

ROMANIA

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

Romania has a population of about 23 million people. There is a substantial Hungarian and German minority and the largest group of Roma in Europe.

The present Constitution was adopted on 8 December 1991 following the overthrow of the Communist regime under Nicolae Ceausescu, which ended forty-two years of Communist rule. The Constitution declares Romania to be a unitary Republic and a democratic and social State governed by the rule of law. The rights of minorities are recognised and protected¹ and Title II of the Constitution sets out fundamental rights, freedoms and duties. The Constitution guarantees, *inter alia*, the right to life, the prohibition of torture and the inviolability of the individual and security of the person.² It also accords citizens the right to petition³ and the right to a remedy.⁴

The judicial system is composed of 179 courts of first instance in civil and criminal matters, 41 departmental courts and 15 courts of appeal. The courts of appeal exercise primary jurisdiction over the most serious criminal offences and hear appeals lodged against decision of the courts of first instance in criminal and civil cases.⁵ The Supreme Court is the court of final instance in respect of criminal, civil and administrative cases and has the power to clarify certain questions of law.⁶ The departmental courts, the courts of appeal and the Supreme Court each have administrative litigation divisions. The Constitutional Court is empowered to consider the constitutionality of laws before their promulgation and has jurisdiction to rule on the extent to which the law or ruling in question respects the fundamental rights and freedoms guaranteed by the Constitution.⁷ The Constitution provides for the independence and irremovability of judges.⁸

¹ See Article 6 of the Constitution (translation taken from www.uni-wuerzburg.de/law/ro00000_.html).

² See Article 22 and 23. Article 22 reads: "Right to life, to physical and mental integrity (1) The right to life, as well as the right to physical and mental integrity of person are guaranteed. (2) No one shall be subjected to torture or to any kind of inhuman or degrading punishment or treatment."

³ Article 47: "1) Citizens have the right to apply to the public authorities by petitions formulated only in the name of the signatories; 2) Legally established organizations have the right to forward petitions, exclusively on behalf of the collective body they represent; ... 4) The public authorities are bound to answer petitions within the terms and under conditions established by law."

⁴ Article 48: "1) Any person aggrieved in his legitimate right by an administrative act or failure of a public authority to solve his application within the legal term is entitled to the acknowledgement of his right, annulment of the act, and remedies for the damage; 2) The conditions and limits on the exercise of this right shall be regulated by an organic law; 3) The state bears patrimonial liability, according to the law, for damages caused by judicial errors in criminal cases."

⁵ Article 125 (1) of the Constitution and Article 10 of Law no. 92/1992.

⁶ See Law no. 56/1993 on the Supreme Court.

⁷ Article 144 of the Constitution.

⁸ Article 123 of the Constitution.

There is also a system of military courts, which consists of military courts, territorial military courts and the military court of appeal. They exercise jurisdiction over offences committed by military personnel and certain offences committed by civilians.⁹

1.2. Incorporation and status of International Law in domestic law

Romania has ratified the following relevant international human rights and humanitarian law treaties:

- Genocide Convention (2 November 1950)
- Geneva Conventions (1 June 1954) and Additional Protocols I and II to Geneva Conventions (21 June 1990)
- CERD (15 September 1970)
- International Covenant on Civil and Political Rights (9 December 1974); First Optional Protocol (20 July 1993) and Second Optional Protocol (27 March 1991)
- International Covenant on Economic, Social and Cultural Rights (9 December 1974)
- CEDAW (7 January 1982)
- CRC (28 September 1990)
- Convention against Torture (18 December 1990)
- Refugee Convention (7 August 1991)
- European Convention for Human Rights (20 June 1994)
- European Convention for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment, (4 October 1994)
- Rome Statute of the International Criminal Court (11 April 2002)

International treaties ratified by Parliament become part of Romanian law and can thus, in principle, be directly invoked and enforced before and by Romanian courts.¹⁰ In practice, Romanian courts have not applied international treaty provisions directly, even though lawyers have invoked them in some instances, but have used international treaties in interpreting national laws referring to human rights.¹¹

Article 20 of the Constitution stipulates: "(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is party to. (2) Where any inconsistencies exist between the covenants and

⁹ The system comprises territorial military courts and a military court of appeal.

¹⁰ Article 11 (1) of the Constitution: "The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to. (2) Treaties ratified by Parliament, according to the law, are part of national law."

¹¹ "As a matter of fact, the Constitutional amendment could be realized only on the initiative, with the procedure and in the limits provided in art. 146 – 148, Title VI Constitutional Review, so that ratification by Romania of an international treaty, prior to or after the entry into force of the Constitution, is relevant only in the interpretation of the domestic norms referring to human rights...it is required to the Court, as an interpretation, to declare a constitutional text out of the human rights international treaty framework. In such a situation, admitting the exception, the Court itself reviews the Constitution. Thus the Court extends itself the borders of its own competences." Constitutional Court Decision 350/19.12.2001, Official Monitor, 117/2002. [Unofficial translation provided by Romanian human rights lawyers.]

treaties on fundamental human rights Romania is party to, and internal laws, the international regulations shall take precedence.”

2. Practice of Torture: Context, Occurrence, Responses

2.1. The practice of torture

Torture was state-sponsored during the communist regime. While physical torture was prevalent in the period from 1947 – 1964, torture methods became more refined after 1964. Torture was used by state agents, i.e. the militia (police), the *securitate* (secret police), the military and prison guards, as a means of state repression directed against political opponents of the regime and minorities. The organisation of former political prisoners has 101,000 members most of whom were subjected to torture or ill-treatment during the communist times.

There have been several allegations of torture since 1990. Instances of ill-treatment of detainees by the police are frequently reported, and according to the survey of a Romanian human rights organisation, one in three prisoners complained about severe beatings in police lock-ups.¹² The perpetrators are commonly the police who are alleged to use physical violence, mainly beatings but in some instances also electric shocks, mainly to extract confessions or obtain information.¹³ The victims are suspects of crimes, often minor offences. Members of the Roma community appear to be specifically targeted. In several cases children have reportedly been seriously beaten or subjected to other forms of ill-treatment by police officers. There have also been several cases of death in custody that appear to have been as a result of torture.¹⁴ Moreover, prison conditions, mainly resulting from extreme overcrowding, have repeatedly been described as unacceptable.¹⁵

2.2. Domestic Responses

After 1990, Romania took several measures aimed at addressing human rights violations during the Ceaucescu regime.¹⁶ The Government has recently carried out a number of reforms impacting on human rights, such as the de-militarization of the police force through the provisions of the Policeman Statute,¹⁷ which entered into force on 24 August 2002. These reforms were undertaken largely to ensure Romania’s compliance with conditions set by the European Communities in respect of the envisaged accession to the European Union. There have also been several training programmes for police and prison staff on human rights, including the prohibition of torture. However, the Government does not appear to have encouraged investigations into cases of alleged torture nor does it appear to have

12 APADOR-CH (Association for the Defence of Human Rights in Romania – the Helsinki Committee), Annual Reports, 1993-2001, section on “police” and “prisons” at www.apador.org.

13 See for individual cases, Report of the Special Rapporteur on the question of torture, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1999/32, Addendum, Visit by the Special Rapporteur to Romania, UN Doc. E/CN.4/2000/9/Add.3, 23 November 1999, paras.16-23. See, also, the Annual Reports of APADOR-CH, *ibid*.

14 See APADOR-CH, Annual Reports, *supra*.

15 See *ibid*. and the Report of the Special Rapporteur on Torture on his visit to Romania. *supra*.

16 See *infra*, V.

17 Law no. 360 of 6 June 2002.

taken steps to implement the Istanbul Protocol or to provide reparation to victims of torture and ill-treatment.

2.3. International Responses

Romania has been visited four times by the European Committee for the Prevention of Torture (CPT) but has only accepted the publication of one of the CPT reports, relating to its visit in 1995.¹⁸

The CPT received numerous complaints about ill-treatment at the hands of the police. The complaints related, particularly to forced confessions during or shortly after arrest. The CPT found that numerous victims were too afraid to complain about ill-treatment and, in cases where they had complained, that their complaints had not been investigated thoroughly by military prosecutors who were until recently in charge of such investigations.¹⁹

The Special Rapporteur on Torture who had previously transmitted numerous allegations to the Romanian Government concerning ill-treatment and torture of detainees by the police, found, following his visit to Romania in 1999, that incidents of torture and ill-treatment were less routine but still persistent, albeit sporadic, cases of police abuse. Moreover, he expressed his concerns about the ineffective system of investigation of complaints by military prosecutors.²⁰

The Human Rights Committee stated in 1993 that it was: "... concerned over abuses committed by the police, such as ... ill-treatment of prisoners. In this regard, the Committee notes that the number of investigations, charges and convictions are extremely few compared with the number of complaints received or abuses reported; that penalties prescribed by law are not commensurate with the gravity of the crimes committed; and that compensation to the victims of abuses is not always forthcoming, all of which contribute to an atmosphere of impunity."²¹

The Committee against Torture has not had the chance to comment on the conformity of Romanian law and practice with its obligations under the Convention since 1992 as Romania has only submitted its initial report but not the second and third reports, which were due in 1996 and 2000 respectively.²²

The Commission of the European Communities regularly monitors Romania's progress towards accession to the European Union. In its 2001 Report, it noted that:

¹⁸ Romania was visited by the CPT in 1995, 1999, 2001 and 2002.

¹⁹ *Rapport au Gouvernement de la Roumanie relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Roumanie du 24 septembre au 6 octobre 1995*, CPT/Inf. (98) 5 (Partie I), 19 February 1998, para. 16 et seq.

²⁰ See Report of the Special Rapporteur on torture, *supra*, paras. 6 et seq.

²¹ Concluding comments of the Human Rights Committee: Romania, UN Doc. CCPR/C/79/Add.30, 5 November 1993, para.11. In its 1999 observations on Romania's country report it expressed concern: "...at the lack of legislation invalidating statements of accused persons obtained in violation of Article 7 of the Covenant;" and noted that the "State party should adopt appropriate legislation that places the burden on the State to prove that Statements made by accused persons in a criminal case have been given of their own free will, and that statements obtained in violation of Article 7 of the Covenant are excluded from the evidence." Concluding Observations of the Human Rights Committee: Romania, UN Doc. CCPR/C/79/Add.111, 28 July 1999, para.13.

²² See CAT UN Doc. A/47/44 (1992) for the consideration of Romania's initial report by the members of the Committee against Torture.

"There continue to be consistent and credible reports of *degrading treatment by the police*- in particular when dealing with persons belonging to the Roma minority. The use of physical violence to extract confessions is not unusual. The Romanian police have a comprehensive and systematised management approach to dealing with complaints. However, successful prosecutions against police officers are rare and internal police investigations have frequently been inconclusive."²³

There are also several cases pending against Romania before the European Court of Human Rights, some of which concern ill-treatment by the police and thus a potential violation of Article 3 of the Convention. At the time of writing, these had only reached the admissibility stage.²⁴

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Torture is expressly prohibited in Article 22 of the Romanian Constitution.²⁵ It is also prohibited as a matter of statutory legislation, in, for example, Article 267 of the Criminal Code,²⁶ added in 1990, Article 68 of the Criminal Procedure Code,²⁷ the Policeman Statute,²⁸ Law on the organisation and functioning of the police,²⁹ and the Law on the organisation and functioning of the Romanian Gendarmerie.³⁰

Article 267 of the Romanian Criminal Code provides for a specific offence of torture: "Pain or strong physical or psychic suffering intentionally caused to a person, especially in order to obtain from this person or from a third person information or confessions, to punish him for an act that he or a third person committed or is suspected to have committed, to intimidate or to exert pressure on him or on a third person, or for any reason based on a form of discrimination of whatever nature, when such pain or suffering is caused by the agent of a public authority or by any other person who acts under an official title, instigated by or with the express or tacit consent of such persons, is punished by from two to seven years' imprisonment."³¹

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The substantive law: Criminal offences, punishments and disciplinary sanctions

²³ Commission of the European Communities, 2002 Regular Report on Romania's Progress Towards Accession, SEC (2002) 1409, 9 October 2002, p.31.

²⁴ See Apador-Ch, Annual reports, *supra*, for further information.

²⁵ Article 22 (2) provides that "No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment."

²⁶ See text below III, 1. See also Article 5 of the Criminal Procedure Code.

²⁷ "It is forbidden to use violence, threats or any other constraints, as well as promises, encouragement with the purpose of obtaining evidence."

²⁸ Article 43 (d).

²⁹ Law no. 218 of 23 April 2002 which replaced the Law no. 26 of 12 May 1994.

³⁰ Law no. 116 of 5 June 1998.

³¹ Based on an English translation of the Criminal Code provided by the Ministry of Justice, cited in the Report of the Special Rapporteur, *supra*.

Torture is punishable by two to seven years imprisonment.³² If the torture results in bodily injuries requiring medical treatment as specified in Articles 181 or 182 of the Criminal Code, the prescribed punishment is 3 to 10 years of imprisonment. Acts of torture causing death are punishable by imprisonment of ten to twenty years or life. Article 267 of the Criminal Code furthermore provides that no exceptional circumstance, whatsoever, can be invoked to justify torture. There is no defence of superior orders, though lawful sanctions can act as a justification for torture.

Ill-treatment in the course of investigations or in respect of a detainee is subject to a punishment of one to five years imprisonment.³³ The crime of rape is punishable by imprisonment ranging from three to ten years and, in cases of rape in custody, five to fifteen years.³⁴ Homicide is, depending on the circumstances of its commission, punishable by 10 years to life imprisonment.³⁵ Torture also constitutes a criminal offence if it is one of the means by which genocide or a war crime is committed.³⁶

Romanian law specifically prohibits suspended sentences,³⁷ conditional discharges,³⁸ the imposition of non-custodial alternatives,³⁹ or any pardons⁴⁰ for acts of torture.

Disciplinary sanctions, such as the interdiction of certain rights, can be applied together with criminal sanctions.⁴¹ According to the Statute of the Police Officer, Law 360/June 2002), internal disciplinary measures ranging from warnings to dismissals can be taken only for misdemeanours.⁴² The decision of whether to suspend or dismiss a police officer is taken only after a final court judgment.⁴³ For the duration of the investigation and any trial, the suspect or accused police officer should be removed from the public eye and assigned to less visible tasks.⁴⁴ The imposition of any of these disciplinary measures is contingent upon the prosecutor opening an investigation.⁴⁵

2. The procedural law

2.1. Immunities

³² Article 267 (1) of the Criminal Code.

³³ See Articles 266(2) and 267 of the Criminal Code.

³⁴ Article 197 of the Criminal Code.

³⁵ See Articles 174 –176 of the Criminal Code.

³⁶ See Articles 357 and 358 of the Romanian Criminal Code.

³⁷ Article 81(3) of the Criminal Code.

³⁸ Article 86 (3) of the Criminal Code.

³⁹ Ibid.

⁴⁰ Article 5 of the Law no.137 of 24 July 1997 on the pardon of certain penalties.

⁴¹ See Articles 64-67 and 71 of the Criminal Code for complementary penalties.

⁴² See Articles 57 and 58.

⁴³ Article 65(1) of Law No. 360.

⁴⁴ Article 65(2) of Law No. 360.

⁴⁵ Article 228 of the Criminal Procedure Code.

The only immunities shielding perpetrators of torture from prosecution and punishment are presidential, parliamentary and magistrates immunity.⁴⁶

2.2. Statutes of Limitation

The criminal law provides for statutes of limitation for all categories of crimes with the exception of crimes against peace and humankind.⁴⁷ The limitation period is five years for ill-treatment, eight years for torture and aggravated torture, ten years for custodial rape and fifteen years for torture resulting in death.⁴⁸

2.3. Investigations

2.3.1. Criminal investigations

A victim of torture or ill-treatment has the right to lodge a complaint to the police or the prosecutor.⁴⁹ A complaint may also be made to the court if the perpetrator is known.⁵⁰

The office of the prosecutor is competent to investigate and prosecute crimes.⁵¹ As of 24 August 2002, this competence extends to alleged acts of torture and ill-treatment committed by the police or prisons officials which had previously been investigated and prosecuted by military prosecutors.⁵²

Criminal investigation and prosecution are governed by the legality principle, i.e. a prosecutor is required to open an investigation upon learning of facts that indicate that a crime had been committed, be it following a complaint, denunciation or through other sources.⁵³

The police, once notified that a crime has been committed, will file a report to the prosecutor about the steps to be taken. Depending on the contents of that report and the prosecutor's assessment of the situation, the prosecutor may either decide to cease the criminal investigation, in which case the prosecutor informs the complainant about his/her decision, or to send the file back to the police for further investigations.⁵⁴ Only the prosecutor can take a decision not to proceed. This decision must be based on one of the grounds envisaged by law.⁵⁵

⁴⁶ See Articles 84 and 69 of the Romanian Constitution as well as Article 12 on ministerial responsibility [Law No. 115 of 28 June 1999, reprinted on 20 May 2002] and Article 91 of the Law on judicial organization [Law No. 92/1992].

⁴⁷ Article 21 of the Criminal Code.

⁴⁸ See Article 122 of the Criminal Code.

⁴⁹ Article 222 of the Criminal Procedure Code. See Niels Uildriks, *Dealing with Complaints against the Police in Romania, Bulgaria and Poland: A Human Rights Perspective*, in: Netherlands Quarterly of Human Rights, Vol.19, No.3, 2001, pp.269-293.

⁵⁰ Article 279(2) of the Criminal Procedure Code.

⁵¹ Articles 209(1) and 216 et seq. of the Criminal Procedure Code.

⁵² See Law No. 360 of 6 June 2002 and Law No.218 of 23 April 2002.

⁵³ Article 209(3) of the Criminal Procedure Code.

⁵⁴ See Article 228 et seq. of the Criminal Procedure Code.

⁵⁵ See Article 10 of the Criminal Procedure Code.

If investigations proceed, the official is to be suspended from his function and may be taken into custody.⁵⁶ The prosecutor and subsequently the Courts, or the victim, may request a medical examination.⁵⁷ Only medical forensic institutions and qualified forensic doctors are entitled to prepare a medical report for the purpose of court proceedings.⁵⁸ If the prosecution or the court requests a forensic examination, expenses will be covered by the state.

The prosecutor has fifteen days from the date of receipt of the police's file, to indict the suspect, or to discontinue/close the investigation.⁵⁹

Anyone may file a complaint to the superior prosecutor against acts and measures taken in the course of investigations if these harm legitimate interests.⁶⁰ The state of the law is ambiguous as to whether a victim has, after exhausting all available avenues, any recourse to a court if the most senior prosecutor decides not to proceed with an indictment. The Criminal Procedure Code does not specify that victims have the right to challenge such a decision before a court,⁶¹ though the Constitutional Court has ruled that this should be possible,⁶² referring to Article 21 of the Romanian Constitution which provides for free access to justice. The Court requested parliament to amend the Criminal Procedure Code so as to bring it in line with its judgment.⁶³ Such a change would bring greater clarity in practice.

In addition to the right to request medical examinations and to challenge decisions of the prosecution taken in the course of the investigation, victims of crime, witnesses and informers also have a right to police protection.⁶⁴ Victims also have certain procedural rights during the investigation stage and at trial.⁶⁵

2.3.2. Role of the Ombudsman

Alternatively, victims can lodge complaints to the Ombudsman. The Ombudsman has the power to take up a case and to bring it to the attention of the Prosecutor General. However, he/she can only make non-binding recommendations and has no means of sanctioning a public authority for the failure to cooperate.⁶⁶

⁵⁶ Article 146 et seq. of the Criminal Procedure Code.

⁵⁷ Article 15 (a) of Government Ordinance no. 1 on the organization and functions of medical forensic institutions of 20 January 2000 as modified by Law no. 459 of 18 July 2001.

⁵⁸ Government Ordinance No.1/ 2000, on the medical forensic institutions organisation and functions

⁵⁹ Articles 261 et seq. of the Criminal Procedure Code.

⁶⁰ Articles 275-278 of the Criminal Procedure Code.

⁶¹ Article 278 Criminal Procedure Code.

⁶² Decision No. 326 of December 1997.

⁶³ Subsequently, a draft bill to that effect was passed by the Senate. At the time of writing this was with the Chamber of Deputies.

⁶⁴ Article 26(11) of the Law no. 218 of 23 April 2002.

⁶⁵ See Article 4 of the Criminal Procedure Code and infra 2.4.

⁶⁶ See Law No.35 on the Organization and Functioning of the Advocate of the People Institution (The Ombudsman Act) which provides that the Office of the Ombudsman has the power "to take up and distribute complaints filed by persons who have been aggrieved by public administration authorities through violation of their civic rights and freedoms, and to decide on such complaints." See the Report of the Special Rapporteur on Torture, E/CN.4/2009/Add.3, 23 November 1999, paras. 47 and 48.

2.4. Trials

In case of an indictment by the Prosecutor, civilian courts are competent to try individuals charged with torture, be they police officers or military personnel.⁶⁷

The judge will take a pro-active role in establishing the truth and witnesses will only be questioned via the judge.⁶⁸ The prosecution must convince the judge that the guilt of the accused has been established beyond any reasonable doubt.⁶⁹ A confession of the accused serves as evidence only to the extent that it is corroborated by facts and circumstances resulting from all of the evidence.⁷⁰ A victim may be heard as a witness, civil party or injured party.⁷¹

3. The Practice

3.1. Investigation and prosecution of torture committed before 1990

Since 1990, there are two types of investigations relating to torture, one concerns torture committed during the communist regime, the other concerns all other incidents of torture and ill-treatment committed thereafter.

In 1991, the Organisation for Former Political Prisoners lodged a complaint with the General Prosecutor, providing a list of 264 persons allegedly responsible for various crimes, including torture, during communist times. An investigation was initiated, but subsequently discontinued, ostensibly due to political pressure since a number of those implicated still wielded considerable influence. These investigations were never resumed. Most of these crimes, since they were committed before or in the 1980s can no longer be prosecuted because of the expiry of the statute of limitations.

Since 1990, there have been hardly any prosecutions. In the case of Gheorghe Ursu, a well-known political dissident who was systematically tortured in 1985 by members of the police forces and died as a result of that torture, a criminal investigation was initiated in 1990. The initial investigations by the Military Prosecutor lasted five years and ended when a former inmate, Marian Clita, confessed to having killed Gheorghe Ursu. However, doubts were raised about this confession in the light of strong evidence of police involvement. In 2000, Marian Clita and four high-ranking police officers were convicted (the latter for charges of abusing detainees). However, the sentence for Marian Clita was halved and no punishment imposed on the police officers as the Court applied a presidential pardon decree 11/1988. After public protests against this judgment, three further officers were charged in November 2000 with the murder of Gheorghe Ursu. However, in 2001 a Court upheld a

⁶⁷ This system has only been in place since 24 August 2002 whereas military courts were competent to try such cases under the previous system.

⁶⁸ See also Article 301 of the Criminal Procedure Code as for the rights of the prosecutor and other parties during the trial.

⁶⁹ See Article 64 of the Criminal Procedure Code which stipulates the type of evidence that may be taken into account .

⁷⁰ Article 69 of the Criminal Procedural Code

⁷¹ Article 82 of the Criminal Procedural Code. Article 24 of the Criminal Procedural Code stipulates that an injured party is the person who, as a result of the criminal act, suffered a physical, moral or material injury.

challenge of the defendants against the legality of proceedings and dismissed the case, a decision that was subsequently appealed by the Prosecutor.⁷²

3.2. Investigation and prosecution of acts of torture committed after 1990

i) Complaints

No comprehensive statistics have been published by Romania on the number of complaints of torture and ill-treatment and the outcome of investigations into same. According to figures provided to CPT by the office of the military prosecutor, there had been 1090 complaints of abusive conduct in 1994 and the first half of 1995, which resulted in criminal proceedings against 48 police officers and administrative sanctions against 51 other officials. An additional 340 complaints related to abusive investigations (Article 266 of the Criminal Code) that led to criminal proceedings against 16 police officers and administrative sanctions against 6 others. Out of the four complaints of torture (Article 267 Criminal Code), one resulted in criminal proceedings against a public official.⁷³

ii) Investigations

Acts of torture and ill-treatment have in general not been thoroughly investigated or punished. It appears that victims have at times refrained from lodging complaints due to fear of intimidation. In a number of cases, victims who lodged complaints, especially those who petitioned the European Court of Human Rights, were either threatened by police officers or later charged with the offence of assaulting a public official.

Under the system of investigation in place until 24 August 2002, the Military Prosecutor appeared not to have zealously pursued complaints against the police. The police, being effectively in charge of the investigations under supervision of the Military Prosecutor, have routinely delayed investigations, at times for several years, or reported that they could not find sufficient evidence to corroborate the claims of torture and ill-treatment. Victims have also faced difficulties in obtaining reliable medical certificates in those cases where the investigating authorities exercised their discretion and decided not to request a medical report from the Forensic Institute. It is not easy for victims to arrange privately for forensic certificates as there are few labs throughout the country and fees are relatively high. Moreover, one of the questions on the forensic certificate asks the victim to specify the origin of the injuries. Several victims have claimed that when they mentioned as cause "battery by the police" the forensic doctors refused to examine them. In some cases, victims' only complained after a considerable delay, making it difficult to find traces of physical torture. On occasion, police have reportedly falsified medical reports to avoid prosecution.⁷⁴ As most cases result in a decision not to indict, victims are required to challenge this decision through more senior prosecutors, which may last up to three years. In the vast majority of cases, the decision not to indict will be confirmed, which leaves the victim with the vague prospect of a further appeal to the courts for which there is no express procedure envisaged by law.

⁷² See the website of the Gheorge Ursu foundation http://gh-ursu.org.ro/radu_cosasu_ursu_case.htm.

⁷³ CPT 1995 report, supra, para. 21.

⁷⁴ Report of the Special Rapporteur, supra, para.46.

When an accused alleges, in the course of a criminal trial, that he/she has been tortured, the attitude of the presiding judge and the circumstances of the case will seemingly determine whether the prosecutor will be asked to verify and/or investigate the allegation. A number of doubts have been expressed as to the actual independence of the judiciary.⁷⁵

iii) Prosecutions, convictions, punishment

Against this background, few investigations have resulted in indictments. While there are no overall figures, the CPT has reported that before 1998, there had been two cases in which policemen were sentenced to five and fifteen years imprisonment respectively for acts of torture.⁷⁶ Since then, there have been no convictions for torture but two cases relating to death in custody in 1999 and 2001, apparently as a result of torture, are currently pending before Romanian courts.

A number of cases are illustrated below for anecdotal purposes.

- In a case of custodial rape committed in 1990 resulting in the pregnancy of the victim, the perpetrator, who denied the charge, committed suicide before he could be brought to trial after laboratory tests had established his paternity.
- In a case in which a ten year old child was subjected to severe beatings by police officers, the responsible officers were charged with abusive conduct pursuant to Article 267 of the Criminal Code. The then competent military court, after a trial that lasted three years, found the culprits guilty and gave them suspended sentences. The court awarded the victim about 400 US dollars in compensation.⁷⁷

Disciplinary measures, such as suspensions and demotions, have been taken against officials guilty of torture and ill-treatment but there has apparently been no consistent practice.

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Constitutional Law

Article 48 (1) of the Constitution accords an express right to a remedy to victims whose rights have been violated by actions of the State: "Any person aggrieved in his legitimate right by an administrative act or failure of a public authority to solve his application within the legal term is entitled to the acknowledgement of his right, annulment of the act, and remedies for the damage."

⁷⁵ The Soros Foundation issued a report on the lack of independence of the judiciary in 2001. The same issue was broached in a very recent report of the Romanian Academic Society (NGO). In September 2002, the chair of the Magistrates' Association openly accused the Government of political interference with the judiciary.

⁷⁶ Report of the Special Rapporteur, *supra*, para.43.

⁷⁷ See Apador-CH, *supra*, for details.

1.2. Administrative Law

Article 1 of the law on administrative disputes⁷⁸ provides that: "... the person aggrieved in his legitimate right by an administrative act or failure of a public authority to solve his application regarding a legitimate right is entitled to address the competent Court for the annulment of the act, the acknowledgement of his right and compensation for the damages thus produced." The Court will, according to Article 11 of that law "...decide upon material and moral compensation."

The victim of such a violation may seek compensation from the responsible administrative body first by bringing a claim in accordance with the law on administrative disputes. If the competent public authority rejects the claim or fails to answer within 30 days, the victim may lodge an appeal to the administrative body charged with appeals. If the latter also rejects the claim, a claim may be lodged with the civil courts according to provisions set forth in the Civil Procedure Code.⁷⁹

1.3. Civil Law

A victim of torture or ill-treatment, or his/her relatives in case of death, may bring a civil suit for damages for the harm suffered against the individual perpetrator as well as the responsible state authority. The individual perpetrator and the State are jointly liable for the damages caused.⁸⁰ The victim may claim pecuniary damages for the costs incurred for medical treatment, rehabilitation as well as for loss of possessions during imprisonment or infirmity. He/She may also claim moral damages, including rehabilitation and social integration but not punitive damages.⁸¹

A civil suit may be brought within three years from the time of the act that gave rise to the claim for damages.⁸² The plaintiff must pay an advance court tax in civil cases, which amounts to 10% of the sum claimed as compensation. In addition, legal expenses incurred during the civil trial will be borne by the losing party.⁸³

The award of reparation is linked to the outcome of the criminal procedure. Therefore, a civil court will keep the case pending until there is a decision of the criminal court in the matter.⁸⁴ The final decision of the criminal court is binding on the civil court in respect of establishment of the facts, the identification of the perpetrator of the crime and his/her guilt.⁸⁵ If the plaintiff satisfies the burden of proof regarding his or her claim, it is within the discretion of the court to award damages.

⁷⁸ Law No. 29 (1990), enacted in accordance with Article 48 of the Constitution.

⁷⁹ See Article 109(2) of the Civil Procedure Code.

⁸⁰ Article 1003 of the Civil Code.

⁸¹ Articles 998 and 999 of the Civil Code.

⁸² Article 8(2) of Decree no. 167/ 1958.

⁸³ Article 274 of the Civil Procedure Code.

⁸⁴ Article 19(2) of the Criminal Procedure Code. The civil action will, however, go forward if the criminal trial has been suspended but will likewise be suspended again should the criminal trial resume. See Article 19(3) of the Criminal Procedure Code.

⁸⁵ Article 22(1) of the Criminal Procedure Code.

If compensation is awarded, the creditor can enforce the judgment by requesting the “Executor’s Office”, i.e. the office charged with enforcing judgements, to enforce the decision of the court. The creditor must file a motion requesting the competent court to seize the debtors’ goods or to take any other legal measures against the debtor that may be required. All assets of a debtor are liable to enforcement with the exception of those deemed to be for personal use and for the benefit of his/her family.⁸⁶

1.4. Criminal Law

A victim of torture may file a claim for compensation as part of the criminal proceedings, pursuant to Section II of the Criminal Procedure Code.⁸⁷ A claim may be brought against the criminal defendant and/or any other party that bears civil responsibility.⁸⁸ Article 14 of the Criminal Procedure Code stipulates that damages will be paid in accordance with the provisions of the civil law: “a) by returning the good(s) and by re-establishing the situation before the crime, by partial or total annulment of a document or by any other means of repair; b) by paying compensation, in case the repair stipulated in a) above is not possible.”⁸⁹

The victim must initiate the civil action as part of the criminal proceedings. The case has to be brought within the time limit that applies to the crime in question. The civil claim may be initiated and carried forward *ex officio* in those cases where the harmed person is a public official or where a public institution has been harmed by a crime.⁹⁰ The prosecutor provides legal support if the harmed person is a public official but has discretion as to whether it offers such support in other civil actions initiated by other victims of crimes, such as torture or ill-treatment.⁹¹ The criminal court will rule on the damages after having reached a verdict concerning the criminal conduct in question.⁹²

A civil action attached to the criminal trial is exempt from judicial expenses.⁹³ The bearing of the costs depends on the outcome of both the criminal and civil aspects of the case. Thus, a victim will only have to cover the costs in case of an acquittal and where his/her civil suit was rejected, to the extent to which the expenses were caused by him/her.⁹⁴

2. The Practice

⁸⁶ See Articles 371 et seq. of the Civil Procedure Code.

⁸⁷ Article 24 of the Criminal Procedure Code provides that the injured party who sues for civil injury becomes a civil party in the criminal proceedings. In the case of the death of the victim, the victim’s relatives are entitled to participate in the proceedings as civil parties and to request compensation.

⁸⁸ See Articles 14(1), (2) and 15(1) and (2) of the Criminal Procedure Code.

⁸⁹ The Criminal Procedure Code also provides for compensation in cases of wrongful imprisonment or wrongful conviction against the State, see Article 504 et seq.

⁹⁰ See Article 17 Criminal Procedure Code.

⁹¹ See Article 18 of the Criminal Procedure Code.

⁹² Article 346 of the Criminal Procedural Code.

⁹³ Article 15(3) of the Criminal Procedure Code.

⁹⁴ Articles 191 and 192 of the Criminal Procedure Code.

REPARATION FOR TORTURE: ROMANIA

Some victims of torture and ill-treatment have in several cases taken legal action to obtain reparation for the harm suffered. The reason why more have not done so appears to relate to the costs of proceedings,⁹⁵ the length of time that proceedings tend to take and the high burden of proving that an act of torture or ill-treatment has been committed by public officials.

Victims of torture and ill-treatment have only in a few cases obtained reparation. The main reason for this low success rate appears to be the fact that the acts of torture or ill-treatment did not result in a criminal conviction and consequently claims for reparation were dismissed.

In the case of rape in custody mentioned above⁹⁶, the only compensation awarded was a small sum for the maintenance of the boy who was born as a result of the rape. In the case of the ten-year old child who was severely beaten by police officers, the court awarded \$400 in compensation.

V. GOVERNMENT REPARATION MEASURES

Following the fall of the communist regime, Romania adopted, mainly due to the pressure of the Romanian Association of Former Political Prisoners, the Law 118/1990 concerning "some rights for people persecuted for political reasons during the dictatorship installed in Romania on March 6, 1945." The law covers those who were displaced, deported, imprisoned, abused in psychiatric institutions or confined to a particular place of residence, if these measures were taken as a means of political persecution. While torture victims are not specifically included as beneficiaries in this law, the majority of those persons falling within the ambit of the law will have suffered some form of ill-treatment or torture. The law provides for a right to symbolic financial compensation for each year of imprisonment/displacement (300 000 Lei = about \$10), free medical assistance and medication, free use of public transport as well as income tax exemptions. The time spent in prison, labour camp or obligatory residence is recognised as working time for pension purposes. While several thousand victims received benefits under the law, its implementation has been hampered by a lack of political will and cooperation of former officials. Several other laws were subsequently proposed, such as a law on nullification of court decisions against political prisoners and restitution of rights before being arrested but none of these proposals were enacted.⁹⁷

In 1996, President Constantinescu expressed his sympathy for the victims of the Communist regime, and particularly former political prisoners. Under his administration, funds have been allocated for the "Sighet memorial," a civil society initiative to transform a prison for political detainees into a museum. While there were numerous torture victims among the former political prisoners, the statement and subsequent measures taken were not related specifically to torture.

⁹⁵ While a joint civil action in criminal proceedings is exempt from stamp taxes, the advance court fee to be paid in civil cases is prohibitive for a great many people and may also induce them to ask for lower compensation in order to lower the amount which has to be paid as court fee.

⁹⁶ See supra III, 3.2.

⁹⁷ In 1999, an ordinance was passed which granted certain rights to those who suffered disadvantages because of their anti-communist resistance.

Medical treatment and social services to victims of past and present torture are provided by NGOs, such as the ICAR Foundation.⁹⁸

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of acts of torture committed in third countries

1.1. The Law

1.1.1. Criminal Law

Under Romanian criminal law, those responsible for having committed acts of torture abroad may be held criminally liable in Romania by operation of the jurisdictional principles of active and passive personality and universal jurisdiction.

According to Article 4 of the Criminal Code, "criminal law applies to crimes committed outside Romania, if the perpetrator is a Romanian citizen or if, possessing no citizenship, the perpetrator has residence in Romania." Art. 5 of the Criminal Code stipulates that "criminal law applies to crimes committed outside Romania, which act against the Romanian state security or against a Romanian citizen's life, or which seriously damage the physical integrity or health of a Romanian citizen and which are committed by a foreign citizen or by a person without citizenship and who is not residing in Romania." Art. 6 of the Criminal Code reads: "criminal law also applies to other crimes than mentioned in art. 5, paragraph 1, namely to crimes committed outside Romania by a foreign citizen or by a person without citizenship and who is not residing in Romania, if:

- a) the respective action is considered a crime as well by the criminal law of the country where the action was committed
- b) the perpetrator is in the country."⁹⁹

According to Article 7 Criminal Code, Article 5 and 6 will only be applied if there is no different disposition imposed by an international convention. The meaning of this provision is not entirely clear but it appears to accord priority to international obligations, which necessitate a wider exercise of universal jurisdiction. This reasoning, in line with Article 11 (2) of the Romanian Constitution, would apply to the obligations of Romania under Articles 5 to 7 of the Torture Convention with which the limitations contained in Article 6 (a) of the Criminal Code are not compatible. Consequently, those suspected of having committed acts of torture abroad, be it against a Romanian citizen or a foreign national, are subject to Romanian criminal law.

Perpetrators of genocide, war crimes and crimes against humanity are arguably for the same reasons subject to Romanian criminal law since Romania has ratified the

⁹⁸ See the website of the ICAR-Foundation: www.icarfoundation.ro.

⁹⁹ It continues: "The provisions in the preceding paragraphs do not apply if, in accordance with the law of the country where the criminal committed the crime, there is any cause preventing initiation of penal suit or continuation of the penal process or penalty enforcement, or when the penalty was executed or considered as having been executed. When the penalty was not executed at all or only part of it was executed, the next procedure will be in accordance with legal provisions on compliance with foreign sentences."

Genocide Convention, the relevant Geneva Conventions and recently the Statute of the International Criminal Court. However, the Romanian criminal code, even though it has a special Title "Crimes against peace and humanity" does neither include many of the crimes prescribed by the 1949 Geneva Conventions and the additional Protocols nor an express criminal offence of crimes against humanity.

On 11 April 2002, Romania ratified the International Criminal Court Statute.¹⁰⁰ Consequently, via the operation of Article 11 and 20 of the Constitution, the three categories of crimes within the jurisdiction of the ICC – genocide, crime against humanity, and war crimes – have now become part of Romanian law.

Perpetrators of acts of torture committed abroad may be prosecuted for their crimes if present in Romania, as there is no trial in absentia. However, as stipulated in Article 8 of the Criminal Code "Criminal law does not apply to crimes committed by diplomats of foreign countries or by other persons who, in compliance with international conventions, are not subject to the Romanian state criminal jurisdiction."¹⁰¹

The investigation and prosecution of perpetrators of such crimes would rest with the General Prosecutor and is the same as for crimes committed in Romania. Suspects of such crimes may be refused refugee status according to Article 1 F of the Refugee Convention but granted the right to remain in Romania if they face the risk of being exposed to the death penalty or torture abroad.¹⁰² The court situated in the area in which the alleged perpetrator is found is competent for hearing such cases.¹⁰³

1.1.2. Extradition Law

As a general rule, extradition is granted or may be requested on the basis of an international agreement or reciprocity, and failing either of these, in accordance with the Romanian law on extradition.¹⁰⁴ The Extradition Law No.296 (2001) stipulates that extradition may be granted or requested for crimes that carry a punishment of more than two years imprisonment.¹⁰⁵ Consequently, torture as defined in Article 267 would fall within the scope of the extradition law. Extradition will only be granted or requested for those crimes that are a crime in both Romanian legislation as well as the legislation of the requesting state.¹⁰⁶ It would therefore depend on the criminal law of the state from which Romania requests the extradition. A request for extradition of an alleged perpetrator of torture present in Romania may be refused if the suspect is a Romanian citizen, has been granted the right to asylum in Romania, enjoys immunity as provided for in international treaties, has been summoned from abroad to be heard as a party, witness or expert by a Romanian judicial authority as provided for by international treaties.¹⁰⁷

¹⁰⁰ Law no. 111 of 13 March 2002 on the ratification of the Statute on the International Criminal Court.

¹⁰¹ There is no express provision concerning immunity for heads.

¹⁰² See Article 13 of Law 296/2001.

¹⁰³ Article 30(b) of the Criminal Procedure Code.

¹⁰⁴ See Article 9 of the Criminal Code.

¹⁰⁵ Article 12 of the Extradition Law.

¹⁰⁶ Article 8 of the Extradition Law.

¹⁰⁷ Article 5(1) of the Extradition Law.

Romania may also refuse or postpone the extradition of any other foreign national, if the extradition is liable to have extremely serious consequences for him/her, especially because of his/her age or health condition.¹⁰⁸

Moreover, extradition is to be refused if the crime for which extradition is requested is of a political nature or if there are well-grounded reasons to believe that a non-political crime was presented as a pretext to proceed against or punish a person for reasons of race, religion, nationality or political opinion. Crimes against humanity and war crimes are expressly mentioned as not being political crimes according to the Romanian extradition law.¹⁰⁹ Torture is not considered to be a political crime as evidenced by Article 267 of the Romanian Criminal Code.

The Romanian state is obliged, if it refuses to extradite one of its own citizens or a political refugee, to refer the case, upon the demand of the requesting state, to its competent judicial authorities so that criminal jurisdiction be exercised.¹¹⁰ In the case of a refusal to extradite a foreign national for serious offences or offences incriminated by international conventions that do not provide for another mechanism for repressing of such crimes, Romania shall examine its own competence and, if applicable, initiate criminal proceedings *ex officio*, without exception and without delay.¹¹¹

The extradition is to be carried out in accordance with the procedure set out in the Extradition Law, with the exception of requests regarding the surrender of suspects to stand trial before international tribunals. Judicial assistance to another state is granted in accordance with the Law on international cooperation in criminal matters¹¹²

1.2. Practice

There have apparently been no cases in which perpetrators of torture committed abroad, be it in form of the crime of torture itself or as part of another international crime, such as genocide or crimes against humanity, have been prosecuted by Romanian authorities and brought to trial. Nor have there been any cases in which refugees had been refused asylum pursuant to Article 1 F of the Refugee Convention and subsequently been allowed to stay for risk of being exposed to the death penalty or torture.

No cases have been reported in which Romania either requested or granted the extradition of an alleged perpetrator of torture. There are also no known cases in which the Romanian authorities, though knowing of the presence of an alleged perpetrator in Romania, took no action to extradite or prosecute him/her.

¹⁰⁸ Article 5(2), *ibid.*

¹⁰⁹ Article 9, *ibid.*

¹¹⁰ Article 7(1) of the Extradition Law.

¹¹¹ Article 7(2) of the Extradition Law.

¹¹² Law No.704 (3 December 2001) on international judicial assistance in criminal matters.

2. Claiming reparation for acts of torture committed in third countries

2.1. Legal action against individual perpetrators of torture

Romanian courts have jurisdiction only in those cases in which the tort in question was either committed in Romania or the damages suffered as a result of the tort materialised in Romania.¹¹³ Thus, a victim of torture or ill-treatment committed abroad will only be able to sue the individuals responsible if he/she can show that the damages resulting from such acts were suffered in Romania. In such a case, Romanian courts would apply Romanian civil law in ruling on the merits of the claim.¹¹⁴

Foreign diplomats enjoy immunity from civil proceedings.¹¹⁵

2.2. Legal action for reparation against foreign States for acts of torture committed in third countries

Foreign states enjoy immunity from suit in relation to any acts carried out in the exercise of public functions. Therefore, even if the Romanian courts were to rule that they had jurisdiction to entertain a claim of damages for torture or ill-treatment suffered at the hands of state agents abroad, victims of such acts would only be able to obtain some form of reparation through Romanian courts if such courts would find that acts of torture do not fall within the scope of recognised state immunity.

2.3. Practice

There are no known cases in which victims who have been subjected to torture or ill-treatment abroad have taken legal action against their tormentors or foreign states in Romania.

¹¹³ See Article 149 of Law 105 (1992) on private international law rules.

¹¹⁴ See Article 107 of Law 105 (1992).

¹¹⁵ Law 105.