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***PROBLEMS ARISING DURING THE  
EXECUTION OF THE STATE'S OBLIGATION  
TO PROVIDE ARRESTEES AND DETAINEES  
WITH REQUISITE MEDICAL ASSISTANCE  
UNDER THE ARTICLE 3 OF THE EUROPEAN  
CONVENTION ON HUMAN RIGHTS***

As is known the Republic of Armenia is a member of the Council of Europe and has signed the European Convention on Human Rights (hereinafter referred to as "the Convention") thus admitting the jurisdiction of the European Court of Human Rights (hereinafter referred to as "the Court"). Under the Convention Armenia undertook the obligation to protect human rights in Armenia and to adapt national legislation to the provisions of the Convention.

The review of the Court's Judgments against Armenia show that one of the most frequently violated articles in our country is the Article 3 of the Convention<sup>1</sup>. Thus, 4 out of 19 Judgments against Armenia adopted by the Court regard the "Prohibition of Torture", where the Court held that there has been a violation of Article 3. The importance of the protection of human rights from any manifestation of torture is very high, especially in such developing countries, as Armenia is, where such crime committers are mainly officials working at the public bodies.

First of all, it is necessary to clarify what content the article in question has and what it provides. Thus, the Article 3 of the Convention is titled "Prohibitions of Torture" and constitutes:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of

the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation<sup>2</sup>. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct<sup>3</sup>.

In order to make a general sense of the meaning of "torture", as well as to clarify difference between inhuman treatment or punishment and degrading treatment or punishment it should be referred to the Court's assessments, to the doctrine, as well as to some relevant acts.

Thus, Article 1 of Resolution 3452 (XXX) declares:

"1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment"<sup>4</sup>.

The Court in its turn defined "torture" as "deliberate inhuman treatment causing very serious and cruel suffering"<sup>5</sup>.

As to difference between inhuman treatment or punishment and degrading treatment or punishment, it is likewise one of gradation in the suffering inflicted, though it should be kept in mind that the Court does not always draw a sharp distinction and often uses qualifications such as “inhuman and degrading treatment”. In the Kudla Case the Court held that it “has considered treatment to be “inhuman” because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be “degrading” because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them”.

The Article 3 of the Convention may be discussed in different contexts, such as: policing; conditions of detention; death penalty; immigration, asylum and extradition; discrimination; child care; corporal punishment; and medical treatment. Within the present scientific article I would like to focus on the latter issue, that is the provision of requisite medical assistance to arrestees and detainees under the Article 3 of the Convention, since currently Armenia and other countries as well in this regard meet some problematic situations in practice which need to be discussed.

Thus, Article 3 imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. Health, age and severe physical disability are amongst the most relevant factors to be taken into account<sup>8</sup>. Consequently, the relevant bodies on behalf of the State have positive obligation to provide arrestees and detainees with necessary conditions among which the medical assistance is an important factor. Persons deprived of their liberty are mainly kept in detention facilities. These facilities should have at least medical units. According to the 3rd General Report on the CPT's activities “While in custody, prisoners should be able to have access to a doctor at any time... A prison's health care service should at least be able to provide regular out-patient consultations and emergency treatment (of course, in addition there may often be a hospital-type unit with beds)”<sup>9</sup>.

It is worth to mention that the legislation of the Republic of Armenia in its turn regulates issues connected with the medical-sanitary aid to arrestees and detainees. Thus, the Law of the Republic of Armenia on the treatment of arrestees and detainees constitutes general provisions on medical-sanitary

aid to arrestees and detainees. The procedures for rendering medical, including psychological aid to arrestees and detainees, their stay in medical institutions, as well as the involvement of employees of such institutions in medical services are regulated by the Government decree No 825-N of 26 May 2006.

Thus, according to the article 21 of the Law of the Republic of Armenia on the treatment of arrestees and detainees facilities where persons deprived of their liberty are kept must have at least one doctor of general specialization. In case of necessity arrestees and detainees needing specialized medical aid shall be transferred to a specialized or a civilian medical institution. The medical examination, treatment, medication or surgery should be free of charge for the persons deprived of liberty and shall be covered by the state budget.

On the one hand this kind of regulation of the relations concerned is quite acceptable in the theoretical level and mainly works in favor of arrestees and detainees. And that is natural, since in the democratic societies a human's rights should be protected irrespective of the victim's conduct<sup>10</sup>. On the other hand some difficulties and problems invisible from the first sight exist in practice regarding the implementation of the above-mentioned provisions.

Indeed, the following problem exists in practice:

As it was mentioned above in the Court's case-law the approach concerning the provision of medical aid to arrestees and detainees is the following: either the State shall provide the requisite medical assistance to the person having serious health problems, or it shall release him (her).

A question may arise here. In particular, what should the State do if the treatment or surgery requires serious financial assets, and for such not a reach country as Armenia is, it is difficult to cover them? For instance, a person needs a transplantation of kidney and such a surgery costs a few decades of thousands of dollars, which Armenia cannot afford taking into account its limited financial resources. Or what should the State do if the person can receive treatment only in clinics in abroad?

The case-law includes certain provisions which may more or less answer the first question. Thus, the State is obliged to protect the physical well-being of persons deprived of their liberty. This means that irrespective of the sum of money the State in all circumstances has to fulfill its positive

obligation to provide arrestees and detainees with necessary medical aid. However, as the Court established in its judgments: "... the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public"<sup>11</sup>, so it can be concluded that the State is free to choose within the possible versions of treatment the one that is compatible with its budget. If the person does not agree with that version, he (she) is free to have a doctor or treatment of his/her own choice.

These provisions, however, do not provide an unambiguous solution to the question concerned, since even the most compatible version of treatment may be still too expensive an unrealistic and at the same time the person deprived of liberty may refuse to have his own doctor. Or it may happen that the person deprived of liberty will have to be transferred to the clinic outside Armenia.

In this case, according to its commitments the State is obliged to release the person. It will not create any problem if the person does not represent a real danger for the society, so he (she) can be released in order to organize his treatment. The problem is getting more complicated if the person constitutes a real danger for the society. In this case the rights of others may be at risk and the State cannot put them in jeopardy by releasing the person deprived of his liberty. On the other hand if the person having health problems is kept in custody it will make a breach of the Article 3 of the Convention.

Indeed, this problem needs a complex approach. In any case the problem in question should be solved pursuant to humanistic approach, because a human life is of a great value. In this respect indeed, the State's obligation to provide medical aid is justified. But in my point of view this aid should be provided within the State's opportunities. That is to say the State should be obliged to provide arrestees and detainees with the medical aid as much as it is prescribed for unprovided population. This opinion is based on the following reasons:

- First, treatment requiring a considerable amount of money will lead to additional expenses from the State Budget, which Armenia cannot afford.
- Then, the provisions in question contradict the Constitution of the Republic of Armenia, because they practise discrimination in regard of the free part of population. In general, the State provides unprovided

population (who are law-abiding citizens) only with certain kind of medical aid. Other diseases that lie behind the established ones are not financed by the State. In these circumstances the State's obligation to provide arrestees and detainees with any treatment and medication and situation when it leaves citizens in freedom suffering is not justified and leads to discrimination in regard of the latter, which is contrary to the Article 14.1 of the Constitution of the Republic Armenia, which provides: "Everyone shall be equal before the law. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or other personal or social circumstances shall be prohibited". Since Armenia now cannot afford to undertake the obligation to provide the unprovided part of the population with all types of treatment, it will be justified to limit the States obligations to provide medical assistance to arrestees and detainees to what is available for the unprovided population<sup>12</sup>.

- Besides, the problem concerned creates complications for the State not only in regard of the above-mentioned but also it may give rise to the number of certain group of crimes. In particular, I mean "Crimes against property". Hence, the provisions in question create favorable conditions for committing a crime for those who have a disease and need an everyday expensive treatment<sup>13</sup>, but do not have enough money to receive it.

In order to make clear what is said let's examine a case. Let's imagine a situation when a certain person suffers from a serious disease, the treatment of which requires a medication costing a considerable amount of money but he cannot afford it and he commits a crime, for example a robbery of jewels. What would be the results? As a result one of the following consequences may follow:

1. Either he will be arrested and during the examination of the case the State, according to its positive obligation will provide him

with necessary medical care. Certainly, it is clear that this is not the ideal situation for one, but the person who suffers from a serious disease, will probably sacrifice his freedom in order to receive treatment and overcome the disease.

2. or he will be arrested and during the examination of the case, if there are obstacles to the treatment, the State, according to its obligations under the Convention will release the person in order the latter organize his treatment. In this case the person concerned loses nothing.

3. or the person concerned just will not be detected. In fact the person not having enough money now will have the stolen jewels and the problem is again solved.

Taking into account the above-mentioned it can be concluded that all three versions of consequences work in favor of the person concerned and actually he has nothing to lose. Taking into account the possible consequences mentioned above, I am of the opinion that most probably the person will commit the crime. And the more people find out about such consequences, the more the probability that such crimes may be

committed increases.

So, taking into consideration the reasons mentioned above, the conclusion is reached that the State should be obliged to provide medical aid to arrestees and detainees as much as it is available for unprovided population. And if the arrestee or detainee has a disease which is not included in the list of available ones, the person deprived of liberty should himself care about the costs of such treatments. This will help to avoid the problems mentioned above. At the same time it should be mentioned that in such cases the State authorities (in particular, judges or the administration of the detention facility) should not anyhow hinder the treatment. In case of necessity, if the person constitutes a real danger for others the special group of police officers should accompany him. I suggest also special provisions to be amended to the national legislation concerning the cases when a person has to receive the treatment outside Armenia. The details of such escort should also be established by national legislation. Only this way it will be possible both to keep the person constituting a danger for society in custody and provide him (her) with necessary medical assistance, at the same time avoiding the violation of Article 3 of the Convention.

### The list of the used sources

1. "Theory and Practice of the European Convention on Human Rights", fourth edition, Antwerpen-Oxford, 2006
2. "Taking a Case to the "European Court of Human Rights", Philip Leach , second edition, Oxford, 2005
3. *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999 V
4. *Assenov and Others v. Bulgaria* judgment of 28 October 1998
5. *Chahal v. the United Kingdom* judgment of 15 November 1996
6. *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25
7. *Mouisel v. France*, Judgement of 14 November 2002
8. *Khudobin v. Russia*, Judgement of 26 October, 2006
9. Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975
10. 3rd General Report on the CPT's activities covering the period 1 January to 31 December 1992
11. <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>

<sup>1</sup> See Judgments against Armenia at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

<sup>2</sup> See *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999V, and the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, §93.

<sup>3</sup> See the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, p. 1855, §79.

<sup>4</sup> See Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975.

<sup>5</sup> See *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 167.

<sup>6</sup> See "Theory and Practice of the European Convention on Human Rights", fourth edition, Antwerpen-Oxford, 2006, page 408.

<sup>7</sup> See "Taking a Case to the "European Court of Human Rights", Philip Leach , second edition, Oxford, 2005, page 204.

<sup>8</sup> See *Mouisel v. France*, Judgement of 14 November 2002, §§ 38-40

<sup>9</sup> See 3<sup>rd</sup> General Report on the CPT's activities covering the period 1 January to 31 December 1992, § §34,35.

<sup>10</sup> This is the reason that no derogation from Article 3 of the Convention is permissible under Article 15, which allows any State (who has signed the Convention) in time of war or other public emergency threatening the life of the nation to take measures derogating from its obligations under the Convention. But no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

<sup>11</sup> See *Khudobin v. Russia*, Judgement of 26 October, 2006, § 93

We do hope that one day Armenia will be able to enlarge the medical assistance provided to this part of population, thus enlarging this service also for arrestees and detainees.

It should be emphasized that this refers not only homeless persons and unprovided population, but also people having ? average profit who, however cannot afford certain kinds of medications.