Office for Democratic Institutions and Human Rights

Final Report
Trial Monitoring Project in Armenia
(April 2008 – July 2009)

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List of Abbreviations

CC	Criminal Code of the Republic of Armenia
CCP	Code of Criminal Procedure of the Republic of Armenia
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations

Executive summary

Results of the ODIHR trial monitoring project ("the project") in the aftermath of the 1-2 March 2008 post-election violence in Yerevan reveal shortcomings in the adjudication of related trials. Recognizing that the trials have taken place amid high public tension and received special public attention, the Armenian authorities could have invested more efforts to ensure their fair and impartial adjudication. This report includes a number of recommendations to assist the Armenian authorities advancing the administration of criminal justice in line with international standards and OSCE commitments.

The project was undertaken to systematically gather information about compliance of the monitored trials with relevant domestic and international fair trial standards, as well as to identify possible shortcomings in the criminal justice system. For this purpose, between April 2008 and July 2009, the project staff monitored 93 criminal cases involving a total of 109 defendants. The monitored cases do not constitute a large portion of the total number of cases tried by the Armenian courts.[1] However, they point to systemic shortcomings and the resulting recommendations are offered to the entire justice system.

Many of the trials monitored took place in an atmosphere of high tension. Some of the defendants expressed their disagreement with the criminal proceedings against them through speeches and other manifestations of protest. They and their supporters in the courtroom often did not show respect for the judges and other participants of the proceedings. These challenging circumstances made the work of courts extraordinarily difficult and at the same time raised the bar for their professional performance to the highest levels. The information gathered allows the conclusion that a number of judges coped with these challenges with due professionalism.

At the same time, the monitoring activities resulted in the identification of various issues of concern regarding the right of the accused and defendants to a fair trial and the right to liberty. The report analyzes these issues in the chapters related to the right to liberty (chapter 1), the right to a public hearing (chapter 2), the presumption of innocence (chapter 3), equality of arms, adversarial proceedings and the extent of reliance on police evidence (chapter 4), the right not to be compelled to testify and the exclusion of unlawfully obtained evidence (chapter 5), the right to defend oneself or through legal counsel (chapter 6), accelerated proceedings (chapter 7), contempt of court (chapter 8), and impartiality of judges and their professional conduct (chapter 9). While each chapter ends with concrete conclusions, recommendations are not placed within the chapters; rather, all recommendations are consolidated in the last part of the report, sorted by addressees.

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[1] Based on the information supplied by the Judicial Department of Armenia in its comments to the draft report, the courts of Armenia decided 2,575 criminal cases concerning 3,259 persons in 2008. Thus, the monitored cases constitute about 3.6% of the total annual number of criminal cases decided by the Armenian courts and involved about 3.5% of the total number of defendants.

More specifically, the information gathered during the project gives rise to concerns about the existing legislation and practices that affect the ***right to liberty***. Judicial review of arrest and detention was not always in line with the relevant international standards and national legal requirements. Custody decisions were not reasoned properly and did not address the facts in the individual cases, but rather contained standard general phrases. Notwithstanding the principle that pre-trial custody should be the exception rather than the rule, custody was habitually extended for the maximum possible period, and alternative measures of restraint were seldom explored, frequently leaving the respective defence motions unaddressed. Police arrests were often improperly and inaccurately documented, creating doubts about the legality of arrests and detention in police custody.

ODIHR recommends that the Armenian authorities take measures to ensure that the practice of ordering and extending custody reflects the jurisprudence of the Armenian Court of Cassation and relevant European standards. The pattern of ordering and extending custody by default should change so that pre-trial detention becomes an exception, as required by international standards, rather than the rule. Specific proposals to that effect are made in the consolidated recommendations, *inter alia*, to guarantee that the gravity of the charges alone is not regarded as a sufficient ground for custody; and that judges consider any appeals of detention promptly and in the presence of the detained individual.

The results of the monitoring suggest that the authorities made an effort to ensure the ***right to a public hearing***. Access to the hearings for members of the public and the media was provided in all of the trials monitored. A number of shortcomings were identified with regard to access to court premises. Inaccuracies of court schedules and their frequent non-observance *de facto* hindered public access to the court hearings and often impeded the monitoring activities. Poor acoustics and lack of technical equipment in the courtrooms also prevented the public from following the trial proceedings. A serious effort should be made to ensure that court bailiffs understand and perform their functions properly. Assisting the public to exercise their right to access public proceedings should become a core function of the bailiff service.

The report also shows that there is room for improvement when it comes to making courts more user-friendly and service-oriented institutions. This includes supplying basic information about scheduled hearings and ensuring that the public may observe and follow everything that happens in the courtroom. Recommendations regarding the right to a public hearing include, among others, that the courts should take into account potential interest of the public in upcoming trials and take steps to accommodate this public interest, including designation of appropriate courtrooms and the use of necessary technical means.

In a number of trials, monitors encountered practices which raised doubts as to whether the defendant was in fact ***presumed innocent until proven guilty***. A number of judges made adverse comments implying guilt of the defendants. Security measures applied to some defendants during their hearings presented the defendants as dangerous criminals and appeared to be disproportionate and not based on individual risk assessments. The monitors also encountered provisional court rulings which refer to defendants as having

committed the crime and hearings where the judges did not fully comply with their obligation to instruct the defendants of their rights, including the right to remain silent.

The report concludes that more efforts should be made to ensure that the judges understand the practical implications of this fundamental principle for the treatment of the accused. Violation of the presumption of innocence should give rise to disciplinary action. Judges should be in the position to rule on the application of measures restricting this right during the trials, as these measures affect the presumption of innocence and other rights of the accused.

Additionally, many of the monitored cases revealed shortcomings with regard to a genuine procedural ***equality of arms*** between the prosecution and the defence, contrary to the fair trial guarantees contained in national legislation and international standards. Judges at times tended to treat the parties unequally, displaying openly friendly attitudes towards the prosecution and openly hostile attitudes towards the defence. In some trials, systematic denial of defence motions to introduce and/or examine additional evidence seriously undermined the possibility to present the case for the defence. The analysis also highlights a concern with the reliance on written witness testimonies in favour of the prosecution when these testimonies could not be meaningfully verified at trial. A related problematic issue encountered in a significant number of cases is the reliance on incriminating police testimonies, without giving the defence an effective opportunity to test the probative value of this evidence in adversarial proceedings, which also casts doubts as to the existence of equality of arms in the monitored cases. In numerous cases, statements of police witnesses were the primary basis for convictions, occasionally despite procedural violations, contradictions and a lack of corroborating evidence.

The analysis concludes in this regard that shortcomings should be addressed through comprehensive solutions. Judges would benefit from additional training on ensuring equality of arms on the basis of the existing legislation. Policy-makers, however, should also give serious consideration to reforming the pre-trial stages of criminal procedure to pave the way for a more adversarial trial. The recommendations contain specific proposals, for instance that written testimonies of witnesses and experts which have not been taken through a newly suggested deposition procedure may not be read out and relied on by the court if these witnesses do not testify at the trial; and furthermore, that in cases where police witnesses are the only witnesses to testify, and their testimony is of decisive nature, the defence should be given sufficient opportunities to examine them in court.

The ***right not to be compelled to testify*** and the obligation to ***exclude unlawfully obtained evidence*** were not always respected. Throughout the monitoring activities, allegations of torture and ill-treatment by police were brought to the attention of the ODIHR project staff. Apart from very few exceptions, both prosecutors and judges remained silent in circumstances in which national legislation and international law required them to react. The report also examines the practice that judges do not always assess the admissibility of evidence as required by national and international standards. These standards stipulate the inadmissibility of evidence obtained through the use of torture or ill-treatment. Defence motions to exclude such evidence were largely ignored or denied. In some cases, judges relied on pre-trial statements of the defendants which were conflicting with their

testimonies made during the trial, despite allegations of duress and intimidation. Similarly, judges relied on witness statements which were allegedly obtained under duress.

The report's findings suggest a need for serious and effective measures. They must be directed first of all to root out abuses of power by the police and investigators, who should be held accountable for incidents of cruel, inhuman and degrading treatment of suspects and witnesses. Serious consideration should be given to establishing a special independent investigative authority to carry out independent enquiries into all such incidents. Judges should have a clear obligation to refer all incidents that come to their attention to this authority. Criminal procedural legislation should also be amended to tighten the prohibition of relying on the evidence obtained through illegal means. Real change will come if the courts begin to routinely deny the prosecution such "fruits of the poisonous tree". In particular, if the defendant retracts his written testimony at trial, it should be excluded from the evidence and may not be relied on by the prosecution.

Monitoring activities revealed a number of shortcomings also with regard to the ***right to defence***, in particular adequate opportunity to mount a defence, and effectiveness of legal representation. In some cases defence lawyers were effectively deprived of an opportunity to mount a defence. A number of defence counsels resorted to walk-outs from the courtroom in protest. Concerns were noted regarding the quality and the effectiveness of public defenders.

The report concludes that there is a need to improve the quality of legal assistance rendered through the Public Defender's Office. Recommendations suggest that consideration should be given to creating a special Legal Aid Council; and in addition, that training should be provided to judges on the practical implications of the principles of equality of arms, the right to defence, and the principle of impartiality including the appearance of impartiality.

Furthermore the report addresses ***accelerated proceedings*** as a helpful means to advance the efficiency of the justice system. It also cautions that such proceedings typically entail the defendants' renouncing of some important procedural rights and therefore need to be accompanied by safeguards to ensure the overall fairness of criminal proceedings. One of the most crucial safeguards in the Armenian criminal procedure is the requirement that the defendant's consent to the use of accelerated proceedings is knowing and voluntary. Monitoring indicated that this was not always sufficiently observed, as some defendants appeared not fully informed and aware of the consequences of their consenting to accelerated proceedings.

Defendants who pleaded guilty in court and were tried in accelerated proceedings spent considerable periods of time in pre-trial detention, while the full investigation was taking place. This suggests that some valuable resources could have been saved and detention periods shortened if these defendants were given an opportunity to enter a guilty plea at an early stage of the proceedings. The existing guarantees of ensuring that defendants enter a plea knowingly and voluntarily need to be implemented more rigorously.

In addition, some of the monitored cases involved frequent application of sanctions for ***contempt of court***. Whereas there is no question about the need to uphold order in the courtroom and protect the dignity of the judiciary, excessive application of such provisions raises concerns. When contempt of court sanctions are not proportional, consistent and disregard due process, their use against trial participants and the public risks harming public trust in the judiciary. Their use against defendants and defence counsel can also impede the right of the defendant to be present at trial and the right to be represented by defence counsel. The use of these sanctions led to holding some court hearings *in absentia* – hardly a desirable outcome from a fair trial perspective.

The report states that Armenian law would benefit from a clearer distinction between the judicial sanctions for contempt of court and the prosecution for criminal contempt of court. Criminal contempt of court should be reserved for offences personally targeting particular trial participants and aimed at perverting the course of justice. Judicial sanctions should cover breaches of court rules and procedures. It should be noted that perseverance of defence lawyers is part of their professional duty before their client. Any unethical behaviour by the lawyers should be reported and handled through disciplinary proceedings. Temporary removal from a court room should be restricted to very short periods, proportional to the severity of an infraction, to allow the decision to be reviewed at regular periods. It is also suggested to allow judicial review of all judicial sanctions. The report recommends that policy makers and legislators in Armenia consider amending the provisions on contempt of court in the criminal legislation to that end.

Finally, concerns were revealed in a number of cases regarding judges' ***impartiality and their professional conduct***. Manifestations of prosecutorial bias and unbecoming statements have the potential to damage the public perception of the judiciary as unbiased and dignified. The monitoring revealed that in some cases the judges conducted proceedings in a manner that left their impartiality open to doubt. There were also instances when trial participants and members of the public were treated by the judges without due respect. These instances reinforce the need for additional training of judges, and also for a rigorous application of disciplinary mechanisms that ensure their accountability. Complaints against judges must be properly investigated and disciplinary action should arise for judges whose conduct is incompatible with their professional ethics.

Overview of the project

The trial monitoring project was launched by ODIHR in the aftermath of violent clashes between the police and protesters in Yerevan on 1-2 March 2008, which resulted in loss of life and numerous injuries. Official information contained in a press release of the Ministry of Foreign Affairs of 4 March indicated eight dead (seven civilians and one police officer), and 133 injured (61 civilians and 72 police officers). Eighteen civilians and 16 police officers were reportedly treated for gunshot wounds.[2]

During the post-election clashes, a state of emergency was declared on 1 March for a period of 20 days by Presidential Decree.[3] In line with OSCE commitments, ODIHR was notified by a Note Verbale from the Armenian Ministry of Foreign Affairs about the temporary limitations imposed by the Decree. The state of emergency was lifted on 21 March.

According to a statement of the Deputy Head of Police of 4 March, 127 individuals were arrested in connection with their participation in the violent demonstrations of 1 March.[4] The spokesperson for the Prosecutor-General stated on 18 March that a total of 109 opposition supporters had been arrested since 1 March, 106 of whom were formally charged. These persons were charged with one or more of the following offences: organization of mass actions accompanied with violation of public order; calls for disobedience to legitimate demands of representatives of authorities; violent disobedience to authorities; actions to seize power accompanied with the violation of constitutional order; violence; illegal procurement and possession of weapons and ammunition; and concealment of crime.

ODIHR carried out an information-gathering visit to Armenia between 8 March and 12 April by a team of human rights experts. As a follow-up activity, ODIHR obtained an agreement from the Armenian authorities to monitor the trials of the individuals charged in connection with the 1-2 March events.

Scope and methodology

The trial monitoring was carried out to: (a) systematically gather information about compliance of the monitored trials with relevant domestic and international fair trial standards, (b) identify possible shortcomings in the criminal justice system on the basis of the monitoring, and (c) present the Armenian authorities with recommendations aimed to improve the administration of criminal justice in light of their OSCE commitments.[5]

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2 OSCE Office in Yerevan, Spot Report, 5 March 2008.

3 See ODIHR Post-Election Interim Report, 20 February – 3 March 2008, p. 4, available at http://www.osce.org/documents/odihr/2008/03/30090_en.pdf.

4 OSCE Office in Yerevan, Spot Report, 5 March 2008.

5 For OSCE commitments in the field of rule of law and criminal justice see *inter alia* the documents adopted in Vienna 1989, Copenhagen 1990, Moscow 1991, Ljubljana Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal

The project focused on the public phase of criminal proceedings – the trials. The monitors attended court hearings to determine their compliance with domestic and international fair trial standards. They did not systematically gather information on the pre-trial stages of the criminal proceedings, nor did they monitor the observance of pre-trial rights of the detained and accused.

The project carried out *procedural* trial monitoring on the basis of applicable national legislation and international standards. Accordingly, project staff did not engage in the assessment of *substantive* aspects of the monitored trials, such as the validity of the charges and sufficiency of the evidence presented by the prosecution.

The ODIHR project manager set up the necessary infrastructure and hired key project personnel. The monitoring activities were carried out by project monitors under the supervision of the project co-ordinator, who was in charge of the monitors' day-to-day operations, and data-gathering.[6] All monitors received training on the methodology and scope of the project, as well as the basics of Armenian criminal procedure. Throughout its duration, the project employed 37 monitors of eight different nationalities.[7]

The monitors attended court hearings in teams of two. For each observed case, they prepared one report using a uniform checklist based on international and national fair trial standards. These reports served as primary sources for the final report.

The handling of cases observed by the project monitors was analyzed primarily as to its compliance with the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), which are legally binding for the Republic of Armenia since 2002 and 1993 respectively. At the same time it should be noted that OSCE commitments in the field of rule of law and criminal justice often contain identical or similar standards.[8]

ODIHR shared the draft final report with the Armenian authorities on 18 November 2009. The Ministry of Justice, Office of the Prosecutor General, and the Judicial Department[9]

Justice Systems and Helsinki Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area. See also Annex 2 of this report.

6 The project methodology was developed on the basis of ODIHR's *Trial Monitoring: A Reference Manual for Practitioners* (2008), available at http://www.osce.org/odihr/item_11_30849.html.

7 Armenia, Denmark, the former Yugoslav Republic of Macedonia, Iran, Kazakhstan, Kyrgyzstan, Norway, and the United States.

8 For example, the right to liberty and restrictions to detention on criminal charges were stipulated in the OSCE documents adopted in Vienna 1989, Copenhagen 1990, and Moscow 1991; the right to freedom from torture and other cruel, inhuman or degrading treatment in Vienna 1989; the principle of the presumption of innocence in Copenhagen 1990; and the right to defence in Moscow 1991.

9 The Judicial Department of Armenia is an independent administrative institution, which exercises the powers vested in the Courts, the General Assembly of Judges, the Council of

provided comments on 4 February 2010. ODIHR is grateful for these comments and made a particular effort to reflect them in this final report. Nevertheless, this report remains the responsibility of ODIHR alone.

General information

The trial monitoring activities began on 15 April 2008 and ended on 31 July 2009. ODIHR project staff monitored 93 criminal cases: 35 cases only in the first instance, 47 cases in the first instance and on appeal, and eleven cases only on appeal. Here, reference is made to a *criminal case* within its meaning in Armenian law: a separate judicial proceeding against one or more defendants with respect to one or more alleged offences prohibited by the criminal law.

The monitored criminal cases involved a total of 109 defendants. The monitors observed proceedings involving 43 defendants only in the first instance; proceedings involving 53 defendants both in the first instance and on appeal; and proceedings involving 13 defendants only on appeal.

Of the 96 defendants whose trials were monitored in the first instance, five were fully acquitted (cleared of all charges) and 91 were convicted of all or some charges.[10] Of the 91 convicted individuals, eight were given non-custodial sentences (fines), while 83 received partially or fully custodial sentences, ranging from one to nine years of imprisonment. Of the 83 sentenced to custodial sentences, 25 were released on the grounds of "conditional non-application" of the sentence.[11] Thus, 58 of the convicted persons remained imprisoned after their trials.

Of the 66 defendants whose cases were monitored on appeal, 58 remained with their sentences unchanged, including four appeals that were left without consideration, one received a heavier sentence ("conditional non-application" was lifted), and seven received lighter sentences. At the President's proposal, the Armenian Parliament adopted a general amnesty on 19 June 2009 as a result of which most individuals sentenced to imprisonment in connection with the 1-2 March events were released.

The project team intended to monitor every case related to the 1-2 March events. Despite all efforts to do so, 18 criminal cases involving 24 defendants charged in connection with the March events were not monitored because the information about the date and time of their trials was unavailable or inaccurate. For detailed information on the monitored cases, please see Annex 1.

Court Chairmen, and the Council of Justice, and facilitates their participation in civil-legal relationships (www.court.am).

[10] In its comments to the draft report, the Judicial Department pointed out that fully or partially acquitted defendants accounted for 13.8% of all defendants tried in the monitored cases, while the same indicator for all criminal cases decided in Armenia in 2008 was 0.67%. In the monitored cases, 34.5% of the convicted received conditional sentences, while for the total number of cases tried in 2008 the figure was 25.4%.

[11] Article 70 of the Criminal Code.

Chapter 1. The right to liberty and security of person

The information gathered during the monitoring gives rise to concerns with regard to the right not to be deprived of liberty except on the grounds of and in accordance with a procedure established by law.

Judicial review of arrest and authorisation of detention did not fully satisfy the relevant international standards and national legal requirements. Custody decisions were not always reasoned properly and did not address the facts in the individual cases, but rather contained standard general phrases. Notwithstanding the principle that pre-trial custody should be the exception rather than the rule, custody was habitually extended for the maximum possible period, and alternative measures of restraint were seldom explored, frequently leaving the respective defence motions unaddressed. Police arrests were sometimes improperly and inaccurately documented, creating doubts about the legality of arrests and holding in police custody.

A. National legislation

The Constitution of the Republic of Armenia guarantees everyone the right to liberty and security, and provides that it may only be restricted in case of lawful detention determined by a court sentence; non-compliance with a judicial act; to ensure the fulfilment of lawful obligations; on a reasonable suspicion that the person in question has committed a criminal offence or to prevent the commission of a criminal offence or absconding after the commission thereof; to establish educational control over a minor or to present him/her to a competent body; to prevent spreading of infectious diseases or to prevent public safety threats posed by persons affected with mental illness, alcoholics, drug addicts or vagrants; as well as to prevent unauthorized entry into the Republic of Armenia or in the case of deportation or extradition.[12]

Armenia's Code of Criminal Procedure (CCP) details the grounds and the procedure for pre-trial detention as well as other measures of restraint to secure the defendant's appearance at trial. The CCP provides for the following measures of restraint: detention, bail, written obligation not to leave, personal guarantee, organization's guarantee, supervision of a minor, and supervision by the commander of the military unit (for military personnel).[13]

In accordance with the law, pre-trial detention may be applied by a court decision if the alleged crime is punishable with at least one year of imprisonment, or when sufficient grounds exist to suspect that the accused intends to abscond or interfere with the proceedings, in particular by exerting unlawful influence on other persons involved in the case, or to tamper with evidence, or to commit another criminal offence, or resist the

[12] Constitution of the Republic of Armenia, Article 16.
[13] CCP, Article 134(2).

implementation of the sentence.[14] When selecting a measure of restraint, factors such as the nature and the gravity of the crime, the personality of the suspect or the accused, his or her occupation and dependents, and availability of a permanent residence should be taken into account.[15]

When presented with a motion to authorize detention, the court is required upon the motion of the defence to consider the possibility of releasing the alleged offender on bail.[16] The maximum total length of pre-trial detention under Armenian law is six months (extensions cannot exceed two months each time); however, in exceptionally complex cases the detention term may be extended up to one year.[17] The CCP does not limit the length of detention during court proceedings.[18]

The detained person has the right of access to legal counsel from the moment when the decision of arrest is made. The duration and the number of meetings with the legal counsel are not limited. Meetings with a lawyer acting as attorney in the case shall be permitted upon presentation of an ID and document issued by the Bar confirming that the bearer is in fact an attorney at law. Meetings of arrestees and detainees with their attorneys shall be held in a place where employees of the places of arrest and detention can see, but cannot hear them.[19]

Armenia's criminal legislation expressly prohibits torture.[20]

B. International standards

The right to liberty of the person is a fundamental human right that is contingent on the right to a fair trial as a safeguard against its unlawful and arbitrary curtailment. The major international human rights instruments such as the UDHR,[21] ICCPR,[22] and ECHR,[23] provide for the right to liberty. The same right is contained in the 1991 Moscow Document of the OSCE.[24]

Respect for the right to liberty requires that no one be subjected to arbitrary arrest or detention. Deprivation of liberty is only permissible on such grounds and in accordance with such procedures as are established by law,[25] i.e. in compliance with the principles of

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14 *Id.*, Article 135.
15 *Id.*, Article 135(3).
16 *Id.,* Article 136(2).
17 *Id.,* Article 138.
18 *Id.,* Article 138(6).
19 Law of the Republic of Armenia on the Treatment of Arrestees and Detainees, Article 15.
20 CC, Article 119. See also *id.*, Article 11.
21 UDHR, Article 3.
22 ICCPR, Article 9.
23 ECHR, Article 5.
24 1991 Moscow Document, §23.1(i).
25 ICCPR, Article 9(1) and ECHR, Article 5(1).

legality and legal certainty. The term "in accordance with law" refers to domestic law, but the domestic law itself "*must be in conformity with the principles expressed or implied in international human rights law*."[26]

The principle of legality requires that the law itself not be arbitrary, that the deprivation of liberty permitted by law not be "*manifestly unproportional, unjust or unpredictable*,"[27] and that the specific manner in which an arrest is made not be discriminatory and be appropriate and proportional in view of the circumstances of the case.

International human rights standards provide for a series of protective measures both to ensure that individuals are not deprived of their liberty unlawfully or arbitrarily, and to establish safeguards against other forms of abuse of detainees. In particular, access to defence counsel should be available soon after arrest. [28] Arrested persons must immediately be informed in simple, non-technical language which they can understand of the essential legal and factual grounds for their arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness.[29] Importantly, in view of the assumption under the ECHR that pre-trial detention must be of strictly limited duration, a periodic judicial review of the lawfulness of detention should be conducted at short intervals.[30]

Anyone who is arrested has the right to be brought promptly before a judge or another officer authorized by law to exercise judicial power. Detained persons shall be entitled to trial within a reasonable time or to release.[31] Furthermore, detained persons shall never be subjected to torture.[32]

It is of utmost importance that the court in its decision-making on issues concerning the lawfulness of arrest takes into account the factual evidence related to the likelihood of absconding or reoffending in case the accused is not detained. Detention should never be considered as a default option whenever someone allegedly commits a criminal offence,

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[26] See *Kemmache v. France* (No. 3), ECtHR Judgment, 24 November 1994, §37.

[27] In the case *Albert Womah Mukong* v. *Cameroon*, UN Doc. CCPR/C/51/D/458/1991, 21 July 1994, §9.8, the Human Rights Committee explained that the term "arbitrary" in Article 9(1) of the ICCPR is not only to be equated with detention which is "against the law", but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

[28] See, e.g., Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997, §27; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 17(1); Basic Principles on the Role of Lawyers, principle 1; UN Centre for Human Rights, *Human Rights and Pre-Trial Detention*, June 1994, pp. 21-23.

[29] *Fox, Campbell and Hartley* v. *the United Kingdom*, ECtHR Judgment, 30 August 1990, §40.

[30] *Bezicheri* v. *Italy*, ECtHR Judgment of 25 October 1989, §21; see also *Assenov and Others* v. *Bulgaria*, ECtHR judgment of 28 October 1998, §162.

[31] See ICCPR, Article 9(3) and ECHR, Article 5(3).

[32] Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 6.

and should only be resorted to if there exists a real threat of absconding or reoffending.[33] The scope of judicial review when authorizing pre-trial detention should be sufficiently wide to allow for such decision-making.

Detention is regarded as the most severe measure of restraint and should be used as a measure of last resort and only if less restrictive measures cannot ensure the proper conduct of the defendant and due administration of justice. The Human Rights Committee has stated that pre-trial detention must not only be lawful, but also necessary and reasonable in the circumstances. It has recognized that the ICCPR permits authorities to hold people in custody as an exceptional measure if it is necessary to ensure that the person appears for trial, but it has interpreted the "necessity" requirement narrowly.[34] It has held that suspicion that a person has committed a crime is not sufficient to justify detention pending investigation and indictment. However, it has held that custody may be necessary to prevent flight, avert interference with witnesses and other evidence, or prevent the commission of other offences. The Committee has also held that a person may be detained when he or she constitutes a clear and serious threat to society which cannot be contained by any other manner.[35] When examining the situation in Armenia, the Committee expressed concern that "*very few detainees benefit from bail, and urge[d] the State party to observe strictly the requirements of article 9, paragraph 3, of the Covenant*."[36]

The standard by which an individual may be arrested is an important issue to consider in the context of the right to liberty. The ECHR provides that "*[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […] (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.*"[37] That said, a minimum standard of reasonable suspicion is required under the European human rights framework to justify an arrest. The ECtHR has interpreted the reasonable suspicion standard as based on "*the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence. However, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage in the process of criminal investigation.*"[38]

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33 See *Ilijkov* v. *Bulgaria*, ECtHR Judgment of 26 July 2001, §§83-84.

34 "The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party", *Hill v. Spain*, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, §12.3.

35 See *Cámpora Schweizer* v. *Uruguay* , UN Doc. CCPR/C/OP/2 at 90, 12 October 1982, §18.1.

36 Concluding observations of the Human Rights Committee: Armenia, CCPR/C/79/Add.100., 19 November 1998, §11.

37 ECHR, Article 5(1).

38 *K.-F.* v. *Germany*, ECtHR Judgment, 27 November 1997, §57. For comparison, the constitutionally mandated standard in the United States to make an arrest or conduct an

The Council of Europe Committee of Ministers recommends that "*remand in custody of persons suspected of an offence shall be the exception rather than the norm*", and only be "*used when strictly necessary and as a measure of last resort*". The recommendation further reads that persons should only be remanded in custody where the following conditions are satisfied cumulatively: *"(a) reasonable suspicion that he or she committed an offence; and (b) there are substantial reasons for believing that, if released, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order; and (c) there is no possibility of using alternative measures to address the concerns referred to in b.; and (d) this is a step taken as part of the criminal justice process."*[39] The Explanatory Memorandum to this Recommendation explains that the above conditions on the use of remand in custody "*reflect the case law of the European Court of Human Rights and are cumulative, so that it cannot be imposed or continued if any of them is absent or ceases to be operative."*[40] Consequently, the gravity of charges alone is not sufficient as the reason for remand in custody.

C. Findings and analysis

Although the project was not primarily aimed at the observance of pre-trial rights and the pre-trial investigation stage was outside the scope of monitoring, information on the right to liberty at the pre-trial stages was collected as a natural by-product of the trial monitoring and is presented in this chapter.[41] Substantive issues concerning the legality of arrests and the choice of detention as a measure of restraint were repeatedly raised by defence counsels before the courts and, subsequently, observed and reported by the trial monitors. The findings in this chapter are based on these observations of the proceedings in the courts of first instance and in appellate courts, as well as on court decisions collected in the course of the project, including the relevant rulings of the Court of Cassation.

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intrusive person or property search is that of a probable cause, which is a higher standard than reasonable suspicion and requires "*a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true.*" (See Handler, J.G., *Ballentine's Law Dictionary: Legal Assistant Edition* (1994, Albany: Delmar Publishers), at p. 431.)

39 Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies), points 3(1), 3(3) and 7.

40 Explanatory Memorandum for Recommendation Rec (2006)13, CM(2006)122 Addendum, 30 August 2006, §7.

41 For a legal analysis of certain issues regarding the pre-trial procedure, including pre-trial custody, see OSCE/ODIHR Opinion *On the Draft Law Amending the Section on Pre-Trial Proceedings in Criminal Cases of the Criminal Procedure of the Republic of Armenia*, Warsaw, 15 July 2009, Opinion-Nr.: CRIM ARM/136/2009(MA), available at http://www.legislationline.org/download/action/download/id/2737/file/FINAL%20Opinion%20Armenia%20CC%20Pre-Trial%20Rights%2015%20July.pdf.

i. Decision to remand the arrested individual in custody pending trial

Armenia's CCP provides for judicial authorization of pre-trial detention.[42] Thus the decision to remand an arrested individual in custody is made by a judge, which is in line with international standards. At the same time, the monitoring revealed a number of concerns with regard to the scope of judicial review and the manner in which the judges exercise this function. The CCP does not require judges to examine the existence of reasonable suspicion that the arrested individual committed a crime and to review the legality of his/her arrest by the police.[43] However, the duty of judges to do so may be derived from the Constitution[44] and it has been explicitly recognized in the jurisprudence of the Court of Cassation.[45]

In practice, judges appeared to decide on whether the arrested person should remain in custody without reviewing what grounds existed for the arrest in the first place, essentially operating on the assumption of legality of police actions. If a judge does not inquire into the existence of reasonable grounds for arrest, such judicial review falls short of international fair trial safeguards. Limiting the scope of judicial enquiry to a mechanical application of custodial or non-custodial measures pending trial undermines the very *raison d'être* of judicial involvement in this stage of the proceedings: to maintain an effective safeguard of the right to liberty. It also leaves unaddressed fundamental concerns that influence the outcome of prosecutions. This was evidenced by the handling by courts of defence motions during the trials – such as motions aimed at excluding some of the evidence related to allegedly illegal or arbitrary detention, or addressing the issues of ill-treatment and police brutality.[46]

The limited scope of judicial review in the CCP could be at least partially remedied through a scrupulous application by judges of the existing legislation on the choice of measures of restraint, including detention. However, the information gathered leads to the

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42 See section A above.

43 CCP, Chapter 17.

44 According to the comments received from the Judicial Department on the draft report, this duty is clearly prescribed by Article 16 of the Constitution, while Article 1 of the CCP provides that in Armenia the rules of criminal procedure are first of all defined by the Constitution. Furthermore, on the basis of Article 6 of the Constitution, the ECHR is a constituent part of the Armenian legal system and prevails over the statutes in case of contradiction.

45 In particular, in the case of *Aleksey Mkrtchyan*, which dates back to 9 September 2005, the Court of Cassation held that *"…for depriving a person of his/her liberty, a reasonable suspicion that he/she committed an offence is necessary. Only in that case deprivation of liberty is considered lawful and justified. However, suspicion is considered to be reasonable only where existing facts and information objectively link the suspected person with the alleged crime. In other words, there must be evidence that actions of the suspected person directly indicate his/her connection with the crime*." Later, the same position was reaffirmed in the cases of *Aram Chughuryan* on 30 August 2007 and *Aslan Avetisyan* on 31 October 2008 (Quotes from comments received from the Judicial Department on the draft report).

46 See chapter 5 below.

conclusion that courts approached this important task in a perfunctory manner: while the CCP requires an examination of factual circumstances in each individual case,[47] courts routinely did not make reference to any factual circumstances to support their decisions on application of the measures of restraint. Court decisions on these issues typically contain *in abstracto* assumptions about the risk of absconding and/or creating obstacles for the investigation, but fall short of providing any specific facts and explanations as to how the law applies to the individual circumstances at hand.

> The order on detention of 29 February 2008 of the Yerevan Kentron and Nork-Marash District Court reads as follows: "The motion of imposition of detention is subject to satisfaction, as the defendant might abscond from investigation, and hinder the preliminary investigation by exerting illegal influence on the persons involved in the proceedings."[48]

In their decisions, judges used standard phrases and references to legislative provisions, and the rulings of different courts look strikingly similar. Issuance of standard, template decisions and not fulfilling the duty to establish convincing grounds justifying detention constitutes a serious restriction of the right to liberty guaranteed by international human rights law.[49]

In nearly all initial orders to remand defendants in custody pending trial (and later extend their detention), judges invariably imposed the two-month term – a maximum one-time period of detention that may be ordered. This pattern of imposing standard (maximum) detention terms for all suspects – regardless of their individual circumstances and the complexity of cases – reinforces the impression of perfunctory decision-making.[50]

> In decisions of the Yerevan Kentron and Nork-Marash District Court dated 25 February 2008, 27 February 2008, 4 March 2008, 8 March 2008, and 25 April 2008, the judges used virtually identical language on the gravity of the charges and the danger of absconding and hindering the preliminary investigation and risk of re-offending to justify the application of detention, essentially reproducing the law. No concrete factual circumstances or evidence were cited.[51]

In making their decisions, courts readily sided with the investigation and prosecution. Their motions on application (and later extension) of detention were routinely upheld by

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47 Article 285(1) "*In the motion of application of detention as a measure of restraint motives and grounds supporting the necessity of imposition of detention shall be mentioned. Materials substantiating the motion should be attached to the decision.*"

48 Doc. No.1 on file with the project.

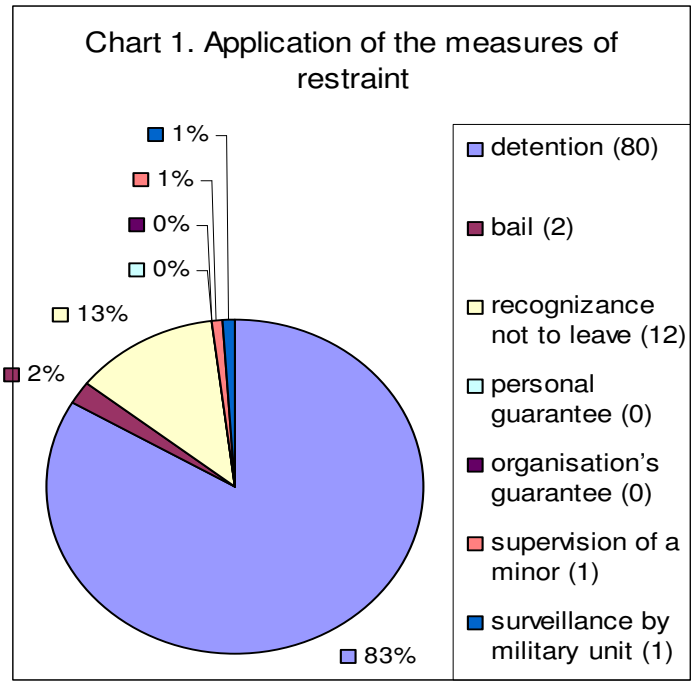
49 See *Mansur* v. *Turkey*, ECtHR Judgment, 8 June 1995, §55.

50 R.N.05-12.05.2008, R.N.08-15.05.2008, R.N.13-04.06.2008, R.N.26-19.06.2008, R.N.17-11.06.2008, R.N.25-18.06.2008, R.N.27-19.06.2008, R.N.35-24.06.2008, R.N.78-03.09.2008, R.N.86-25.09.2008, R.N.137-22.06.2009, R.N.138-25.06.2009, R.N.139-10.07.2009.

51 R.N.130-29.04.2009, R.N.31-23.06.2008, R.N.25-18.06.2008, R.N.61-04.08.2008, R.N.25-18.06.2008, R.N.129-16.03.2009.

the courts. In some cases court decisions appeared to largely reproduce the wording of the prosecution's motions to order pre-trial detention of the accused.[52]

National and international legal norms oblige the Armenian courts to consider the possibility of application of alternative measures to pre-trial detention.[53] However, it appears that many judges did not consider the possibility of release on bail and court decisions do not address this issue. The most frequently imposed measure of restraint was detention – it was applied in 83% of the monitored cases (see chart 1 below).



In five cases the initially applied detention, as a measure of restraint, was lifted and substituted by bail or written obligation not to leave.[54]

The gravity of charges alone was in some instances considered a sufficient ground for imposing pre-trial detention, contrary to international standards.[55]

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[52] R.N.11-24.05.2008, R.N.108-25.11.2008, R.N.78-03.09.2008, Doc. No.2 on file with the project.

[53] CCP, Article 132(2). International standards require that the judicial authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial. Not only the right to "*trial within a reasonable time or to release pending trial*" is proclaimed but also that "*release may be conditioned by guarantees to appear for trial*" [See *Kaszczyniec* v. *Poland*, no. 59526/00, §57, 22 May 2007]. In its comments on the draft report, the Judicial Department pointed out that the scope of application of bail was expanded after the decision of the Court of Cassation of 13 July 2007 in the case of *Taron Hakobyan*. The Court of Cassation held that bail should be considered regardless of the severity of the crime incriminated to the accused.

[54] R.N.04-09.05.2008, R.N.06-13.05.2008, R.N.29-20.06.2008, R.N.42-04.07.2008, R.N.61-04.08.2008.

The Yerevan Kentron and Nork-Marash District Court in the reasoning of its decision of 10 May 2008 stated: "taking into consideration the fact that the maximum time period of the imprisonment term prescribed by the Criminal Code for commitment of a crime of which the accused is suspected is more than one year, the Court finds that the motion [by the prosecution] is well founded and should be satisfied."[56]

The monitoring also revealed two additional concerns with regard to proceedings on the choice of the measure of restraint. The first one relates to a lack of transparency as decisions in this regard are taken by the judge in a closed hearing.[57] The second concern involves situations when decisions to authorize remand of defendants in custody were handled by the judges who subsequently tried the same cases on the merits. Depending on what issues the judge establishes when deciding the issue of pre-trial custody and on his/her role during the trial, it may be argued that the initial decision to keep a suspect in custody may negatively affect the judge's ability to try the case with a due degree of impartiality.[58]

ii. Extension of detention orders and appeals against continued detention

The right to obtain a speedy review by the court of the lawfulness of detention not only at the time of the initial deprivation of liberty but also periodically thereafter, including during the trial, is enshrined in international standards.[59] In Armenia, the defence may challenge continuing detention by appealing to a higher court and through motions in the

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55 *Nikolov v. Bulgaria*, ECtHR Judgment, 30 January 2003, §70.

56 R.N.58-16.06.2008.

57 In many OSCE participating States (such as Kazakhstan, USA, UK and Germany) this is a public procedure. In the Russian Federation, the Plenary of the Supreme Court of the Russian Federation ruled in its decision No.1 from 5 March 2004 that: "*In accordance with the law consideration of a motion on detention or its extension is carried out in public procedure, excluding exceptions set out in Part 2 of Article 241*."

58 See *Reference Guide to Criminal Procedure* (Annex to the Report by the Brussels Working Group, Belgian OSCE Chairmanship, 24 November 2006), at http://www.osce.org/documents/cio/2007/11/28253_en.pdf, §2.3.2: "*A judge deciding on a case shall not have any involvement at any prior stage of the criminal procedure*." See also relevant ECtHR jurisprudence in *Hauschildt v. Denmark*, ECtHR Judgment, 24 May 1984, where during the reviews of the pre-trial detention the judge found there was a "particularly confirmed suspicion" that the applicant has committed the crime in question and he was a presiding judge during the trial. In its comments on the draft report, the Judicial Department pointed out that in *Ilijkov v. Bulgaria* the ECtHR held that "*the mere fact that a trial judge had made decisions on detention on remand cannot be held as in itself justifying fears that he is not impartial*." The Judicial Department also remarked that such situations must have been rare.

59 See *Navarra v. France*, 23 November 1993, ECtHR Judgment, §26. See also: Recommendation Rec(2006)13 of the Council of Europe's Committee of Ministers to member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (Adopted by the Committee of Ministers on 27 September 2006).

course of the trial.[60] The results of the monitoring project cast some doubt on the effectiveness of both of these remedies.

International standards require not only that the deprivation of liberty be lawful within the meaning of national law, but also that it is for the state authorities to provide well-founded justification for continued detention.[61] When considering decisions to extend detention, the ECtHR uses a stricter test than for the initial justification to remand in custody, requiring relevant and sufficient reasons for continued detention.[62] However, judges did not approach these decisions with the degree of earnestness prescribed by these standards. Most concerns outlined above with regard to the initial detention orders to remand the accused in custody are equally applicable to the decisions on continuing detention.

After the expiration of the initial term of detention, judges continued to extend detention in almost all reviewed cases for two-month periods, the maximum one-time period of detention that may be ordered. Only in two cases extensions of detention were made for 15 and 20 days.[63] In all but one case, defendants remained in custody until the end of the trial.[64] In one case the defendant was released in the middle of the appeal hearing as he had already spent in pre-trial detention the prison term to which he was sentenced by the court of first instance.[65]

This practice suggests that judges were not assessing the real and potential risks in each individual case, limiting themselves to formal confirmations of the previous orders. In some cases the judges simply repeated the wording which was used to justify detention at the initial stage of investigation.[66] Courts did not appear to critically examine the prosecution's requests to continue imposing maximum detention terms.[67]

> At the hearing of 30 June 2008 the defence motioned the court to lift or change the imposed measure of restraint (detention), as the case was already at the trial stage, the investigation was over, all investigative actions were completed, and consequently, there was no risk of interfering with the administration of justice. This motion was dismissed by the judge with the reason that the impugned crime was classified as a "grave" crime according to the Criminal Code; therefore, continued detention was justified.[68]

In at least one case the burden of proof was shifted from the prosecution and the obligation of proving the absence of grounds for detention was placed on the defence.

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60 CCP, Articles 102, 287, 288.

61 *Letellier v. France*, ECtHR Judgment, 26 June 1991, §35; *Mansur v. Turkey*, ECtHR Judgment, 8 June 1995, §52; *Shishkov v. Bulgaria*, ECtHR Judgment, 9 April 2003, §58.

62 See *Wemhoff v. Germany*, ECtHR Judgement, 27 June 1968, §§12-17.

63 R.N.61-04.08.2008, R.N.112-02.12.2008.

64 R.N.129-16.03.2009.

65 R.N.128-26.03.2008.

66 R.N.112-01.12.2008.

67 R.N.83-18.09.2008, R.N.139-10.07.2009, R.N.138-25.06.2009, R.N.108-25.11.2008, R.N.130-29.04.2009, R.N.131-29.04.2009, R.N.112-01.12.2008.

68 R.N.48-17.07.2008.

In his decision of 9 April 2008, the judge of the Yerevan Kentron and Nork-Marash District Court stated that "the defence counsel failed to provide any evidence proving that while at liberty the defendant will not abscond, re-offend or collude, whereas the defendant is charged for a grave offence, punishable by 5-10 years of imprisonment, which subsequently increases the risk of absconding."[69]

The ECtHR has established that shifting the burden of proof to the detained person in matters of deprivation of liberty is tantamount to overturning the rule of Article 5 of the Convention. International standards clearly place the duty to justify continued detention on the prosecution.[70] The court's reasoning in the above case – that there are no exceptional circumstances warranting the release of the applicant – shifts the burden of proof on the detained person and is not acceptable.

Defence motions to change the measure of restraint during the trials were frequently left without consideration. Judges postponed ruling on such motions "until the examination of relevant facts", which often meant the final judgment in the case (when the issue became moot).[71] This practice may not be specifically prohibited by the letter of national law,[72] but is highly questionable in light of international standards, in particular the requirement of a speedy resolution of challenges to the lawfulness of detention.[73]

In the trial of defendant C., a former MP, the defence counsel repeatedly motioned the court to change the measure of restraint from detention to any alternative. On 30 April 2008 the defence made a motion, arguing that C. did not have a criminal record and had a good reputation, and therefore the risk of the defendant's absconding the trial did not justify detention. In support, the defence submitted a letter of guarantee for C. signed by the Heritage Party Members of Parliament. The judge denied this motion without reasoning. During the hearings of 14 May 2008 and 17 June 2008 the defence counsel again motioned for the release of the defendant from custody, and again these motions were denied without clear reasoning. On 17 July 2008 the defence counsel again requested the court either to release C. or to apply bail. Additionally, the defence asked the judge to consider the motion immediately and to present a reasoned decision on the issue. This time the judge postponed the consideration of the motion and never returned to it in the course of the trial. Later, the defence submitted similar motions on 5 August 2008 and 22 October 2008, but the judge

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69 R.N.61-04.08.2008.

70 *Ilijkov v. Bulgaria,* ECtHR Judgment, 26 July 2001, §85; *Nikolov v. Bulgaria*, ECtHR Judgment, 30 January 2003, §70.

71 R.N.108-25.11.2008.

72 CCP, Article 102(2).

73 International human rights standards in guaranteeing arrested or detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaim their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. The requirement that a decision must be made speedily applies equally to the initial decision on whether a detention is lawful and to any appeals against that decision provided for by the national law or procedure [See *Navarra v. France*, ECtHR Judgment, 23 November 1993, §28].

again postponed their consideration. The motions remained without consideration until the verdict was announced on 10 November 2008.[74]

At the first hearing of defendant D.'s case on 28 April 2008, the defence motioned to change the measure of restraint against D., arguing that his detention was unlawful and no longer justified. This motion was denied without any reasoning. The motion was repeated at the second hearing of 15 May 2008. The judge informed the defence that he would make a decision on the defendant's continuing detention or release after the examination of evidence is concluded. The judge, however, did not rule on the motion until the end of the trial and the announcement of the verdict on 16 June 2008.[75]

There were also a few cases of courts not adopting decisions on the extension of detention in a timely manner and defendants remaining deprived of their liberty without any legal basis.

On 22 July 2008, the defence motioned the court to release defendant B. The defence counsel pointed out that the court did not resolve the issue of detention in its decision of 14 July and the previously set period of detention expired on 15 July. The judge denied the motion and explained that "a clerical error" occurred that was corrected by his decision of 22 July 2008.[76]

The existing deficiencies with regard to decisions on remand in custody were not remedied on appeal. Appellate court decisions often did not consider or even mention the arguments presented by the appellants. They did not examine the existence of a reasonable suspicion as a basis for pre-trial detention, nor otherwise critically assessed decisions to impose the strictest measures of restraint. Appellate judges were reluctant to question the basis for earlier decisions. Of the numerous appeals submitted in the 1-2 March cases, only one resulted in replacing the measure of restraint from custody to bail.[77]

In one case which reached the Court of Cassation, Armenia's highest court pointed to the lack of effective judicial review.

Court of Cassation: the case of Aslan Avetisyan

The Court of Cassation, the highest judicial body in the Republic of Armenia, highlighted several important issues regarding authorizing detention in Armenia in the case of Aslan Avetisyan – one of the defendants of the March 1-2 events.[78]

The Court pointed out that both decisions of the first instance and appellate courts on applying detention were not reasoned by sensible conclusions based on factual circumstances. Judges only referred to and quoted the legislative texts listing the grounds for detention. The Court found such

[74] R.N.108-25.11.2008.
[75] R.N.35-24.06.2008.
[76] R.N.122-02.12.2008. See also, R.N.108-25.11.2008, R.N.78-03.09.2008.
[77] R.N.61-04.08.2008.
[78] Decision No. AVD/0022/06/08 of 31 October 2008.

reasoning insufficient and pointed out that the lower courts should give due regard to the factual circumstances and base their decisions on individual circumstances of the case. Otherwise, the Court stated, "the legal guarantee of legitimate restriction of the constitutional right of liberty of a person and personal immunity will be illusory and void of any practical effect." All court conclusions on the existence of specific grounds for detention should derive from the case materials.[79]

The Court also found that the gravity of the offence and the necessity of carrying out investigative actions cannot amount to permissible grounds justifying the application of detention.

iii. Other relevant issues: lack of an accurate record of arrest

The project monitors did not comprehensively gather information on the pre-trial stages of the proceedings. At the same time, it transpired in the course of a number of trials that important issues raised by the defence pointed to weaknesses in the procedural framework regulating arrests in Armenia.

According to the defendants and their counsel, the records ("protocols") documenting the arrest frequently contained inaccurate information about the moment of the person's factual apprehension. In several cases, the defence convincingly demonstrated that protocols on arrest were drawn hours or even days after the factual apprehension, in breach of the legal time limits[80] for these procedures.[81]

D. Conclusions

The monitored trials point to concerns about the existing legislation and practices that affect the right to liberty. Arrest and detention practices in Armenia need to be brought into compliance with relevant international standards.

Reported problems with arrest and detention point out the need to revise legislation, strengthen the existing procedural safeguards and improve their implementation. Armenian authorities need to take measures to ensure that the practice of ordering and extending custody reflects the Court of Cassation's jurisprudence and European standards.

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[79] In its earlier decision the Court of Cassation stated that detention is the most stringent measure of restraint. It can be applied only if other possible measures of restraint could not ensure the proper conduct of the accused. In this regard, the grounds of detention are defined as legislatively prescribed circumstances, which should be proved with materials obtained in the criminal case. The latter determine whether the application of detention is well-founded or groundless. Therefore, any conclusions about the possible behaviour of the accused enumerated under Article 135 should be based on factual circumstances of the case (Decision of 30 August 2007, No. VB-132/07).

[80] CCP Article 131^1 prescribes that the protocol on arrest must be compiled within three hours after bringing the person suspected of committing a crime before the body of inquiry, investigator or prosecutor.

[81] R.N.78-03.09.2008, R.N.139-10.07.2009, R.N.83-18.09.2008, R.N.27-19.06.2008, R.N.22-16.06.2008, R.N.113-10.12.2008.

Remand in custody should not be justified exclusively by the severity of the alleged offence.

All arrests made by the police, as well as any transfers of the arrested and detained persons, need to be recorded in a timely and accurate manner.

Independent judicial review of arrest and detention is of particular importance to ensure the legality and lawfulness of the deprivation of liberty in every case. In this regard, project findings indicate that the Armenian judiciary is not performing all the functions necessary to ensure such an effective judicial review – this in particular relates to the judicial review of the grounds for arrest and the authorisation of detention. Furthermore, the results of the monitoring suggest that existing laws are also not fully implemented by judges deciding on keeping defendants in custody during pre-trial investigation.

The pattern of ordering and extending custody by default should change so that pre-trial detention becomes an exception, as required by international standards, rather than the rule. Specific proposals to that effect are made in the recommendations. It is recommended to expand the scope of judicial enquiry when the arrested individual first appears before the judge, and to carry out this hearing in adversarial and public proceedings. Judges should make use of existing alternatives to pre-trial detention. Policy-makers should review the court practice and initiate an inclusive discussion on improving the effectiveness of existing alternatives to pre-trial detention, as well as possible introduction of new ones.

If detention is chosen, detention terms should be determined based on individual circumstances of every case. The current practice of near-automatic imposition of two-month detention terms should be discontinued. Consideration should also be given to introducing a *habeas corpus* petition that would give the defence the right at any moment to question detention if it succeeds to demonstrate a *prima facie* case of unlawfulness of detention.

Chapter 2. The right to a public hearing

The results of the monitoring suggest that the Armenian authorities made an effort to ensure the right to a public hearing. Access to the hearing for members of the public and the media was provided in all of the monitored trials. A number of shortcomings identified in this chapter focus on restrictions of access to court premises which limited public attendance. Inaccuracy of court schedules and their systematic non-observance also hindered public access to court hearings and impeded monitoring activities. Poor acoustics and a lack of technical equipment in a number of courtrooms prevented the public from following the trial proceedings.

A. National legislation

The Constitution of the Republic of Armenia guarantees everyone the right to a public hearing, permitting restrictions on this only where "*the interests of morals, public order, national security, protection of the private life of the participants, or if the administration of justice so require*."[82] The CCP provides that trials shall be public.[83] While this right may be restricted by a court decision, in circumstances and in the manner prescribed by law "*for the purpose of protection of public morals, public order, state security, and the private life of the parties, as well as the interests of justice*,"[84] the judgment may only be pronounced publicly.[85]

The CCP specifies that, upon a motion by a party to the trial, the court may decide to restrict public access where the case involves state, service or commercial secret.[86]

The service of court bailiffs was created in Armenia with the purpose of ensuring the protection of life, health, dignity, rights, and freedoms of judges, participants of the proceedings, and other persons in court from criminal and other unlawful encroachment, as well as the execution of court judgments.[87] While discharging their functions the bailiffs are entitled to clarify the identity of persons; remove persons from the courtroom on the basis of court decisions or restrict the entry of such persons; examine the persons entering the court building or the courtroom, as well as their belongings; and use physical force and special measures in accordance with the Judicial Code.[88]

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82 Constitution of the Republic of Armenia, Article 19.
83 CCP, Article 16(1). *See also* Judicial Code of the Republic of Armenia, Article 20(1).
84 *Id.*, Article 16(2). *See also* Judicial Code of the Republic of Armenia, Article 20(2).
85 *Id. See also* Judicial Code of the Republic of Armenia, Article 20(3).
86 CCP, Article 172(5).
87 Judicial Code of the Republic of Armenia, Article 198.
88 *Id.*, Article 214(1).

A decision of the Council of Court Chairpersons intended to increase transparency and curb corruption within the judicial system emphasizes as a priority equipping all courtrooms with state-of-the-art sound recording solutions.[89]

B. International standards

The right to a public trial is universally considered a fundamental human right and as such is enshrined in the UDHR,[90] the ICCPR,[91] and the ECHR.[92] It is explicitly mentioned in the 1990 Copenhagen Document of the OSCE.[93] The right to a public trial is crucial in the sense that it provides an important safeguard for the protection of the right of the individual and the interest of society at large.

International standards require that "*a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons*."[94] The ECtHR held that the "*public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts […] can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of […] a fair trial [...]*"[95]

The right to a public hearing is a qualified right. ECHR Article 6(1) explicitly states that "*the press and public may be excluded from all or part of the trial ... where ... the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*" Therefore, on occasion it may be necessary to limit the open and public nature of proceedings in order to protect the safety or privacy of witnesses, or "*to promote the free exchange of information and opinion in the pursuit of justice*."[96] However, on every occasion domestic courts have an obligation to provide well-founded justification as to the existence of legitimate grounds and prove that such grounds outweigh the importance of ensuring the public nature of the trial.[97]

The rule of publicity also extends to the pronouncement of judgments. The UN Human Rights Committee General Comment on the right to equality before courts and tribunals and to a fair trial requires that "*[a]ny judgment rendered in a criminal case, including the*

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89 Council of Court Chairpersons, Decision No 92 (2006).
90 UDHR, Article 10.
91 ICCPR, Article 14(1).
92 ECHR, Article 6(1).
93 1990 Copenhagen Document, §13.9.
94 UN Human Rights Committee General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, §29.
95 *Pretto and Others v. Italy,* ECtHR Judgment, 8 December 1983, §21.
96 *B. and P. v. the United Kingdom*, ECtHR Judgment, 24 April 2001, §37; See also *Z v. Finland*, ECtHR Judgment, 25 February 1997, §99.
97 *Volkov v. Russia*, ECtHR Judgment, 4 December 2007, §31.

essential findings, evidence and legal reasoning, shall be made public,"[98] only permitting to restrict public access to judgments where the interests of a juvenile person so require. Public scrutiny also implies full access to judgments. Therefore, public knowledge of court decisions cannot be secured by confining information to a limited group of persons, such as the participants of the case.

C. Findings and Analysis

This chapter discusses the shortcomings identified on the basis of the monitors' observations and covers access to the court facilities, to public information, and related issues that affect the right to a public hearing. Some of the observed trials received significant public attention. While the challenges associated with conducting such trials are formidable, failure to meet them comes at a high cost of lost public confidence.

Many monitored trials took place in an atmosphere of high tension. Some of the defendants expressed their disagreement with the criminal proceedings against them through speeches and other manifestations of protest. They and their supporters in the courtroom often did not show due respect for the judges and other participants of the proceedings. These challenging circumstances made the work of courts extraordinarily difficult and at the same time raised the bar for their professional performance to the highest levels. The information gathered from the monitoring allows to conclude that a number of judges coped with these challenges with due professionalism.

Despite their best efforts, the monitors missed 18 cases. This was primarily due to sudden changes in hearing schedules, which created logistical challenges for the observation. On some occasions, information about the trials was received only when the hearings were over. In several instances, specific requests for information were made, indicating the case details. However, the monitors were informed that the preliminary investigation was not over and the case was not yet sent for trial. Nonetheless, a few days later it became known that the cases were already tried. Additionally, the official website of the Judiciary of Armenia (www.court.am) did not always have updated information about the cases scheduled for hearing. The schedules posted on the website occasionally contradicted the information about hearings publicly announced by the judges or received by the monitors from the Court of Cassation. Access of the monitors to court information somewhat improved from May 2009, after a series of meetings held by ODIHR with officials in Yerevan.

i. Access to court premises

Although all cases were tried in open proceedings, access to court premises was frequently restricted. The need to ensure security in court buildings is certainly a valid concern, but its application should be balanced with the need to ensure public access to trials. The state

[98] UN Human Rights Committee General Comment 32, on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, §29.

authorities are ultimately responsible for securing this access and should take special measures to accommodate it for the hearings in which the public takes particular interest.

On 8 May 2008 the Court of Cassation issued a clarification regarding the powers of the bailiff service prescribed by the legislation, including:

1. *To clarify the identity of persons entering the court, present in the courtroom, as well as subjected to judicial sanctions;*
2. *To remove a person from the courtroom on the basis of a court decision or restrict the entry of a person mentioned in such decision;*
3. *To examine persons entering the court building or the courtroom, as well as their belongings;*
4. *To use physical force and special measures in accordance with the regulations and under the conditions specified in the [Judicial] Code.*[99]

The Court also informed that *"taking into account the complexity and peculiarity of some of the judicial cases, a high security regime can be established with the aim of ensuring the security of the judge, trial participants, and other persons, under which the entry of citizens to court premises is possible only with a document verifying the identity of the person."*

This clarification did not mention who would decide on the introduction of high security regimes and how such decisions would be communicated to the public. Judging by the practice, some of the observed trials were treated as requiring a high security regime, but no specific announcements to that effect were made to the public by the respective courts or the Court of Cassation.

International standards attach importance to public access to the courtrooms. A violation of the defendant's right to a public trial was declared in cases where access to the court building was restricted throughout the proceedings, although the case was not tried *in camera*. For instance, the ECtHR declared a violation of Article 6 of the ECHR related to the public hearing in the case of *Zagorodnikov v. Russia,*[100] where a policeman standing at the entrance repeatedly turned away people who wished to enter the courtroom, but who did not have a notice to appear or an identity card. At each hearing a number of seats in the courtroom remained free. The government argued that it was practically impossible to accommodate all, but the ECtHR rejected this argument stating that "*the Government did not put forward any argument capable of persuading the Court to agree that admitting the public to the hearings would have jeopardized public order or affected the length of the proceedings*."[101]

On multiple occasions, the monitors encountered policemen and bailiffs at the entrance of court premises, who turned away people for reasons other than security, such as failure to

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99 Judicial Code, Article 214.
100 *Zagorodnikov v. Russia,* ECtHR Judgment, 7 June 2007.
101 *Id.*, §26.

produce an ID, an alleged unavailability of free seats,[102] or an alleged postponement of the trial.

The monitors and members of the public who tried to attend an appeal hearing scheduled at the Criminal Court of Appeals on 21 May 2008 were turned away by the bailiffs, who informed them that the hearing was postponed. When the monitors entered the court building anyway, they found that the hearing in fact took place as scheduled.[103]

IDs were mostly required at the Criminal Court of Appeals and the Yerevan Criminal Court. The monitors observed that IDs were not checked every day for the same trial, and for some trials there was no ID check at all. In some cases police officers checked IDs at the perimeter of the court buildings, and this was followed by another ID check by the bailiffs on court premises.[104]

Law enforcement officers in civilian clothing were granted privileged access to the courtrooms on some occasions, while members of the public were told that no seats were available.[105]

Occasionally, the monitors observed seemingly arbitrary decisions made by the bailiffs themselves to expel particular individuals from the court premises and/or deny them access to the courtroom. In some cases the bailiffs were hostile and impolite towards the relatives of defendants, monitors, and other members of the public.[106]

On 17 July 2008 a photojournalist was not allowed by the bailiffs to enter the courtroom at the Yerevan Kentron and Nork-Marash District Court on the sole ground that during the first hearing the judge removed him from the courtroom.[107] In one case, ODIHR monitor was pushed out of the crowded courtroom by the bailiffs immediately after the hearing was over, without giving her any time to collect her belongings.[108]

Observers encountered situations when the level of public interest in cases was extremely high. For example, at the trial of P. and S. at the Yerevan Kentron and Nork-Marash District Court, people shared the available seats and were standing at the far end of the courtroom. Some 20 people were also standing in the lobby.[109] The principle of publicity does not presuppose that all those who wish to be present in the courtroom would be accommodated. At the same time, on some occasions it appeared that smaller courtrooms

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[102] R.N.115-30.05.2009, R.N.109-12.2008, R.N.113-10.2008, R.N.49-18.07.2008, R.N.135-27.06.2006, R.N.126-11.03.2009.

[103] R.N.11-24.05.2008.

[104] R.N.130-30.03.2009, R.N.112-02.12.2008, R.N.109-01.12.2008, R.N.135.22.06.2009, R.N.136.-22.06.2009, R.N.137-22.06.09, and R.N.138.25.06.2009.

[105] R.N.112-02.12.2008, R.N.61-04.08.2008, R.N.49-18.07.2008, R.N.136-22.06.2009.

[106] R.N.130-29.04.2009, R.N.108-25.11.2008, R.N.52-21.07.2008.

[107] R.N.61-04.08.2008.

[108] R.N.130-29.04.2009.

[109] R.N.48-17.07.2008

may have been deliberately chosen for the hearings of high-profile cases to limit public attendance. Such practices could not contribute to strengthening public trust in the administration of justice.

> The high-profile trial of D. began on 28 July 2008 at Courtroom 4 – the largest courtroom at the Kentron and Nork-Marash District Court in Yerevan. However, the subsequent hearings were held in Courtroom 5, which was substantially smaller. It was explained that the larger courtroom was occupied, as a different criminal case was reportedly heard there. On 30 July 2008 the monitors observed that Courtroom 4 was used for a civil case involving three participants, while the trial of D. continued in Courtroom 5.[110]

As mentioned above, some of the monitored trials were conducted in a highly tense atmosphere. At times, defendants and their supporters in the courtroom breached orders of the judges and did not comply with the legal requirements of courtroom procedures. In these circumstances, judges resorted to the removal from the courtroom of members of the public and representatives of the media.[111]

Judges are authorized by law to impose a range of sanctions for disobedience with their orders including a warning, removal from the courtroom, and a fine.[112] The need to balance the interests of orderly administration of justice with the rights of individuals would suggest that these sanctions should be exercised with due care and moderation. Such care was indeed exercised by some judges. In some cases, however, judges removed persons from the courtroom without any prior warning or justification for their decision. On several occasions, members of the public were removed from the courtroom without prior warning for applauding defendants.[113] When judges could not identify the culprits in the audience, they removed entire rows of spectators.[114] These practices negatively impacted on the defendants' right to a public hearing.

ii. Access to information

Publicity of the trial is ensured only if the public is able to obtain accurate information about its time and place. Court schedules should provide complete information including the name of the defendant, the charges against him/her, the name of the judge trying the case, the time of the court session, and the courtroom. However, the project monitors found that the schedule often did not provide complete and accurate information, e.g. the hearings were held at a different time or location than the one posted on the board.[115]

The monitoring also revealed significant shortcomings with regard to adherence to the court schedules. Only 15% of the observed court sessions were held as scheduled. Late or

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[110] R.N.112-02.12.2008.
[111] See also chapter 8.
[112] CCP, Article 314[1].
[113] R.N.52-21.07.2008, R.N.83-18.09.2008, R.N.27-19.06.2008.
[114] R.N.112-02.12.2008, R.N.52-21.07.2008, R.N.135-22.06.2009.
[115] R.N.34-24.06.2008, R.N.3-02.05.2008, R.N.44-11.07.2008, R.N.92-01.10.2008, R.N.40-01.07.2008.

early start of court sessions was a common practice.[116] Occasionally, trial participants had to wait for several hours for hearings to begin.[117] While non-adherence to the schedules may be caused by different reasons (some of them beyond the judges' control), the scope and systematic nature of the problem calls for the adoption of comprehensive remedial measures. The seriousness of this problem was emphasized by the Court of Cassation, which stated that a late start of the hearing constitutes a serious breach of the CCP and entails a breach of Art. 6(1) of the ECHR on the right to a public hearing and adversarial hearing.[118]

Of 13 court hearings held in the case of M. only one started on time – the pronouncement of the verdict. The hearing of 7 July 2008 was delayed by 20 minutes, as security guards brought in a different defendant by mistake. The hearing of 25 August 2008 was rescheduled after a 20-minute delay, as M. was not brought in from the detention facility (outside the courtroom, bailiffs informed the trial monitors that defendants were not delivered to court due to petrol shortages caused by the war between Russia and Georgia). The session on 4 September 2008 began with a 52-minute delay due to unavailability of the courtroom; while the hearing on 8 September 2008 began one hour late for unknown reasons.[119]

iii. Courtroom equipment and facilities

All observed trials were held in courtrooms. In general, the Armenian authorities should be commended for their continuing efforts to equip all courtrooms with appropriate furniture and technical equipment. The project monitors found that most courtrooms were adequately equipped with computers and audio-recording systems.

In some instances, however, courtrooms did not have the necessary equipment for proper examination of evidence, such as screens and DVD players.[120] In other cases, the audio-recording equipment was not working and proceedings were only recorded by handwritten notes. [121] Where audio-recording of the proceedings was made, judges occasionally ordered the clerks to turn off and later turn on the recording devices, while the trial was ongoing. Allowing "off the record" communications in the course of the trial raises concerns, since such remarks may not be subjected to the scrutiny of higher courts and the public.[122]

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[116] R.N.04-09.05.2008, R.N.52-21.07.2008, R.N.08-15.05.2008, R.N.14-04.06.2008, R.N.16-06.06.2008.

[117] R.N.06-13.05.2008, R.N.17-11.06.2008, R.N.27-19.06.2008, R.N.31-23.06.2008, R.N.35-24.06.2008, R.N.59-06.06.2008, R.N.90-26.09.2008.

[118] Decision N 3-118/VD of 2 March 2007.

[119] R.N.113-10.12.2008.

[120] R.N.83-18.09.2008, R.N.26-19.06.2008.

[121] R.N.33-24.06.2008.

[122] The existence of a noise-isolating glass shield separating the audience from the key spectators of the proceedings deprived the monitors of the full and unconstrained possibility of monitoring "off the record" communications in the course of the trial. R.N.141-27.07.2009.

The observers noted that in numerous cases the public was unable to follow court proceedings due to poor acoustics.[123] Courtrooms were generally not equipped with sound-amplifying systems. As a result, proceedings were often inaudible to the public, fuelling frustration and irritation in the audience. This situation was exacerbated when judges, prosecutors and other trial participants did not speak sufficiently clearly and loudly. Improvements in these areas are necessary to ensure meaningful exercise of the right to a public hearing guaranteed by national legislation and international standards.

D. Conclusions

Access to court hearings for at least some members of the public and the media was provided in all of the monitored trials. None of the monitored trials were conducted *in camera*.

Publicity of the trial is not only a fair trial safeguard for the defendant, but also an important instrument to build and maintain public trust in the administration of justice. As any other public institution, the justice system serves the society, personified by every member of the public who enters the courthouse. The monitors gathered evidence suggesting that the work of the court bailiff service is not guided by these basic principles. In addition to the security-related functions, assisting the public to exercise their right to access court proceedings should become a core function of the bailiff service. A serious effort should be made to ensure that court bailiffs understand and perform this function properly.

Ensuring physical security on the court premises should be achieved through the use of appropriate modern technical means, rather than intrusive and generally ineffective checks of identity documents.

The monitoring showed that there is room for improvement when it comes to making courts more user-friendly and service-oriented institutions. This includes supplying basic information about the scheduled hearings and ensuring that the public may hear everything that happens in the courtroom.[124]

As a related issue, recording of court hearings should be improved to ensure a complete and accurate record of the proceedings.

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[123] R.N.112-02.12.2008, R.N.52-21.07.2008, R.N.83-18.09.2008, R.N.136-22.06.2008, R.N.137-22.06.2008, R.N.138-25.06.2008, R.N.26-19.06.2008.

[124] In its comments on the draft report, the Ministry of Justice informed that on 24 October 2009 "Datalex" pubic information booths were introduced in Armenia. These booths provide an opportunity to follow any ongoing trials in Armenia, namely to be informed of the status of the case and its history, see the deadlines, full texts of decisions, final acts of the court, search the "Arlis" compendium of legislation, visit the webpages of governmental bodies, and make payments for duties. According to the same source, 30 "Datalex" pubic information booths have already been installed in courts and in governmental buildings.

Chapter 3. Presumption of innocence

In a number of trials the project monitors encountered practices which raised doubts as to whether the defendant was in fact presumed innocent until proven guilty. Some judges made adverse comments implying guilt of the defendants. The security measures applied to some defendants during the hearings (handcuffs and heavy presence of security personnel) presented the defendants as dangerous criminals. The monitors also encountered provisional court rulings which refer to defendants as having committed the crime and hearings where the judges did not fully comply with their obligation to instruct the defendants of their rights, including the right to remain silent.

A. National legislation

The Constitution of the Republic of Armenia guarantees everyone the right to be presumed innocent until proved guilty. The same article expressly provides that the defendant is free of the burden of proof and entitled to the benefit of the doubt.[125] The Constitution also provides for the privilege against self-incrimination and incrimination of immediate family, and prohibits the use of any evidence obtained illegally.[126]

The CCP reaffirms the guarantees of the presumption of innocence, the prohibition against placing the burden of proof on the defence, the defendant's entitlement to the benefit of the doubt,[127] and the privilege against self-incrimination and incrimination of immediate family.[128]

Armenia's law expressly addresses the issue of applying restraints to pre-trial detainees by providing that handcuffing is only permissible where the conduct of the detainee creates a reasonable assumption that the he or she may have an intent to escape, to inflict self-injury or injury to others, or to resist actions by the police.[129] The prohibition on the use of means of restraint in the absence of an imminent threat of escape or violence is presumably intended to prevent a visual impression of the detainee's guilt.

B. International standards

The key international and regional human rights instruments, including the UDHR,[130] the ICCPR,[131] and the ECHR,[132] enshrine the right of the accused to be presumed innocent

[125] Constitution of the Republic of Armenia, Article 21.
[126] *Id.*, Article 22.
[127] CCP, Article 18.
[128] *Id.*, Article 20. See also *id.*, Article 334(2) and Article 336(1).
[129] Law of the Republic of Armenia on the Police Troops, Article 20.
[130] UDHR, Article 11(1).
[131] ICCPR, Article 14(2).
[132] ECHR, Article 6(2).

until proven guilty in accordance with the law. The 1990 Copenhagen Document of the OSCE includes the presumption of innocence among "*those elements of justice which are essential to the full expression of the inherent dignity of all human beings*."[133] The UN Human Rights Committee General Comment on the right to equality before courts and tribunals and to a fair trial establishes as a corollary of the presumption of innocence the requirement that the burden of proof rests with the prosecution and that the defendant be entitled to the benefit of the doubt. It also affirms proof beyond reasonable doubt as the standard of proof in criminal cases.[134]

The principle of the presumption of innocence can thus be broken down into three interlinked elements:

a) the court should not start with the preconceived idea that the defendant committed the offence he or she is charged with;
b) the burden of proof rests with the prosecution;
c) any doubt should be interpreted in the defendant's favour.[135]

Not only the courts but other state bodies as well are bound by the principle of presumption of innocence.[136] It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.[137]

The right to silence and the privilege against self-incrimination are generally recognized international standards, which lie at the heart of the notion of a fair procedure.[138] The rationale is in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of fair trial.[139]

The treatment of defendants (including shackling, handcuffing or otherwise restraining the defendant) should fully reflect the principle of the presumption of innocence. Outward signs emphasizing the dangerousness of the defendant undermine the principle of presumption of innocence. The Human Rights Committee specifically noted that "*defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals.*"[140]

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133 1990 Copenhagen Document, §5.19.

134 UN Human Rights Committee General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, §30.

135 See *Barberà, Messegué and Jabardo v. Spain*, ECtHR Judgment, 6 December 1988, §77.

136 See *Daktaras v. Lithuania,* ECtHR Judgment, 10 October 2000, §42.

137 UN Human Rights Committee General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, §30.

138 See ICCPR, Article 14(3)(g). See also *Allan v. the United Kingdom*, ECtHR Judgment, 5 November 2002, §44.

139 *John Murray v. the United Kingdom*, ECtHR Judgment, 8 February 1996, §45.

140 See UN Human Rights Committee General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, §30.

The issue of shackling and security measures is dealt with by the ECtHR mainly in the light of prohibition of inhuman and degrading treatment (Article 3), rather than presumption of innocence (Article 6). In this regard the following rules were set by the European Court.

Safety measures should be justified by the circumstances of the case, be proportionate to the needs of security, otherwise they would contribute to the humiliation of the defendant whether or not that had been the intention. Handcuffing a person or imposing other security measures (such as special forces in the courthouse) give rise to the violation of Article 3 of the Convention in a situation where no serious risks to security could be proved to exist.[141]

The consideration of whether there is a danger that the person concerned might abscond or cause injury or damage is of great importance.[142] Article 3 is violated in cases where a person is unjustifiably handcuffed or other security measures are imposed upon him/her during public hearings.[143] The defendant's status as public figure, the lack of earlier convictions, and orderly behaviour during the criminal proceedings are relevant factors in assessing security interests and the risk of absconding or resorting to violence during the transfer to the courthouse or at the hearings.[144]

Appearance of judicial proceeding should not lead an average observer to believe that "extremely dangerous criminals" are on trial. Therefore metal cages, barred ceilings, heavily armed guards in the courthouse or inside the courtroom, should be exceptional. Otherwise, both the principle of the presumption of innocence and prohibition of humiliation would be undermined.[145]

C. Findings and Analysis

The right to be presumed innocent until proven guilty covers the stage of criminal investigation and the trial proceedings. In this project the monitors observed compliance with this principle in the courtroom setting. They were not asked to evaluate whether the prosecution succeeded to prove beyond reasonable doubt that the accused were guilty as charged. Such an assessment would require a substantive review of the evidence and exceed the scope of this project.

The monitors did not systematically collect information on comments made by public officials outside the courtroom that may have compromised the presumption of innocence.[146]

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[141] See *Mouisel v. France*, ECtHR Judgment, 14 November 2002, §47; *Henaf v. France*, ECtHR Judgment, 27 November 2003, §48; and *Istratii and Others v. Moldova*, ECtHR Judgment, 27 March 2007, §57.

[142] *Raninen v. Finland*, ECtHR Judgment, 16 December 1997, §56.

[143] *Gorodnichev v. Russia*, ECtHR Judgment,, 25 May 2007, §§105-109.

[144] *Sarban v. Moldova*, ECtHR Judgment, 4 October 2005, §89.

[145] *Ramishvili and Kokhreidze v. Georgia*, ECtHR Judgment, 27 January 2009, §100.

[146] Available project resources did not permit to carry out monitoring of the media.

The monitors evaluated the following elements of the principle of presumption of innocence: attitude of courts towards the defendants, more specifically, whether the courts displayed any preconceived inclinations and/or demonstrated a biased approach towards the defendants and their guilt; the existence of psychological or any other kind of pressure put on the defendants by judges or any other participants of the trial; and the existence of external manifestations incompatible with the presumption of innocence (unwarranted use of handcuffs, cages, and other security measures).

i. Adverse comments by judges

The monitors observed that in numerous cases judges made comments implying guilt of the defendants in the course of the trial.[147] These comments were frequently combined with an accusatory or even openly hostile attitude demonstrated by the judges. Such comments and attitudes are incompatible with the defendants' right to a fair trial and undermine public trust in the impartial administration of justice.

During a hearing of the case of defendant M. on 4 November 2008, the defence counsel in his speech emphasized circumstances which positively described the character and achievements of the defendant. He said: "Owing to this man's victories, the anthem of Armenia was played and the Armenian flag was raised in many countries of the world; he was awarded with numerous medals and trophies". The judge ironically asked: "Is this a mitigating or an aggravating circumstance?" and immediately added: "I myself consider it an aggravating circumstance, since the person of such virtues should not have committed such crimes".[148]

On 11 July 2008, during the hearing of the case of defendant A., when the defendant was brought into the courtroom, the public started to applaud. The judge of the Criminal Court of Yerevan angrily commented on this reaction by the public by saying "I feel ashamed for the 1 March and for people like you (addressing this statement to A.)".[149]

In some instances, judges in the monitored cases appeared to put pressure on the defendants to admit guilt. While judges have a legal obligation to ascertain the plea of the defendant,[150] they should do so within the bounds of neutrality and with due regard to the defendant's right not to testify against oneself.[151]

During a hearing on 23 June 2008 in the case of K., the judge asked twice the question whether the defendant admitted his guilt. After the defendant answered "Not guilty" for the second time, the judge ironically asked again: "Not at all?". Later, just before the defendant began to testify, the judge

[147] E.g. R.N.38-30.06.2008, R.N.30-22.06.2008, R.N.14-04.06.2008, R.N.24-18.06.2008, R.N.85-25.09.2008, R.N.18-12.06.2008, R.N.51-21.07.2008, R.N.55-22.07.2008, R.N.77-03.09.2008, R.N.100-10.10.2008.

[148] R.N.107-21.11.2008.

[149] R.N.83-18.09.2008.

[150] CCP, Article 334.

[151] See also chapter 5 below.

told him that if he admitted his guilt and expressed remorse, the Court would view it as a mitigating circumstance.[152]

While questioning defendant N., the judge of the Criminal Court of Yerevan asked the defendant whether he had been an activist of the opposition movement or not, to which the defendant replied that he did not want to answer that question. In response to this, the judge audibly mumbled: "He is quite an activist, but he is afraid to admit it." Then, the judge loudly warned the defendant that such behaviour was not in the defendant's best interests, and that it would be better if he told the truth.[153]

Armenian law requires a judge to explain the defendant the right not to testify against himself, his spouse or close relatives, the right not to be bound by any confession or denial of guilt made during pre-trial stages, and the right to remain silent.[154] While the judges generally followed these rules, project monitors observed occasions when the courts did not properly discharge their obligation to explain some of the defendants' rights, which form a constituent part of the presumption of innocence and have essential significance for a fair trial.

During a hearing on 29 April 2008 in the case of K., the judge of the Criminal Court of Yerevan did not explain to the defendant that he is not bound by any confession or denial of guilt made during pre-trial stages of the case. Nor did the judge explain to the defendant that he was not bound to answer questions, and that his refusal to answer could not be interpreted against him.[155]

ii. Security measures

International human rights standards prescribe that defendants should normally not be shackled or kept in cages during trials, or otherwise presented to the court in a manner indicating that they may be dangerous criminals. Special care should be taken to ensure that security measures are applied consistently with the presumption of innocence.

The monitors noted that at least eleven observed trials were accompanied by heavy use of security measures. In at least 32 first instance cases the defendants were handcuffed when they entered the courtroom, but the handcuffs were removed soon after.[156] However, on some occasions the defendants remained in handcuffs during the entire trial or hearing.[157] Only in a small number of cases, the defendants who entered courtrooms were not in handcuffs at all. In courts of appeal, the defendants were brought in handcuffs, which were then removed from their hands and put on their feet, or were used to shackle the defendants' legs to the iron bar fixed below their bench.

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152 R.N.52-21.07.2008.
153 R.N.83-18.09.2008.
154 CCP, Articles 334 and 336.
155 R.N.04-09.05.2008, R.N.89-26.09.2008.
156 E.g. R.N.9-19.05.2008, R.N.15-06.06.2008, R.N.16-06.06.2008, R.N.17-11.06.2008, R.N.20-13.06.2008 R.N.22-16.06.2008, R.N.23-17.06.2008, R.N.24-18.06.2008, R.N.33-24.06.2008.
157 R.N.18-12.06.2008, R.N.44-11.07.2008, R.N.92-01.10.2008.

In several cases the monitors observed heavy use of various combinations of security measures, including a simultaneous use of handcuffs and the massive presence of police force in the courtroom.[158] It appeared that some individual security measures were not based on the risks associated with particular individuals. While overall security in the courtroom needs to be maintained, individual security measures applied to the defendants must be balanced with the need to uphold the presumption of innocence.

In the case of defendant C., nine armed security officers and five bailiffs were guarding the defendant, who was also feet-cuffed.[159] During the consideration of the criminal case of high-profile defendant K., eight to 12 bailiffs regularly occupied the first two rows in the courtroom. Four to six bailiffs were regularly standing between the benches. In addition, several armed police officers were guarding the defendant.[160]

There also did not appear to be an established mechanism to challenge the use of security measures. Judges seemed to be reluctant or unable to exercise control over these issues.

In two cases considered by the Criminal Court of Appeals on 19 September 2008 and 17 July 2008 respectively, the defendants were feet-cuffed during the whole court session and were guarded by a group of armed police officers and bailiffs. Both the defendants and their defence counsels challenged the lawfulness of feet-cuffing and requested the court to order that the feet-cuffs be removed, referring to international standards and alleging that it amounted to humiliating treatment. One of the defendants also said that it hindered an effective protection of his rights and had a distracting effect. The judge replied: "This is the established practice. We do not mind, so ask the escorting group if it is acceptable to them". However, the chief of the group refused the request.[161]

The monitoring also revealed that some interim judicial decisions referred to the accused/defendant as "a person who committed the crime".[162] In this regard it is important to note that the presumption of innocence is violated "if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law", and it is sufficient, "even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty".[163]

D. Conclusions

The presumption of innocence was compromised by the comments and actions of a number of judges in the monitored proceedings. More efforts should be made to ensure

[158] R.N.13-04.06.2008, R.N.30-22.06.2008, R.N.86-25.09.2008, R.N.130-29.04.2008,
[159] R.N.13-04.06.2008.
[160] R.N.112-02.12.2008.
[161] R.N.88-26.09.2008, R.N.91-29.09.2008.
[162] R.N.112-02.12.2008, R.N.61-04.08.2008.
[163] *Allenet de Ribemont v. France*, ECtHR Judgment, 10 February 1995, §35).

that the judges understand the practical implications of this fundamental principle for the treatment of the accused.

Recognizing the legitimate need to maintain order in the courtroom, application of security measures to the defendants during some of the monitored trials appeared to be disproportionate and not based on an individual risk assessment of these defendants. Individual security measures applied to defendants must be balanced with the need to uphold the presumption of innocence. Judges should be in the position to rule on the application of such measures during the trials, as they affect the presumption of innocence and other rights of the accused.

Chapter 4. Equality of arms and the extent of reliance on police evidence

Many of the monitored cases revealed shortcomings with regard to a genuine procedural equality between prosecution and defence, contrary to the fair trial guarantees contained in national and international standards. Judges at times tended to treat the parties unequally, displaying openly friendly attitudes towards the prosecution and openly hostile attitudes towards the defence. In numerous trials, judges did not allow the defence to reasonably present their case and/or confront the prosecution witnesses. This chapter also highlights a concern with the reliance on written witness testimonies in favour of the prosecution when these testimonies could not be meaningfully verified at trial or had been withdrawn.

A related problematic issue encountered in a significant number of cases is the over-reliance on incriminating police testimonies, which also casts doubts over the existence of equality of arms in the monitored cases. In several cases, statements of police witnesses were the primary basis for convictions, sometimes despite apparent procedural violations, contradictions and the lack of corroborating evidence.

A. National legislation

Armenia's legislation, specifically the CCP, provides for a strict separation between the functions of the defence and the prosecution[164] and guarantees equality of arms[165] by requiring that the defence be placed on an equal footing with the prosecution in presenting their case. Specifically, the CCP mandates equal access to evidence for both parties to the proceedings.[166]

The CCP and the Judicial Code[167] assign high priority to the adversarial character of trial proceedings.[168] The introduction of adversarial elements into Armenia's criminal justice system has been a key part of the judicial reform, buttressed by the adoption of constitutional amendments in 2005, and a number of steps have been taken to balance the positions of the defence and the prosecution.

Both parties are required by law to be present at the hearing.[169] In the event of a failure of the defence counsel to appear at the hearing the trial is postponed. The defence counsel cannot be replaced in the absence of the defendant's consent, except where the defence

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[164] CCP, Article 23(2).

[165] *Id.*, Article 23(5); see also Article 304(1).

[166] *Id.,* Article 23(5).

[167] *Id.,* Article 23(1); see also Judicial Code of the Republic of Armenia, Article 17.

[168] This should not be interpreted as defining Armenia's criminal justice system as adversarial. It is based on a civil law tradition and includes many features that do not exist in traditionally adversarial systems (e.g. the court may summon witnesses on its own initiative and send a case for supplementary investigation).

[169] CCP, Article 23(8); see also Article 390.

counsel fails to appear at three consecutive hearings due to a prolonged illness or on other grounds, in which case a new defence counsel from the Office of the Public Defender may be appointed by the court.[170]

The court is required to assess evidence for admissibility.[171] According to the CCP, "*[a]ll pieces of evidences are subject to scrutiny concerning their admissibility, and the totality of the evidence obtained is subject to scrutiny concerning its sufficiency for the determination of the case."* [172]

The taking of evidence can be done at the request of the parties as well as at the initiative of the court.[173] In accordance with the principle of immediacy, "*the motions and demands shall be considered and resolved immediately upon their declaration, if no other manner is prescribed upon the provisions of this Code*."[174] In the event of a witness' absence, the judge, based on the relative importance of the witness' testimony, decides on whether or not to postpone the hearing.[175]

B. International standards

"Equality of arms" means that both parties should be in an equal legal position in the course of the trial, namely, they are entitled to equal treatment before the court. This implies that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[176]

The UN Human Rights Committee has stated that a fair hearing requires a number of conditions, including equality of arms, respect for the principle of adversary proceedings and expeditious procedure.[177] The ECtHR held that "*according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent […]*".[178]

In criminal trials where the prosecution is supported by state structures and resources, the principle of equality of arms is an essential guarantee of the right to defend oneself. The

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170 *Id.,* Article 304(2).
171 CCP, Article 106.
172 *Id.*, Article 127.
173 *Id.,* Article 331.
174 *Id.*, Article 102(2).
175 *Id.*, Article 332(1).
176 UN Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, §13; see also *Dudko v. Australia*, UN Doc CCPR/C/90/D/1347/2005, 29 August 2007, §7.4.
177 See *Morael v. France*, UN Doc. ,Supp. No. 40 (A/44/40) at 210 (1989). 28 July 1989, §9.3.
178 *Foucher v. France*, ECtHR Judgment, 18 March 1997, §34; *Bulut v. Austria*, ECtHR Judgment, 22 February 1996, §47.

principle of equality of arms ensures that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information,[179] the right to legal counsel, the right to call and examine witnesses and the right to be present at the trial.

The right to equality of arms also incorporates the right to adversarial proceedings, which means in principle the opportunity for parties to a criminal trial to have knowledge of and comment on all evidence adduced or observations filed.[180] Further, the principle of equality of arms, read together with the right to have adequate time and facilities for the preparation of a defence of Article 6(3)b ECHR, imposes an obligation on prosecuting and investigating authorities to disclose any material in their possession, for or against the accused. This principle extends to material which may undermine the credibility of a prosecution witness.[181]

The principle of equality of arms has as its important corollary the requirement that the parties be afforded equal opportunities to summon witnesses.[182] This requirement finds its legal basis in Article 6.3 (d) of the ECHR, which enshrines the right of everyone charged with a criminal offence *"to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."* It is a core element of the right to fair trial and an essential safeguard against admission of biased evidence.

Relevant international human rights instruments do not lay down any rules on the admissibility of evidence.[183] In this regard, the ECtHR only considers whether decisions appear arbitrary or manifestly unreasonable and whether proceedings as a whole were fair.[184] According to the Court's case law, the requirements of fairness of the proceedings include the way in which the evidence was submitted.[185]

The Court has ruled that "*even though it is normally for the national courts to decide whether it is necessary or advisable to call a witness, there might be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6.*"[186]

As examples of such circumstances, the Court held that "*the domestic courts' refusal to examine the defence witnesses without any regard to the relevance of their statements led to a limitation of the defence rights incompatible with the guarantees of a fair trial*

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179 *Foucher v. France*, ECtHR Judgment, 18 March 1997, §§35-36.
180 *Ruiz-Mateos v. Spain*, ECtHR Judgment, 23 June 1993, §63.
181 See *Dowsett v. United Kingdom*, ECtHR Judgment, 24 June 2003, §41
182 See *Engel and Others v. the Netherlands*, ECtHR Judgment, 8 June 1976, §91.
183 See, e.g. *Olujic v. Croatia*, ECtHR Judgment, 5 February 2009, §77.
184 See *Khamidov v. Russia,* ECtHR Judgment, 15 November 2007, §170*).*
185 See, *inter alia, Lüdi v. Switzerland*, ECtHR Judgment, 15 June 1992, §43.
186 See *Popov v. Russia*, ECtHR Judgment, 13 July 2006, §179.

enshrined in Article 6"[187] and that "*in circumstances where the applicant's conviction was based primarily on the assumption of his being in a particular place at a particular time, the right to obtain the attendance and examination of witnesses on his behalf and the principle of equality of arms, which are specific aspects of the right to a fair trial, imply that he should have been afforded a reasonable opportunity to challenge the assumption effectively*".[188]

On testimonies of police witnesses, the Court has ruled in the past that "*the fact that the only evidence in criminal proceedings is the witness testimony of an arresting police officer is not in itself contrary to Article 6 of the Convention, as long as the accused has the opportunity to test this evidence in adversarial proceedings*".[189]

In its Resolution 1620 on the Implementation by Armenia of the Council of Europe Parliamentary Assembly (PACE) Resolution 1609, on the Functioning of democratic institutions in Armenia, the PACE stated that *"a verdict based solely on a single police testimony without corroborating evidence is not acceptable."*[190]

Finally, the principle of immediacy is an important fairness safeguard, as the evidence produced must be sufficiently "direct" to actually make refutation possible during the public hearing. The rights of the defence are restricted to an extent incompatible with the requirements of Article 6 if the conviction is based solely, or to a decisive extent, on the depositions of a witness whom the accused had no opportunity to examine or to have examined either during the investigation by a judicial authority or at trial.[191] More concretely, the ECtHR ruled that a person may not be convicted based on hearsay evidence in the form of documents or written evidence, if the defendant has not had a chance to confront and cross-examine the sources of this evidence.[192]

C. Findings and Analysis

The information gathered by the project monitors suggests that the principle of equality of arms was not consistently adhered to in the observed trials. The monitors identified a number of shortcomings with the equality of treatment of both parties by the court and the opportunities given to them to present their case. These issues are addressed in the respective sections below. A separate section is devoted to the reliance on written testimonies of prosecution witnesses and the compatibility of this practice with the principle of adversarial proceedings.

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187 *Id.*, §188

188 See *Polyakov v. Russia,*ECtHR Judgment, 29 January 2009, §36.

189 See *Galstyan v. Armenia*, ECtHR Judgment, 15 November 2007, §78.

190 PACE Resolution 1620 on the Implementation by Armenia of the Assembly Resolution 1609, §4.7.3.

191 *Delta v. France*, ECtHR Judgment, 19 December 1990, §37; *Isgrò v. Italy*, ECtHR Judgment, 19 February 1991, §35.

192 *Delta v. France*, ECtHR Judgment, 19 December 1990, §37.

i. Opportunity to present the case

The monitors recorded manifestations of unfavourable disposition by the court towards the defence, as well as situations when the defence was unable to effectively exercise their procedural rights and present their case. The monitoring data indicates that the defence was put at a disadvantage with regard to introducing and examining evidence, and having their arguments heard.

Equality of Arms in Figures

While the figures presented below do not provide conclusive evidence by themselves, they serve as an indicator supporting the existence of a certain imbalance in favour of the prosecution in the monitored trials.

In observed trials at the first instance courts, the defence submitted 390 motions (24 procedural and 366 substantive), [193] while the prosecution submitted 115 motions (10 procedural and 105 substantive). In appellate proceedings, the defence submitted 93 motions (27 procedural and 66 substantive), while the prosecution made 20 motions (one procedural and 19 substantive). In total, the defence made 483 motions, whereas the prosecution made 135 motions.

First instance courts granted 20 of 24 procedural and 101 of 366 substantive motions for the defence. 201 substantive motions were denied, while consideration of 64 substantive motions was postponed (and remained unresolved during the trial). In appellate proceedings, 24 of 27 procedural and 12 of 66 substantive motions were granted. 19 substantive motions were rejected.

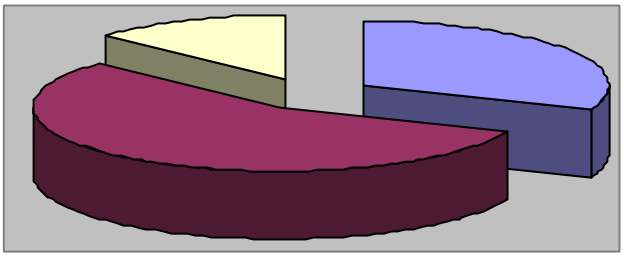
For the prosecution, first instance courts granted eight of ten procedural motions and 80 of 105 substantive motions. Consideration of six substantive motions was postponed. Appellate courts refused one procedural motion from the prosecution and granted 17 of 19 substantive motions, with reasoned rulings. Courts denied two motions, providing detailed reasoning for these rulings.

In total, 31% of motions from the defence were granted, 56 % denied and 13 % left unresolved. For the prosecution, 75 % of motions were granted, 20 % denied and 5% left unresolved.

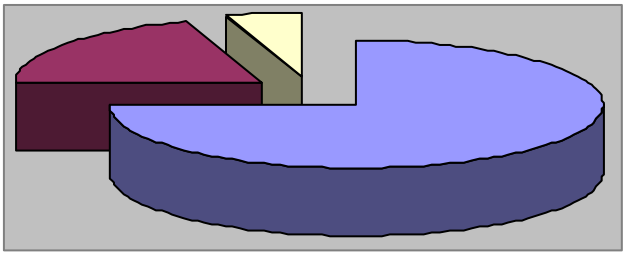
Chart 2. Rulings on Motions

MOTIONS BY THE DEFENCE

[193] For the purposes of this report, the motions were divided into two groups: procedural and substantive. "Procedural" refers to motions that addressed procedural issues, such as the postponement of a hearing. "Substantive" refers to motions that directly concerned a party's presentation of its case (motion to summon a witness, to attach a document to a case file, to release the defendant, to review the lawfulness of detention, etc). Motions on applying accelerated court proceedings and challenges of the impartiality of the judge were considered a distinct category and were not counted as either procedural or substantive motions.



MOTIONS BY THE PROSECUTION



Defence lawyers regularly motioned the courts to summon witnesses, order forensic expertise, and introduce other additional evidence.[194] Courts were generally reluctant to grant such motions, often without any reasoning, although national legislation obliges the courts to give reasoning for these rulings.[195]

Such unsubstantiated denials of motions put the defence at a serious legal disadvantage, depriving it of an opportunity to present their cases on equal footing with the prosecution. As a result, in at least 44 monitored first instance cases the witness testimonies heard by the courts supported only the prosecution's version of events. The defence was effectively prevented from access to potentially exonerating evidence and the opportunity to refute the testimony of prosecution witnesses.[196]

During the hearing of 28 April 2008 of A.'s case at the Yerevan Kentron and Nork-Marash District Court, the defence moved to call two individuals as additional witnesses. It submitted that their testimony was relevant since they accompanied A. at the scene where he was apprehended in the morning of 1 March 2008 (A. was charged with resistance to the police). This motion was denied by the judge without providing any reasons. As there was no other relevant evidence presented and examined in court, the verdict was primarily based on the testimonies of two police officers who apprehended A.[197]

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[194] In informal conversations, a number of defence lawyers admitted that they often refrained from disclosing their witnesses to the prosecution during pre-trial stages because they feared that these witnesses would be pressured.

[195] CCP, Article 331.

[196] E.g., R.N.3-02.05.2008, R.N.17-11.06.2008, R.N.18-12.06.2008, R.N.20-13.06.2008, R.N.31-23.06.2008, R.N.61.-04.08.2008, R.N.83-18.09.2008, R.N.119-08.01.2009.

[197] R.N.35-24.06.2008.

The project monitors also reported another manifestation of unequal treatment of the parties in the course of numerous proceedings: judges frequently interrupted defence lawyers when they were making statements, questioning witnesses, or making motions. The prosecution, on the other hand, was given ample opportunities to present its case.[198]

During a hearing on 26 May 2008 at the Criminal Court of Appeals the prosecutor was making his final statement for 25 minutes, uninterrupted by the judge. However, the judge frequently interrupted the defence counsel when he was making his final statement, saying, "This is only a final statement and you must cut up."[199]

ii. Unequal treatment of the parties

Observers also reported examples of judicial behaviour which portrayed a negative and occasionally openly hostile attitude of judges towards defendants and their lawyers. Incompatibility of this attitude with the presumption of innocence was already discussed in chapter 3 above. Manifestations of such behaviour by judges also give rise to concerns about equality before the court, especially when considering the often amiable disposition of judges towards the prosecution. Trial monitors observed a general pattern of tolerance on the part of judges for delayed appearances and absences of the prosecutors, while the same actions of defence lawyers entailed an imposition of contempt sanctions (see also chapter 9).[200]

At the end of a hearing on 12 August 2008 at the Yerevan Kentron and Nork-Marash District Court the defence counsel informed the judge that they had another hearing on the date appointed for the next court session and requested to re-schedule this session. The judge rejected this request without any justification. Consequently at the appointed date, on 14 August 2008, the defence lawyers did not appear in court. The judge proceeded with the hearing and ridiculed the defendant, suggesting that his lawyers had more important clients than him: "Couldn't one of them come? So they have cases that are more important?… I interpret this as a lack of respect towards you… You should be interested in proceeding. You better get yourself another lawyer". The judge then applied a judicial sanction to the absent defence counsel for the contempt of court by motioning the Chamber of Advocates to institute disciplinary proceedings against the defence lawyers.[201]

During the break in the hearing at the Yerevan Criminal Court on 8 July 2008, the judge and the prosecutor engaged in a friendly conversation in the courtroom. The prosecutor told the judge that she was in a hurry, as she had another hearing in the appeal court and asked the judge to call there. The judge made a phone call to someone and promised that the prosecutor would arrive

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198 E.g., R.N.61-04.08.2008, R.N.108-25.11.2008, R.N.124-09.02.2009.

199 R.N.13-04.06.2008. CCP, Article 354(6) states that the court cannot limit a pleading with a definite timeline and the judge is only entitled to interrupt the persons making the pleadings if they refer to issues irrelevant to the examined case.

200 R.N.18-12.06.2008, R.N.43-08.07.2008, R.N.112-02.12.2008.

201 R.N.112-02.12.2008

soon. The judge adjourned the hearing shortly after the break. The defendant remained in detention.[202]

The monitors who came to the Yerevan Criminal Court on 1 July 2008 were told by the bailiff that the hearing would be postponed because "today is the 90th anniversary of the Prosecutor's Office and the prosecutor will not come". The hearing was indeed postponed by the judge because the prosecutor did not appear. The Court did not provide or discuss the reasons for the postponement.[203]

At the beginning of the hearing at the Yerevan Kentron and Nork-Marash District Court on 15 January 2009, the secretary announced that the defence lawyer was absent. The judge informed the participants that although in the morning the defence lawyer called him to say that he was ill, the judge did not regard this as a valid reason for absence since the lawyer failed to serve the court with a medical certificate. The judge then tried to continue the trial without the defence lawyer but the defendant objected and the judge had to adjourn.[204]

iii. Extent of reliance on police evidence

The use of testimonies by police officers was a prominent feature of several observed trials. Of 234 witnesses called by the prosecution in the monitored cases, 125 witnesses were police officers. The monitors reported 19 separate cases where charges were based on incriminating statements given by police officers. 62 police witnesses were examined in these cases – ranging from one to seven per case. In 17 cases the testimony of police witnesses was the only witness testimony given in court and became the primary basis for court decisions. Results of the monitoring of these cases give rise to several concerns.

Of the 19 cases featuring police witnesses, 13 defendants were charged with resistance to the police.[205] Some of the police officers giving witness testimony in these cases were also recognized as victims. At least six defendants made allegations of police misconduct or brutality against them at the time of apprehension.[206] These allegations were not investigated and no tainted evidence was excluded by the judges.

In these circumstances, national law and international fair trial standards would create an expectation for the courts to make every effort to obtain and examine all relevant evidence and give the accused an effective opportunity to challenge the prosecution's evidence. The courts, however, did not appear to make such an effort. Monitoring data indicates that judges readily accepted the testimonies of police witnesses and did not ask for corroborating evidence. In some cases, police testimonies were accepted by the judges even when there were significant contradictions between the pre-trial testimonies of these

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202 R.N.44-11.07.2008
203 R.N.44-11.07.2008
204 R.N.121-22.01.2009
205 CC, Article 316.
206 R.N.3-02.05.2008, R.N.8-15.05.2008, R.N.17-11.06.2008, R.N.32-23.06.2008, R.N.49-18.07.2008, R.N.108-25.11.2008.

witnesses and their statements at trial,[207] and when there were clear inconsistencies between the testimonies of different officers in the same case.[208]

At the same time, judges did not ask the prosecution to supply evidence corroborating the police testimonies and denied motions of the defence to summon witnesses, including prosecution witnesses whose written statements have been read out in court.[209]

In one case two police witnesses were examined during the trial about the circumstances of the arrest which they carried out. The defence motioned to summon three witnesses: two civilians and one police officer who reportedly witnessed the arrest. These motions were denied by the judge. The defendant was convicted under Article 316(1) of the Criminal Code for resistance to the police and sentenced to three years of imprisonment.[210]

While some of these motions were denied without any reasoning,[211] in other instances judges told the defence that there was no need to invite witnesses whose pre-trial statements have already been read in court,[212] had no substantial significance for the case[213] or that the suggested witnesses would not provide impartial testimony because of their links with the defendant.[214]

The case of Smbat Ayvazyan illustrates many of the concerns mentioned above.[215]

The Case of Smbat Ayvazyan

Smbat Ayvazyan, a member of the opposition, former Minister of Public Procurement and Minister of State Revenue, was charged and subsequently convicted for assaulting police officers in the front yard of the Kentron District Police Station, when he was ordered by the police officers to get out of the car and follow them to the police station. Charges against Mr Ayvazyan were based on the statements of five police officers of the Kentron District Police Station. Three of these police officers escorted the defendant, while two others were on duty at the entrance of the police station.

During the trial the defendant was not given an opportunity to cross-examine the two police officers who were on duty at the entrance. The three police officers who escorted Mr Ayvazyan were the

[207] R.N.46.09.07.2008, R.N.49.07.2008, R.N.52-21.07.2008, R.N.55.-22.07.2008, R.N.61-04-08-08, R.N. 108.25.11.2008, R.N109.01.12.2008.

[208] R.N.32-23.06.2008, R.N.20-13.06.2008, R.N.112-02.12.2008, R.N.17-11.06.2008, R.N.28-20.06.2008, R.N.46-09.07.2008, R.N.52-21.07.2008, R.N.112-02.12.2008, R.N.17-11.06.2008, R.N.28-20.06.2008, R.N.46-09.07.2008, R.N.52-21.07.2008, R.N.61-04.08.08, R.N.80-07.09.2008, R.N.84-20.09.2008, R.N.108-25.11.2008, R.N.109-01.12.2008.

[209] R.N.61-04.08.2008, R.N.108-25.11.2008, R.N.109-01.12.2008, R.N.112-02.12.2008, R.N. 46-09.07.2008, R.N.35-24.05.2008.

[210] R.N.35-24.06 2008

[211] R.N.35-24.05.2008, R.N.109-01.12.2008.

[212] R.N 109-01.12.2008

[213] R.N.-61-04.08.2008

[214] R.N.61-04.08.2008, R.N.112-02.12.2008.

[215] R.N.112-02.12.2008

only witnesses he could examine at trial. On the day when these witnesses were questioned by the prosecution, the defence attorneys asked for more time to prepare their cross-examination, and the judge granted this request. However, when the trial resumed and the defence was ready for cross-examination, the witnesses were not in the courtroom. They did not reappear at the trial, despite defence motions to summon them again.

Numerous motions made by the defence in the course of the trial were denied. The defence motioned, *inter alia*, to summon and examine two individuals who were taken to the police together with the defendant; five witnesses (interviewed by the defence before the trial) who were present in the front yard of the police station at the time in question; another detained individual, who was brought to the same police station at the same time as the defendant; and a journalist who was also present at the front yard of the police station at the time in question and published an article to this effect. Denying these motions, the judge frequently ruled that "the case file contains no reference to these witnesses".

Statements by the police witnesses were accepted by the court, despite contradictions in the trial testimonies of the examined police officers. In particular, four of the five police officers testified that the defendant did not use any foul language.

In its judgment of 19 November 2008 the trial court gave the following reasoning for dismissing written evidence submitted by the defence: "arguments, facts and materials submitted by the defence are found by the court to be ill-founded. Those [facts, arguments and material] do not derive from the factual circumstances of the case, were provided by people who have close relations with the defendant and therefore are as such not impartial and aim to protect him."

The defence appealed this judgement, arguing that the charges were based solely on the testimonies of police officers; the time of apprehension was not correctly registered in the procedural documents; substantiated defence motions were denied, crucial defence evidence was not admitted; and no opportunity was given for cross-examination of the police witnesses.

The Court of Appeals upheld the judgment of the trial court, citing the same findings. With regard to the defence arguments, the Court of Appeals found that these were "non-essential violations of the criminal procedural law and as such could not constitute a basis for setting aside the judgement and discontinuing the proceedings."

iv. Written testimonies and the right to confront witnesses

In adversarial criminal procedure, all the evidence must in principle be produced in the presence of the accused and before the court. The principle of immediacy carries special importance, as an additional guarantee of a fair trial. The defendant should be given an adequate and proper opportunity to challenge and question witnesses against him, either when he makes his statement or at a later stage.[216] The State should take positive steps to enable the accused to exercise these rights in an effective manner.[217]

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[216] *Lüdi v. Switzerland*, ECtHR judgment of 15 June 1992, Series A no. 238, p. 21, § 49; *Delta v. France*, ECtHR Judgment, 19 December 1990, §36.

[217] *Sadak et al v. Turkey*, ECtHR Judgment, 17 July 2001, §67.

These standards imply that every reasonable effort should be made to obtain the attendance of witnesses at trial. The monitoring results indicate that this was not the case in several trials. Judges readily relied on written statements of witnesses taken at the pre-trial stages of the proceedings, often ignoring the requirements of national law on the use of such statements.[218] In one case an alleged business trip was deemed a valid reason for the prosecution witness' failure to appear in court,[219] while on two other occasions the court made no inquiry at all into the reasons for the witness' non-appearance.[220] In all these cases judges publicized the written statements of the witnesses, while the defence was deprived of the opportunity to confront these witnesses.

At the trial of defendant B. at the Yerevan Kentron and Nork-Marash District Court, the judge read out the testimonies of three unnamed witnesses, who allegedly said that they recognized photos of the defendant and identified him as the person who slapped the police officer. These witnesses were not named, they were not present and they were not called before the Court.[221]

In a case involving two defendants, the Yerevan Criminal Court established that three absent prosecution witnesses were not properly notified. The judge simply read out their pre-trial testimonies.[222]

D. Conclusions

The results of the monitoring allow the conclusion that the principle of equality of arms was not implemented in many observed trials and that the prosecution and defence were not treated on an equal footing. The systematic denial of defence motions to introduce and/or examine additional evidence seriously undermined the possibility for the defence to present its case.[223] In some trials the courts relied on the testimony of police witnesses without giving the defence an effective opportunity to test the probative value of this evidence in adversarial proceedings.

The shortcomings mentioned above must be addressed comprehensively. The judges would benefit from additional training on ensuring equality of arms on the basis of the existing legislation. Policy-makers, however, should also give serious consideration to

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[218] CCP, Article 342.

[219] R.N.36-25.06.2008.

[220] R.N.119-08.01.2009, R.N.44-11.07.2008

[221] R.N.9-19.05.2008.

[222] R.N.87-25.09.2008.

[223] The Office of Prosecutor General expressed the following disagreement with these findings in its comments on the draft report: *"Almost in all trials the principle of equality of arms was respected: in particular, the defense was provided with an opportunity to present evidence, examine it, assess it, examine the witnesses without any time limitation; in violation of the requirements of Article 309 of the CCP, prosecution witnesses were even examined outside the scope of charges, to which the prosecutors reacted."*

reforming the pre-trial stages of criminal procedure to pave the way for a more adversarial trial.

Equality of arms will remain unattainable in reality as long as the prosecution prepares all evidence for the trials. The defence should be allowed to collect evidence. In particular, the defence should be allowed to submit its own list of witnesses that must be called at the trial. An adversarial deposition procedure should be introduced to record witness testimony before the trial, if there is a risk of witness non-appearance. More generally, the experience of OSCE participating States with so called "parallel investigation" and "two case files" (defence and prosecution) should be carefully studied and analysed.

Chapter 5. The right not to be compelled to testify and the exclusion of unlawfully obtained evidence

Throughout the monitoring activities, troubling allegations of torture and ill-treatment by police were brought to the attention of project staff. Prosecutors and judges generally did not react appropriately when such allegations were brought to their attention, thereby disregarding their duties clearly established under national and international law. Internal prosecutorial enquiries apparently held in some cases did not result in any public documents or proceedings.

This chapter also examines the practice that judges did not always assess the admissibility of evidence as required by national and international standards. In particular, these standards stipulate the inadmissibility of evidence obtained through the use of torture or ill-treatment. Defence motions to exclude such evidence were ignored or denied. In some cases, judges relied on pre-trial statements of the defendants which were conflicting with their testimony made during the trial, despite allegations of duress and intimidation. Similarly, judges relied on witness statements which were allegedly obtained under duress.

A. National legislation

The right not to be compelled to testify against oneself is guaranteed by the Constitution of Armenia.[224] The Constitution also prohibits the use of unlawfully obtained evidence.[225] The CCP, in addition to the privilege against self-incrimination,[226] expressly provides for the right of the suspect and the accused to refuse to testify, furnish any materials to the prosecution, or otherwise co-operate with the prosecution.[227] It also requires that the person in question be informed of this right.[228] Likewise, the provisions of the CCP which detail the rights and obligations of the accused include an express mention of the right to refuse to testify and/or give explanations.[229] The provisions of the Code on the procedure of interrogation of the defendant require the presiding judge to inform the defendant that he or she is entitled not to testify.[230]

The CCP expressly prohibits the use of evidence obtained through the use of torture, coercion or fraud, or as a result of a violation of rights of the suspect or the accused, or as

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224 Constitution of the Republic of Armenia, Article 22.
225 *Id.*
226 CCP, Article 20.
227 *Id.*, Article 19(5).
228 *Id.*, Article 19(2).
229 *Id.*, Article 65(2).
230 *Id.*, Article 336.

a result of a procedural violation.[231] Torture is prohibited by Armenia's criminal law.[232] Moreover, eliciting evidence by coercion or ill-treatment may potentially qualify as abuse of official authority, which is prosecutable under Armenia's Criminal Code.[233]

The court is under a duty to review evidence for admissibility.[234] The proffering party has to demonstrate that the evidence has been obtained in compliance with the criteria for its admissibility. However, the CCP is unclear with respect to the strength of the rules of exclusion. Whereas it states that only evidence gathered in adherence to the rules of the CCP may be used in court, and explicitly excludes evidence gathered through the use of force, threat, fraud, violation of the dignity of the defendant or other illegal means, violating rights of suspect to a defence or "essential violations", it then goes on to limit "essential violations" to those which impair the reliability of the facts.[235]

B. International standards

The right not to testify against oneself or confess guilt is an essential protection rooted in the principle of presumption of innocence. The ICCPR provides that "*[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: […] (g) Not to be compelled to testify against himself or to confess guilt.*"[236] The 1991 Moscow Document of the OSCE commits the participating States to adopt effective measures *"to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person."*[237]

Although not expressly provided for by the ECHR, the right to remain silent is implied by the language of Article 6. The ECtHR has stated that "*[a]lthough not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.*"[238]

The right to remain silent during police interrogation is an important corollary of both the right not to be compelled to testify and the principle of presumption of innocence.[239] This

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[231] *Id.*, Article 11(7) and Article 105.
[232] CC, Article 119.
[233] *Id.,* Article 308.
[234] CCP, Article 106 and Article 127.
[235] *Id.*, Article 104 (3) and 105 (1) and (2).
[236] ICCPR, Article 14(3)(g).
[237] 1991 Moscow Document, §23.1(vii).
[238] *John Murray v. United Kingdom*, ECtHR Judgment, 8 February 1996, §45.
[239] See also ICCPR, Article 14(3)(g), and supra chapter 3.

is to be understood as precluding convictions based entirely or mainly on negative inferences drawn from the defendant's silence during police questioning and at trial.[240]

The right not to be compelled to testify or confess guilt is intrinsically related to the requirement that any evidence obtained as a result of torture or coercion be excluded. The UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment (UN CAT) provides that "*any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*"[241]

Relevant international standards outlaw any form of compulsion, ranging from torture to other forms of ill-treatment or coercion. In particular, the Guidelines on the Role of Prosecutors prohibit prosecutors' use of evidence "*obtained through recourse to unlawful methods, which constitute a grave violation of the suspect´s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights.*"[242] The UN Human Rights Committee General Comment 20 adopted an inclusive understanding of inadmissible evidence that covers evidence obtained under duress by requiring that "*the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.*"[243] The UN Human Rights Committee in its General Comment 13 added that "*[t]he law should require that evidence provided by[...] any[...] form of compulsion is wholly unacceptable.*"[244] The UN Human Rights Committee has also stated that "*[c]onfessions obtained under duress should be systematically excluded from judicial proceedings.*"[245]

Moreover, the authorities have a duty to duly investigate any allegations of torture or ill-treatment raised by criminal defendants. This duty is rooted in a number of international norms, including the obligation of the State under both the ICCPR and the ECHR to provide an effective remedy to any victim of human rights abuse.[246] The UN Human Rights Committee reaffirms this view with regard to the relevant provisions of the ICCPR.[247] In the 1994 Budapest Document of the OSCE the participating States

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240 *Id.* See also *Funke v. France*, ECtHR Judgment, 25 February 1993, §44.

241 UN CAT, Article 15; see also *id.*, Article 13 and Article 16(1).

242 Guidelines on the Role of Prosecutors, Guideline 16, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

243 UN Human Rights Committee General Comment 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7), CCPR/C/GC/20, 10 March 1992, §12.

244 UN Human Rights Committee General Comment 13 on Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), CCPR/C/GC/13, 13 April 1984, §14.

245 UN Human Rights Committee Concluding Observations: Georgia, UN Doc: CCPR/C/79/Add.75, 5 May 1997, §26.

246 ICCPR, Article 2(3); ECHR, Article 13.

247 *Casafranca v. Peru*, UN Doc. CCPR/C/78/D/981/2001, 22 July 2003, §7.1; *Zelaya Blanco v. Nicaragua,* U.N. Doc. CCPR/C/51/D/328/1988, 20 July 1994, §10.6.

committed themselves *"to inquire into all alleged cases of torture and to prosecute offenders"*.[248]

The duty to investigate has been specifically addressed by the ECtHR which on a number of occasions has found states to be in breach of Article 3 (prohibition of torture) for their failure to carry out an effective official investigation into the applicant's allegations of ill-treatment.[249] The Court's jurisprudence makes it clear that the investigation should be capable of leading to the identification and punishment of those responsible.[250] The investigation into serious allegations of ill-treatment must be thorough. The authorities must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence.[251] In cases where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the cause of the injury.[252]

C. Findings and analysis

i. Failure to investigate allegations of torture, ill-treatment, and police brutality

While international law and national legislation place a strong obligation on State authorities to investigate allegations of torture, the monitoring data indicates that this obligation was not always met. Trial monitors heard disturbing allegations related to the conduct of law enforcement officials. Time and again, defendants told the court that they were beaten by the police and suffered from cruel and inhuman treatment while in custody. They supplied photos, medical records, and other evidence to support their statements.

Defendant G. and his lawyer told the court that G. was severely beaten by the police at the time of his arrest, and then again beaten at the Kentron Police Station by an investigator nicknamed "Goebbels". He suffered a broken rib, broken finger, and head injuries. G's lawyer also mentioned that the police used an electric shock device.[253]

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[248] 1990 Budapest Document, §20.

[249] *Assenov et al. v. Bulgaria*, ECtHR Judgment, 28 October 1998, §§102, 106; *Kuznetsov v. Ukraine,* ECtHR Judgment, 29 April 2003, §105; *Labita v. Italy*, ECtHR Judgment, 6 April 2000, §131.

[250] See *Muradova v. Azerbaijan,* ECtHR Judgment, 2 April 2009, §§100, 1001; *Assenov et al v Bulgaria, Labita v. Italy* supra note 255

[251] See *Tanrıkulu v. Turkey*, ECtHR Judgment, 8 July 1999, §§104-106, and *Gül v. Turkey*, ECtHR Judgment, 14 December 2000, §89.

[252] See *Aksoy v. Turkey,* ECtHR Judgment, 18 December 1996, §61.

[253] R.N.17-11.06.2008.

Defendant M. told the court that he was threatened and beaten at the Ijevan Police Station, and that an investigator pressed and broke his fingers with pliers to force him sign a statement which he did not read. He showed some of his injuries to the court.[254]

Defendant B. testified that he was arrested on 4 March 2008 when he was requested to come to the Nork-Marash Police Station. There, he was severely beaten by different officers for several days. He listed the names of the responsible officials. He described the beatings in detail. He also mentioned that one day the head of the investigation said: "Take him out and shoot him. We will say that he was trying to escape and we had to shoot him."[255]

At the hearing of 9 July 2008, the defence counsel informed the court that defendant C.'s foot was wounded when he was brought to the police station on 1 March and asked for medical assistance. However, he did not receive medical help until 5 March. The investigator told C. that he would be allowed to see a doctor if he signed a statement dictated to him.[256]

At the hearing of 6 August 2008 defendant D. described that when he and his brother were coming back from Echmiadzin to Yerevan, their car was surrounded by armed men who jumped out of a van. The men forced the door open and he received two blows with a gun to his head, and then was thrown to the ground. He saw a man with a gun directed at him. He heard two gunshots, one of which wounded him. He was pushed into a car and taken to the police station. He saw his brother on the floor there, covered in blood. He was also thrown on the floor and they were both severely beaten by several people. He was taken to the hospital only the next day, where he was denied food and water.[257]

At least 27 defendants alleged ill-treatment at the hands of law enforcement officers at the time of arrest or during pre-trial detention. In some cases, separate complaints were filed with the prosecutor's office.[258] In addition to physical violence and threats to life, allegations ranged from insults, humiliation and threats to denial of food and medical assistance and other severe forms of cruel, inhuman, and degrading treatment.[259] There were also instances where witnesses stated in court that they gave their pre-trial testimonies under pressure, duress or intimidation (see below).

Courts usually did not react to these statements. Only on two occasions trial judges addressed the prosecutors' office with requests to institute criminal proceedings, both

[254] R.N.53-21.07.2008.
[255] R.N.83-18.09.2008.
[256] R.N.84-20.09.2008.
[257] R.N.129-16.03.2009.
[258] E.g. R.N.83-18.09.2008, R.N.128-26-03-2009, R.N.129-16.03.2009, R.N.27-19.06.2008, R.N.17-11.06.2008.
[259] E.g. R.N.84-20.09.2008, R.N.129.-16.03.2009, R.N.83-18.09.2009, R.N.84-12.09.2009, R.N.138-25.06.2009, R.N.18-12.06.2008, R.N.137-22.06.2009, R.N.7-19.06.2008, R.N.136-22.06.2009.

times in relation to witnesses who alleged that their pre-trial testimonies were given under duress.[260] No law enforcement official has been charged.

ii. Failure to exclude tainted evidence

Judges and prosecutors have an obligation to assess the admissibility of evidence.[261] Armenian law clearly prohibits the use of evidence obtained through the use of torture, coercion or fraud, as a result of a violation of rights of the suspect or the accused, or procedural violations.

Results of the monitoring indicate that prosecutors and judges did not uphold their duty to examine the admissibility of the evidence obtained during the investigation. Judges largely ignored or denied motions of the defence to exclude inadmissible evidence.[262] None of these motions resulted in an examination by the court of the circumstances in which the disputed evidence was obtained. As a result, several convictions handed down by the courts were based at least in part on evidence tainted by allegations of torture, coercion, fraud, violation of the rights of the accused, or procedural breaches.

The defence counsel motioned the Yerevan Criminal Court to exclude the protocol on the identification of defendant M. as evidence obtained in violation of the law. The defence presented proof that during the line-up, M. was the only person who was bleeding and had visible signs of beating on his face. M. reportedly also heard that the investigator pointed him out to the victim and witnesses as he walked out of the elevator, saying "That's him." The judge denied the motion saying, "The forensic medical report explains everything".[263]

The defence motioned the Yerevan Criminal Court to exclude the pre-trial testimony of witness G., as it was obtained in breach of the law. In particular, the lawyer reported that G. was interrogated at the National Security Service for nearly seven hours,[264] then transferred to the Special Investigation Unit. The interrogation protocol was compiled by an investigator at the Special Investigation Unit

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260 Based on the information supplied by the Judicial Department and the Office of the Prosecutor General in their comments on the draft report, four criminal cases have been opened by the Prosecutor's Office. On one occasion, three cases were opened following a request by a judge of the Kotayk Regional Court of 7 May 2009. These cases concerned three different witnesses in one trial who alleged that their pre-trial testimonies were given under duress. On another occasion, a criminal case was opened at the request of the Kentron and Nork-Marash District Court on 22 May 2009 and also involved a witness who testified at the trial that his pre-trial testimony was obtained by force. The investigation carried out by the Prosecutor General's Office found that the allegations made by all these witnesses were without merit and all four cases were discontinued. The Judicial Department also pointed out that in two cases given as examples in this report, the courts were aware of ongoing criminal investigations and therefore did not make any decisions with regard to the defendants' statements.

261 See supra, Section A and B.

262 R.N. 52-21.07.2008, R.N.22-16.06.2008, R.N.113-10.12.2008, R.N.49-18.07.2008.

263 R.N.83-18.09.2008.

264 CCP, Article 205^1 provides that interrogation of a witness cannot last continuously longer than four hours.

who did not carry out the interrogation. The judge rejected the motion simply stating that, "There is not enough proof to exclude the evidence" and relied on written pre-trial testimony of G. in the verdict.[265]

In the observed trials the judges were often more inclined to rely on the pre-trial testimonies of the defendants and witnesses rather than the examination of their oral testimonies given in court, especially if they were in contradiction to each other (see also chapter 5).[266] Moreover, even when defendants or witnesses explained such discrepancies by duress and intimidation during the investigation judges still ignored such statements and relied on such written testimonies.[267]

Such practices raise questions about the implementation of the principles of the equality of arms and adversarial proceedings in Armenia.

The broad use in court of the written testimonies obtained by investigative bodies, ignoring allegations of defendants that their statements during the pre-trial stage were made under duress, intimidation or torture, exemplify an inquisitorial bias in the judiciary to assign additional value to any written formalized evidence received during the investigation. This approach might create an incentive for law enforcement agencies to produce such evidence through various unscrupulous ways, including torture, thus endangering the fundamental freedoms of the accused and witnesses, and ultimately undermining public trust in the judiciary.

iii. Pressure, intimidation, and other interference with witnesses

Observers reported instances when witnesses told the court that their pre-trial testimony was not given voluntarily, citing pressure, intimidation, and deprivation of liberty.[268] As mentioned earlier, judges usually did not react to such statements and did not initiate any further enquiries into their veracity.[269]

In one case tried at Yerevan Criminal Court several witnesses told the court that they were deprived of liberty and denied food and water for three days, and then forced to write down statements dictated by the investigators. The judge remarked: "Is it so easy to convince you to give a false testimony? There are some unsolved cases out there, will you give testimony as well?" The judge's

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265 R.N.22-16.06.2008.

266 R.N.49-18.07.2008, R.N.52-21.07.2008.

267 R.N.48-17.07.2008.

268 R.N.48-17.07.2008, R.N.137-22.06.2009, R.N.136-22.06.2009.

269 In their comments on the draft report, the Judicial Department and the Office of the Prosecutor General referred to the four cases described above in FN 260. The Judicial Department also noted that such statements "*were thoroughly examined either during the court proceedings with the participation of defence counsels or they have been analyzed and received appropriate assessment by judicial acts. In case of sufficient grounds, the relevant materials were sent to the prosecutor's office. There were numerous instances when, as a result of consideration of such statements and for the purpose of excluding further pressures against witnesses, the courts made use of protective measures of persons and their families*."

verdict relied on the testimonies of these witnesses, without any mention of the allegations of the issue of coercion or any discussion of admissibility.[270]

At the hearing of 18 May 2009 the witness refused to confirm his pre-trial testimony. He explained that his interrogation lasted for about six hours and the investigator repeated the same questions many times. The witness felt exhausted and signed the protocol drawn by the investigator without reading. Another witness in the same case testified that he did not read his pre-trial testimony before signing as he was interrogated for eleven hours without interruption and deprived of food and water.[271]

D. Conclusions

Disturbing accounts of police brutality, ill-treatment, and even torture at the hands of law enforcement personnel were given in a number of monitored trials. These allegations have not been duly addressed; both the prosecutors and the judges remained silent in the circumstances when the national legislation and international law impose on them a duty to react. The courts often relied on evidence tainted by such allegations to hand down convictions.[272]

This state of affairs warrants serious and effective measures. They must be directed first of all to root out abuses of power by the police and investigators, who should be held accountable for every incident of cruel, inhuman and degrading treatment of the suspects and witnesses. As already recommended to Armenia by the UN Human Rights Committee

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[270] R.N.18-12.06.2008.

[271] R.N.136-22.06.2009. In its comments on the present report, the Judicial Department explained that the trial court questioned the witnesses in connection with this testimony and found that this testimony was unreliable.

[272] The Judicial Department supplied the following comment with regard to these conclusions: "*Based on a small number of examples, we find that the general conclusion that the courts did not properly examine the question of admissibility of evidence is incorrect. The fact that the issue of admissibility of evidence has been discussed by the courts is confirmed by the judgments made in relation to cases of Hakob Hakobyan, Gabriel Gabrielyan, and Lavrent Gasparyan. In these cases some evidence that formed the basis of the charges was declared inadmissible by the courts. Moreover, according to the judgment of the Yerevan Criminal Court of 16 September 2008 in relation to the case of Armen Sargsyan, two protocols of identification dated 6 March 2008 were declared inadmissible evidence. After declaring the protocols of identification of A. Sargsyan by two witnesses inadmissible (…), the Criminal Court found that the guilt of the defendant was established on the basis of the testimony provided by the same witnesses after the identification process. The Court of Cassation on 16 September 2009 reversed this judgement and discontinued the criminal prosecution of A. Sargsyan because his participation in the committed crimes was not proven. The Court of Cassation, pursuant to the doctrine of "fruits of the poisonous tree", ruled that after declaring the two protocols of witness identification of A. Sargsyan inadmissible evidence, the testimonies of the same witnesses could not have been used as evidence and form the basis of the charges against A. Sargsyan. The constitutional prohibition of using unlawfully obtained evidence concerns also the evidence that derives from unlawful evidence*."

in 1998,[273] it might be worthwhile to establish a special investigative authority to carry out an independent enquiry into all such incidents. Judges should have a clear obligation to refer all incidents that come to their attention to this authority. It should be given a mandate to investigate and prosecute law enforcement officials implicated in such incidents.

Criminal procedural legislation should also be amended to tighten the prohibition of relying on the evidence obtained through illegal means. Real change will only come if the courts begin to routinely deny the prosecution such "fruits of the poisonous tree". In particular, if defendants retract written testimonies at trial, these testimonies should be excluded from the evidence and must not be relied on by the prosecution.

[273] The UN Human Rights Committee expressed "*concern about allegations of torture and ill-treatment by law-enforcement officials*" and recommended "*the establishment of a special independent body to investigate complaints of torture and ill-treatment by law enforcement personnel*". Concluding observations of the Human Rights Committee: Armenia CCPR/C/79/Add.100., 19 November 1998.

Chapter 6. The right to defend oneself or through legal counsel

This chapter examines the results of the monitoring project with regard to the right to defence, in particular the adequate opportunity to mount a defence and the effectiveness of legal representation. In some cases defence lawyers were effectively deprived of an opportunity to mount a defence. Some defence counsels walked out of the courtroom in protest. Some concerns were also noted regarding the quality and effectiveness of public defenders.

A. National legislation

The Constitution of Armenia sets forth the right of everyone to legal assistance as well as to the "*assistance of a legal defender chosen by him/her starting from the moment of his/her arrest, subjection to a measure of restraint or indictment.*"[274] The CCP further details this right by providing that every suspect or accused in a criminal case has the right to defend him or herself in person or through the legal assistance of a defence counsel and/or a legal representative, with the ensuing obligation on the part of the criminal proceedings body to explain to the person in question their rights and facilitate the exercise thereof, as well as to ensure that the legal representative of the suspect/accused takes part in the proceedings.[275]

The CCP affords every suspect and accused the right to unimpeded access to and assistance by their defence counsel from the moment of their detention or indictment, respectively, including the right to communicate with the defence attorney without hindrance.[276] The participation of a defence counsel cannot be denied to a suspect/accused who has expressed a wish to be assisted by a counsel, and in certain instances this right cannot be waived.[277]

The defendant is free to choose his/her defence counsel. Where the defendant does not have a counsel or the means to pay for a lawyer, but either wishes to be defended by a counsel or cannot waive his/her right to such defence, a counsel shall be appointed by the Public Defender's Office under the Chamber of Advocates of the Republic of Armenia.[278] The body conducting the proceedings is expressly banned from recommending a defence counsel.[279] The defendant has the right to invite more than one counsel.[280] Indigent

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274 Constitution of the Republic of Armenia, Article 20.
275 CCP, Articles 10 and 19.
276 *Id.*, Article 63 and Article 65.
277 *Id.*, Article 69(1); see also Constitution of the Republic of Armenia, Article 20.
278 *Id.*, Article 70(1).
279 *Id.*, Article 70(2).
280 *Id.*, Article 70(6).

defendants, as well as defendants who do not wish to be defended by a counsel but cannot waive this right, are entitled to state-funded defence counsel services.[281]

If the counsel chosen by or appointed to represent the defendant fails to render his/her services at specified times, the counsel shall be replaced.[282] The replacement may only be done with the consent of the defendant. In case it is impossible to replace the counsel, the trial must be stayed until a new lawyer is found. The incoming counsel shall be allowed adequate time to familiarize him/herself with the case.[283]

The relevant legislation expressly prohibits interference by third parties with attorneys´ lawful professional activities and exempts attorneys from criminal liability for statements made in good faith before a court or bodies of inquiry or investigation.[284]

B. International standards

The UDHR,[285] the ICCPR[286] and the ECHR[287] all set forth the right of a person accused of a crime to defend oneself in person or by defence counsel. This right is prominently reflected in the commitments of the OSCE participating States.[288] Similarly, the UN Basic Principles on the Role of Lawyers affirm everyone's entitlement to assistance of legal counsel and call upon states to create efficient and non-discriminatory procedures and mechanisms "*for effective and equal access to lawyers*" as well as to ensure "*the provision of sufficient funding and other resources for legal services to the poor.*"[289] The defendant has the right to be defended by a counsel of his/her own choosing.[290]

The concept of fairness enshrined in international law requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6(1) and Article 6(3)(c) of the ECHR.[291]

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[281] *Id.*, Article 10(5), and Law of the Republic of Armenia on Advocacy, Article 6. See also Article 20 of the Constitution.
[282] CCP, Article 70(5).
[283] *Id.*, Article 304.
[284] Law of the Republic of Armenia on Advocacy, Article 21.
[285] UDHR, Article 11(1).
[286] ICCPR, Article 14(3)(b).
[287] ECHR, Article 6(3)(c).
[288] See, e.g., OSCE 1990 Copenhagen Document, §5.17.
[289] UN Basic Principles on the Role of Lawyers (1990), Principles 1-4, Access to Lawyers and Legal Services.
[290] ICCPR, Article 14(3)(b); ECHR, Article 6(3)(c).
[291] See *John Murray v. UK*, ECtHR Judgment, 8 February 1996, §§62-64.

The right to be defended is violated if a detainee is not permitted to correspond with a lawyer. As the ECtHR noted in its landmark *Golder* judgment, "*[h]indering the effective exercise of a right may amount to a breach of that right even if the hindrance is of a temporary character.*"[292] Therefore, as soon as a detainee wants to prepare his defence with the assistance of a lawyer such contact must be possible.

International standards require that indigent defendants be provided with free or state-funded legal assistance when the interests of justice so require. Where deprivation of liberty is at stake, the interests of justice, in principle, call for legal representation.[293] The UN Basic Principles on the Role of Lawyers provide that "*[a]ny such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.*"[294]

The state has a duty to provide competent and effective representation for the defendant. The ECtHR noted that "*[a]lthough a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, nevertheless the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.*"[295]

Under the relevant international standards, the state must allow adequate facilities for the preparation of the defence. Such facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. Communications with the accused must be conducted in conditions giving full respect for confidentiality. The UN Human Rights Committee specifically noted that "*lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.*"[296]

The UN Basic Principles of the Role of Lawyers require that states "*ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; inter alia, and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in*

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[292] *Golder v. UK*, ECtHR Judgment, 21 February 1975, §26.

[293] *Benham v. United* Kingdom, ECtHR Judgment, 10 June 1996, §61; see also *Quaranta v. Switzerland*, ECtHR judgment of 24 May 1991.

[294] UN Basic Principles on the Role of Lawyers (1990), Principle 6.

[295] See *Kamasinski v. Austria*, ECtHR Judgment, 19 December 1989, §65; also *Artico v. Italy*, ECtHR Judgment, 13 May 1980, §§33-36; and *Daud v. Portugal*, ECtHR Judgment, 21 April 1998, §38.

[296] UN Human Rights Committee General Comment 13 on Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), CCPR/C/GC/13, 13 April 1984, §9.

accordance with recognized professional duties, standards and ethics."[297] The Principles also require that lawyers "*enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.*"[298]

C. Findings and analysis

i. Access to legal assistance

The majority of defendants in observed proceedings were represented by legal counsel. In 83 cases observed in the first instance, the monitors reported that defendants were represented by private counsel in 61 cases, by public defenders in 18 cases,[299] and unrepresented in four cases. On appeal, private counsel represented appellants in 41 monitored cases, public defenders in 12 cases,[300] and no defence lawyers were present in four cases.[301]

Access to legal counsel at the pre-trial stages of the proceedings was outside the scope of the monitoring. Instances of denial of such access to the arrested in the aftermath of the 1-2 March events were recorded by different human rights organizations.[302] Some defence lawyers informed the project monitors privately that they faced difficulties with access to their arrested clients. These issues, however, were rarely raised during the trials.

Defendant L. alleged that he repeatedly requested a lawyer, but did not have any counsel for three months while he was in detention.[303] Defendant F. testified that he was beaten by officers of the Special Investigatory Service, who tried to compel him to waive defence counsel and give false testimony.[304]

ii. Adequate opportunity to mount a defence

The monitors observed a number of instances where defence lawyers were effectively deprived by the court of the opportunity to perform their professional functions and mount a defence. The impropriety of prejudiced attitudes by the bench is discussed in chapters 3 and 9, while the impact of such judicial conduct on the right to equality of arms and adversarial proceedings is addressed in chapter 4. These instances raise obvious concerns relating to the effective exercise of the right to defend oneself through legal counsel.

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297 UN Basic Principles on the Role of Lawyers (1990), Principle 16.
298 *Id.*, Principle 20.
299 Private counsel and a public defender represented one defendant at different hearings.
300 Private counsel and public defenders were involved in one case of two defendants.
301 In two cases, no information is available.
302 See e.g. *Democracy on Rocky Ground*, Human Rights Watch, 25 February 2009 (http://www.hrw.org/en/node/80935/).
303 R.N.84-20.09.2008.
304 R.N.90-26.09.2008.

At the hearing on 15 May 2008 at Yerevan Kentron and Nork-Marash District Court, the judge frequently interrupted the defence when they were questioning two prosecution witnesses (police officers). The judge did not allow the defence to question the witnesses about apparent contradictions between their pre-trial statements and trial testimonies. The judge stated that "what ought to be discussed at the trial, are the actions of the defendant".[305]

Some defence lawyers left the courtroom in protest. The monitors observed four separate instances of such walk-outs, in the course of three trials.[306] Similarly, lawyers have also boycotted scheduled hearings to protest against purportedly arbitrary actions by judges.[307]

The legitimacy of sanctioning these lawyers for contempt of the court is also addressed in chapter 9. Clearly, such conduct gives rise to serious issues relating to the professional duties and ethics of lawyers. These issues should be resolved with due regard to international standards on the independence of the legal profession.

In the course of a hearing on 21 August 2008 defence lawyer S. made several motions to examine additional evidence. *Inter alia*, he motioned to examine a DVD record in his possession which refuted the testimony of prosecution witnesses (police officers) against his client. The same record was earlier admitted as evidence in another case and was a key evidence for the acquittal of several individuals who were arrested together with his client. The judge deemed this motion untimely and left it without consideration. The lawyer insisted on his motion several times in the course of the hearing but it was not granted. Later, the defence counsel made motions requesting to invite and examine additional witnesses, who were not summoned to court. These motions were also deemed untimely by the court and left without consideration. The judge made a warning to the lawyer to follow his rulings and maintain order in the courtroom. The lawyer accused the court of prosecutorial bias and persecution of his client for political activities and left the courtroom in protest. The judge sanctioned this behavior by referral to the disciplinary proceedings of the Chamber of Advocates and also requested the prosecutor's office to launch a criminal case against S. for contempt of the court.

The disciplinary body of the Chamber of Advocates concluded that the court unlawfully refused to examine evidence submitted by the defence attorney, in breach of the CCP, the Constitution, and Art. 6 of the ECHR. With references to domestic and international standards on the legal profession and freedom of expression, it found that the judicial sanction was applied against the lawyer who was diligently performing his professional duties. The application of this sanction was found ungrounded and the lawyer's demarche was described as the "last and exceptional measure of protest available to the lawyer in response to the arbitrary conduct of the judge during the hearing". The disciplinary body ruled to discontinue disciplinary proceedings and also expressed concerns about the criminal case against S. for contempt of the court.

[305] R.N.35-24.06.2008.
[306] R.N.112-02.12.2008, R.N.108-25.11.2008, R.N.141-27.07.2009.
[307] R.N.112-02.12.2008, R.N.108-25.11.2008, R.N.139-10.07.2009.

iii. Effectiveness of the legal representation

The monitors' checklist contained a question on the overall performance of the defence. The monitors assessed that the right to "qualified, competent, and effective" legal counsel was ensured in 87 (62%) of the 140 observed cases and not ensured in 33 (23.5%) cases.[308] Privately contracted counsel was positively assessed in 67 cases and negatively assessed in 24 cases, while the work of public defenders was perceived as satisfactory in 19 cases and unsatisfactory in eight cases.

These figures suggest that external observers assessed the overall performance of the defence rather positively. Concerns were raised regarding the quality of legal representation rendered by public defenders. Their work received an unsatisfactory assessment in 37% of the cases handled by them (for private counsel, the figure is 24%). In these cases, the monitors reported that they found public defenders generally passive. Some appeared to be ill-informed about the charges against their clients and the facts of their cases. They did not always submit motions to request presentation of evidence, examination of new witnesses, or filed briefs on procedural matters. These concerns point to the need for improvement of the overall quality of representation rendered through the Public Defender's Office.

When the judge asked the public defender to explain the consequences of an accelerated trial to the defendant and declared a five-minute break for that purpose, the public defender left her client in the courtroom and went out. When the hearing resumed, the public defender informed the court that she had explained everything to the defendant and everything was clear to him. Her position in the pleadings was expressed as follows: "as far as the defendant accepted his guilt, there is nothing to do but to join the prosecution and confirm the guilt of the defendant, according to the ethics of an attorney."[309]

During the break, a public defender took a phone call and told someone that he was trying to get rid of the case, but it was assigned to him anyway. He promised to finish within an hour. When the hearing resumed, the public defender was very passive. He did not make any motions and his statement in the pleadings was ill-prepared. When the verdict was announced, the defendant was clearly disappointed and accused the defence counsel of inaction.[310]

D. Conclusions

The right to defend oneself or through legal counsel becomes a hollow promise if the defence is not given a real opportunity to present its case at trial. This was the situation in some of the monitored trials. Examples of defence demarches in these trials show that the tensions were at highest levels and confirm the seriousness of the problems. The need for

[308] In seven cases the monitors found the question difficult to answer; in eight cases no defence counsel was present; and in five cases no information is available.

[309] R.N.33-24.06.2008.

[310] R.N.32-23.06.2008.

comprehensive solutions to address the existing inequality of arms has already been emphasised in chapter 4 above.

Quality of representation was also an issue in some of the observed trials. Monitoring results indicate that there is a need for improving the quality of legal assistance rendered through the Public Defender's Office. Consideration should be given to creating a special Legal Aid Council. This body would be vested with the powers to define policies on the provision of legal aid and analyse reports on the current challenges and practices. It may be composed in equal proportion of representatives of the Chamber of Advocates, representatives of civil society, academia and the judiciary, as well as representatives of the Ministries of Justice and Finance.

Chapter 7. Accelerated proceedings

Expedited trials are a useful means to advance the efficiency of the justice system; they, however, typically entail the defendants' renouncing of some important procedural rights and therefore need to be accompanied by safeguards to ensure the overall fairness of criminal proceedings. One of the most crucial safeguards, as examined in this chapter, is the requirement that the defendants give consent to the use of accelerated proceedings knowingly and voluntarily. The monitoring indicated that this was not always sufficiently observed and not all defendants appeared to be fully informed and aware of the consequences of their consenting to accelerated proceedings.

A. National legislation

Armenian law allows for expedited trials. In cases where the maximum sentence prescribed by law for the alleged offense does not exceed ten years of imprisonment, the CCP allows for accelerated proceedings at the defendant's request. Accelerated procedures may be used only if the defendant pleads guilty to the charge. The prosecutor may object to an accelerated procedure in the indictment but is entitled to change his position before the trial.[311]

The key feature of accelerated proceedings is that the evidence that can be called at trial is limited. The court, however, is required to conduct a full inquiry into the defendant's personal character, the degree of responsibility, as well as any mitigating and/or aggravating circumstances that may affect the liability and sentencing. A sentence imposed in a case that received an accelerated disposition cannot exceed two thirds of the maximum sentence provided by law for the offence. If two thirds of the maximum sentence is a more lenient punishment than the minimum sentence provided by law, then the minimum sentence should be imposed.[312] The final judgment may be appealed in court pursuant to the regular appeal procedure, with the exception that evidentiary errors cannot serve as ground for repealing the judgment by the appeals court.[313]

In order to be considered by the court, the defendant's request for an accelerated trial must pass a three-pronged test. It must be demonstrated that a) the applicant fully realizes the nature and consequences of the request; b) the request is submitted at the applicant's own free will; c) the request is submitted after consultations with the applicant's defence counsel.[314] In the event the applicant does not have a defence lawyer, the court is required to furnish him/her with one. If the defendant refuses counsel, an accelerated trial cannot proceed. Where there is more than one defendant in the case, an accelerated procedure may only be ordered if all of them consent to its application.[315]

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311 CCP, Article 375^1.
312 *Id.*, Article 375^3.
313 *Id.*, Article 375^4.
314 *Id.*, Article 375^1.
315 *Id.*, Article 375^2 and $375^1(5)$.

B. International standards

The use of abbreviated criminal proceedings may advance the efficiency of justice and ensure better compliance with the requirement that a trial takes place within a reasonable time. However, such proceedings should be accompanied by appropriate procedural safeguards to avoid potential violations of the defendants' rights and prevent situations where efficiency is gained at the expense of justice.

Council of Europe Recommendation No. R (87) 18 Concerning the Simplification of Criminal Justice does not unequivocally recommend that "guilty pleas" be part of the criminal justice system, but it encourages the use of such procedures wherever compatible with constitutional and legal traditions. In such procedures, "*an alleged offender is required to appear before a court at an early stage of the proceedings in order to state publicly to the court whether he accepts or denies the charges against him […]. In such cases, the trial court should be able to decide to do without all or part of the investigation process and proceed immediately to the consideration of the personality of the offender, the imposition of the sentence and, where appropriate, to decide the question of compensation.*"[316] If used, a guilty plea must be accompanied by a number of essential safeguards: "*[It] must be carried out in a court at a public hearing,*" "*[t]here should be a positive response by the offender to the charge against him,*" and "*[b]efore proceeding to sentence an offender under the "guilty plea" procedure, there should be an opportunity for the judge to hear both sides of the case.*"[317]

The Recommendation also allows recourse to simplified procedures: penal orders and similar procedures, which dispense with the hearing stage and lead to decisions equivalent to sentences. Such procedures are recommended for offences that are "*minor due to the circumstances of the case, where the facts of the case seem well established and it appears certain that the person charged is the person who committed the offence.*"[318] It emphasizes the need to ensure that the accused "*be properly informed of the consequences of his acceptance. It should be made known to him in a clear and definite manner, the person concerned being allowed a reasonable time in which to take legal advice if he so wishes.*"[319] It underscores the indispensability of the consent of the accused: "*[t]he accused's opposition to the penal order, for which reason need not be given, should ipso facto cause the order to be null and void and make it necessary to have recourse to ordinary procedure without the prohibition of reformatio in peius being applied.*"[320] The Recommendation specifically advises against the imposition of prison sentences by way of simplified procedures.[321]

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316 Council of Europe Recommendation No. R (87) 18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice, III (a)(7).
317 *Id.*, III (a)(8).
318 *Id.*, II (c)(1).
319 *Id.*, II (c)(2).
320 *Id.*, II (c)(5).
321 *Id.*, II (c)(3).

The Recommendation also suggests that ordinary judicial procedure be made more efficient. In particular, it provides that "*[w]hether a preliminary investigation would be useful should be determined by a judicial authority, taking due account of police inquiries, the gravity and complexity of the case, and whether or not the facts are contested by the accused. 4. If there is a preliminary investigation, it should be carried out according to a procedure which excludes all unnecessary formalities and, in particular, avoids the need for a formal hearing of witnesses in cases where the accused does not contest the facts. 5. If the relevant judicial authority does not consider that it would be useful to have a preliminary investigation, the case should be brought directly before the trial court.*"[322]

The Recommendation also suggests granting prosecutors discretionary powers, wherever historical and constitutional traditions so allow.[323] The principle of discretionary prosecution "*should be exercised on some general basis, such as the public interest*"[324] and implies that "*[t]he decision to waive prosecution [..] only takes place if the prosecuting authority has adequate evidence of guilt.*"[325]

C. Findings and analysis

Of the 82 cases monitored in the courts of first instance, 25 were tried in accelerated proceedings. Of the 32 defendants sentenced through these expedited trials, 15 were set free in court after conditional non-application sentences, 13 received imprisonment terms.

The accelerated trial proceedings, provided for in Armenian law, are different from the "plea bargaining" found in many adversarial justice systems, in that the accused may not negotiate his sentence with the prosecution. Rather, the judge applies the reduced sentence at his discretion within the bounds of criminal law. Given the broad scope of application of accelerated proceedings (offences punishable by up to ten years of imprisonment), the judge's sentencing discretion remains considerable. This creates a fundamental uncertainty for the defendants whose principal motivation for choosing an accelerated trial is an expectation of a prompt release.

As an explanation for his motion for an accelerated trial in court, K. said that he understood that "he would be released if he pleaded guilty."[326] In a different trial, when M. was asked to confirm his motion for an accelerated trial, he said that he already explained that he "would like to end this as soon as possible."[327] Defendant P., who was tried in accelerated proceedings, looked surprised and deceived when the judge sentenced him to imprisonment.[328]

[322] *Id.*, III (a) (3, 4, 5).
[323] *Id.*, I (a) (1) ("*The principle of discretionary prosecution should be introduced or its application extended wherever historical development and the constitution of member states allow; otherwise, measures having the same purpose should be devised.*")
[324] *Id.*, I (a) (4).
[325] *Id.*, I (a) (3).
[326] R.N.16-06.06.2008.
[327] R.N.54-22.07.08.
[328] R.N.33-24.06.2008.

This uncertainty also clouds any negotiations that *de facto* take place between the parties. Most of the monitored accelerated trials left an impression that they were based on prior agreement between the prosecution and the defence on the choice of accelerated proceedings. In several cases, the prosecution objected to accelerated proceeding in indictments but subsequently changed its stance in court. However, the existing procedure places any such bargaining beyond the court scrutiny and leaves the defendants vulnerable to potential coercion and deception.

While the law requires participation of defence counsel in accelerated proceedings, this guarantee may not be sufficient to ensure that the defendant waived a full trial knowingly and voluntarily. Some of the observed cases showed that defendants struggled with their decision to move for an accelerated trial. In some instances, contrary to the law, the motion was made for them by their lawyers.[329]

Defendant P., who apparently had a history of a mental illness, appeared confused and did not seem to follow the proceedings. P. was unable to correctly answer when he was arrested and when he was served with the indictment. When the judge asked whether he understood the consequences of admitting his guilt and asking for an accelerated trial, P. answered that he could not say for sure. The judge declared a five-minute break and asked the counsel to explain the consequences to the defendant, although the lawyer claimed that she had already done so. As soon as the judge left the courtroom, the lawyer went out. P. remained in the courtroom with security guards, who advised him to opt for an accelerated trial. When the hearing resumed, the defence lawyer informed the judge that she had explained the consequences and everything was clear to the defendant and turned to P., who only said "yes". No further questions were posed by the judge and he ruled to proceed with the accelerated trial.[330]

The existing safeguards for the defendants can be strengthened by their rigorous application. Conversely, unprofessional performance of their duties by the judges and prosecutors may render these legal protections ineffective.

In particular, the law requires prosecutors to present the charges, while the judges must ascertain that the defendant understands the charges, agrees with them, and is aware of the consequences of his motion to forego the full trial.[331] The legislative requirement to present the charges at trial represents an additional safeguard for the defendant and equally serves to inform other trial participants and members of the public.

The monitors observed that in a number of cases the prosecutors did not present the charges in a clear and understandable manner. They promptly read only the concluding part of the indictment, riddled with legalese. There was no explanation of the factual

[329] R.N.12-29.05.2008, R.N.14-04.06.2008, R.N.6-13.05.2008.
[330] R.N.33-24.06.2008.
[331] CCP, Article 375^1.

circumstances and the exact actions imputed to the defendants. Judges did not ask specific questions to ascertain whether the defendants actually understood the charges.[332]

In general, courts seemed to treat their duty to verify the pre-conditions for accelerated trials as a mere formality. Judges often asked the questions prescribed by the law in rapid succession: whether the charge is clear to the defendant, whether he agrees with the charge, whether he stands by the motion for an accelerated trial, whether the motion is made voluntarily, whether he consulted with his counsel before filing the motion and understands the consequences of an accelerated trial? A single "yes" from the defendant was deemed sufficient to rule on the application of accelerated proceedings.[333] Judges did not reject any motions for expedited trials, nor discontinued any accelerated proceedings once they commenced. In some cases, judges did not even ask all the questions required by the law.[334]

In some trials the defendants made statements indicating that they did not accept all or some of the charges against them, casting doubt on the legitimacy of accelerated proceedings and highlighting the problems with their perfunctory application.

Defendant A. first refused to motion for an accelerated trial, then changed his mind and made the motion. After the prosecutor read the charges the judge asked if everything was clear and A. answered "yes". The judge then asked if A. admitted the charges. A. answered "yes" but added that "it is written more seriously than what I had done." The judge did not ask any further questions and ruled to proceed with an expedited trial.[335]

At the hearing of 5 May 2008 H. pleaded guilty to the charges of resisting and using violence against the police. His counsel motioned for an accelerated trial. In his final statement, H. asked the court to take into account that he had a heart illness and was physically unable to make the alleged resistance and assault.[336]

When E. was asked by the judge about his plea, he said that he agreed with the charges partially. In particular, he said that the ammunition found at his house is 15 years old, and he had already been convicted for bringing ammunition from Karabakh before, so this was a double punishment for the same crime. He added that he did not want to politicize his speech, but it was obvious that he was being punished twice for the same crime because he participated in the rallies. The judge proceeded with an accelerated trial.[337]

Finally, the CCP provisions as they are currently applied do not give sufficient room for early plea negotiations which would allow to save time and not perform a full

[332] R.N.16-06.06.2008, R.N.4-09.05.2008, R.N.34-24.6.2008, R.N.59-06.06.2008, R.N.8-15.05.2008.
[333] R.N.5-12.05.2008, R.N.10-23.05.2009, R.N.7-15.05.2008.
[334] R.N.2-21.04.2008, R.N.34-24.06.2008, R.N.4-09.05.2008, R.N.54-22.07.2008.
[335] R.N.68-14.08.2008.
[336] R.N.10-23.05.2008.
[337] R.N.59-06.06.2008.

investigation, thereby also shortening the considerable time the accused spend in pre-trial detention.

D. Conclusions

Additional consideration should be given to improving accelerated proceedings. There were doubts as to whether all defendants were properly informed and fully aware of the consequences of choosing an abbreviated trial. The existing guarantees of ensuring that defendants enter a guilty plea knowingly and voluntarily need to be implemented more rigorously.

Defendants who pleaded guilty in court and were tried in accelerated proceedings spent considerable periods of time in pre-trial detention while the investigation was taking place. This suggests that some valuable resources could have been saved if these defendants have been given an opportunity to enter a guilty plea at an earlier stage of the proceedings. Consideration should be given to introducing a procedure which truly shortens the criminal process and protects the right of the accused to a fair trial.

Chapter 8. Contempt of court

Some of the monitored cases took place amid high tensions. At times, the behaviour of the defendants and their supporters rendered orderly conduct of the judicial proceedings extremely difficult. These trials involved frequent application of sanctions for contempt of court. Whereas order in the courtroom and the dignity of the judiciary need to be upheld and protected, excessive application of such provisions raises concerns which are examined in this chapter. When contempt of court sanctions are not proportional and disregard due process, their use against trial participants and the public including journalists risks harming public trust in the judiciary. The use of sanctions against defendants and defence counsel can also impede the right of the defendant to be present at trial and the right to be represented by defence counsel.

A. National legislation

Contempt of court is an offence under Armenia's Criminal Code. The prohibited conduct includes failure to appear by a witness, victim or defence attorney, non-compliance with orders of the judge, disruption of the court hearing, as well as insults directed at the parties to the trial or the judge.[338]

The Judicial Code of Armenia requires that everyone treat the court in a respectful manner and authorises issuing sanctions for acts that constitute contempt of court.[339] The Judicial Code provides for four types of such sanctions: (a) warning, (b) removal from the courtroom, (c) a judicial fine and (d) filing a request with the Prosecutor General or the Chamber of Advocates concerning punishment of a prosecutor or a defence counsel. A sanction must be in proportion to the gravity of the act and pursue the aim of safeguarding the normal functioning of the court. Warning and removal from the courtroom are applied by means of a protocol decision of the court made in the same court session. A court decision imposing a judicial sanction becomes final immediately. The imposition of a judicial fine may be appealed. The imposition of a judicial sanction does not preclude other forms of liability against the person already sanctioned.[340]

The Judicial Code included a safeguard against trials *in absentia* by providing that in the event a criminal defendant is removed from the courtroom, the proceedings shall be stayed.[341] However, the recently revised Article 314^1 of the CCP allows the judge to proceed with a trial *in absentia* if the defendant continues to behave disruptively despite an earlier caution. In February 2009, the Armenian Parliament adopted a package of amendments to the CCP modifying the legal provisions on prohibition of *in absentia* hearings, which came into force on 1 March 2009. The amendments removed the

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338 CC, Article 343.

339 Judicial Code of the Republic of Armenia, Article 6.

340 *Id.*, Article 63.

341 *Id.*

prohibition on holding *in absentia* proceedings and allowed for the proceedings to continue in absence of the defendant.[342]

Article 314[1] provides for a scale of judicial sanctions applicable in cases of contempt of court as well as the conditions for their application, and allows to respond to acts of contempt of court by issuing a warning, removal from the courtroom, imposition of a fine, or lodging a complaint with the Prosecutor's Office or the Chamber of Advocates. Judicial sanctions may be applied for disrespectful attitude towards the court, disruption of normal court proceedings, abuse of procedural rights, and failure to perform procedural duties. If the defendant is removed from the courtroom for disrespectful attitude or disruptive conduct, proceedings continue *in absentia*, with the requirement that the final judgment be announced in the defendant's presence.[343]

B. International standards

Contempt of court has been defined as "*[a]ny act which is calculated to embarrass, hinder, or obstruct [a] court in the administration of justice, or which is calculated to lessen its authority or dignity.*"[344] The power to adjudicate and punish such conduct is considered an essential adjunct of the rule of law and an inherent aspect of the authority of judges to control the proceedings before them by taking appropriate steps to ensure that the administration of justice is not impeded.[345] As for the protection of authority of the judiciary, what is at stake is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large.[346]

The general fair trial rule is that defendants are entitled to be present during their trial.[347] However, proceedings in the absence of the defendant, so called trials *in absentia*, may be permissible under exceptional circumstances in the interest of the proper administration of justice. A trial *in absentia* may, for instance, take place if the defendant has waived his right to a fair trial. For the defendant's waiver of this important right to be legitimate, it must be shown that it was established in an unequivocal manner and that minimum and adequate safeguards were available after such a waiver was made.[348]

The right of an accused to be present at trial may be also temporarily restricted if the accused disrupts the court proceedings to such an extent that the court deems it impractical for the trial to continue in his or her presence.[349]

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342 CCP, Article 314[1].

343 *Id.*

344 Black's Law Dictionary, p. 319 (6th ed.1990).

345 *Ravnsborg v. Sweden*, ECtHR Judgment, 23 March 1994, §34.

346 *Fey v. Austria*, ECtHR Judgment, 24 February 1993, §30.

347 ICCPR, Article 14(3)(d) and ECHR, Article 6(1).

348 *Poitrimol v. France*, ECtHR Judgment, 23 November 1993, §31; *Zana v. Turkey*, ECtHR Judgment, 25 November 1997, §70.

349 See *Fair Trial Manual*, Amnesty International, 1998, Chapter 21.1.

International human rights standards emphasize that *"when exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary."*[350] Resolution (75) 11 of the Committee of Ministers of the Council of Europe on the criteria governing proceedings held in the absence of the accused also contains a number of basic safeguards, stating *inter alia* that *"evidence must be taken in the usual manner and the defence must have the right to intervene"*.[351]

C. Findings and analysis

Some of the monitored trials, including highly publicized cases, took place in a highly tense atmosphere. Judicial proceedings were interrupted by the defendants and their supporters who expressed their disagreement with the criminal proceedings. Their behaviour made the orderly conduct of the judicial proceedings difficult. In these circumstances, judges made use of different sanctions to penalize disruptive behaviour in the courtrooms. This included warnings, imposition of fines, and removal from the courtroom. Judicial sanctions were imposed on defendants, their lawyers, and members of the public, including media representatives. In some cases judges also requested the prosecution to initiate criminal proceedings against the offenders.

After the 1 March 2009 amendments to the CCP allowing the continuation of trials without the defendant in certain circumstances, provisions allowing the removal of defendants were applied as sanction more frequently. Prior to the amendments, judges were commonly inclined to apply other judicial sanctions, such as warnings and fines, and removal was seen as an exceptional measure.

The main overarching concerns with the use of the sanctions imposed relate to their proportionality, due process, and consistency in their application. The monitoring also highlighted additional concerns with the application of specific sanctions *vis-à-vis* different trial participants.

i. Proportionality, due process, and consistency

The Judicial Code makes it clear that if judges apply sanctions for contempt of court, these should be *"in proportion to the gravity of the act and pursue the aim of safeguarding the normal functioning of the court"*.[352] These principles were generally respected by the judges. At the same time, the monitors observed situations where the applied sanctions appeared disproportionate to the offence. For example, in some cases the defendants expressed their objections to the proceedings by refusing to comply with the legal

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[350] UN Human Rights Committee General Comment No. 13 on Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), CCPR/C/GC/13, 13 April 1984, §11.

[351] Council of Europe Committee of Ministers, Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused, 21 May 1975, §5

[352] Judicial Code of the Republic of Armenia, Article 63.

requirements of courtroom behaviour, in particular not standing up or sitting down when required by the court. Judges repeatedly punished this disobedience by removing defendants from the courtroom.

> In the hearing of 21 January 2009 at the Appeal Court, defendant S. was ordered to be removed from the courtroom for contempt of court without warning for not standing up when the judges entered the courtroom. The court postponed the hearings for five days.[353]

Proportionality is linked to the observation of due process. The monitors noted that judicial sanctions have sometimes been speedily applied by a judge without hearing the person to whom the sanction was imposed on. This deprived the offenders of the possibility to provide explanation for their conduct, make a statement in mitigation, or apologize to the court. When sanctions were applied to defendants, defence lawyers were not always given the opportunity to make a submission on behalf of their clients.[354]

Another general issue is related to the consistency of application of sanctions. The same behaviour of defendants and other trial participants was penalized in some cases but ignored in others. The same judge would rigorously apply sanctions for some time, and then turn a blind eye on the same conduct later. While an element of subjectivity may be unavoidable, widely varying practices negatively impact on the rights of affected individuals.[355]

The legislative framework contributes to this inconsistency. At present, Armenian law does not draw a clear line between the conduct punishable under the Criminal Code and the conduct that would entail the application of sanctions under the Judicial Code. This gives judges discretion to immediately punish an alleged offender for contempt of court by applying a judicial sanction, or refer the case to the prosecutor for the institution of criminal proceedings, or to do both.

ii. Application of sanctions vis-à-vis defendants and their lawyers

Disruptive behaviour by the defendants (refusal to stand up or to sit down, making statements without the court's permission, using insulting language towards trial participants, etc.) was typically penalized by removal of defendants from the courtroom for a certain period of time. The monitors recorded 19 instances of such removal in eight trials.

Clearly, removal of the defendant from the courtroom and continuation of the trial *in absentia*[356] is a rather exceptional measure and should be seen as such by judges. Judges should be guided by the proportionality principle and assess the degree of disruption to the

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353 R.N.141-27.07.2009.

354 R.N.108-25.11.2008, R.N.112-02.12.2008, R.N.61-04.08.2008, R.N.52-21.07.2008.

355 R.N.44-11.07.2008, R.N.112-02.12.2008, R.N.121-22.01.2009, R.N.43-08.07.2008.

356 Article 314^1(6) of the CCP allows judges to proceed with the trial if defendants are removed from the courtroom for contempt of court. The term spent in custody as a result of application of a judicial sanction is not subtracted from a possible prison term.

proceedings caused by the defendant's conduct in order to strike a balance between the fundamental fair trial rights of the defendant and the gravity of the offending behaviour. This was not the case in some of the observed trials.

On 27 December 2008, 9 January 2009, 13 January 2009, 16 January 2009, 30 January 2009, 12 February 2009, 9 March 2009, and 13 March 2009, defendants in the "case of seven"[357] were removed from the courtroom as they did not rise when the judge entered the court room and expressed their views on the fairness of the trial.

Following the 1 March 2009 amendments to the CCP allowing proceedings to continue in absence of the removed defendants, the presiding judge in the "case of seven" regularly imposed ten days of removal from the court room, citing the CCP.[358] On 9 March 2009 the judge applied this sanction without any prior warning.

On 13 March 2009 the judge confronted defendant G. for his failure to rise when the judge entered the courtroom. The judge asked whether the reason was the defendant's health condition. The defendant said "no" and asked to explain the reasons for his conduct. The judge did not allow the defendant to make a statement and instantly proceeded to reading out a decision to remove the defendant from the court room for a period of ten days.

After the "case of seven" was split into five separate proceedings against the remaining defendants, the judges seemed less inclined to use their powers to sanction disruptive behaviour in the court room. Defendant G. continued not to rise when required by the court procedures but the judge did not pay attention to this conduct.

On 8 April 2009, 15 April 2009 and 17 April 2009 defendants A. and S. stood up when the judge entered the courtroom and remained standing throughout the hearing. The judge did not interrupt the proceedings and did not react to this conduct of the defendants, allowing the hearings to proceed.

On several occasions, the judges also penalized defence lawyers. Four sanctions were imposed on defence lawyers in three trials. A prosecutor was sanctioned (by official warning) for leaving the courtroom in one case – after the defendants drew the court's attention to this incident.

Some defence lawyers were sanctioned for protesting against actions of the judge and making statements regarding the perceived unfairness of the proceedings. International standards make it clear that lawyers should be able to perform their professional functions without intimidation and harassment and not suffer any sanctions for actions taken in accordance with recognized professional duties, standards and ethics.[359] Escalated

[357] Consolidated proceedings against the alleged organizers of the mass disorders on 1-2 March 2008.

[358] The court referred only to the CCP, without any reference to Article 63 of the Judicial Code as amended on 1 March 2009.

[359] See UN Basic Principles on the Role of Lawyers (1990), Principle 16.

confrontation between the bench and defence counsel resulted in stalemate situations which affected the right to a fair trial.

During the hearing of the "case of seven" on 16 March 2009, defence attorney A. notified the court that his client no longer wanted his services and would hire a new counsel. The prosecutor accused the defence of delaying the proceedings. The judge refused to accept the attorney's resignation and ordered him to remain the appointed counsel.[360] When A. did not return to the courtroom after a recess, the judge ruled to sanction him for contempt of court and sent a submission to the Chamber of Advocates asking to institute disciplinary proceeding against A. In response to this ruling, other defence lawyers present in the courtroom made a joint statement that "an organized campaign was mounted against the defence lawyers" and that they were effectively deprived of the possibility to carry out an adequate defence. All defence lawyers got up and left the courtroom. The court responded to this demarche by ordering the application of judicial sanctions against all involved defence lawyers and relevant submissions were made to the Chamber of Advocates. None of the defendants were present in the courtroom as they were all previously removed from the courtroom by the judge for contempt of court.

iii. Application of sanctions vis-à-vis members of the public

Contempt of court sanctions were also occasionally applied against members of the public who disrupted the proceedings. The disrupting behaviour included applauding the defendants, and making loud remarks and noise. One of the contributing factors appeared to be the presence of police personnel in the audience (both in uniform and plain clothes), who argued with the spectators. The judges removed individuals or entire rows of spectators from the courtroom. The same issues regarding proportionality and due process raised above are equally applicable to these cases.

During the trial of defendant E., the judge removed E.'s mother from the courtroom during nearly every hearing as she reacted emotionally to the proceedings.[361] Throughout the trial the judge also removed dozens of people from the courtroom without prior warning.[362]

At the hearing on 2 June 2008 in the case of H., the judge asked two women to leave the courtroom, as they had laughed at the testimony of the witnesses. No warnings were made.[363]

When defendant A. made an emotional statement on 16 October 2008, the audience applauded. The judge ordered everyone who applauded to vacate the courtroom. One woman was also ordered by the judge to provide her name and address to the court. The judge did not state the legal basis

[360] According to the comments by the Judicial Department to the draft report, the court could not accept the lawyer's resignation given the requirement prescribed by Article 72 of the CCP that the resignation from counsel is possible only in presence of the defendant. Since the court earlier removed the defendant from the courtroom by its sanction, Article 69 of the CCP required the counsel's participation in the proceedings.

[361] R.N. 83-18.09.2008.

[362] R.N.112-02.12.2008.

[363] R.N.27-19.06.2008.

for the removal, duration of this sanction, and why he needed information about the woman's identity.

At the hearing of 28 April 2009, a member of the public addressed a judge with a request to speak up as it was not possible to hear what was being said by the judge. The judge confronted this individual and asked: "Was it you who complained about the acoustics?" The man confirmed and explained that he had hearing problems and therefore it was difficult for him to hear what was being said by the judge when the judge was not speaking sufficiently loudly. The judge then ordered him to vacate the courtroom and said: "Let only those remain here who do not have hearing problems and can follow the proceedings as they are".[364]

In a number of cases the contempt sanctions were applied against representatives of the media.[365]

D. Conclusions

While the conduct of defendants and their supporters put much pressure on the judges in some of the monitored trials, the application of contempt of court sanctions raised a number of concerns. In several cases, the sanctions did not appear to be proportionate to the penalized offences. Consistency of application and the observance of due process also appeared problematic in some trials. The use of these sanctions led to holding some court hearings *in absentia* – hardly a desirable outcome from a fair trial perspective. Judges did not appear to always exercise their authority to impose sanctions with due moderation and respect for the rights of the affected individuals.

Armenian law would benefit from a clearer distinction between judicial sanctions for contempt of court and prosecution for criminal contempt of court. Criminal contempt of court should be reserved for offences personally targeting particular trial participants and aimed at perverting the course of justice. Judicial sanctions should cover breaches of court rules and procedures. It should be noted that perseverance of defence lawyers is part of their professional duty before their client. Any unethical behaviour by lawyers should be reported and handled through disciplinary proceedings.

It is recommended that temporary removal from a court room be restricted to very short periods (1-12 hours), proportional to the severity of an infraction, and reviewed at regular periods. It is also suggested to allow judicial review of all judicial sanctions. Judges would benefit from more training on these issues as part of continuing professional education.

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[364] R.N.135-22.06.2009.

[365] The judges also reportedly requested the prosecution to start criminal proceedings against particular journalists.

Chapter 9. Impartiality of the judges and their professional conduct

The monitors assessed that in the majority of cases the judges remained impartial in the course of the hearings. However, a substantial number of reports revealed concerns regarding their impartiality and professional conduct. This chapter examines manifestations of prosecutorial bias and unbecoming statements, which have the potential to damage the public perception of the judiciary as impartial, unbiased and dignified.

A. National legislation

The principle of impartiality of judges is closely intertwined with the notions of separation of powers and judicial independence, which are enshrined in Armenia's Constitution.[366] The CCP specifically requires that courts be fair and impartial.[367]

Issues pertaining to judicial impartiality and the professional conduct of judges are specifically addressed by the Judicial Code, which incorporates a set of provisions that form the Rules of Judicial Conduct. The Judicial Code includes both a general requirement that a judge "*aspire to ensure the impartiality and independence of the court,*" [368] and provides for specific constituent elements of such impartiality. In particular, the Rules of Judicial Conduct prohibit judges from allowing to be influenced by external parties, creating an impression of such influence, or using their office for their own or a third party's benefit.[369] Where the judge is biased in favour of or against a particular party or interest in the case, the judge is required by law to recuse him/herself.[370]

The Rules of Judicial Conduct contain a number of requirements concerning a judge's attitude and professional demeanour. Specifically, judges are required to "*[d]isplay a patient, dignified, and calm attitude towards all persons with whom the judge comes into contact in his official capacity*" and to ensure that court staff exhibit a similar attitude.[371] In addition to a general requirement of impartiality, the Rules of Judicial Conduct incorporate a prohibition against verbally or nonverbally expressing bias or discriminatory attitude or what may be interpreted as such.[372]

Judges who are found in breach of the Rules of Judicial Conduct are subject to disciplinary liability by the Justice Council[373] and the conduct that gave rise to liability

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366 Constitution of the Republic of Armenia, Article 5 and Article 94.
367 CCP, Article 23(4).
368 Judicial Code, Article 88.
369 *Id.*, Article 89.
370 *Id.*, Article 91.
371 *Id.*, Article 90(3).
372 *Id.*
373 *Id.,* Article 97.

may be penalized by a range of sanctions from a warning to a motion with the President of the Republic of Armenia to terminate the judge's powers.[374] If the President rejects this motion, the sanction of severe reprimand is applied.[375]

B. International standards

Effective enjoyment of human rights depends on the proper administration of justice, which is in turn dependent on the existence of a competent, independent and impartial judiciary. The requirement that the judiciary be impartial is implicit in the right to a fair and public hearing by an independent and impartial tribunal.[376]

The UN Basic Principles on the Independence of the Judiciary expressly endorse the principle of judicial impartiality,[377] while the UN Bangalore Principles of Judicial Conduct detail its constituent elements, including the requirement of unbiased and unprejudiced performance of judicial duties, the prohibition of making statements that can affect the outcome of proceedings, and requirements for a judge's recusal. The Bangalore Principles advise*, inter alia*, that, *"A judge shall perform his or her judicial duties without favour, bias or prejudice. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary."* [378]

International standards emphasize that justice must exist both as a matter of fact and as a matter of reasonable perception. The Bangalore Principles of Judicial Conduct expressly provide that justice *"must not merely be done but must also be seen to be done."*[379] The jurisprudence of the ECtHR supports and reinforces the standards of judicial impartiality, including the requirement of the appearance of impartiality as reasonably perceived by an external observer. Appearance of partiality may leave a sense of grievance and of injustice, undermining trust and confidence in the judicial system.[380]

C. Findings and analysis

The monitors were requested to answer whether, in their opinion, the judge maintained impartiality in the course of the trial. 56% of the monitored hearings were assessed

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374 *Id.,* Article 157.

375 *Id.,* Article 166.

376 UDHR, Article 10; ICCPR, Article 14(1); ECHR, Article 6(1).

377 UN Basic Principles on the Independence of the Judiciary (1985), Principle 2*;* See also Universal Charter of the Judge (1990), Article 5.

378 Bangalore Principles of Judicial Conduct (2002), Value 2 (Impartiality).

379 Bangalore Principles of Judicial Conduct (2002), Value 3 (Integrity); See also Judges' Charter in Europe (1997), European Association of Judges, Principle 3.

380 *Thorgeirson v. Iceland,* ECtHR Judgment, 25 June 1992, §51; *Fey v. Austria*, ECtHR judgment of 24 February 1993, §30.

positively in this regard, while in 42% of the hearings the monitors did not think that judges remained impartial. No information was reported in 2% of the cases.

The key issue in many monitored cases was the manifestation of prosecutorial bias by judges. Such biased conduct runs afoul of the presumption of innocence and the equality of arms (see chapters 3 and 4 above). It also undermines the impartiality of judges and the judiciary in general when judges are perceived to be "walking hand in hand" with prosecutors.

> Throughout the trial of G. at Yerevan Kentron and Nork-Marash District Court the judge was smiling whenever the defendant or his counsel were making statements and examining witnesses. The judge was also making eye contact with the prosecutor and they were smiling at each other. Looking at the prosecutor, the judge rolled his eyes whenever the defence made motions. On several occasions when the defence counsel brought a motion, the judge asked the prosecutor: "What should we do?"[381]

The monitors also reported other instances of unprofessional conduct by judges. In 43 cases the monitors reported what they regarded as unbecoming statements or actions by the bench. These included insensitive, tactless or downright rude remarks to trial participants and members of the public, and otherwise not treating those present in the courtroom with due respect. In 48 cases the monitors recorded that judges raised their voice at someone in the courtroom.

It is acknowledged that at times judges faced hostile attitudes from the audience and were challenged by disobedience from the defendants who protested against the proceedings. These difficult circumstances highlight the need for impartial and professional conduct by the judges. Public respect and trust in the judiciary may only be maintained through adhering to the highest standards of professional behaviour.

Defence lawyers motioned to recuse judges in 44 cases. One such motion was granted and the judge recused himself.[382]

> During the hearing of 5 August 2008, defendant K. tried to make a statement. The judge snapped at him, using an inappropriate (familiar) form of the pronoun "you": "I don't want to listen to you. Stop talking! I'm not listening to you". When the defendant objected to being treated in this manner, the judge imposed a judicial sanction and fined him.[383]
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> When defendant A. finished testifying on 27 June 2008 the judge (addressing him inappropriately with familiar pronoun "you") said: "You are so vague. I think people who have higher education should be able to analyze things better, but this clearly does not apply to you."[384]

[381] R.N.108-25.11.2008.
[382] R.N.130-29.04.2009.
[383] R.N.112-02.12.2008.
[384] R.N.44-11.07.2008.

When witness M. started to testify, the judge asked whether she felt hostility towards defendant A. The witness appeared surprised and quietly replied: "No, why?" The judge sarcastically remarked: "Usually the Jews are known to give questions instead of an answer; but apparently we, Armenians, are not much better."[385]

When a defence attorney was trying to respond to the prosecution's objection to her motion on 30 July 2008, the presiding judge cut her short and said: "This is not the Opera Square for you. This is the Appeals Court."[386]

When members of the public began applauding and cheering for defendant M. at the Yerevan Criminal Court, the judge said to the audience: "I don't even want to lower myself to your level. Polite treatment is not for people like you." On another occasion, she shouted at the public: "Who are you? Who is going to pay attention to you? This hearing is for the parties, and you don't have any rights here. If you carry on like this, I will have you escorted out and order a closed hearing."[387]

During the break in the hearing on 20 August 2008, the judge started discussing the case with the prosecutor in the presence of observers. She said: "It just makes me laugh. The defendant is talking nonsense and he thinks that I am going to believe him… And his mother is constantly speaking from her seat, a stupid woman. I don't even want to lower myself to the level of the people like her."[388]

During the trial of L., the judge several times raised his voice at the defence counsel, telling her to sit down and be silent. When the judge pressured a witness to answer a question, the defence counsel objected. The judge answered: "Are you objecting? Go ahead, it's your business. Object to your heart's content." Then he shouted: "Sit down in your seat and do not interfere!" The defence lawyer refused and the judge said: "Don't sit down, if you don't want to. It is all the same to me."[389]

D. Conclusions

The monitoring revealed that in a number of cases judges conducted proceedings in a manner that left their impartiality open to doubt. There were also clear instances when judges treated trial participants and members of the public without due respect. These observations have underlined the need for additional training of judges, and also for rigorous application of the disciplinary mechanisms that ensure their accountability. Complaints against the judges must be properly investigated and disciplinary action should arise for judges whose conduct is incompatible with professional ethics.[390]

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385 *Id.*

386 R.N.64-05.08.2008. The Opera Square was the site of 1 March rallies.

387 R.N.83-18.09.2008.

388 *Id.*

389 R.N.99-09.10.2008.

390 The Judicial Department supplied the following comment in this regard: "*According to the current legislation, issues relating to breaches of judicial ethics are addressed by the Ethics Committee under the Council of Court Chairpersons. In 2008, the Ethics Committee considered issues relating to judicial ethics with regard to seven judges, and in 2009 with regard to three judges. During that period the Ethics Committee did not consider any issue*

Consolidated recommendations

To legislators and policy-makers

In order to strengthen respect for the right to liberty and related safeguards in Armenia, the following recommendations are offered to legislators and policy makers:

1. Consider revising the existing procedure for judicial review of arrest and the choice of measure of restraint in the CCP. When the arrested individual is brought before a competent judge for the first time, the judge should first review the existence of reasonable grounds for and the legality of arrest and only then decide on the necessity to apply measures of restraint pending trial. This hearing should be spelled out in the CCP on the basis of the following recommendations:

    a. Judges should use the standard of reasonable suspicion and assess the existence of evidence that would satisfy an objective observer that the person concerned might have committed the offence.

    b. The public prosecutor should be obliged to disclose the evidence relied on as the basis for arrest/request to order detention.

    c. The proceedings should be governed by the principle of equality of arms and conducted in an adversarial environment.

    d. The proceedings should be public, subject to the same narrowly defined exceptions as the trial proceedings.

    e. The proceedings should be recorded (verbatim record) in the same manner as the trial proceedings.

    f. Any allegations of police misconduct should be immediately referred to responsible authorities, i.e. the prosecution and/or internal disciplinary mechanisms. Consideration should also be given to establishing a special independent investigative authority (see chapter 5/Conclusions).

2. Consider reviewing court practice and initiating an inclusive discussion on improving the effectiveness of existing alternatives to pre-trial detention, as well as the possible introduction of new alternatives. To that effect, study the good practices of other OSCE participating States.

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relating to the judges who were involved in the consideration of criminal cases in connection with the events of 1 and 2 March 2008."

3. Consider introducing a *habeas corpus* petition that would give the defence the right at any moment to question directly the detention if the petition establishes a *prima facie* case of unlawfulness of detention. *Habeas corpus* petitions made during the trial should be considered and resolved by the judge immediately.

For enhanced respect for equality of arms (chapter 4), the following recommendations are offered to legislators and policy makers:

4. Consider introducing a deposition procedure to record witness testimony prior to the trial. This procedure should allow the parties to confront and cross-examine a witness before a specialized judge in adversarial proceedings. The deposition procedure should be available on an equal footing to the prosecution and the defence.

5. The defence should be given an opportunity to include in the case file received by the trial judge its own list of witnesses to be examined at the trial, and to attach written testimonies of its witnesses certified by a special judge through the deposition procedure.

6. Written testimonies of witnesses and experts which have not been taken through the deposition procedure may not be read out and relied on by the court if these witnesses do not testify at the trial.

7. The CCP should be amended to provide that whenever a person is interrogated in the absence of counsel, even if the person has waived counsel, the written testimony may not be relied on unless the interrogated person affirms the veracity of the statement at trial. If the defendant retracts the written statement at trial, it should be excluded from the evidence.

In order to improve the respect for the right not to be compelled to testify (chapter 5), the following recommendations are offered to legislators and policy makers:

8. The CCP should contain a clear requirement that judges must react to all allegations of torture and ill-treatment and impose on them a legal duty to refer this information to the responsible authorities (or a special independent investigative authority) for an effective investigation.

9. Rules on the inadmissibility of evidence in the CCP should clearly state the standard of proof needed to exclude tainted evidence. The defendant should not be placed in a position to prove the application of torture beyond reasonable doubt. It should be sufficient to exclude tainted evidence if a judge has reasonable doubts as to its legality. The CCP should be amended to clearly state that the burden of proof to show that the evidence was obtained lawfully rests with the prosecution.[391]

[391] In its comments on the draft report, the Ministry of Justice informed that in the new draft CCP the burden of proof of the admissibility of evidence rests with the investigation body.

10. Consider adoption of a law to allow regular inspections of all places of detention by independent monitoring mechanism(s). The representatives of such mechanisms should have uninhibited and confidential access to all detainees. Their visits should be carried out regularly and they should present regular public reports.

In order to ensure that accelerated proceedings (chapter 7) advance the efficiency of justice and avoid putting at risk the right to a fair trial, the following recommendations are offered to legislators and policy makers:

11. Consider introducing a procedure allowing defendants to enter a plea of guilty at an earlier stage of the proceedings, thus shortening the criminal procedure and the time in pre-trial detention. To this end, practices from other OSCE participating States should be studied to ensure the rights of the accused and the victims.

To regulate and sanction contempt of court (chapter 8) more in line with international standards, the following recommendations are offered to legislators and policy makers:

12. Amend the CCP and the Criminal Code to clearly differentiate the grounds for the application of contempt of court sanctions.

    a. It is recommended to allow judicial referrals for criminal prosecution of alleged contempt of court only for serious offences personally targeting particular trial participants and aimed at perverting the course of justice.

    b. Judicial sanctions should be reserved for breaches of court rules and procedures.

    c. Temporary removal from a court room should be restricted to very short periods (1-12 hours), proportional to the severity of an infraction; the decision should be reviewed at regular periods.

    d. It is suggested to allow judicial review of all judicial sanctions.[392]

    e. Acts committed in a professional capacity should be dealt with only through referrals to the respective disciplinary proceedings.

To the judiciary

In order to strengthen the right to liberty and related safe-guards in Armenia, the following recommendations are offered to judges and other actors within the judiciary:

[392] In its comments on the draft report, the Ministry of Justice informed that the draft amendments to the CCP include the right to appeal against the decision on removal from a courtroom within three days from its announcement.

13. Any appeals of detention should be considered promptly and in the presence of the detained individuals.

14. Motions on detention issues during the trial should be ruled on by the presiding judge without undue delays.

15. Any judicial ruling on detention should be reasoned and should contain:

    a. The relevant material evidence and the individual factual circumstances of the case, which led to the determination that the decision on remand is required;

    b. An explanation why other measures of restraint cannot be applied in the individual's case;

    c. Examination of the defence arguments;

    d. Action taken with respect to any allegations of mistreatment or torture;

    e. Examination of the continued existence of a reasonable suspicion against the defendant whenever a decision to prolong detention is made. Extension of detention terms cannot be solely based on the same arguments that were used to authorize the previous detention term.

16. The practice of Armenian courts with regard to the choice of pre-trial measures of restraint should reflect the jurisprudence of the Court of Cassation and the ECtHR. Judges should make use of the existing alternatives to pre-trial detention.

To advance greater respect for the right to a public hearing (chapter 2), the following recommendations are offered to judicial actors:

17. The Court of Cassation and the Council of Court Chairpersons should give consideration to adopting standardized rules on court security. These rules should clearly spell out the procedures and the responsible authorities for introducing different levels of security in courts, the consequences of different security levels, including the corresponding obligations of the bailiff service. The levels of security for particular trials should be clearly communicated to the public. Police forces should be used to reinforce the security at court premises only in exceptional circumstances described by the rules.

18. To advance service-oriented court management, a specially designated officer of the court's secretariat should be vested with the task to supply information about the court schedule and other issues related to the organization of trials. The public should have easy access to such officers.

19. Information about the scheduled court hearings should be publicly available. Further efforts should be made to ensure its accuracy, including synchronization of the information available on the Internet and in the court secretariats.

20. The courts should take into account the potential interest of the public in upcoming trials and take steps to accommodate this public interest, including designation of appropriate courtrooms and the use of necessary technical means.

21. Recordings of court hearings should be done in full. Selective recording is not an acceptable practice. Judges should not be managing the recording systems from the bench. These technical functions should be vested with the appropriate technical personnel. Courts should be given clear guidance on the rules of recording and access to the records.

22. In addition to the recording equipment, courtrooms, where necessary, should also be equipped with sound amplifying systems. These systems should be properly maintained.

In order to better respect the principle of presumption of innocence (chapter 3), the following recommendations are offered to judicial actors:

23. Judges should refrain from making comments that may imply their position as to the guilt of the defendants. Procedural court rulings issued prior the judgment on the merits should not imply guilt of the defendants.

24. Security measures applied to the defendants should be based on individual risk assessments in every case. These measures should safeguard the presumption of innocence and every effort must be made to prevent humiliating and degrading treatment. General security measures to ensure order in the courtroom should not create an impression of guilt of the defendants.

25. Ultimate control over the application of security measures in a courtroom should be vested with the judge. The defence should be able to motion the judge directly on the issue of individual security measures when the defendant appears in court. The judge should rule on this motion during the same hearing.

To enhance respect for equality of arms (chapter 4), the following recommendations are offered to the judiciary:

26. Judges should treat both parties to a criminal case on an equal footing. Violations of this rule should constitute grounds for disciplinary proceedings.

27. The defence should be given an opportunity to include in the case file received by the trial judge its own list of witnesses to be examined at the trial. The court should call all witnesses listed in the prosecution and defence lists. Any motions to examine additional witnesses by the parties should be decided by the judges on an individual basis, and rejections should be reasoned. All motions for the examination of additional evidence by the parties should be considered in the same court session/hearing.

28. In cases where police witnesses are the only witnesses to testify, and their testimony is of decisive nature, the defence should be given sufficient opportunities to examine them in court. In the absence of such examination, the court may not rely on their written testimony.

In order to improve the respect for the right not to be compelled to testify (chapter 5), the following recommendation is offered to judges:

29. Judges should exclude any evidence tainted by allegations of torture and ill-treatment, unless the prosecution succeeds in removing doubts about its admissibility.

In order to strengthen the right to equality of arms (chapter 4), right to defence (chapter 6) and impartiality and professional conduct of judges (chapter 9), the following recommendations are offered to judges:

30. Judges should adhere to the principles of equality of arms and adversarial proceedings.

31. Complaints against the judges must be properly investigated and disciplinary action should be taken against judges whose conduct is incompatible with the Judicial Code.

In order to ensure that accelerated proceedings (chapter 7) advance the efficiency of justice and avoid putting at risk the right to a fair trial, the following recommendation is offered to judges:

32. Judges should ensure that the existing safeguards are applied rigorously in order to ensure that defendants enter a guilty plea and agree to accelerated proceedings knowingly and voluntarily.

To judicial training providers

33. Judges who review arrest and detention should receive frequent and regular training on:

    a. The relevant case law of the Court of Cassation of Armenia and the European Court of Human Rights (ECtHR) on judicial review of detention;

    b. Best practices of other OSCE participating States, including those which have specialized judges to deal with the authorization of restriction of fundamental rights during pre-trial investigation, in particular rulings on arrest and the continued detention.

34. Additional training on the practical implications of the principles of equality of arms, the right to defence, and the principle of impartiality including the appearance of impartiality should be provided to judges.

To the Ministry of Justice

35. When preparing amendments to the CCP, the above recommendations should be taken into serious consideration.

To enhance respect for the right to a public hearing (chapter 2), the following recommendations are offered to the Ministry of Justice:

36. As a rule, security on the court premises and court territory should be maintained by the bailiff service. Court bailiffs should also assist the public with the exercise of their right to attend public trials. To these ends:

    a. The Ministry of Justice jointly with the Council of Court Chairpersons should promulgate a Code of Conduct for the bailiff service that would clearly spell their rights and professional duties *vis-à-vis* the judge, the court personnel, participants of the trial, and the public.[393]

    b. The bailiff service should be equipped and trained to employ modern security measures to ensure physical security in the court building.

    c. Court bailiffs should be vested with limited and clearly defined police powers that may be applied only in situations of attempted breaches of the security rules. In each such case a proper record should be drawn to allow for administrative and judicial review.

37. The absence of an identity document by itself should not serve as a ground for restricting the right to access a public trial.

To the law enforcement agencies

In order to strengthen the right to liberty (chapter 1) and related safeguards in Armenia, the following recommendation is offered to law enforcement agencies:

38. Defence lawyers should be given immediate access to all police records regarding the time and circumstances of the arrest of their clients.

In order to strengthen safeguards for the right not to be compelled to testify (chapter 5), the following recommendation is offered to the to law enforcement agencies:

39. Law enforcement and medical personnel and custody officers should receive appropriate instructions and training on their duties arising from the prohibition against torture.

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[393] In its comments to the draft report, the Ministry of Justice informed that Rules of Conduct for court bailiffs are currently being developed.

To the Chamber of Advocates/Bar Association

To improve access to the right to defend oneself or through legal counsel (chapter 6), the following recommendations are offered to the Chamber of Advocates/Bar Association:

40. The services of the Public Defenders Office should be improved through training and other measures, as necessary.

41. The Chamber of Advocates, together with the Ministry of Justice and interested civil society organizations, should consider establishing a Legal Aid Council to define policies on the provision of legal aid.

Annex 1. Information about the monitored cases

Relevant Articles of the Criminal Code of the Republic of Armenia

112 – Infliction of willful heavy damage to health
176 – Robbery, i.e. overt theft of somebody's property
177 – Theft, i.e. clandestine appropriation of somebody's property in significant amounts
183 – Gaining illegal control of a car or other means of transportation without the intention of theft
225 – Organization of mass disorders accompanied by violence, pogroms, arson, destruction or damage to property, using fire-arms, explosives or explosive devices, or by armed resistance to a representative of the authorities
225^1 – Organizing and holding public meetings in breach of the order prescribed by law
235 – Illegal procurement, transportation, keeping or carrying of weapons, explosives or explosive devices, except smoothbore long-barrel hunting guns, ammunition
238 – Theft or extortion of fire-arms, fire-arm components, ammunition, explosives and explosive devices
271 – Use of narcotic drugs without medical permission
301 – Public calls to appropriate power, overthrow constitutional order, or violate territorial integrity
316 – Violence or threat of violence, not dangerous for life or health, against a representative of authorities or close relatives, concerned with performance of his official duties, as well as hindrance to the representative of authorities in the execution of duties
334 – Concealment of a grave or a particularly grave crime, as well as tools and means of the crime, crime traces or criminally acquired items

	Defendant: Last Name, First Name	**Monitored Instance**	**Charges, Criminal Code Art.-Part**	**Counsel: Yes/No, Contracted or Public Defender**	**Accelerated Proceedings, Yes/No**	**Trial Outcome**	**Sentence: m – months, y - years**	**Appeal Outcome**
1.	Hovsepyan, Artak	1^{st} instance	235-1	Y, Public Defender	Y	Convicted (235-1)	6 m imprisonment	No appeal
2.	Voskanyan, Ruben	1^{st} instance	225^1 +316-1	Y, Contracted	Y	Convicted (225^1 and 316-1)	Fine + 2 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
3.	Hambardzumyan, Davit	1^{st} instance	316-1	Y, Public Defender	Y	Convicted (316-1)	1 y and 6 m imprisonment, Art. 70 applied, released from	No appeal

							the courtroom	
4.	Simonyan, Hovhannes	1st instance	271-1	Y, Contracted	Y	Convicted (271-1)	Fine 80,000 AMD	No appeal
5.	Mikaelyan, Gurgen	1st instance	225-2	Y, Public defender	N	Acquitted	-----	No appeal
6.	Aghamalyan, Grigor	1st instance	225-2 /changed to 225-4/	Y, Contracted	N	Convicted (225-4)	1 y imprisonment	No appeal
7.	Harutyunyan, Norik	1st instance	225-2	Y, Public defender	Y	Convicted (225-2)	2 y imprisonment	No appeal
8.	Hareyan, Vahagn	1st instance	225-1	Y, Contracted	N	Convicted (38/225-2)	4 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
9.	Stepanyan, Khachik	1st instance	271-1	Y, Contracted	Y	Convicted (271-1)	Fine 80,000 AMD	No appeal
10.	Martirosyan, Karen	1st instance	271-1	Y, Contracted	Y	Convicted (271-1)	Fine 80,000 AMD	No appeal
11.	Habashyan, Grigor	1st instance	271-1	Y, Contracted	Y	Convicted (271-1)	Fine 80,000 AMD	No appeal
12.	Armenakyan, Mkrtich	1st instance	225-2	Y, Public defender	Y	Convicted (225-2)	4 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
13.	Grigoryan, Melik	1st instance	316-1	Y, Contracted	N	Convicted (316-1)	6 m imprisonment	No appeal
14.	Arabachyan, Borik	1st instance	176-1	N	N	Convicted (176-1)	1 y imprisonment	No appeal
15.	Gasparyan, Lavrent	1st instance	176-2/3+225-2	Y, Contracted	N	Convicted (176-2/3+225-2)	4 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
16.	Antonyan, Aharon	1st instance	225-2+183 -2 +177 -2+165	Yes, Public defender	N	Convicted (225-2+183-2 +177-2+165)	6 y imprisonment	No appeal
17.	Grigoryan, Aghvan	1st	183-2+177 -2	Yes,	N	Convicted (183-	3 y imprisonment, Art.	No appeal

		instance		Public defender		2+177-2)	70 applied, released from the courtroom	
18.	Hakobyan, Tigran	1st instance	225-2+176 -2	Y, Contracted	N	Convicted (225-2+176-2)	3 y imprisonment	No appeal
19.	Harutyunyan, Samvel	1st instance	316-2	Y, Contracted	N	Convicted (316-2)	1 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
20.	Sukiassyan, Tigran	1st instance	225-2	Y, Contracted	Y	Convicted (225-2)	3 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
21.	Kitesov, Alexander	1st instance	225-2	Y, Contracted	Y	Convicted (225-2)	3 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
22.	Grigoryan, Yeghishe	1st instance	225-2	Y, Contracted	Y	Convicted (225-2)	2 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
23.	Gasparyan, Vardan	1st instance	225-2	Y, Contracted	Y	Convicted (225-2)	3 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
24.	Matevosyan, Gagik	1st instance	271-1+268 -2	Y, Contracted	N	Convicted (271-1+268-2)	Fine 500,000 AMD	No appeal
25.	Yeritsyan, Soghomon	1st instance	316-1	Y, Contracted	Y	Convicted (316-1)	1 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
26.	Mnatsakanyan, Hovhannes	1st instance	225-2+176 -2	Y, Contracted	Y	Convicted (225-2+176-2)	3 y and 6 m imprisonment, Art. 70 applied, released from the courtroom	No appeal
27.	Nersisyan, Albert	1st instance	225-4	Y, Contracted	Y	Convicted (225-4)	1 y imprisonment, Art. 70, released from the courtroom	No appeal
28.	Melkonyan, Yasha	1st instance	316-1	N	N	Convicted (316-1)	2 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
29.	Sargsyan, Nver	1st	316-1	Y,	Y	Convicted (316-1)	3 y imprisonment	No appeal

		instance		Public defender				
30.	Bagratyan, Arayik	1st instance	176-1	N	N	Convicted (176-1)	1 y imprisonment	No appeal
31.	Manucharyan, Karlen	1st instance	225-2	Y, Public defender	Y	Convicted (225-2)	3 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
32.	Mkrtchyan, Harutyun	1st instance	225-2	Y, Contracted	Y	Convicted (225-2)	3 y imprisonment, Art. 70 applied, released from the courtroom	No appeal
33.	Mkhoyan, Hovhannes	1st instance	334-1	Y, Contracted	Y	Convicted (334-1)	1 y and 6 m imprisonment, Art. 70 applied, released from the courtroom	No appeal
34.	Movsisyan, Armen	1st instance	225-2	Y, Contracted	Y	Convicted (225-2)	3 y and 6 m imprisonment, Art. 70 applied, released from the courtroom	No appeal
35.	Jhangiryan, Vardan	1st instance	316-2	Y, Contracted	N	Convicted (316-1)	3 y imprisonment, Art. 70 applied, released from the courtroom	Not monitored
36.	Shamshyan, Gagik	1st instance	343-3	Y, Contracted	N	Convicted (343-3)	Fine 350,000 AMD	Not monitored
37.	Hakobyan, Hakob	1st instance	225-1	Y, Contracted	N	Convicted (225-1)	5 y imprisonment	Not monitored
38.	Mikayelyan, Sasun	1st instance	225-1+235 - 1, 2	Y, Contracted	N	Convicted (225-1+235-1,2)	8 y imprisonment	Not monitored
39.	Malkhasyan, Myasnik	1st instance	225-1+38/316- 2	Y, Contracted	N	Convicted (225-1) Cleared (38/316-2)	5 y imprisonment	Not monitored
40.	Arzumanyan, Alexander	1st instance	225-1	Y, Contracted	N	Convicted (225-1)	5 y imprisonment	Not monitored
41.	Sirunyan, Suren	1st instance	225-1	Y, Contracted	N	Convicted (225-1)	4 y imprisonment	Not monitored
42.	Voskerchyan, Grigor	1st instance	225-1 /changed to	Y, Contracted	N	Convicted (301-1)	2 y imprisonment	Not monitored

			301-1/					
43.	Veziryan, Gohar	1st instance	343-3	Y, Contracted	N	Convicted (343-3)	Fine 350,000 AMD	Not monitored
44.	Abrahamyan, Mkrtich	1st instance and Appeal	225-2	Y, Contracted	N	Convicted (225-2)	3 y and 6 m imprisonment	Upheld
45.	Avagyan, Armen	1st instance and Appeal	316-1	Y, Public defender	N	Convicted (316-1)	1 y and 6 m imprisonment	Sentence upheld, Art. 70 applied
46.	Tarkhanyan, Karen	1st instance and Appeal	225-1	Y, Contracted	N	Convicted (225-1)	4 y imprisonment	Upheld
47.	Arakelyan, Davit	1st instance and Appeal	316-1	Y, Contracted	N	Convicted (316-1)	1 y imprisonment, Art. 70 applied, released from the courtroom	Left without consideration
48.	Khachatryan, Levik	1st instance and Appeal	316-1	Y, Contracted	Y	Convicted (316-1)	1 y and 6 m imprisonment, Art. 70 applied, released from the courtroom	Detention calculated in the final punishment; restrictions on freedom of movement reversed
49.	Hovakimyan, Misak	1st instance and Appeal	316-1	Y, Contracted	N	Acquitted	----------	Upheld
50.	Ghazaryan, Gevorg	1st instance and Appeal	225-1	Y, Contracted	N	Convicted (225-1)	5 y imprisonment	Upheld

51.	Sargsyan, Mher	1st instance and Appeal	176-2	Y, Public defender	Y	Convicted (176-2)	3 y imprisonment	Upheld
52.	Stepanyan, Nver	1st instance and Appeal	225-2	Y, Public defender	N	Convicted (225-2)	3 y imprisonment	Upheld
53.	Malkhasyan, Isahak	1st instance and Appeal	316-1+235 -4	Y, Contracted	N	Convicted (316-1) Cleared (235-4)	1 y imprisonment, Art. 70, released from courtroom	Left without consideration
54.	Ghazaryan, Andranik	1st instance and Appeal	225-2+176-1	Y, Contracted	N	Convicted (176-1) Cleared (225-2)	1 y imprisonment	Upheld
55.	Barseghyan, Grigor	1st instance and Appeal	225-2+176 -2	Y, Contracted	N	Convicted (176-2) Cleared (225-2)	3 y imprisonment	Upheld
56.	Petrosyan, Garegin	1st instance and Appeal	225-2+176- 2	Y, Contracted	N	Convicted (176-2) Cleared (225-2)	3 y and 6 m imprisonment	Decrease in sentence to 3 y imprisonment
57.	Margaryan, Arman	1st instance and Appeal	225-2+176 -2	Y, Contracted	Y	Convicted (225-2+176 part 2)	3 y and 6 m imprisonment	Upheld
58.	Nersisyan, Avetik	1st instance and Appeal	316-1	Y, Public defender	N	Acquitted	----------	Upheld
59.	Ghazaryan, Vahe	1st instance and	225-2	Y, Contracted	N	Convicted (225-2)	4 y and 6 m imprisonment	Upheld

		Appeal						
60.	Mnatsakanyan, Roman	1st instance and Appeal	225-2	Y, Public defender	N	Convicted (225-2)	3 y and 6 m imprisonment	Upheld
61.	Avetisyan, Aslan	1st instance and Appeal	225-4	Y, Contracted	N	Convicted (225-4)	6 m imprisonment	Upheld
62.	Abrahamyan, Armenak	1st instance and Appeal	225-2	Y, Contracted	N	Convicted (225-2)	3 y and 6 m imprisonment, Art. 70 applied, released from the courtroom	Sentence upheld, Art. 70 lifted, imprisoned
63.	Ashughyan, Edvard	1st instance and Appeal	225-2	Y, Contracted	Y	Convicted (225-2)	3 y imprisonment	Upheld
64.	Ghavalbabunts, Vardan	1st instance and Appeal	225-2	Y, Contracted	N	Convicted (225-2)	4 y imprisonment	Upheld
65.	Matevosyan, Davit	1st instance and Appeal	316-1	Y, Contracted	N	Convicted (316-1)	3 y imprisonment	Upheld
66.	Grigoryan, Armen	1st instance and Appeal	225-2+176 -2	Y, Contracted	Y	Convicted (225-2+176-2)	3 y and 6 m imprisonment	Cleared of Art 225-1. Decrease in sentence to 3 y imprisonment
67.	Ghukasyan, Yurik	1st instance and Appeal	225-2+176 -2	Y, Contracted	Y	Convicted (225-2+176-2)	3 y and 6 m imprisonment	Cleared of Art 225-1. Decrease in sentence to 3 y imprisonment

68.	Mkrtchyan, Tigran	1st instance and Appeal	225-2	Y, Public defender	Y	Convicted (225-2)	3 y imprisonment	Upheld
69.	Mkrtchyan, Sargis	1st instance and Appeal	225-2+176 -1	Y, Contracted	N	Convicted (176-1) Cleared (225-2)	1 y imprisonment	Upheld
70.	Gasparyan, Khachik	1st instance and Appeal	316-1	Y, Public defender	N	Convicted (316-1)	2 y imprisonment, Art. 70 applied, released from the courtroom	Upheld
71.	Abrahamyan, Hamlet	1st instance and Appeal	316-1	Y, Public defender	N	Acquitted	----------	Upheld
72.	Baghdasaryan, Tigran	1st instance and Appeal	316-1	Y, Contracted	N	Convicted (316-1)	Fine 350,000 AMD	Upheld
73.	Bareghamyan, Aram	1st instance and Appeal	225^{1}+316-2+112-2	Y, Contracted	N	Convicted (316-2+112-2) Cleared (225^{1})	6 y imprisonment	Upheld
74.	Elazyan, Qristapor	1st instance and Appeal	225-2	Y, Contracted	N	Convicted (225-2)	4 y imprisonment	Upheld
75.	Hayotsyan, Vardges	1st instance and Appeal	316-1	N	N	Convicted (316-1)	1 y and 6 m imprisonment, Art. 70 applied, released from the courtroom	Left without consideration
76.	Sargsyan, Armen	1st instance and	225-2	Y, Public defender	N	Convicted (225-2)	4 y imprisonment	Upheld

		Appeal						
77.	Shahinyan, Arman	1st instance and Appeal	316-1	Y, Contracted	N	Convicted (316-1)	1 y and 6 m imprisonment	Upheld
78.	Gasparyan, Tatev	1st instance and Appeal	235-1+112 -1	Y, Contracted	N	Convicted (235-1+112-1)	3 y and 6 m imprisonment	Upheld
79.	Meliqbekyan, Mekhak	1st instance and Appeal	235-1+112 -1	N	N	Convicted (235-1+112-1)	4 y imprisonment	Upheld
80.	Khachatryan, Alik	1st instance and Appeal	176-2	Y, Contracted	Y	Convicted (176-2)	3 y imprisonment	Upheld
81.	Karapetyan, Arman	1st instance and Appeal	176-2	Y, Contracted	Y	Convicted (176-2)	3 y imprisonment	Upheld
82.	Vardapetyan, Harutyun	1st instance and Appeal	176-2	Y, Contracted	Y	Convicted (176-2)	3 y imprisonment	Upheld
83.	Aghayan, David	1st instance and Appeal	225-2+316 -1	Y, Contracted	N	Convicted (225-2+316-1)	5 y imprisonment	Upheld
84.	Gharibyan, Harutyun	1st instance and Appeal	225-1	Y, Contracted	Y	Convicted (225-1)	3 y imprisonment	Upheld
85.	Saghatelyan,	1st	316-1+ 316-	Y,	N	Convicted (235-	5 y imprisonment	Upheld

	Mushegh	instance and Appeal	2+235- 4	Contracted		4+316-1+316-2)	Fine 900,000 AMD	
86.	Nikolyan, Vrej	1st instance and Appeal	316-2+225 -1	Y, Contracted	N	Convicted (225-1+316-2)	6 y and 6 m imprisonment	Upheld
87.	Hovhannisyan, Ara	1st instance and Appeal	225-2+238 -4	Y, Contracted	N	Convicted (225-2+238-4)	9 y imprisonment	Upheld
88.	Ayvazyan, Smbat	1st instance and Appeal	235-4+316-1	Y, Contracted	N	Convicted (235-4+316-1)	2 y imprisonment Fine 300,000 AMD	Upheld
89.	Gabrielyan, Gabriel	1st instance and Appeal	225-2+225 -1	Y, Contracted	N	Convicted (225-2+225-1)	7 y imprisonment	Upheld
90.	Manukyan, Ashot	1st instance and Appeal	225^{1}+316 -2	Y, Contracted	N	Convicted (316-2) Cleared (225^{1})	5 y imprisonment	Upheld
91.	Hayrapetyan, Karen	1st instance and Appeal	338-1	Y, Contracted	N	Convicted (338-1)	1 y imprisonment	Decrease in sentence to 3 m imprisonment
92.	Manukyan, Gevorg	1st instance and Appeal	225-2	Y, Contracted	N	Convicted (225-2)	4 y imprisonment	Upheld
93.	Gaspari, Vardges	1st instance and Appeal	316-1	Y, Contracted	N	Convicted (316-1)	1 y imprisonment	Upheld

94.	Jhangiryan, Gagik	1st instance and Appeal	316-1	Y, Contracted	N	Convicted (316-1)	3 y imprisonment	Upheld
95.	Gevorgyan, Felix	1st instance and Appeal	34/177-2/1,3+235-1+238-1+225-2	Y, Public defender	N	Convicted (34-177-2/1+34-177-2/3, 235-1, 238 -1, 225-2)	7 years of imprisonment	Upheld
96.	Khurshudyan, Armen	1st instance and Appeal	34/177-2/1,3+235-1+238-1+225-2	Y, Public defender	N	Convicted (34-177-2/1+34-177-2/3, 235-1, 238 -1, 225-2)	4 y imprisonment	Upheld
97.	Baghdasaryan, Husik	Appeal	235-1	Y, Contracted	N	Convicted (235)	3 y imprisonment	Decrease in sentence to 2 y imprisonment
98.	Harutyunyan, Hovik	Appeal	235-1	Y, Contracted	N	Convicted (235)	1 y and 6 m Imprisonment	Upheld
99.	Parunakyan, Sarkis	Appeal	316-1	Y, Public defender	N	Convicted (316-1)	3 y imprisonment	Decrease in sentence to 1 y and 6 m imprisonment
100.	Ghrejyan, Avetik	Appeal	235-1	Y, Contracted	N	Convicted (235-1)	Imprisonment, no information	Upheld
101.	Nazanyan, Artur	Appeal	225-2	Y, Contracted	N	Convicted (225-2)	3 y imprisonment	Upheld
102.	Ghazaryan, Hovhannes	Appeal	316-1	N	N	----------	----------	Left without consideration
103.	Gevorgyan, Sos	Appeal	235-1	Y, Contracted	N	Convicted (235-1)	1 y imprisonment	Upheld
104.	Ayvazyan, Masis	Appeal	316-1	Y, Contracted	N	Convicted (316-1)	1 y and 6 m Imprisonment, Art. 70 applied, released from the courtroom	Upheld

105.	Nahapetyan, Artak	Appeal	177-1	Y, Contracted	N	Convicted (177-1)	1 y and 6 m imprisonment, Art. 70 applied, released from the courtroom	Upheld
106.	Miqaelyan, Aleta	Appeal	225^1	Y, Contracted	N	Convicted (225^1)	Fine 100,000 AMD	Upheld
107.	Sargsyan, Larisa	Appeal	225^1	Y, Contracted	N	Convicted (225^1)	Fine 100,000 AMD	Upheld
108.	Geghamyan, Arman	Appeal	177-2	Y, Contracted	N	Convicted (177-2)	Imprisonment, no information	Upheld
109.	Margaryan, Artur	Appeal	177-2	Y, Contracted	N	Convicted (177-2)	Imprisonment, no information	Upheld

Annex 2. Selected Commitments of the OSCE Participating States

Vienna 1989 (Questions Relating to Security in Europe: Principles)

(13) (…) [the participating States] will

(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia,* effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

(23.2) - ensure that all individuals in detention or incarceration will be treated with humanity and with respect for the inherent dignity of the human person;

(23.3) - observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the United Nations Code of Conduct for Law Enforcement Officials;

(23.4) - prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices;

(23.5) - consider acceding to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, if they have not yet done so;

(23.6) - protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and take effective measures to prevent and punish such practices.

Copenhagen 1990

(2) [The participating States] are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:
(…)

(5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) - the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) - the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) - any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) - any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) - no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) - everyone will be presumed innocent until proved guilty according to law;

(12) The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments.
(…)

(16.2) - intend, as a matter of urgency, to consider acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if they have

not yet done so, and recognizing the competences of the Committee against Torture under articles 21 and 22 of the Convention and withdrawing reservations regarding the competence of the Committee under article 20;

(16.3) - stress that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;

(16.4) - will ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;

(16.5) - will keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under their jurisdiction, with a view to preventing any cases of torture;

(16.6) - will take up with priority for consideration and for appropriate action, in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE, any cases of torture and other inhuman or degrading treatment or punishment made known to them through official channels or coming from any other reliable source of information;

(16.7) - will act upon the understanding that preserving and guaranteeing the life and security of any individual subjected to any form of torture and other inhuman or degrading treatment or punishment will be the sole criterion in determining the urgency and priorities to be accorded in taking appropriate remedial action; and, therefore, the consideration of any cases of torture and other inhuman or degrading treatment or punishment within the framework of any other international body or mechanism may not be invoked as a reason for refraining from consideration and appropriate action in accordance with the agreed measures and procedures for the effective implementation of the commitments relating to the human dimension of the CSCE.

Moscow 1991

(21) The participating States will

(21.1) - take all necessary measures to ensure that law enforcement personnel, when enforcing public order, will act in the public interest, respond to a specific need and pursue a legitimate aim, as well as use ways and means commensurate with the circumstances, which will not exceed the needs of enforcement;

(21.2) - ensure that law enforcement acts are subject to judicial control, that law enforcement personnel are held accountable for such acts, and that due compensation may

be sought, according to domestic law, by the victims of acts found to be in violation of the above commitments.
(…)

(23.1) The participating States will ensure that

(i) no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;

(ii) anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;

(iii) any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;

(iv) any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful;
(…)

(vi) any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards;

(vii) effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;

(viii) the duration of any interrogation and the intervals between them will be recorded and certified, consistent with domestic law;

(ix) a detailed person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;

(x) such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;

(xi) anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.

Ljubljana 2005 (Decision No. 12/05 Upholding Human Rights and the Rule of Law in Criminal Justice Systems)

The Ministerial Council,

Recognizing that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law is a prerequisite for achieving a lasting peace, security, justice and stability,

Reaffirming the rule of law commitments contained in the 1975 Helsinki Final Act, the 1989 Concluding Document of Vienna, the 1990 Copenhagen Document, and the 1991 Moscow Document, those undertaken at the 1994 OSCE Summit in Budapest, and other relevant OSCE commitments and recalling relevant international obligations, including the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Reiterating that the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law and in line with relevant OSCE commitments and international obligations of the participating States, and that respect for that system must be ensured,

Considering that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression,

Recognizing that rule of law must be based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention,

Recognizing that an impartial and independent judiciary plays a vital role in ensuring due process and protecting human rights before, during and after trials,

Recognizing that defence lawyers play a critical role in ensuring the right to a fair trial and in the furtherance and protection of other human rights in the criminal justice system,

Underlining the need to speak out publicly against torture, and recalling that all forms of torture and other cruel, inhuman or degrading treatment or punishment are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and stressing the need to strengthen procedural safeguards to prevent torture as well as to prosecute its perpetrators, thereby preventing impunity for acts of torture, and calling upon participating States to give early consideration to signing and ratifying the Optional Protocol to the Convention against Torture,

Decides to:

— Increase attention to and follow up on the issues of the rule of law and due process in criminal justice systems in 2006, *inter alia,* by encouraging participating States to improve the implementation of existing commitments, also drawing on the expertise of the ODIHR, and in close co-operation with other relevant international organizations in order to avoid unnecessary duplication;

Tasks the ODIHR and other relevant OSCE structures to:

— Assist the participating States to share with one another successful examples, expertise and good practices to improve criminal justice systems;

— Assist the participating States upon their request to strengthen the institutional capacity of defence lawyers to protect and defend the rights of their clients.

Brussels 2006 (Brussels Declaration on Criminal Justice Systems)

We, members of the Ministerial Council, reaffirm the commitments related to the administration of criminal justice, especially those contained in the Helsinki Final Act (1975), the Vienna Final Document (1989), the Copenhagen Document (1990), the Charter of Paris for a New Europe (1990), the Moscow Document (1991), the Budapest Document (1994), and the Charter for European Security (1999).

We recall Ministerial Council Decisions No. 3/05 on combating transnational organized crime and No. 12/05 on upholding human rights and the rule of law in criminal justice systems (Ljubljana, 2005).

We further recall the proceedings of the Human Dimension Seminar on Upholding the Rule of Law and Due Process in Criminal Justice Systems (Warsaw, May 2006).

We also recall relevant UN instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We recall the commitment of the participating States to ensure the independence of the judiciary.

We recognize that nothing in this document shall undermine or diverge from participating States' existing commitments or obligations under international law, while we also acknowledge that each participating State, consistent with its legal tradition, determines the appropriate ways to implement them in its national legislation.

We consider that:

— Judicial independence is a prerequisite to the rule of law and acts as a fundamental guarantee of a fair trial;

— Impartiality is essential to the proper discharge of the judicial office;

— Integrity is essential to the proper discharge of the judicial office;

— Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge;

— A guarantee of equality of treatment to all before the courts is essential to the due performance of the judicial office;

— Competence and diligence are prerequisites to the due performance of the judicial office.

We consider that:

— Prosecutors should be individuals of integrity and ability, with appropriate training and qualifications;

— Prosecutors should at all times maintain the honour and dignity of their profession and respect the rule of law;

— The office of prosecutor should be strictly separated from judicial functions, and prosecutors should respect the independence and the impartiality of judges;

— Prosecutors should, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

We consider that:

— Law enforcement officials should at all times fulfil the duty imposed upon them by law, by serving the public and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession;

— In the performance of their duty, law enforcement officials should respect and protect human dignity and maintain and uphold the human rights of all persons;

— Law enforcement officials should use force only to the extent necessary and appropriate to accomplish their mission and to ensure the safety of the public;

— Law enforcement officials, as members of the broader group of public officials or other persons acting in an official capacity, should not inflict, instigate, encourage or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment;

— No law enforcement official should be punished for not obeying orders to commit or conceal acts amounting to torture or other cruel, inhuman or degrading treatment or punishment;
— Law enforcement officials should be cognizant and attentive to the health of persons in their custody and, in particular, should take immediate action to secure medical attention whenever required.

We consider that:

— All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer, without discrimination and without improper interference from the authorities or the public;

— Decisions concerning the authorization to practice as a lawyer or to join the profession should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority;

— Lawyers should not suffer or be threatened with any sanctions or pressure when acting in accordance with their professional standards;

— Lawyers should have access to their clients, including in particular to persons deprived of their liberty, to enable them to counsel in private and to represent their clients according to established professional standards;

— All reasonable and necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law;

— Lawyers should not be refused access to a court before which they are qualified to appear and should have access to all relevant evidence and records when defending the rights and interests of their clients in accordance with their professional standards.

We consider that the enforcement of custodial sentences and the treatment of prisoners must take account of the requirements of safety, security and discipline, while also ensuring prison conditions which do not violate human dignity and which offer meaningful occupational activities and appropriate treatment programmes to inmates, thus preparing them for their reintegration into society.

We call on the participating States to fully implement their commitments and international obligations to ensure fair and effective operation of their criminal justice systems.