ANALYTICAL DOCUMENT

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TRIAL AND PUNISHMENT OF TORTURE AND ILL-TREATMENT – CASE LAW ANALYSIS

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LRCM
Rights and justice for all

Kingdom of the Netherlands

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Likewise, we sincerely thank **all LRCM colleagues** who provided assistance throughout the research, who ensured all logistical and visibility arrangements and made the launch of this study possible.

SUMMARY

The Republic of Moldova has recognized the importance of combating torture and ill-treatment, acceding to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984 and to the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted by the Member States of the Council of Europe on 26 November 1987. Acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Republic of Moldova assumed the obligation to guarantee the right not to be subjected to torture or inhuman or degrading treatment.

The ECtHR has repeatedly ruled that, even in the most difficult circumstances, such as the fight against terrorism and organized crime, torture and inhuman or degrading treatment or punishments are absolutely prohibited. Therefore, regardless of the reasons for detention or the crime of which the detainee is suspected, s/he must not be subjected to ill-treatment. However, in multiple judgements of the European Court of Human Rights (ECtHR) condemning the Republic of Moldova it was found the violation by the Republic of Moldova of the obligation not to ill-treat, to investigate and to apply appropriate punishments for the crimes of torture and ill-treatment.

The study analyses the practice of the Supreme Court of Justice (SCJ) starting from July 2013. The analysed period was selected deliberately, having three rationales behind it: (1) in December 2012, substantial legislative interventions took place concerning the Criminal Code, stiffening the penalties for torture and ill-treatment; (2) absence of similar studies on this subject for the reference period; (3) the persisting public opinion that the real conviction rate of torturers is low or delayed, a fact that would generate a state of impunity.

The research results are based on 71 irrevocable judgements of the SCJ, in which 102 persons are accused. The analysed judgements were issued between July 2013 and February 2022 and refer to offences committed between 2006 and 2018.

Subjects of crimes: 75% of the analysed court judgements refer to charges brought against **policemen**. This category is followed by **employees in the field of education** (8%) and representatives of **private security services** (6%).

Court solutions: 73 out of 102 accused persons were convicted. Other 17 persons were acquitted, and with regard to 12 persons the trial was terminated for procedural reasons, such as the expiration of the statute of limitations or the resumption of prosecution with violations. The acquittal rate in the given cases is five times higher than the average of acquittals in the judiciary system (about 3%).

The acquittal rate in the courts is 38%, being 13 times higher than the average acquittal rate in the country. In other 12% of cases, the proceedings were terminated. In certain cases,

we noticed a reluctance of the court judges to convict the policemen for ill-treatment. This can be explained by the harsh penalty provided by the law and the past interaction of judges with the accused in the context of criminal cases handled by the latter.

The solution of the first instance court was quashed in the courts of appeal in 59% of cases. Prosecutors are more likely to succeed in the court of appeal, where the acquittal rate drops threefold down to 13% and the rate of termination of criminal proceedings drops to 5%. At the SCJ, the acquittal rate increased from 13% to 17%, and the rate of termination of the examination of cases from 5% to 12%. Therefore, only 50% of the accused were convicted by the judges of the first instance courts, a rate that increased to 82% in the courts of appeal and which subsequently decreased to 71% in the SCJ. Therefore, the chance of the person getting more lenient sentence at the SCJ is higher than at the level of the court of appeal.

Overruling 50% of the judgements of the first instance court in the appeal procedure and, subsequently, overruling a significant number of sentences of the courts of appeal by the SCJ may speak of a faulty examination of the given cases, of the absence of uniform case law or of the pro-accusatory bias of the judges of the courts of appeal. The sentence pronounced in the appeal procedure in 50% of the cases was harsher than in the first instance, and in 9% of the cases it was more lenient.

Three out of four judgements of the court of appeal are upheld by the Supreme Court of Justice. This fact means that most of the "final" judgements are taken at the level of the courts of appeal. Even though in 76% of the appeals the solution of the court of appeal was upheld, in 17% of the cases the SCJ gave a solution more favourable to the appellant. Only in 7% of the examined cases, the SCJ imposed a harsher sanction than the court of appeal. However, these figures should be viewed with some reserve, as the above statistical data do not reflect referrals for retrial ordered by the SCJ, which are quite numerous.

Duration of trial of the cases: The average duration of a trial in the case of torture and ill-treatment is 6 years. The shortest duration of a trial in a case of torture or ill-treatment at all three levels of jurisdiction was 375 days, and the longest was 4163 days (11.5 years). Criminal proceedings actually take even longer. The period of investigation of the case by the prosecutors must be added to this term. In some cases, the investigation lasted for more than five years. Consequently, for the ill-treatment produced until December 2012, the statute of limitations for the application of the sanction (which is calculated until the judgement of the court of appeal is pronounced) could expire. Expiration of the statute of limitations in at least two cases automatically resulted in the non-application of sanctions, even if the person's guilt was proven.

Retrials: Before it becomes irrevocable, one in three cases of torture or ill-treatment is referred for retrial. The situation in which cases are referred for retrial three or more times is more serious. This was found in at least 8 cases (11% of the analysed cases).

Sanction of imprisonment: 71 people were sanctioned with imprisonment. However, only 20 persons (28% of persons sentenced to imprisonment) ended up in the penitentiary. Regarding the other 51 people (72%), the imprisonment sentence was suspended, the only consequence suffered by the convicts being the dismissal from office and the prohibition

for a certain period to return to the public service. In fact, suspension has been ordered by judges whenever the law gave the judge discretion to do so (under the law, only imprisonment terms of up to five years can be suspended). We also found that the judges always imposed an imprisonment sentence very close to the minimum term prescribed by law. Such a practice of sanctioning ill-treatment can hardly be reconciled with the commitment to combat torture and ill-treatment.

Case law is not entirely uniform, especially at different levels of courts. As it was mentioned above, half of the judgements of the first instance court are reversed by the courts of appeal. Subsequently, a large number of judgements of the courts of appeal are reversed by the SCJ. The SCJ has the role of introducing a mechanism to consolidate the case law. It is important to ensure that the penalties already provided by law are properly enforced.

METHODOLOGY

The purpose of this document is to study the case law regarding torture and inhuman or degrading treatment in order to conclude how these are sanctioned in the Republic of Moldova in the last decade. In this study there were analysed the judgements of the Supreme Court of Justice (SCJ) which refer to Article 309[1] of the Criminal Code (as amended by Law no. 139 as of 30.06.2005 and repealed in December 2012)[1] and to Article 166[1] of the Criminal Code (in force since December 2012), which criminalize torture, inhuman or degrading treatment (for the purpose of this study the generic term "ill-treatment" will be used). The document does not analyse case law based on Art. 328 paragraph 2 letters a) and c) (excess of power or excess of official authority accompanied by the application of violence; torture or actions that humiliate the dignity of the injured party), repealed in December 2012 by the operation of Law no. 252/2012[2].

There were analysed all court judgements adopted between July 2013 and February 2022, available on the website of the SCJ http://www.csj.md/, section "Judgements of the SCJ Criminal Panel of Judges". There were identified 71 judgements of this kind that targeted 102 accused. Some judgements refer to ill-treatment that took place before July 2013, including in 2006. Several cases refer to the ill-treatment of protesters in April 2009.

We have made every effort to analyse relevant judgements of the SCJ. It is not excluded that some judgements of the SCJ regarding torture and inhuman or degrading treatment could not be found on the web page. However, the big number of analysed cases allows us to have a fairly representative picture to draw conclusions regarding the sanctioning of these crimes in the Republic of Moldova.

Only the text of the SCJ judgements was studied in this research. There were studied only those judgements of the SCJ by which the case was irrevocably solved. The judgements of the SCJ by which the cases were sent for retrial were not analysed.

The LRCM analysed the criminal behaviour, the period when the crime was committed and the judgements of the Supreme Court and the lower courts (courts of appeal and first instance courts). Additionally, there were analysed the type and severity of the imposed sanctions, the duration of the examination of each case, the subjects who were involved in committing acts of torture and/or ill-treatment, etc.

[1] Repealed by Law no. 252 as of 08 November 2012 on Amendments and Addenda to some Legal Acts.

[2] The torture within this element of the crime had a similar content to the torture pursuant to Art. 309[1] of the Criminal Code (in the version before the entry into force of Law no. 252/2012) and to the torture pursuant to the current version of para. (3) of Art. 166[1] of the Criminal Code. The repeal in this sense of paragraph (2) letter c) of Art. 328 of the Criminal Code was a consequence of the fact that the torture in the content of this aggravating form of excess of power or excess of official authority overlapped with the offence of torture, especially because it was considered lex specialis of the element stipulated by Art. 309[1] of the Criminal Code.

Information about all examined files has been entered into a table, which can be consulted by any interested person by scanning this QR code. The cases in this table are systematized according to the SCJ judgement.

The analysis does not intend to determine what should have been the right solution in the judgements under review. Based on a set of indicators the document analyses whether overall: (1) the trial procedure for cases of torture and ill-treatment appears to be effective from the point of view of a professional in the field of law and an impartial observer and (2) whether the case law of the courts of the Republic of Moldova in this field is uniform.

The collection and systematization of the information, as well as drafting of this document, was done by Daniel GOINIC. The draft of the study and the table with the information about those 71 case records were finally developed by the President of the LRCM, Vladislav GRIBINCEA, who made some proposals for their improvement.

Additionally, the draft document and its main findings were consulted at a public event held on 5 December 2022, with invited professionals from the domain[3]. The results of the discussions and the validation of the final findings can be found in the content of this document.

[3] Launch event of the draft document and its consulting, 5 December 2022, available at: https://www.facebook.com/CRJM.org/videos/697350358478856

INVESTIGATION AND SANCTIONING OF TORTURE AND ILL-TREATMENT

THE DEVELOPMENT OF THE LEGISLATIVE FRAMEWORK

Until December 2012, the Criminal Code of the Republic of Moldova had several articles criminalizing torture and ill-treatment. Even if the Criminal Code criminalized torture in a separate article (309[1]), some cases were qualified as bodily injury through torture (Art. 151 and 152), rape or violent actions of sexual nature accompanied by torture (Art. 171 and 172) or excess of official authority accompanied by acts of torture (Art. 328)[4]. This happened because torture was mentioned as an aggravating circumstance for these crimes and the judges considered that in these cases, they are special norms in relation to Art. 309[1], even if the sanction provided for by the latter was more severe[5]. Currently, torture is regulated under para. (3) and (4) of Art. 166[1] of the Criminal Code, and inhuman or degrading treatment is regulated under para. (1) and (2) of Art. 166[1] of the Criminal Code.

By Law no. 252/2012, Art. 309[1] of the Criminal Code and the other articles (in the part that refers to ill-treatment) have been repealed, and ill-treatment no longer represents an aggravating circumstance in the other articles of the Criminal Code. All cases of ill-treatment now must be qualified only under Art. 166[1] of the Criminal Code. Law no. 252 made it impossible to apply Art. 90 of the Criminal Code (suspension of the imprisonment sentence execution) for acts of torture, a very widespread phenomenon until then. If the judges find that torture has taken place, they have no alternative, but to imprison the torturer. However, in the case of inhuman and degrading treatment, the person could be sanctioned by a fine from 800 to 1000 conventional units. This was considered a too lenient sanction and for these reasons in 2018 it was excluded, inhuman or degrading treatment being punishable only by imprisonment from 2 to 8 years and the prohibition to hold public office from 3 to 15 years[6]. Likewise, Law no. 252/2012 excluded the possibility of applying the statute of limitations for being held criminally liable, a more lenient punishment than the minimum provided by law for torture, or ill-treatment or amnesty for torture cases.

Comparing the elements of crime stipulated by Art. 309[1] of the Criminal Code (torture) in the version existing before the entry into force of Law no. 252/2012 and Art. 166[1] of the Criminal Code (torture, inhuman and degrading treatment), we come to the conclusion that the ele-

[4] Often the criminal cases submitted to the court were qualified as excess of official authority (Art. 328 of the Criminal Code) and not as torture (309[1] of the Criminal Code). The prosecutors explained that they qualify the act as excess of official authority when it is not serious enough to be qualified as torture. This happens because the Criminal Code does not provide for a special norm criminalizing inhuman or degrading treatment. For details, see the LRCM study "Execution of the judgements of the European Court of Human Rights by the Republic of Moldova, 1997-2012", page 130, available at: http://old.crjm.org/wp-content/uploads/2014/04/Executarea-hotararilor-CtEDO-de-catre-RM-1997-2012-1.pdf

[5] See Law no. 252 as of 08 November 2012 on Amendments and Addenda to some Legislative Acts, available at: https://www.legis.md/cautare/getResults?doc_id=22399&lang=ro

[6] See Law no. 157 as of 26 July 2018 on Amendments and Addenda to some Legislative Acts, available at: https://www.legis.md/cautare/getResults?doc_id=105514&lang=ro

ments of crime stipulated by para. (1) Art. 309[1] of the Criminal Code are relatively equivalent to the elements of crime stipulated by para. (3) of Art. 166[1] of the Criminal Code, and the elements of crime stipulated by para. (3) of Art. 309[1] of the Criminal Code (torture in aggravating circumstances) are equivalent to the elements of crime stipulated by para. (4) of Art. 166[1] of the Criminal Code. And the courts found that the behaviour criminalized under Art. 166[1] paragraph 3 and 4 is the same as in the case of Art. 309[1] of the Criminal Code.

Inhuman and degrading treatment was defined for the first time in Art. 166[1] para. 1 in the spirit of the UN Convention against Torture. Para. 2 of Art. 166[1] contains the aggravating circumstances in case of inhuman and degrading treatment. The sanction stipulated by Art. 3091 para. (1) of the Criminal Code provided for imprisonment from 2 to 5 years with the deprivation of the right to hold certain positions or exercise certain activity for a period of up to 5 years. The sanction stipulated by Art. 166[1] para. (3) of the Criminal Code provides for imprisonment from 6 to 10 years with the deprivation of the right to hold certain positions or exercise certain activity for a period from 8 to 12 years. The sanction stipulated by Art. 309[1] para. (3) of the Criminal Code provided for imprisonment from 5 to 10 years with the deprivation of the right to hold certain positions or exercise certain activity for a period from 2 to 5 years, and the sanction stipulated by Art. 166[1] para. (4) of the Criminal Code provides for imprisonment from 8 to 15 years with the deprivation of the right to hold certain positions or exercise certain activity for a period from 10 to 15 years. It follows that the penalties introduced by Law no. 252/2102 are more severe. For this reason, for acts committed before the entry into force of this law (21 December 2012), more lenient criminal law has to be applied.

ILL-TREATMENT CASES AND THEIR SANCTIONING IN THE REPUBLIC OF MOLDOVA

In line with the international treaties to which it is a party of, the Republic of Moldova is obliged to create effective mechanisms to prevent and eradicate torture, inhuman and/or degrading treatments. The application of any form of torture or ill-treatment is absolutely prohibited in all circumstances, including in the context of the fight against terrorism and other serious crimes. This principle has always been supported by the European Court of Human Rights (ECtHR). Therefore, regardless of the reasons for apprehension or detention, the person cannot be subjected to ill-treatment.

However, the Republic of Moldova was frequently convicted at the ECtHR for violating Art. 3 (prohibition of torture and inhuman and degrading treatment) of the European Convention on Human Rights (ECHR). Until 1 June 2022, the ECtHR issued 119 judgements in which it found 169 violations of Art. 3 of the ECHR committed by our state. Most of these violations refer to the cases of application of ill-treatment (38), their faulty investigation (42) and poor conditions of detention (48)[7].

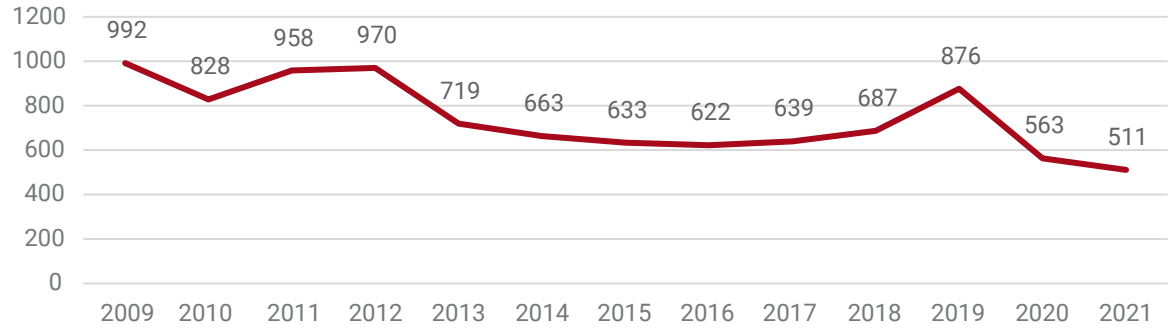
Even though the number of complaints of ill-treatment has decreased by 50% in the last decade, from around 1000 in 2009 to 500 in 2021, it remains quite large[8]. Despite the large number of complaints, prosecutors rarely decided to initiate criminal prosecution based on them. In 2021,

[7] LRCM, Art. 3 ECHR: summary of violations found regarding the Republic of Moldova (12 September 1997 – 1 June 2022), available at https://crjm.org/art-3-cedo-sinteza-violarilor-constatate-in-privinta-republicii-moldova-12-septembrie-1997-1-iunie-2022/

[8] LRCM, Infographic, How is torture and ill-treatment fought in the Republic of Moldova? available at https://crjm.org/cum-este-combatuta-tortura-si-maltratarea-in-republica-moldova/

prosecutors initiated investigations only on 1 out of 11 complaints concerning ill-treatment they received, and only 4-5% of complaints received lead to cases being sent to courts. The table below shows the statistical data of the Prosecutor General's Office regarding complaints of ill-treatment in the Republic of Moldova.

Complaints regarding ill-treatment received by the Prosecutor's Office



Source: Annual activity reports of the Prosecutor General's Office, processed by the LRCM

Taking into account the specificity of the cases of torture and ill-treatment, the appointment of forensic medicine expertise and psychiatric and psychological examination of the victims/ injured parties, hearing and identification of persons who are aware of the case, conducting face-to-face confrontations, etc. are mandatory procedural actions that last for a long time. The prosecutor's office pointed out that the execution of psychiatric and psychological examination takes up to 12 months, slowness determined by a small number of judicial experts in the field of psychology[9]. Therefore, the average duration of initiated criminal investigations is 1 - 2 years.

Investigation of torture and ill treatment

Year	Complaints filed	Initiated criminal prosecution cases	Share of complaints where criminal prosecution was initiated	Cases submitted to court	Share of cases submitted to court
2009	992	159	16%	36	3.6%
2010	828	126	15%	65	6.6%
2011	958	108	11%	36	4.4%
2012	970	140	14%	46	4.8%
2013	719	157	22%	49	5.1%
2014	663	118	18%	46	6.4%
2015	633	113	18%	38	5.8%
2016	622	107	17%	31	4.9%
2017	639	103	16%	34	5.5%
2018	687	93	14%	26	4.1%
2019	876	86	10%	34	5%
2020	563	47	8%	22	2.6%
2021	511	46	9%	21	4.1%

Source: Annual activity reports of the Prosecutor General's Office, processed by the LRCM

[9] The response of the Prosecutor General's Office as of September 23, 2022 to the LRCM appeal regarding the request for information, available at: https://crjm.org/wp-content/uploads/2022/11/2022-09-23-Raspuns-PG-solicitare-CRJM.pdf

As it follows from the statistical data, acts of torture and ill-treatment usually take place at the premises of law enforcement bodies. The only witnesses to these actions are often the co-workers of the torturers, who, out of corporate solidarity, deny the existence of ill-treatment, a fact that considerably affects prompt uncovering of the crime[10]. Furthermore, the prosecutors identified the phenomenon of the practice of not reporting ill-treatment events in prisons, a fact that rapidly develops latent criminality[11]. On the other hand, the rate of the real term conviction of the torturers is low, and the trials last for a long time, which generates a state of impunity.

Out of hundreds of complaints received annually, in 2020 the judges passed 25 sentences in ill-treatment cases. Regarding 15 out of 32 accused persons, the judges ordered the acquittal or termination of the trials.

In 2021, the judges passed 34 sentences of this kind targeting 53 persons. 20 accused were acquitted or the cases against them were terminated. The average acquittal rate in the judiciary of the Republic of Moldova has never exceeded 5%.

Sanctions imposed by the courts of the first level

Year	Sentences pronounced	TOTAL (persons)	Sanctions (persons)				Termination of the proceedings on procedural grounds (persons)	Acquittal (persons)
			Imprisonment	Suspended imprisonment	Fine	Community service		
2013	49	86	2	28	11	-	22	23
2014	43	62	14	27	5	-	6	10
2015	43	63	9	29	11	-	1	13
2016	35	51	3	15	7	-	11	15
2017	20	25	3	12	1	-	5	4
2018	24	33	9	9	2	-	5	8
2019	30	49	3	14	4	1	16	11
2020	25	32	2	7	7	1	6	9
2021	34	53	5	24	3	1	9	11

Source: Annual activity reports of the Prosecutor General's Office, processed by the LRCM

Even if the guilt of ill-treatment is found, the applied sanctions are, as a rule, quite lenient. In 2021, at the level of courts, only 1 out of 10 persons was sentenced to imprisonment, while every second defendant was given a suspension of punishment with imprisonment. In the same way, people suspected of applying ill-treatment are very rarely suspended from their position, and the authorities do not even have information regarding the application of this measure. Also, there is no public statistical data in the judiciary regarding the sanctions applied by irrevocable sentences in torture cases. The only statistical data are published by the Prosecutor General's Office, but these data only refer to the sanctions applied by the judges of the first instance court. These sanctions are often modified in appellate courts.

[10] Ibidem.

[11] The phenomenon of torture: findings of the Prosecutor General's Office, available at: https://juridicemoldova.md/15893/fenomenul-tortu-rii-constatarile-procuraturii-generale.html?fbclid=IwAR3_RAc8GRtiB81NXTzvk9CPhRgfdXbycTvCEBAHn_0N-8iLuhMPpNL_PQg (accessed on 2 December 2022);

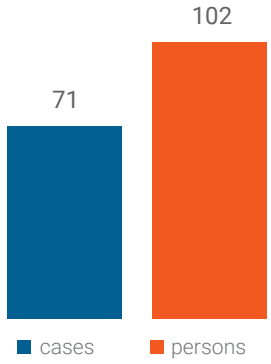
INFORMATION ON ANALYSED CASES

A) GENERAL ISSUES

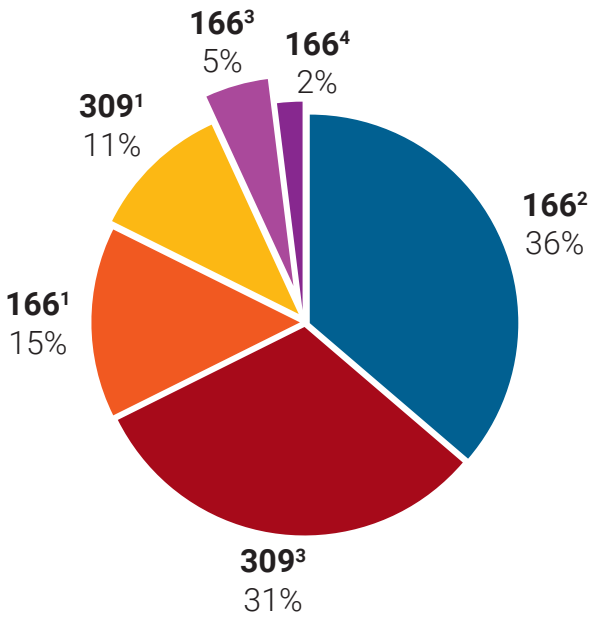
The analysed judgements were issued by the Supreme Court of Justice (SCJ), starting from July 2013 until February 2022 (the last judgement identified on the SCJ page at the stage of drafting this document). Based on this criterion there were collected 74 judgements. However, it should be noted that three judgements could not be analysed, as their text was not published because minors were involved in these cases[12]. Therefore, the present study will analyse 71 final judgements targeting 102 suspects.

Most of the criminal offences in those 71 cases refer to Art. 166[1] para. (1) and para. (2), i.e. inhuman and degrading treatment. These represent 41 cases involving 52 subjects. The application of torture, i.e. Art. 309[1] of the Criminal Code and Art. 166[1] para. (3) and para. (4) – represent 30 cases involving 50 subjects.

Total number of analised case records and persons



Main article incriminated to the subject of offence
representation %

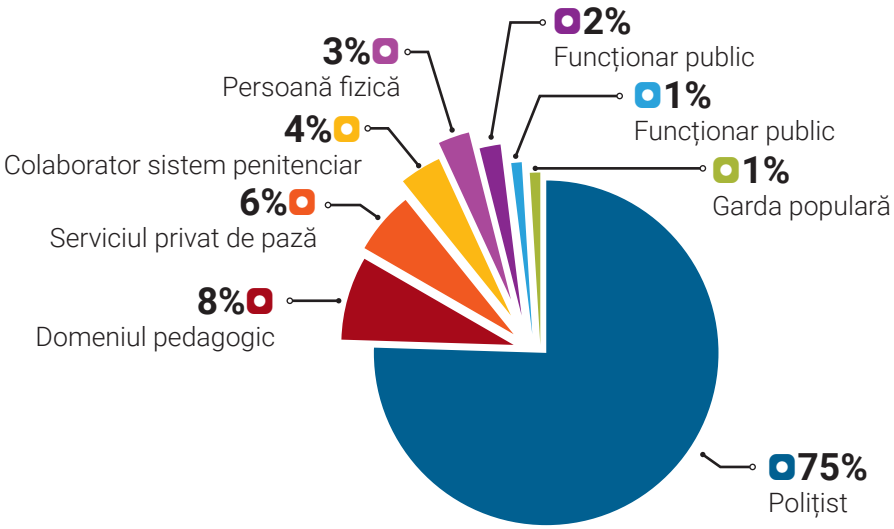


[12] Pursuant to Art. 18 para. (2) of the CPP, the SCJ did not publish the judgements because minors were involved in the criminal cases. See case 1ra-480/2017; 1ra-849/17 and 1ra-775/2017.

B) WHO APPLIES TORTURE AND ILL-TREATMENT?

Although it provides conclusive statistical information, it would be wrong to call this ranking the top of the professions that most frequently commit acts of torture and/or ill-treatment. Rather, this top can be referred to as the ranking of subjects who end up being prosecuted for these crimes.

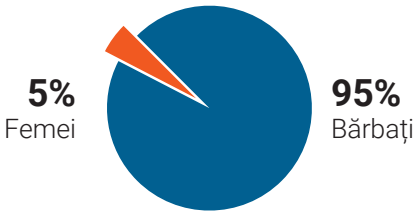
Profile of subjects committing offences of torture/inhuman and degrading treatment



75% of the analysed SCJ judgements refer to charges brought against policemen. The offences for which they are sanctioned refer to ill-treatment during detention, arrest, hearings (in order to force the person to plead the alleged guilt in committing the crime) or, in general, when the person was in police custody. The relatively large number of accused police representatives is also explained by the fact that, as a rule, they act jointly (patrol team, investigation group), but also considering the "specificity" of their work that requires the performance of procedural activities and interaction with the population. Despite the numerous capacity building and training measures for police officers, in 2018 the application of ill-treatment was still found and confirmed by the SCJ in three different episodes, all committed within a relatively short period of time[13].

This category of subjects is followed by teachers and heads of educational institutions, who represent 8% and by representatives of private security services – 6%. Also, penitentiary employees and civil servants (representatives of decentralized public services, popular guard, and local elected officials, etc.) resorted to ill-treatment.

Gender representation of prosecuted persons



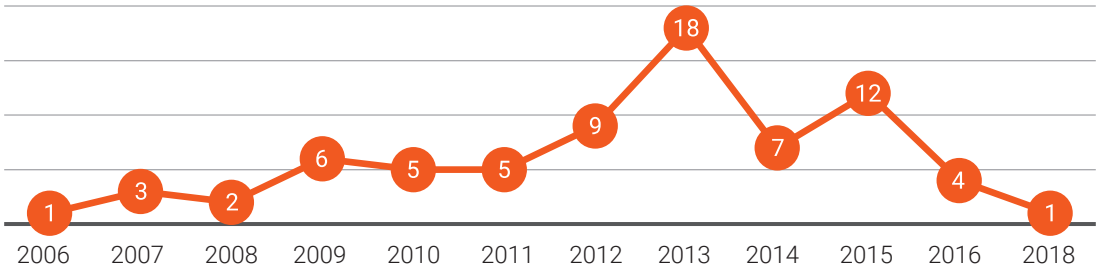
[13] See case no. 1ra-622/2020. The subject committed the illegal acts on 01.09.2018, 22.09.2018 and 05.11.2018. Among other things, he applied two strong blows with his fists in the area of the left cheek and neck of a person; later he applied a blow with his fist in the area of the eye and the right cheek from which the person fell down and further applied six strong blows with his fists in the area of the head and face and with his feet in the area of the neck and back, etc.

Out of 102 subjects identified in the SCJ judgements, 97 (95%) are men and 5 (5%) are women, and last all are employed in educational institutions. Out of those five women three were acquitted and two - convicted.

C) YEAR OF COMMISSION AND DURATION OF EXAMINATION OF TORTURE AND ILL-TREATMENT OFFENCES

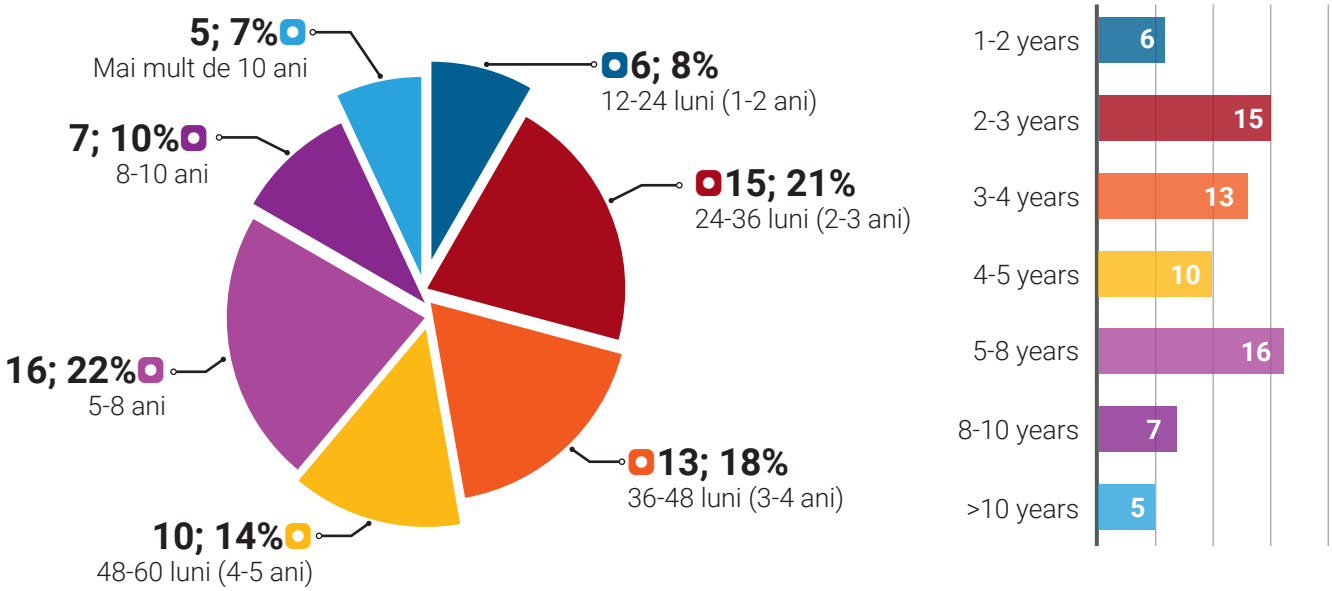
The analysed judgements refer to the offences committed in different periods of time. Most of them numbering 18 (25%) were committed in 2013. Other 12 (17%) were committed in 2015. The most recent finding of the commission of this crime dates back to 2018. These figures may not be representative, however. They could only speak of a greater openness of prosecutors to investigate ill-treatment cases. Indeed, in the years 2009-2012 there were many more complaints than in 2018, but there were far fewer convictions for ill-treatment in those years (or cases are pending).

Year of commission of torture or ill-treatment offence (first episode)



The promptness of sanctioning is another important element in combating the criminal phenomenon, especially when it comes to the cases of torture or ill-treatment. The average duration of examination of these cases in the courts, in the courts of the first instance and appellate courts was about six years. Several years of investigation of the cases by the prosecutors shall be added to this term.

Duration of examination of torture and/or ill-treatment cases



The shortest duration of a trial in a case of application of inhuman and degrading treatment was 375 days[14]. At the same time, the duration of examination in the courts of 12 cases (16%) exceeded 8 years, of which in 5 cases it lasted more than 10 years. The longest trial in a torture case lasted 4163 days (11.5 years)[15].

The average duration of six years can hardly be considered acceptable. In 2020, the average duration of examination of a criminal case in the Republic of Moldova in all three courts was 473 days[16], i.e. 1.3 years, or 4.5 times less than the average examination of cases of torture and ill-treatment. The long examination of the cases of ill-treatment even led to the expiration of the term for criminal prosecution of the persons who committed the ill-treatment until December 2012 (when the law was amended and these offences became imprescriptible)[17].

> "... the person being handcuffed in the corridor of the police station was kicked in the chest by the defendant who was passing by him. Later, the subject struck him again with his hand over the head in such a way that he hit his head against the wall, which had bumps, after which he struck him again with his foot over the head, exactly in the same part with which he hit of the wall and because of pains endured the mentioned person fell down to the ground. Being on the ground and not having the effective possibility to defend himself from the blows, because he was handcuffed, being continuously threatened with the repetition of such treatments towards him, in case he does not plead guilty, he was hit again by several times with the feet in the left side of the abdomen. Later on, after the policeman stopped kicking him and he got up from the ground, he was kicked over the head once more and because of it, the injured party again hit his head against that wall..."

(extracted from case 1ra-499/2017)

In the case mentioned above, the person was released from criminal liability under Art. 309[1] para. (1) of the Criminal Code in connection with the expiration of the statute of limitations. The judgement of the court of the first instance was passed in 2014, although the illegal deed was committed in 2007. The court of appeal and the SCJ in such circumstances were obliged to uphold the judgement of the court of the first instance.

The research results show that making justice in cases of torture and ill-treatment takes time. There must be serious reasoning if crimes are sanctioned more than 8-10 years after they were committed, and the perpetrators no longer get to serve their sentences due to the expi-

[14] See case 1ra-622/2020
[15] See case 1ra-818/2019
[16] LRCM, Analytical document "Moldovan Justice in Figures – a Comparative Perspective" (2022), page 21, available at https://crjm.org/en/moldovan-justice-in-figures-2022-2/
[17] See for example case no. 1ra-1355/2017, where the court of appeal terminated the trial in connection with the statute of limitations for being held criminally liable. The judgement of the court of appeal was pronounced in 2017. The court of appeal specified that the crime (309[1] of the Criminal Code) represents a less serious one, being committed on 4 April 2010, and under Art. 60 para. (1) letter a) of the Criminal Code the statute of limitations for being held criminally liable for such crimes is 5 years from the date of commission.

ration of the statute of limitations. Often, the delay in the examination of the analysed cases was due to the referral of the cases for retrial by the SCJ, in some cases even for four times. Sometimes, there was an impression that some cases were intentionally sent for retrial to get the statute of limitations for the application of the criminal sanction expired (the given term is calculated until the judgement of the court of appeal).

This may mean that the given cases involve a high degree of complexity, and it takes much longer time to carry out all the special investigative actions and submit the case to the court. Another explanation could be the lack of will or fear to issue a judicial solution promptly, in cases where the subjects of the crimes are persons with public positions and influential connections at the local/regional level. In addition to the excessive length of court proceedings, the prosecutors' investigations usually also last for years[18].

[18] Thus, in case no. 1ra-294/2021 the criminal prosecution lasted more than four years and in cases 1ra-239/2020 and 1ra-763/2019 it lasted over seven years.

SANCTIONING THE CASES OF TORTURE AND ILL-TREATMENT

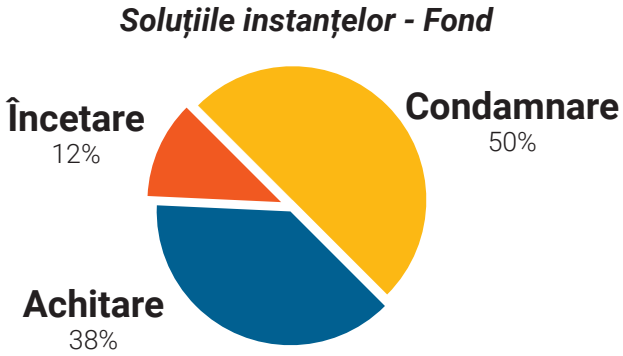
The judgements of the SCJ do not include the essence of the arguments of the court of the first instance, but only the brief description or reproduction of the indictment and, subsequently, the arguments invoked by the parties against the sentence of conviction or acquittal in the court of appeal. We managed, however, to understand the essence of the ill-treatment cases invoked by the prosecutors. These are mentioned in the table with the description of those 71 analysed files.

However, it is necessary to reiterate the fact that the author of the research does not have the purpose to evaluate the arguments and the solution of the courts, assuming that they are fair and based on the evidence administered. In this research, we only examined the dynamics of the solutions ordered by the judges on these types of cases.

SOLUTIONS OF THE FIRST INSTANCE COURTS

The research results confirm that in half of the cases the persons (51) were convicted by the court of the first instance.

The acquittal rate in the courts is 38%, being 13 times higher than the average acquittal rate in the country. In other 12% of cases, the proceedings were terminated.



In order to acquit persons, in most cases, the courts of the first instance found that the deed was not committed by the defendant/defendants[19] or that a constitutive element of the crime was missing[20] (lack of intent to commit the crime or lack of special quality of the subject). In several cases, people were released from criminal liability in connection with the expiration of the statute of limitations for being held criminally liable[21].

[19] See cases: 1ra-1390/2016; 1ra-1671/2016; 1ra-1705/2018; 1ra-239/2020 etc.
[20] See cases: 1ra-777/2016; 1ra-905/2016; 1ra-1355/2017; 1ra-703/2019.
[21] See cases: 1ra-498/2016; 1ra-1512/2016; 1ra-499/2017.

"... when he entered the police station, he saw that in the corridor there were people kneeling with their hands up, in another room the door was open and he saw a boy who was half-naked, had injuries and heard cries. He was also put on his knees, facing the wall. When he wanted to ask something he was neglected. When he was facing the wall, a policeman came and hit him. He does not know how many blows he received, because there had been a series of blows. Then he was taken to another office where there were several policemen including those concerned. They asked him on what occasion he was in the GNAS. He replied that he was at a peaceful protest and was expressing his attitude with reference to the elections...
... Later he received threats that he would not see the light of day, that he would be thrown into the pond, that no one would know where he was and that he would be imprisoned for 7-10 years. All this time they were beating him. A policeman was hitting him on the head and shoulders with his baton and fists. He tried to defend himself, he was falling down. The policeman gave him a cloth to wipe the bloodstains from the walls and floor. He declared that he did not think he still had a chance, he signed all the documents, and they pulled his pants down, he begged them to leave him alone. After all, he admitted the charges brought against him...
Then he was taken to Penitentiary no. 13, where he was detained for 10 days. He stated that he does not remember the document on the basis of which he was detained. He was taken to court, where he was later released. He wrote petition for ill-treatment in Penitentiary no. 13, which was examined in 5-6 days and following that the forensic examination was carried out..."

(extracted from case 1ra-498/2016)

In the case mentioned above, the court of the first instance convicted the persons under Art. 309[1] para. (1). By the same sentence they were released from criminal liability in connection with the expiration of the statute of limitations for being held criminally liable[22].

The rate of acquittals in cases of torture and ill-treatment is quite high (the average rate of acquittals in Moldova does not exceed 3%)[23], these data could speak about the quality of evidence administered by prosecutors (absence of sufficiently strong evidence)[24]. However, there have been identified judgements of the courts of the first instance directly criticized by

[22] The court of appeal overruled the judgement of the court of the first instance and qualified the deed under para. 3 of Art. 309[1]. The court of the first instance held that no indisputable evidence was presented that the defendants would have acted by common agreement, with prior intention and understanding. The court of appeal (and later the SCJ) refuted the given position based on the evidence from the case record. The position of the court of the first instance is unfounded according to which the aggravating circumstance "by two or more persons", stipulated by Art. 309[1] para. (3) letter c) of the Criminal Code, applies only in cases where the crime is committed in complicity. In the same vein, the court of appeal ruled that it is significant that the absence or presence of prior agreement between the perpetrators cannot influence the qualification of those committed under letter c) para. (3) Art. 309[1] of the Criminal Code, but this circumstance can be taken into account when individualizing the punishment.

[23] According to the Activity Reports of the Prosecutor's Office in the reference period (2017 – 2020), the rate of acquittals is on average 2.5%, which represents a constant index in relation to the rate of acquitted persons, source: http://procuratura.md/md/d2004/

[24] All the courts acquitted the person and found the non-existence of criminal deeds, noting the failure of the prosecutor to act promptly, pick up and check the video recordings, especially from the video surveillance cameras in the corridor where the detainee was kept. This effectively deprived the court of the possibility to evaluate this video evidence, which would have objectively confirmed or refuted the defendant's statements (according to which no one entered or left the detainee's room). The injured party also did not request medical assistance, a fact confirmed by the video recording from the surveillance camera installed at that station.

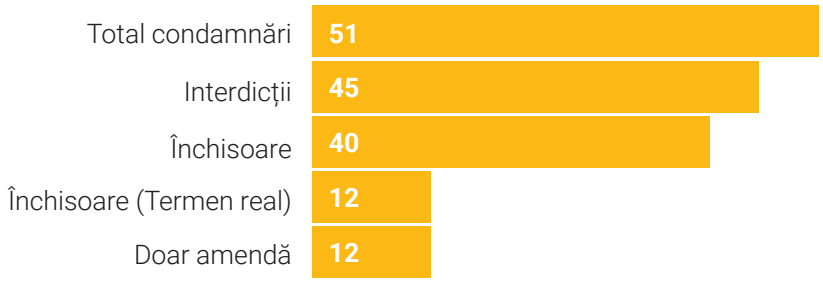
the courts of appeal and the SCJ for the faulty way of reasoning[25] or for the direct omissions in the examination of the evidence[26]. In certain cases we noticed a reluctance of the court judges to convict the policemen for ill-treatment. This can be explained by the harsh penalty provided by the law and the past interaction of judges with the accused in the context of criminal cases handled by the latter.

For example, in a case in which a head of an investigation department, in order to impose a confession of guilt, applied blows with his hands over the head and body causing damages to the person's health for a period of six days, the court of the first instance considered that the deed does not meet the elements of the crime, because the ill-treatment is not serious enough, obviously contrary to the standards of the ECHR. On the other hand, the court of appeal convicted the policeman. The court of appeal was critical of the court of the first instance judgement, including the failure to consider or the dismissal of relevant evidence[27]. The SCJ confirmed the findings of the court of appeal.

Also, there were identified problems in courts regarding the qualification of the defendants' actions after the entry into force of Law 252/2012. We have noted judgements by which the accusations of ill-treatment brought to the defendants were reclassified, more lenient sanctions were applied, or even the criminal proceedings were terminated with the release from criminal liability of the defendants, on the grounds that the committed crimes "were decriminalized". However, it seems that this practice had little applicability, being remedied by a decision of the Plenary of the Criminal Panel of the SCJ in 2014[28]. In the same way, the courts of appeal and the Supreme Court noted that if the deed falling under the scope of the old law is also criminalized by the new criminal law, but the new law worsens the situation of the person who committed such a crime, the old criminal law shall be applied, more favourable to the perpetrator[29].

The graph below shows the sanctions that were ordered by the judges of the court of the first instance in torture and ill-treatment cases.

Type of sanctions (first instance courts)



[25] See for example case 1ra-1671/2016. The court of appeal ruled that the court of the first instance gave a wrong and erroneous assessment of the administered evidence. Moreover, it described in the descriptive part the deed as being established, but in the conclusion, it acquitted the defendant on the grounds that the deed was not committed by him. Based on the evidence, the court of appeal classified the defendant's actions as torture. The SCJ upheld the judgement of the court of appeal, including its conclusions.

[26] See for example case 1ra-1390/2016. The court of the first instance acquitted the defendants. The higher courts mentioned that the conclusions of the court of the first instance regarding the acquittal of the defendants are not related to the administered evidence, although there was a forensic examination that detected six bruises on the face, upper lip, chest on the left and right, injuries produced due to repeated actions with hard blunt objects having a limited impact surface, through a striking mechanism (with fists).

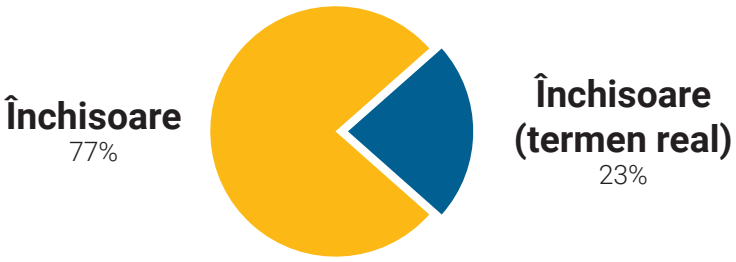
[27] See case 1ra-832/2017. According to the court of appeal, the court of the first instance wrongly concluded that the statements of a witness given during the criminal investigation cannot be used as the basis of the sentence, because he does not "have command of Russian language", and the interpreter's signature is missing from the minutes. However, in court, the witness stated that he was interrogated by the prosecutor in the presence of the interpreter, who read the minutes in Gagauz language and he, having agreed with it, signed the minutes. The witness confirmed these statements more than once.

[28] See case nr. 4-1ril-3/2014

[29] See case 1ra-1265/2016.

Out of the total number of convicted persons, 40 were sentenced to imprisonment. In the case of 28 persons, the execution of the given sentence was conditionally suspended, and the convicts were released. Only 12 people were sentenced to a real imprisonment term.

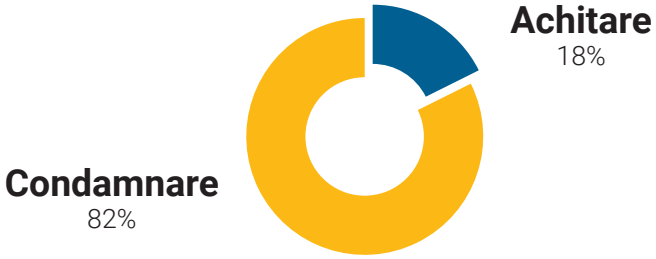
Sanctions - first instance court (imprisonment)



SOLUTIONS OF THE COURTS OF APPEAL

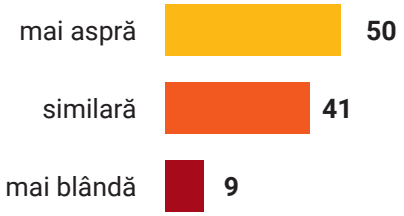
Prosecutors had a better chance of success in the court of appeal. At least, this is what the statistical data extracted from the analysed court judgements show. At the court of appeal, the conviction rate rose to 82%, compared to 50% at the court of the first instance.

Court solutions - Appeal court



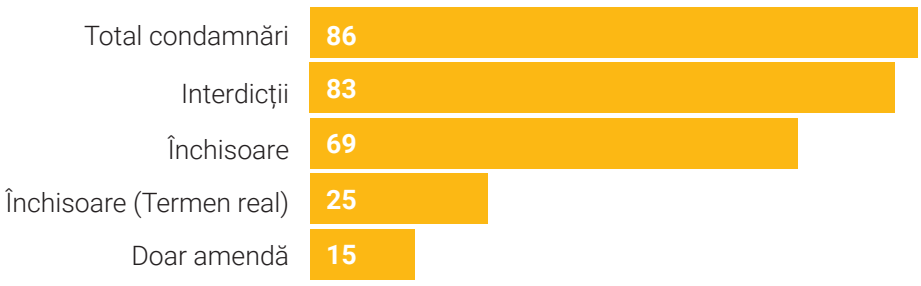
At the level of the courts of appeal, in at least 41% of all examined cases, the judgement of the court of the first instance was upheld. However, modification in the court of appeal of the solution of the court of the first instance in 59% of the cases is a very high rate compared to other types of examined case records, which may speak of a faulty examination of the cases in the courts, of the absence of uniform case law or of the pro-accusatory bias of the judges of the courts of appeal. Indeed, in 50% of cases the punishment of the court of appeal is harsher, and in 9% of cases - more lenient (out of which 15 persons were acquitted).

Solution nature (compared to the first instance court) no. of subjects



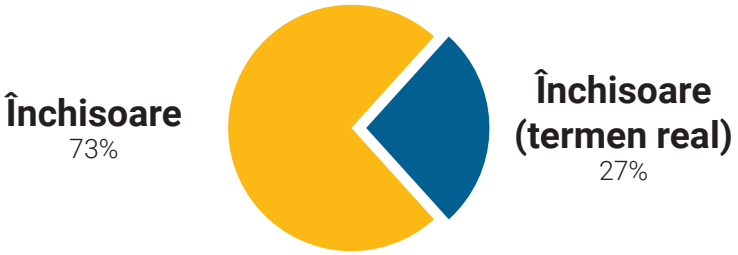
The graph below shows the sanctions that were ordered by the judges of the courts of appeal in the cases of torture and ill-treatment.

Type of sanctions (courts of appeal)



Out of the total number of those convicted at the appeal level, 69 persons (73%) were sanctioned with imprisonment, of which 25 persons (27%) with the real term of execution of the sentence. We shall remind you that the courts of the first instance ordered the imprisonment of only 12 persons, twice less than the courts of appeal.

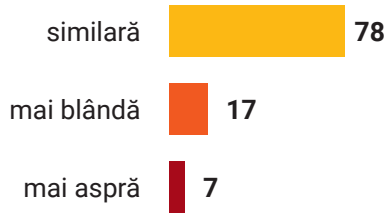
Sanctions - appeal court (imprisonment)



SOLUTIONS OF THE SCJ

A different situation is found in the case of solutions given by the SCJ judges. Practically, three out of four judgements of the court of appeal are upheld by the SCJ. The findings of 54 judgements of the courts of appeal, targeting 78 defendants, were upheld by the Supreme Court. In other words, most of the "final" judgements in torture and ill-treatment cases are taken at the level of appeal court.

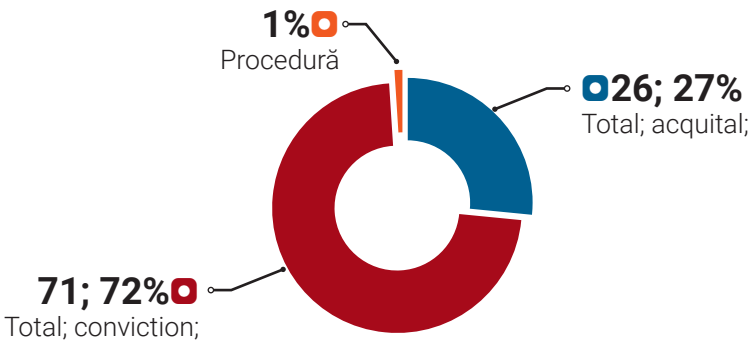
Solution nature (compared to the first instance court) no. of subjects



Only in 4 judgements targeting 7 suspects the SCJ passed harsher verdicts, and in another 13 judgements targeting 17 suspects it ordered more lenient sanctions, including acquittal of persons in 9 cases[30].

The chance that the person will get more lenient sentence at the SCJ level is higher than at the level of the court of appeal. Any person convicted in the first or second instance is practically encouraged to challenge the judgement at the SCJ. Even if in 76% of appeal requests the nature of the solution concerning the appeal was upheld, in 17% of cases the SCJ gave a

Court solutions - Recourse



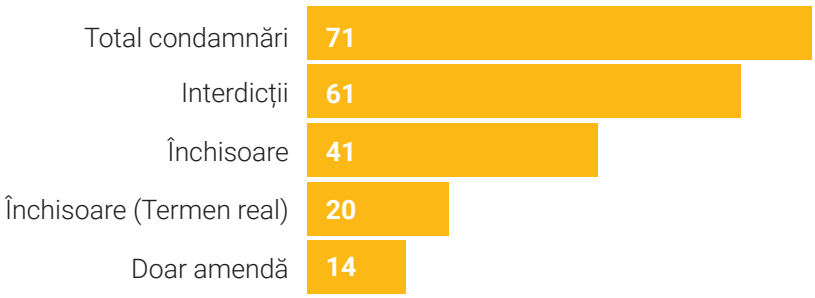
[30] As a rule, because the criminal proceedings are terminated in connection with the amnesty (two cases related to the application of ill-treatment) or because one element of the crime is missing (e.g., the status of a special subject).

solution more favourable to the appellant. Only in 7% of the examined cases, the SCJ imposed a harsher sanction than the court of appeal.

We also found that the SCJ, when it did not agree with too lenient sentence applied by the court of appeal, referred the case for retrial. The toughening of the punishment usually took place when after the retrial of the case the court's judgement remained faulty in the opinion of the SCJ.

The graph below shows the final sanctions ordered by the SCJ judges in the cases of torture and ill-treatment.

Type of sanction - Recourse



71 people were sanctioned with a sentence of imprisonment, of which 20 – with a real term of execution of the sentence. According to the judgements of the court of the first instance, 12 persons should have served this sentence and according to the courts of appeal – 25 persons. In two cases, where the real execution of the imprisonment sentence was applied by the hierarchically lower courts, the SCJ found that the term for criminal prosecution had expired and released the persons[31]. Expiration of the term for criminal prosecution automatically entails non-application of sanctions, even if the person's guilt was proven.

Sanctions - recourse (imprisonment)

The average duration of the real term of imprisonment in torture and ill-treatment cases is 5.5 years. The minimum term of imprisonment was five years, and the maximum term – eight years.

[31] The persons committed the offence under Art. 309[1] of the Criminal Code but considering the provisions of Art. 60 paragraph (1) letter b) of the Criminal Code, the courts found that the term for prosecution had expired.

„... The defendant forced a minor to strip down to his underwear in the presence of several persons, using derogatory words and jokes about the minor's speech defect. Although there were boats on the shore, he ordered to enter into the cold water of the pond to retrieve the fishing nets. The minor was there for a long time, looking for the fishing nets, found them and went out with them to the opposite bank of the pond, where being already in a state of unconsciousness he was pulled out of the water and dressed by other people. Although the minor was in a state of hypothermia and semi-conscious, the defendant interrogated him about the alleged theft of fish from that pond, continuing to use threats and humiliating words..."

(extracted from case 1ra-716/2019)

This was the only case of applying the sanction stipulated by Art. 1661 para. (4) of the Criminal Code, which provides for imprisonment from 8 to 15 years. The minimum punishment prescribed by law was applied in the given case.

The SCJ also ordered the application of the penalty with a fine, on the grounds that the acts of the defendants were not torture, but fell under the scope of other criminal acts (ill-treatment, according to the version of the law in force until December 2012)[32].

As concerns the suspension of the execution of the sentence, this is not a right of the defendant, but the discretion of the court instance, which is free to assess whether or not it is appropriate to grant it. Frequent resorting to the conditional suspension of the execution of the sentence contributed to strengthening the opinion of Moldovan public that the perpetrators remain unpunished. In fact, whenever they passed an imprisonment sentence of less than five years, the judges ordered suspended execution of it, because the law allows them to suspend imprisonment sentences of less than five years. Even if the law stipulates that the suspension should be thoroughly motivated, in the analysed judgements this rarely happened. On the other hand, we found that in the absolute majority of cases, when the courts apply Art.90 of the Criminal Code, the prosecutor's office declares an appeal or recourse in order to request the application of the effective execution of the sentence[33].

Below we present an example of a case when the SCJ ruled to apply Art. 90 of the Criminal Code, although the court of appeal sentenced the defendants to imprisonment with execution.

[32] See for example cases 1ra-1265/2016 - Botezat Veaceslav; 1ra-28/2017 – Gînga Vasile etc.

[33] The prosecutor's office requested the exclusion of the provisions of Art. 90 of the Criminal Code from the sentence in the appeal procedure. The prosecutor's office referred to the Zeynap Ozcan v. Turkey case (20 February 2007) in which it was ruled that the conditional suspension of the sentence of the convicted, who was guilty of committing acts of torture, does not constitute an adequate punishment in line with the provisions of Art. 3 of the ECHR, a fact that can generate the conviction of the Republic of Moldova at the ECtHR through the prism of the tolerance shown by the authorities towards the phenomenon of torture. The court of appeal considered this request unfounded, or, a punishment with the real execution of the sentence "would be too harsh in relation to the damage suffered" (see case no. 1ra-1438/2020)

case 1ra-713/2021	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
"As representatives of a private security service, they applied the special means of protection to two people - the irritating spray with tear gas, spraying it in their eyes, following that they hit multiple blows with their fists to different parts of the body. On the same day, at another time (call-out) they hit two other people up to 10 blows with a rubber stick, with their feet and fists in different parts of the body, mainly in the head and back area ..."	The court reviewed the evidence and qualified the actions as inhuman and degrading treatment (four episodes against seven injured parties). The court imposed each of them a fine of 20,000 MDL and a ban on carrying out the activity for 5 years.	The court of appeal concluded that the court of the first instance noting in the actions of the defendants the elements of the crime for committing four episodes, has chosen the mildest punishment for the defendants - the fine. The court sentenced the persons to imprisonment with execution for a term of 4 years and the prohibition to carry out the activity for 5 years.	The SCJ overrules the judgement of the court of appeal and applies Art. 90 of the Criminal Code (suspension of the imprisonment sentence). The SCJ reasons it by the personality of the defendants, who are in the dock for the first time, are young, have families and minor children to support. The defendants actually spent 139 days (approx. 4 months) in prison.

The analysed case law regarding cases of torture and ill-treatment confirms the absence of a clear punitive policy in this domain. This practice cannot ensure a certain balance between the purpose of re-educating the torturers and expectations of the society regarding justice administration implemented. This was also confirmed by some judges of the SCJ who presented dissenting opinions[34].

> "... the deed committed by the defendant is a particularly high-profile case for the society, taking into account the circumstances in which it was committed and the relationships it targets, and that number of crimes of this kind is increasing in the Republic of Moldova. So, the application of the provisions of Art. 90 of the Criminal Code, in this case, will not have the intended impact on achieving the purpose of the criminal penalty"...

(extracted from the dissenting opinion in case no. 1ra-2116/2021 as of 24 February 2022)

Persons suspected of torture and ill-treatment must usually be suspended from office during the criminal prosecution and examination of the case in court, in order to exclude the risk of destruction of evidence and revictimization of the victim. According to the prosecutor's office, the authorities do not have information regarding the application of this special coercive measure. Based on the analysis of the SCJ judgements, only in one case out of 71, the defendants were suspended from office[35]. Therefore, this procedural measure is very rarely applied in practice.

As a result of the analysis of the irrevocable judgements of the SCJ, we conclude that only every fifth person (or 20 persons out of 102 examined in the present study) ends up serving the sentence in prison. This would confirm our previous findings that the conviction rate for torture and ill-treatment is low, the fact that creates impunity for torturers[36]. It is debatable to what extent this is due to the legal framework, we rather believe it is due to poor enforcement of the law in practice.

[34] See dissenting opinions of judge Elena Cobzac in cases no. 1ra-1115/21 and no. 1ra-2116/2021

[35] See case no. 1ra-295/2021. By the orders of the Head of the General Police Inspectorate as of 24 July 2017 there were applied coercive procedural measures, such as provisional suspension from office.

[36] LRCM and Promo-LEX, Communication to the Committee of Ministers of the Council of Europe regarding guarantees and the impact of measures taken by the authorities to prevent and combat ill-treatment (2021), available at: https://crjm.org/wp-content/uploads/2021/07/2021-07-27-LRCM-PromoLEX-submission-9.2-Levinta-group.pdf

UNIFORMITY OF CASE LAW

Analysing the case law in cases of torture and ill-treatment, we cannot say with certainty that it is totally uniform. The figures mentioned in the previous chapter tell us about the presence of a non-uniform practice at the level of the courts of appeal and the courts of the first instance, once the imposing number of sentences of the court of the first instance are overruled, and the solutions of the court of appeal judges are different in 59% of cases (even if they are harsher or more lenient). There have been identified judgements of the courts of the first instance criticized by the courts of appeal and the SCJ for the faulty way of reasoning or for the direct omissions in the examination of the evidence.

The Supreme Court of Justice has special and important mission of standardizing case law for these types of cases. These efforts would not require legislative intervention, but rather the organization of regular meetings with all judges of a single court, the codification of the SCJ practice, the development and application of thematic guidelines, and perhaps a SCJ advisory board consisting of members with diverse experience.

Further on, we present some of the analysed cases, which raise doubts about the uniformity of the case law.

THE SPECIAL QUALITY OF THE SUBJECT OF THE OFFENCE STIPULATED BY ART. 166[1] OF THE CRIMINAL CODE

Not every responsible individual who at the time of committing the crime has reached the age of 16 can be the subject of this crime. The legislator provided for the special quality of the subject: 1) public person; 2) the person who, de facto, exercises the powers of a public authority; 3) any other person who: a) acts in an official capacity; b) acts with the express or tacit consent of such a person.

We have noticed an uneven practice regarding the teaching staff, namely whether this category can be charged for committing the offence stipulated by Art. 166[1] of the Criminal Code. Out of 8 cases examined at the SCJ, 6 people were acquitted[37], and 2 were convicted[38]. In one of those two cases of conviction, the person was sentenced on appeal to suspended imprisonment, and at the SCJ level the appeal was declared inadmissible, because it was submitted beyond the legal deadline. The teaching staff was convicted for assaulting students under Art. 166[1] after several teachers were acquitted by the SCJ because they cannot be subjects of this crime. After passing the sentence of conviction, the SCJ passed several more judgements in which it found that teachers are not subjects of the offence stipulated by Art. 166[1]. Therefore, the conviction in question does not represent a change in case law, but a deviation from the existing practice.

[37] See cases 1ra- 121/2016, 1ra-333/2017, 1ra-938/2017, 1ra-72/2016, 1ra-1398/2017 and 1ra-1378/20
[38] See cases 1ra-1266/2018 and 1ra-1130/2018

case 1ra-121/2016	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
"Following the goal of humiliating the pupils who had climbed onto the roof of the school, he brought out a minor in front of the class and, scolding him, grabbed him by the chin with his hand and hit him with the head against the black-board, causing him injury in the form of bruises, which according to the expert's conclusion is qualified as insignificant bodily injury."	The deed does not meet the constitutive elements of the crime. The person was found guilty under Art. 313 of the Criminal Code.	The defendant's actions caused physical and mental suffering to the minor, a fact confirmed by the statements of the witnesses (other minors). **The court of appeal qualifies the position of school principal as a person with a designated responsible position.** It condemns the person under Art. 166^{1} para. (2) letter a), e) of the CC and applies the fine in the amount of 16 000 MDL and the prohibition to carry out the activity for 5 years.	**The SCJ noted that neither the victim nor the defendant (school principal) possessed the special qualities provided by law and necessary for qualification under Art. 166^{1} of the CC,** and the degree of suffering caused by illegal actions does not allow them to be classified as a crime, but as a misdemeanour (313 CC).
	Acquittal	Conviction	Acquittal

case 1ra-1266/2018	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
"The person slapped a minor three times across the face, then slapped another minor on the head and constantly used insulting words in their regard. On another occasion, through verbal coercion, he forced them to perform 1000 squats each, a physical effort of exaggerated intensity, which produced the excessive overwhelming of the targeted children"	The court of the first instance reviewed the evidence and qualified the actions as inhuman and degrading treatment. The court of the first instance imposed a fine of 17 000 MDL and the prohibition to carry out the activity for 5 years.	**The court of appeal upheld the judgement of the court of the first instance. The defendant's actions and their consequences are too abusive for the psyche of some 10-12-year-old children, which indicates that they have exceeded the minimum level stipulated by Art. 3 of the ECHR and ideally fall within the scope of the legal norms stipulated by Art. 166^{1} of the Criminal Code.**	The SCJ upheld the judgement of the lower courts, including their conclusions. **The SCJ mentioned that the defendant, as a teacher and school principal, did not act with an official title, but acted as a person performing the duties of a public authority, being the subject of the crime.**
	Conviction	Conviction	Conviction

In all six acquittal cases upheld by the SCJ, similar solution came from the court of the first instance. The uneven practice was created at the level of the courts of appeal, where in four cases people were convicted. As a rule, the courts of appeal overruled the judgements of the courts of the first instance on the grounds that the latter did not give a correct assessment to the statements of the injured party and the witnesses, and last but not least, they considered that the teachers were the subjects of the given crime. In its turn, the SCJ overruled the judgements of the courts of appeal, upholding those issued by the first instance.

"MINIMUM LEVEL OF SEVERITY"

According to the specialized literature, the "minimum level of severity" implies a relative evaluation on a case-by-case basis. The evaluation shall take into account: the intensity of the action or inaction causing either physical or mental pain or suffering to a person; the duration of its application; the effects of the deed on the person's physical and mental health; the applicable means; method of operation; the environment of the action or inaction causing either physical or mental pain or suffering to a person; the sex; age; the state of health of the victim,

etc. All these taken together can illustrate whether the pain or suffering is strong or not. So, to be considered "strong", pain or suffering must attain a level of intensity and atrocity. As a rule, compliance with these requirements is the result of a deed with a strong effect or accumulation by the perpetrator of several actions or inactions, committed with a single intention and with a single purpose[39].

case 1ra-1283/2021	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
*"as a result of a verbal conflict, the subject, a member of a popular guard, **punched a person in the head,** following which he lost consciousness"*	**The court of the first instance reviewed the evidence and qualified the actions as inhuman and degrading treatment.** The court of the first instance imposed a fine of 18 000 MDL and the prohibition to carry out the activity for 5 years.	**The court of appeal terminated the criminal proceedings, because the committed deed constitutes a misdemeanour,** moreover the statute of limitations for contravention sanctioning has expired. The court of appeal noted that the injured party herself stated that she was hit only once, and the conflict between them lasted around 5-10 minutes, thus missing the element of inhuman treatment, which is estimated to be premeditated and applied for hours in a row and causing either bodily harm or profound physical or mental suffering.	**The SCJ overrules the judgement of the court of appeal and upholds the judgement of the court of first instance.** The SCJ highlighted that "the need to punish the injured party for the behaviour shown towards the members of the Popular Guard and his actions of smoking in public - was the determining factor". The SCJ invoked that the pain and suffering of the injured party cannot be considered simple "brutality", as the court of appeal noted, but **it falls under the scope of inhuman and degrading treatment.**
	Conviction	Acquittal	Conviction

In the case mentioned above, we observed completely different positions of the courts. In the opinion of the court of appeal, the treatment applied to the victim must exceed a certain "minimum level of severity", and the inhuman or degrading treatment is not simple brutality, but is sufficiently serious, and if there are still doubts regarding the sufficiency of the severity of the treatment, the liability shall not be applied under Art. 166[1] para. (1) of the Criminal Code. The SCJ invoked that the pain and suffering of the injured party as a result of the punch in the head cannot be considered simple "brutality" and this behaviour falls under the scope of the crime of inhuman and degrading treatment.

Case no. 1ra-80/2017	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
*"being the head of the directorate of an ecological agency, in order to punish a person for a theft of wood, he went to his residence and **applied several blows with his fists and feet to different parts of the body,** causing insignificant bodily injuries"*	The court of the first instance reviewed the evidence and **qualified the actions as inhuman and degrading treatment.** The prosecution qualified the deeds as torture. The court imposed a fine of 20 000 MDL and the prohibition to carry out the activity for 5 years.	The court of appeal terminated the criminal proceedings on the grounds that the **committed deed is not sufficiently serious and constitutes a contravention** and in connection with the expiry of the statute of limitations for being held liable.	**The SCJ upheld the judgement of the court of appeal,** including its conclusions.
	Conviction	Acquittal	Acquittal

[39] The Prosecutor's Office of the Republic of Moldova, Methodological recommendations for the effective investigation of crimes of torture, inhuman or degrading treatment, Chisinau, 2014, page 36, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MDA/INT_CAT_AIS_MDA_29483_E.pdf

The court of appeal found that the constitutive element (the objective side) of the crime, namely "the threshold of severity of physical or mental pain or suffering, which would represent inhuman or degrading treatment" was not confirmed. Although, as stated in the previous judgement, many more blows were applied, including with the feet. In its turn during the examination of the case the prosecutor's office requested that the given deed shall be qualified as torture. According to the SCJ, the conflict between the defendant and the victim is a result of past conflict relations between two villagers, and in no way between a natural person and a public person or official. Additionally, the deed would have been committed outside working hours.

NOT EXERCISING OFFICIAL DUTIES AT THE TIME OF COMMITTING THE DEED

Case no. 1ra-911/17	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
"He showed up at the victim's home and ***officially declaring and knowing that the victim knew that he was a policeman,*** *he acted in order to intimidate him for changing his statements in a criminal trial where the defendant's father was in the capacity of a suspect,* ***he applied several punches in the abdomen area.***"	**The court of the first instance convicted the person under Art. 287 of the Criminal Code - hooliganism.** The court of the first instance considered that the subject was not exercising his duties at the time of committing the deed. It sanctioned the person with a fine of 12 000 MDL.	**The court of appeal reclassified the facts as ill-treatment.** It ruled that the subject was at work, or, according to Art. 26 of the Law on the activity of the police and the status of the police officer, he carries out his professional activities in the interests and for the benefit of the individual, community and institutions of the state, solely on the basis of and pursuant to the law, etc. It sanctioned the person with a fine of 20 000 MDL and deprived him of the right to hold office for 3 years.	**The SCJ upheld the judgement of the court of appeal, including its conclusions.**
	Conviction under art.287	Conviction under art. 166[1]	Conviction under art. 166[1]

The court of the first instance and the court of appeal had different opinions. The court of the first instance re-qualified the defendant's deeds as hooliganism. According to the court of appeal, the defendant was not in the exercise of the position, but acted on behalf of the public authority, as an official person, actions that conditioned the person's victimization by causing feelings of fear, anxiety and inferiority. Additionally, it is prohibited to the police officer to abuse his official capacity and compromise through his private or public activity the prestige of the position or authority he belongs to. The SCJ confirmed the findings of the court of appeal.

DISTINCTION BETWEEN TORTURE AND ILL-TREATMENT

Taking into account the special features arising from the content of the term, only serious forms of mental or physical pain or suffering can be qualified as torture. This degree of severity may be inferred directly from a single act of particular cruelty or as a consequence of a combination of acts causing mental and/or physical pain, which are different and repeated, which together cause anxieties and/or injuries of a gravity characteristic of torture.

Case no. 1ra-716/2019	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
„... The defendant forced a minor to strip down to his underwear in the presence of several persons, using derogatory words and jokes about the minor's speech defect. Although there were boats on the shore, he ordered to enter into the cold water of the pond to retrieve the fishing nets. The minor was there for a long time, looking for the fishing nets, found them and went out with them to the opposite bank of the pond, where he had been already in a state of unconsciousness. He was pulled out of the water and dressed by other people. Although the minor was in a state of hypothermia and semi-conscious, the defendant interrogated him about the alleged theft of fish from that pond, continuing to use threats and humiliating words..."	The court of the first instance reviewed the evidence and **qualified the actions as inhuman and degrading treatment.** The prosecution qualified the deeds as torture.	**The court of appeal reclassified the deeds as torture.** The court of appeal considered as wrong the conclusion of the court of the first instance, such as that the pain or suffering caused to the victim was not strong, or, the manner of committing it led to consequences that constitute strong physical or mental suffering.	**The SCJ upheld the judgement of the court of appeal.**
	Conviction for ill-treatment	Conviction for torture	Conviction for torture

In the case above, the court of the first instance had a different opinion from the superior ones, providing reasoning that the defendant's deed did not reach the necessary level of severity (it was not strong enough) to be qualified as torture. The court of appeal and the SCJ concluded that torture and not inhuman treatment was applied in the given case, because there was sufficient intensity of the deed and the purpose of intimidation, humiliation of the minor, of his pleading guilty in committing the theft of fish from the water basin, as well as of his punishment for the committed deed, thus the minor who stayed in cold water for a long period of time was caused a sufficient intensity of pain. This was the only case where the SCJ applied/upheld the sanction stipulated by Art. 166^{1} para. (4) of the Criminal Code. The minimum punishment prescribed by law was applied in the given case (8 years of imprisonment).

Case no. 1ra-590/2018	First instance court reasoning	Court of appeal reasoning	SCJ reasoning
On 9 April 2009, the defendant detained and took the person to the police station, without any legal ground, with the aim of putting pressure on her to obtain confessions in order to identify the participants in the actions of 7 April 2009. Later ***he punched her several times in the head after which he forced her to lie on the floor facing down with her clothes over her head and proceeding with illegal actions he kicked her numerous times over some parts of the body.***	The court of the first instance convicted the person **under Art. 328 para. (1) of the Criminal Code (excess of official authority).** The court re-qualified the deeds. The prosecutor requested the conviction under Art. 309^{1} para. 3.	The court of appeal overruled the judgement of the court of the first instance, **qualifying the deeds as torture.**	The SCJ upheld the judgement of the court of appeal, including its conclusions. It was previously referred for retrial 3 times.
	Conviction under Art. 328 of the Criminal Code	Conviction	Conviction

The ECtHR stated in many judgements that the distinction between torture and other types of ill-treatment must be made according to the difference in the intensity of the pain caused. The severity or intensity of the pain caused can be precisely determined by referring to: 1) duration, 2) physical and mental consequences, 3) sex, age and state of health of the victim, 4) manner and method of execution[40]. In the case noted above, the court of the first instance considered irrelevant the circumstances stated in the ECtHR case law. The court of appeal and the SCJ objected to the judgement of the court of the first instance and re-qualified the defendant's deeds as torture.

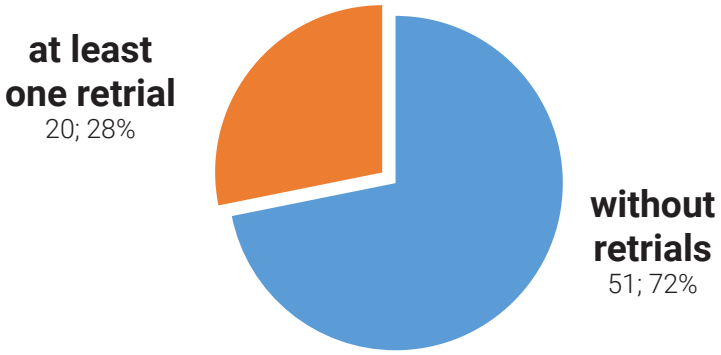
However, the important rule that we have highlighted by analysing the judgements of all the courts is that, if doubts persist regarding the degree of severity of the pain or suffering caused to the victim, liability has to be applied under para. (1) Art. 166[1] of the Criminal Code (ill-treatment) not under para. (3) Art. 166[1] of the Criminal Code (torture).[41]

RETRIALS IN TORTURE AND ILL-TREATMENT CASES

71 cases were examined within the framework of this research. More than 30 other cases were still under examination, being referred by the SCJ for retrial to the court of appeal.

Out of those 71 cases, 51 (72%) were never referred for retrial, and other 20 (28%) were referred for retrial at least once. This fact suggests that every third case of torture or ill-treatment was referred for retrial by the SCJ.

Retrials in cases of torture/ ill-treatment



Referring the case for retrial should mean the need to correct some errors admitted by the lower courts. However, it seems to be problematic when just every third case concerning the persons under investigation is sent at least once for retrial before becoming irrevocable.

The situation in which cases are referred for retrial two or more times is more serious. In at least eight analysed cases (11%), the case was sent by the SCJ for retrial at least three times. The repeated retrial of the same case is difficult to justify. Furthermore, the referral of the case for retrial automatically increases the chances of the expiration of the statute of limitations for crimes committed before December 2012.

[40] See Corsacov v. Moldova case no. 18944/02; Selmouni v. France case no. 25803/94; Ilascu and others v. Moldova and Russia [GC] case no. 48787/99,
[41] See for example case nr. 1ra-72/2016

The SCJ most often invokes the insufficient evaluation of the evidence by the hierarchically lower courts in the decision on the referral of the case for retrial. It results from the analysis of the cases that the SCJ mentioned that the instructions from the first judgement on the referral for retrial were not respected by the court of appeal[42].

The big number of decisions on the referral for retrial in torture and ill-treatment cases may be an indicator of existing deficiencies in the work of the courts of appeal.

[42] Initially, the court of appeal sentenced all three defendants to 5 years of imprisonment with the execution of the sentence. Later, the court of appeal acquitted them on the grounds that the deed was not committed by the defendants. The court of appeal did not doubt the fact that on 8 April 2009 the person was subjected to torture, but the administered evidence did not confirm that the criminal deeds were committed namely by the defendants. According to the court of appeal, during the alleged ill-treatment of the person, two out of three defendants were, in fact, outside the police station premises (a possible alibi), but the court failed to show which evidence proves this fact. For these reasons, the SCJ referred the case for retrial.

CONCLUSIONS

- There were analysed 71 irrevocable judgements of the SCJ. They refer to deeds committed between 2006 and 2018.

- The average rate of examination of torture and ill-treatment cases at those three court levels is 6 years. This means that justice in such cases takes 4.5 times longer than usual. Some cases are examined for more than 8 or 10 years, which determined the expiration of the statute of limitations for the application of the criminal sanction.

- The total duration of the criminal proceedings is also long. In some of the analysed cases the criminal prosecution lasted for more than six years. A delay in prosecuting or examining the case in the court could be explained by the lack of will or fear of the suspects, who are persons with public positions and influential connections or with whom prosecutors and judges interact frequently.

- The shortest duration of a trial was 375 days. The duration of the examination of 12 cases (16%) exceeded 8 or even 10 years. The longest judicial process lasted for 11.5 years.

- The acquittal rate in the courts is 38%, being 13 times higher than the average acquittal rate in the country. In other 12% of cases, the proceedings were terminated. However, prosecutors are more likely to succeed in the court of appeal and the conviction rate has increased to 82%, compared to 50% in the court of the first instance.

- At the level of the courts of appeal, the solution of the court of the first instance is overruled with a rate of 59%. Compared to other types of examined cases, this may speak about faulty examination of cases by judges, about the absence of uniform case law, or about the pro-accusatory bias of the court of appeal judges. In 50% of cases the punishment in appeal procedure is harsher and in 9% of cases - more lenient (out of which 15 persons were acquitted).

- Three out of four judgements of the court of appeal are upheld at the SCJ. This means that most of the "final" judgements in torture and ill-treatment cases are taken at the level of appeal court.

- The chance that the person will get a more lenient sentence at the SCJ level is higher than at the level of the court of appeal. Even if in 76% of appeal requests the nature of the solution concerning the appeal was upheld, in 17% of cases the SCJ gave a solution more favourable to the appellant. Only in 7% of the examined cases, the SCJ imposed a harsher sanction than the court of appeal.

- 75% of the analysed SCJ judgements refer to the sanctioning (the acquittal, as the case may be) of police officers. This category of subjects is followed by employees in the domain of education, who represent 8%, and by representatives of private security services – 6%.

- 71 people were sentenced to imprisonment, of which only 20 were jailed. The rate of real term conviction is low, which would generate impunity for the torturers.

- The average duration of the real term of imprisonment is 5.5 years and the longest – 8 years. In all cases where judges imposed an imprisonment sentence of less than 5 years they suspended its execution, sometimes without any conclusive reasoning.

- Almost every third case is referred for retrial. In at least 8 analysed cases (11%), the SCJ referred the case for retrial three or more times. This speaks of the failure to follow the SCJ instructions by the courts of appeal or of the questionable validity of these instructions.

- The case law is not entirely uniform, especially at different levels of courts. This can also be determined by inconsistencies in the practice of the SCJ.

RECOMMENDATIONS

- **The study does NOT recommend toughening penalties for the acts of torture or ill-treatment.** It is important that the sanctions already provided by law are properly enforced.

- **Amendment to the Criminal Procedure Code excluding the possibility of repeated referral of the case for retrial.**

- **Consolidation of efforts to standardize the case law -** the research results highlight the presence of a non-uniform practice at the level of appeal courts and/or courts, once an imposing number of sentences of the court of the first instance is overruled and the solutions of the court of appeal judges are different. Accordingly, the case law requires generalizations, including at the level of the courts of appeal. The SCJ has a primary role in this regard. These efforts are related to the introduction for the SCJ and lower courts of a formal mechanism to strengthen case law[43] by: organizing regular meetings with all judges of a single court, the codification of the SCJ practice, the development and application of guidelines on the individualization of criminal sanctions, and establishing of a SCJ advisory board consisting of members with diverse experience, including from outside the judiciary.

[43] Other recommendations can be found in another LRCM study "From judgements to justice: How can we achieve better judicial reasoning in the Republic of Moldova?" (2021), available at: https://crjm.org/wp-content/uploads/2021/11/2021-25-10-De-la-hotarari-judecatoresti-la-justitie_2021-EN_FINAL.pdf

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