

Based on our reviews, we did not see article 314 of the Penal Code have any application in the investigation and adjudication practice to date. Should such cases present themselves, they would contain elements of torture inthe form of inhuman treatment or insult of dignity, becaue the Penal Procedure Code, as is known, does not force the defendant to speak or make self-incriminating statements. It appears that the contents of article 314 of the Penal Code are entirely reflected in article 86 of the Penal Code. Thus, the object, subject and subjective element of these penal offenses are the same and the only difference lies in the objective element, because article 314 does not envisage severe physical mental suffering of the victim, as stipulated by article 86 of the Penal Code. On the other hand, we know that article 86 of the Penal Code, although it is titled 'Torture,' it includes unlawful actions, which in international acts have been qualified as inhuman or degrading treatment. As we noted at the beginning of this research study, where we analyzed these international acts, the difference between torture and inhuman, degrading treatment lies in the intensity of violence that is used.Article 16 of the Convention against Torture, Other Cruel, Inhuman or Degrading Punishment or Treatment, which the Republic of Albania adhered to in 1993, requires the State parties to prevent *"other actions that constitute cruel, inhuman or degrading punishment or treatment, which are not acts of torture, as established by it in article 1, when such actions have been committee by an official person or any other person acting in an official capacity, or with his encouragement or expressed or silent acquiescence…"* Thus, since the Convention does not envisage definitions of actions that are qualified as *cruel, inhuman or degrading punishment or treatment,* **it is inferred that the actions not included in the meaning of torture shall belong to this lighter category.**

In order to avoid the confusion created in the practice of justice bodies, but also the contradictions in domestic legislation, **we suggest that it is appropriate to review the provisions of the Penal Code in order for them to clearly and separately address the penal offense of torture and that of inhuman or degrading treatment.**

We think that such a formulation would serve more enhanced investigation to discern the use of violence that is not committed in the circumstances and with the elements required for the penal offense of torture.

Besides, legislation needs to envisage, more clearly, the legal tools and ways necessary, in order for every citizen claiming a violation of the right envisaged by article 25 of the Constitution and article 3 of the ECHR to not be subjected to torture and inhuman treatment may have the opportunity to defend himself and demand the interruption of such treatment as well as remuneration for the violation of this right.

3.3 The treatment and special position of the victim during the adjudication and investigation of the penal offense of torture

It is essential that police, prison and justice authorities and bodies ensure that all cases of maltreatment by law enforcement officers are punished with determination, investigated and sentenced according to the law. In these cases, failure in effective and efficient investigation and prosecution, and the right adjudication of charges of maltreatment contributes to a reduced citizens' confidence in law enforcement authorities and an expansion of the phenomenon of impunity. The instructions of the CoE's Council of Minister's Committee to uproot impunity in cases of serious violations of human rights envisage that, *"State parties will fight impunity seeing it as a matter of **justice for the victims,** as a way to deter human rights violations and for the purpose of **protecting the rule of law and public trust in the justice system."***[23]

Based on monitoring by AHC through the years in the justice bodies, but also on media reports, we have learned that there have been cases when defendants claim during adjudication that they have been maltreated during preliminary investigations. There are numerous cases that have been made public in the media whereby, although the defendant has not displayed such claims, his physical injuries have been very evident during appearance in court. Furthermore, the National Mechanism for the Prevention of Torture at the Ombudsman and the Albanian Helsinki Committee have verified

23 Report by the Council of Europe's Commissioner on Human Rights, following the visit to Albania during September 23-27, 2013

numerous complaints about maltreatment, mainly but not only by persons detained by policeand have informed the responsible state institutions about these situations.

Meanwhile, the CPT, in its Report on 2012, with regard to the findings of the visit conducted in 2010 in Albania, notes that it has been made aware of numerous claims of physical and psychological maltreatment of persons suspected of committing penal offenses, by the police, including of minors. The claims had to do mainly with maltreatment committed during the questioning process for the purpose of extracting information or making persons admit guilt. The CPT made several recommendations on this issue, particularly with regard to the access that detained/arrested persons should have to a lawyer or medical doctor, in such cases, with regard to making detainees aware of their rights, the maintenance of records during detention/arrest and regarding problems related to minors. In the same report, the CPT notes the lack of effective investigation into claims for maltreatment, even in cases when these are presented before a judge. This international body emphasizes that **anytime a suspect fort the committal of a penal offense appears before judicial authorities and makes claims for maltreatment, these claims should be recorded in a written form, the conduct of a medical forensic examination should be immediately ordered (including, if necessary, a forensic psychiatrist) and the necessary steps should be undertaken to ensure that the claims are investigated in the proper manner. This position should be taken independently from whether the person displays visible injuries or not.** Furthermore, even in the cases when there is no expressed claim for such maltreatment, competent authorities should order a medical forensic examination anytime there is reason to believe that the person may have been a victim of maltreatment. The careful and meticulous documentation of medical records would greatly facilitate the investigation of potential cases of maltreatment and the holding of perpetrators accountable. **If the use of violence is verified, then a penal case should be initiated, even when the injured individual does not request such a thing.** However, based on information presented in this research study, it results that the prosecution bodies in Tirana and Elbasan have opted for not initiating penal prosecution even in cases of accusations of torture and inhuman, degrading treatment.

The European Court of Human Rights has consolidated jurisprudence according to which, the failure of state structures to carry out an official effective investigation in cases when *"an individual raises a controversial claim for serious maltreatment by police or other similar bodies"* represents a violation of the ECHR. Such an investigation should lead to the identification and punishment of those responsible, without which the general prohibition of torture and other forms of maltreatment would be ineffective in practice

and would lead to effective impunity for abuse.From this standpoint, it is intolerable that the prosecutor or judge remain silent when presented, in the exercise of their duties, with a person under investigation or being tried, under arrest, who displays physical or psychological injuries. This is a position that is openly in violation of the fulfillment of duties by these state officials.

In the decision of 2013 on the case *Kaçiu and Kotorri,* which includes, *inter alia,* torture used by police toward the petitioner while being questioned, the ECtHR spoke of violation of Article 3 of the ECtHR by Albania. The Court judged that the petitioner had been beaten so brutally that **he had been sent to the courtroom being supported by police officers. The Court further noted that, although domestic authorities were aware of the fact that the petitioner had been beaten, the prosecutor undertook no step to investigate the serious and repeated claims of the petitioner. Moreover, the judge, in the preliminary hearing, did not demand the investigation of the physical condition of the petitioner, which was apparently not good, although the latter was not able to even stand on his feet or walk.**

Based on the numerous complaints that the Ombudsman, AHC and other organizations operating in this area, it results that the cases of claims regarding use of violence in the premises where persons deprived of their liberty are detained and treated, are numerous. For that reason, it is indispensable that persons placed in isolation, beforehand, but also later are checked up time after time by a doctor. There may be cases of pressure on doctors to not establish the real health condition of the isolated person. Such cases (if proven) should be followed by charges of torture, or in the form of inhuman treatment, depending on the circumstances of the concrete cases. It is not possible to view claims that actions undertaken to preserve the security of the institution or because of the acute "threat" of persons deprived of their liberty as justified.

Overcrowding has been and remains a problem in the country in prisons and detention facilities. During 2015, the phenomenon assumed disturbing dimensions and surpassed the overcrowding level of 30% of our prison and detention facility capacities. This situation is accompanied by harmful consequences to the health or spiritual condition of persons deprived of their liberty, especially the sick, elderly, women, minors, etc.It is the duty of relevant state structures to alleviate this phenomenon, using all the possible legal tools, such as release on bail, for cases demonstrating rehabilitation and no longer posing a threat to society; more frequent application of alternative sentences to imprisonment; amnesties; pardoning of sentences; release when isolation threatens the life and health of the person deprived of his liberty. The courts should be well informed about the situation in prisons and

detention facilities and keep it in mind at the moment they decide on security measures and sentences for the defendants they adjudicate. The prosecutors and courts as structures of the judicial power, an important one in the state, should contribute better to the fulfillment of the obligations that the state has for respecting the rights of citizens, wherever they are. This has been and continues to be the position taken by the European Court of Human Rights.

IV. CONCLUSIONS

- Justice bodies have not carried out any research with regard to the practice of the investigation and adjudication of the penal offense of "Torture" and the High Court has not issued any unifying decision in this regard.
- The prosecution bodies, especially those of Tirana, are not adequately open so as to enable transparency over their activity and the possibility of becoming familiar with it, for the purpose of research studies undertaken in the penal area.
- Penal policy implemented by justice bodies does not respond to the needs of the country at present for tackling and preventing the phenomenon, at a time when this phenomenon appears spread, especially in premises where persons deprived of their liberty are accommodated.
- Justice bodies do not have a correct understanding of the penal offense of "Torture" and sufficient knowledge about the practice and standards created by ECtHR in this area. Furthermore, they do not have the necessary sensibility with regard to the social threat posed by these penal offenses, which reduce citizens' trust in the system and the activity of public officials.
- It results that cases denounced according to article 86 of the Penal Code have been qualified en masse, in a suspicious manner, as "Committing arbitrary actions," or "Abuse of office," according to the articles 250 and 248 of the Penal Code, which have nothing to do with protection against torture, sanctioned by article 25 of the Constitution and article 3 of the ECtHR. Prosecutors have underestimated these penal offenses and in no case have they carried out the pertinent investigations themselves.
- For these cases, investigations have been superficial and not deep enough as to clarify the full circumstances of the cases. Often times,

the process does not take the necessary time required to carry out the necessary investigations, especially for obtaining all testimonies that would provide an impartial rendering of the situation. It results that in some cases, the medical forensic examination was not conducted in order to ensure a timely recording of the injuries of the victim, or there are delays in conducting this examination, which reduces the chances or obstructs the accurate definitions of injuries and the health condition of the injured individuals.

- In general, a reasonable approach to verify and investigate with objectivity the claims of injured persons has not been manifested.

- It results that for the penal offenses containing elements of torture, inhuman and degrading treatment, very light sentences have been rendered, generally less than the minimum envisaged by law and that this is the result of complete consensus between prosecutors and judges.

- Prosecutors, in their decisions for rejecting penal prosecution and for dropping penal prosecution, do not cite clearly and nominally the subjects which, according to article 291, paragraph 2 and 329, item 1, of the Penal Procedure Code, have the right to appeal these decision in court. This makes it impossible to properly control the notifications by the prosecutors and creates room for denying interested subjects the right to become aware of the rejection or dropping of penal prosecution, or for exercising the right to appeal in court if they deem it appropriate.

- Penal legislation has not been aligned with the meaning that the ECtHR has given to the penal offenses of torture and inhuman, degrading treatment, and does not extend to private subjects who might commit such penal offenses. Also, domestic penal legislation, articles 86 and 87 of the Penal Code, has not been aligned with the standard established by the Constitutional Court by Decision No. 3, dated 11.02.2004.

- Article 86 of the Penal Code, although entitled “Torture,” includes also the offenses that, according to article 3 of the ECHR, are termed inhuman, degrading treatment, which differ from the first because of the lower level of violence that is exercised. On the other hand, the content of article 314 of the Penal Code has a subject only the persons tasked with the conduct of investigations and does not involve other public and private subjects who may perpetrate actions that include elements of torture. As a conclusion, we may say that our legislation does not provide a complete legal regulation for the penalization of all forms and subjects that carry out acts of torture and inhuman and degrading treatment.

- Law no. 8454, dated 04.02.1999, "On the Ombudsman," amended, which regulates the functioning of this body, with a special role in overseeing cases of torture and inhuman, degrading treatment, establishes that this institution **recommends** to the prosecutor's office to initiate investigations when it observes that a penal offense has been committed, but this runs contrary to the stipulation of article 281/1 of the Penal Procedure Code which **obliges all public official to file a criminal report** when, in the course of exercising their duties, or because of their functions or services, they become aware of a penal offense which is prosecuted by the initiative of the prosecutor's office.

- Our legislation does not envisage clear judicial means or ways to enable citizens to demand the interruption of torture and inhuman, degrading treatment, as well as to demand remuneration for their sustained injuries.

- The situation of domestic legislation, the disputable practice of the work of justice bodies in this field and the spread of the phenomenon are indications that demonstrate that state structures have failed to ensure adequate protection and represents a violation of article 3 of the European Convention of Human Rights.

V. RECOMMENDATIONS

- Justice bodies need to carry out research studies with regard to practices created in the course of investigations and adjudications of the penal offense of “Torture” and the High Court should, on that basis, prepare a unifying decision in this regard in order to provide proper guidance for rendering justice in this area. In particular, this honorable court should correctly orient justice bodies with regard to the distinctions between articles 86 of the Penal Code and articles 248, 250 and 314 of the Penal Code.

- The legislation that regulates the functioning of the prosecutor's offices should envisage provisions that enable transparency over the decision-making of these bodies and the access of subjects undertaking research in the area of their activity. The General Prosecutor's Office should orient its subordinate bodies to be open to cooperation in this regard.

- For the purpose of implementing a correct penal policy, toward fighting the phenomenon of torture and inhuman, degrading treatment, justice bodies need to become familiar in a regular basis with the reports by national and international oversight bodies in this field.

- Justice bodies need to be trained more in order to receive more knowledge about the correct understanding of the penal offense of “Torture,” as well as sufficient knowledge about the practice and standards created by the ECtHR in this area. They also need to increase their sensibility regarding the social threat posed by these penal offenses, which reduce citizens' confidence in the system and the activity of public officials.

- In particular, measures should be undertaken in order to improve the investigative activity in this area in order for it to be conducted in keeping with the standards created by the ECtHR and with a reasonable approach to verify and investigate with objectivity the claims of the injured individuals.

- Measures should be taken in order to orient properly the measure of sentences for this category of penal offenses in order for them to be in keeping with the social threat that they pose and avoid the massive practice of sentences under the minimum that is prescribed by law.

- The prosecutor's offices need to take measures in order to specify the content of their acts with regard to the rejection and dropping of penal prosecutions, citing clearly and nominally the subjects that, according to article 291, paragraph 2 and 329, item 1, of the Penal Procedure Code, have the right to appeal their decisions to court.

- Measures should be taken so that in the context of justice reform, penal legislation in this area is aligned with the meaning that the ECtHR has given to the offenses of torture and inhuman, degrading treatment, and have it extend to private subjects who may commit such penal offenses, as oriented by the Constitutional Court by Decision no. 3, dated 11.02.2004. Furthermore, our legislation should be completed with clear provisions that envisage the procedural judicial tools and ways to enable citizens to demand the interruption of torture and inhuman, degrading treatment to their detriment as well as to demand remuneration for what they have sustained.

- Law no. 8454, dated 04.02.1999, "On the Ombudsman," amended, should be amended in the part where it establishes that this institution **recommends** to the prosecutor's office to begin investigations, when observing that a penal offense has been committed, in order to unify it with article 281/1 of the Penal Procedure Code, which **obliges the filing of a criminal report by all public officials who,** in the course of exercising their duties or because of their functions or services, they become aware of a penal offense that is prosecuted by the initiative of the prosecutor's office.

- The overseeing bodies of justice bodies need to increase their attention in order to look with proper seriousness at cases when prosecutors and judges hush in situations whereby the defendant, how is under arrest, or the witness, present themselves before them with wounds and injuries, or claim to have been maltreated because of the penal prosecution or the testimony.

- In order to enable the objective reflection of violence suffered by persons who are deprived of their liberty, we suggest that: no citizen is accommodated in the internal premises of police institutions, detention facilities or prisons, without first being examined by a doctor, without the presence of other persons. A copy of the medical report should be made available to the examined person who should have the right to contest it.

- Look at legislation in order for abbreviated adjudications (according to article 406 of the Penal Procedure Code) is not implemented for some crimes that pose a high level of social threat, such as torture, and that rejection of penal prosecution is disallowed when a medical report has found physical or psychological damage on the injured person.

Albanian Helsinki Committee December 2015