

Brief analysis of the existing
situation on torture and
ill-treatment in the recent
years in Georgia



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I. Introduction

The brief report provided below supported by Open Society Georgia Foundation refers to the situation on combating torture, inhumane or degrading treatment in 2012-2017 in Georgia. The research reflects the progress that Georgia has achieved both in legal and practical terms. Additionally, the research places a special emphasis on the problems and drawbacks that still persist in the field of combating torture. It is mainly based on reports and accounts of reputable international, regional and local supervisory bodies as well as local NGOs operating in the field of Human Rights.

The foremost aim of the research is to inform the interested public about the existing situation regarding the prohibition of ill-treatment. Together with certain progress achieved in past years, problematic spheres remain, improvement of which requires creation of relevant mechanisms. In this report we have reviewed the current situation and put forward some recommendations for identified problems.

In 2012 a series of video recordings aired on TV caused great perplexity among Georgian public as well as international community. The videos depicted prison administration and personnel subjecting prisoners to torture, inhumane and degrading treatment in one of the penitentiary institutions of Georgia. The mentioned recordings clearly evidenced those systematic problems which have been subject of criticism from the Public Defender of Georgia as well as International supervisory bodies, local and international NGOs for years.

The European Committee for the Prevention of Torture, Inhumane and Degrading Treatment (*hereinafter CPT*), as well as the Public Defender (National Prevention Mechanism) constantly expressed concern about the conditions of imprisonment in penitentiary institutions and temporary detention facilities and their incompatibility with international standards.

The number of prisoners and overcrowding of cells,¹ insufficient health care and poor treatment especially with regard to Hepatitis C and tuberculosis frequently became the

¹ For years, according to reports, Georgia was holding the leading position among the world countries by the prisoners number per 100,000 general population: 24,114 prisoners in 2011, 23,684 prisoners in 2010, and 21,239 prisoners in 2009.

subject of discussion at the European Court of Human Rights². Increasing number of temporary measures that European Court prescribed to Georgian government (regarding applications on conditions of imprisonment or treatment) should have served as a clear indication for the government of existing problems in the penitentiary system. However, the indicators mentioned, as well as monitoring results and recommendations of Public Defender and NGOs were mostly ignored. On top of that, the effectiveness of investigation into allegations of ill-treatment was almost non-existent. As a result, the systemic problems visibly manifested themselves and reached its peak in September 2012.

Five years after the well-known video tapes became public, the systematic reforms have not been carried out appropriately in many fields. This is especially true with regard to specialized institutions, the existence of which will guarantee that the prevention of torture and ill-treatment, as well as effective investigation is not dependent on the good will of certain individuals, but rather on the institutions capable of providing independent investigation and prevention. The latter is the most challenging issue with regard to ill-treatment in Georgia and the present report provides analysis and brings forward the argumentation on the mentioned challenges.

II. Achievements in combating torture after 2012 Parliamentary elections

After 2012 Parliamentary elections, the government publicly declared combating torture and implementing fundamental changes in penitentiary system as its priority. The Public Defender, European Committee against Torture, Inhuman and Degrading Treatment, United Nations Special Rapporteur on Torture, and other cruel, inhuman or degrading treatment or punishment (hereinafter UN Special Rapporteur) the UN High Commissioner on Human Rights explicitly confirm positive changes in their reports and accounts regarding imprisonment and prisoners' treatment in view of combating torture and degrading treatment in penitentiary institutions. During 2013-2016, the European Court of Human Rights has not issued a single temporary measure for Georgian Government regarding treatment of prisoners.³

Number of prisoners.

Human rights national and international supervisory bodies made several positive remarks about the reduction of the total number of prisoners which resulted in less crowding of

² The cases of the European Court of Human Rights: Poghosian v. Georgia; Makharadze and Sikharulidze v. Georgia; Ildani v. Georgia; Jeladze v. Georgia; Mindadze v. Georgia

³ Information can be accessed at: http://echr.coe.int/Documents/Stats_art_39_01_ENG.pdf>

penitentiary facilities.⁴ While in 2011-2012 there were 24,114 (in 2011) and 19,349 (2012) inmates, as a result of a large-scale amnesty and pardoning, as well as use of alternative means of custodial restraint, only 9,093 prisoners had been left in detention facilities by the end of 2013. In the following years the number of inmates fluctuated inconsiderably between 9,000 to 10,000 (2014 – 10,372, 2015 -9,716, 2016 – 9,334).

In comparison with previous years, the death rate among prisoners has reduced considerably. 23 prisoners died in 2013, 27 in 2014, 12 in 2015⁵, and 17 in 2016.⁶

Current conditions in penitentiary institutions

National and international human rights organizations positively assessed the changes and attempts made for the improvement of the existing conditions in penitentiary institutions in Georgia. As a result of carrying out large-scale reconstruction and repair works, oversight bodies have recognized that the absolute majority of penitentiary institutions (except the Institution #7⁷) meet the international standards. Several penitentiary facilities have been shut down⁸ due to the lack of proper living conditions, and most facilities have been fundamentally repaired.⁹

Improvements in healthcare

Funding of healthcare has considerably increased and special efforts have been made to reform penitentiary health care system. Development of prevention, diagnostic and treatment programs for Hepatitis C deserves a special mention. The latter has resulted in

⁴ Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 December 2014, CPT/Inf (2015) 42, December 15, 2015. (2) Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, September 23, 2005, E/CN.4/2006/6/Add.3

⁵ Information can be accessed at: <http://www.moc.gov.ge/images/temp/2016/05/11/f3bcb63287f84369208717a248dc595b.pdf>

⁶ Information can be accessed at: <http://www.moc.gov.ge/images/temp/2017/06/02/c95a2d57fa8923d18ce3b0aefd39b75f.pdf>

⁷ In the recent three years, in his annual reports submitted to Parliament of Georgia, the Public Defender has constantly recommended the authorities to shut down Penitentiary Institution #7. The European Committee against Torture considers the conditions in the Penitentiary Institution #7 equals inhuman conditions. According to the statement of the Ministry of Corrections of Georgia, the Ministry at this stage is not able to make a decision on total shut down of the institution but in the nearest future intends to substantially reduce the number of inmates and place the convicts in the institutions of relevant risk level.

⁸ Institutions #1 and #4

⁹ Institutions #3 and #16

solving the systemic problem with regard to treatment of prisoners with Hepatitis C.¹⁰ The death rate decreased. Changes have been made to legal mechanisms of releasing prisoners or postponing their sentence.¹¹

Considerable amendments have been implemented in legislation, especially to the Imprisonment Code, according to which the Minister of Corrections of Georgia was obliged to prepare and approve the decree enabling members of the National Preventive Mechanism to take photos in penitentiary establishments. Once the decree came into effect on 1 September 2016, it substantially expanded the possibilities of the Public Defender's Office and National Preventive Mechanism for identifying and documenting the facts of torture and other degrading treatment.

III. Major drawbacks in combating torture after 2012 Parliamentary elections

The following chapter presents all deficiencies identified in recent years in Georgia. Information provided is based on reports and accounts of various organizations.

Monitoring – National Prevention Mechanism

Despite the above mentioned positive changes, a serious problem that still persists relating to the access to video and or other electronic recordings of penitentiary facilities by the Public Defender's Office and members of the National Prevention Mechanism. This practice contradicts Article 18 of the Organic Law on Public Defender and creates a considerable barrier for the major constitutional body in the field of human rights to access all information that is necessary to facilitate identification of the facts of torture or other degrading treatment.¹²

Apart from that, it is specifically problematic that Imprisonment Code, as well as the rule on conducting visual and/or electronic supervision and control, allows the administration of the penitentiary institution to observe visually via technical devices meetings conducted

¹⁰ The noted systemic problem was ascertained by the European Court of Human Rights in its pilot decision on the case Poghosian vs Georgia (2009) and Ghavtadze vs Georgia (2009)

¹¹ 2014-2016 Reports of the National Prevention Mechanism of the Public Defender of Georgia

¹² National Prevention Mechanism, Report #6 on the visit to the Penitentiary Institution #6, 2016, page 3, can be accessed at <http://www.ombudsman.ge/uploads/other/3/3808.pdf>

between prisoners and representatives of the Public Defender's Office.¹³ The latter contradicts Article 19 of the Organic Law on Public Defender, as well as Article 20 of the additional protocol of the UN Convention against Torture.

Application of special measures

The European Committee against Torture and the Public Defender express their concerns regarding the extensiveness and enforceability of "special measures" and their application procedures in Imprisonment Code.¹⁴ Additionally keeping prisoners in a solitary/ de-escalation cell for a long term or placing handcuffs with the aim of to punish prisoners was criticized by the European Committee against Torture, the Special Rapporteur of the United Nations on Torture and Public Defender.¹⁵ The Committee against Torture believes such type of complete social isolation represents inhuman treatment.¹⁶

Documentation procedures

There is a lack of timely and methodological documentation procedures on the facts of ill-treatment. Additionally, there is no legal requirement for the medical personnel to immediately notify relevant investigative bodies about the alleged signs of ill-treatment. . The principle of medical confidentiality is violated by the presence of prison administrative personnel during medical consultations.¹⁷

Legal definition of prohibition of torture and plea bargaining

As a result of amendments made to the Criminal Code of Georgia, it was clearly defined that term of limitation does not apply to the crime of torture or other kind of degrading treatment (Article 144¹-144³). Due to the absolute character of prohibition of torture and ill-treatment, the existence of limitation period or any ambiguity is unacceptable.

¹³ Public Defender of Georgia, Human Rights Conditions in the closed facilities (National Prevention Mechanism), 2016, page 41, can be accessed at <http://www.ombudsman.ge/uploads/other/4/4585.pdf>

¹⁴ Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 December 2014, CPT/Inf (2015) 42, December 15, 2015; Public Defender of Georgia, National Prevention Mechanism, 2015, can be accessed at www.ombudsman.ge/uploads/other/3/3777.pdf

¹⁵ In accordance with the amendments made to the Imprisonment Code on June 20, 2017, the maximum term for placement in the solitary confinement cell is 14 days. However this change will be effected on January 1, 2018.

¹⁶ Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 December 2014, CPT/Inf (2015) 42, December 15, 2015

¹⁷ Annual reports of the Public Defender of Georgia for 2014, 2015. Annual reports by the National Prevention mechanism for 2014-2016.

It is also not possible to use plea bargaining in relation to prohibition of torture in the same manner as with other crimes. According to a UN Special Rapporteur on Torture, “pardoning/plea bargaining should not be used toward those defendants/convicts who are responsible for torture even if they gave evidence against other defendants”.¹⁸ The similar position is expressed by the UN Human Rights Committee¹⁹ as well as in the case law of the European Court of Human Rights.²⁰

However, despite such strict standard established by international and regional human rights supervisory organizations, in 2013 out of 17 persons detained for the crime of torture, to some plea bargain was concluded, and furthermore Vladimer Bedukadze was not awarded any punishment at all.

In previous years the disposition²¹ of particular articles was specified in the Criminal Code of Georgia, which helped to differentiate the crimes of torture/degrading treatment and battery from each other. However, the Public Defender of Georgia²² and the UN Special Rapporteur on Torture²³ placed the emphasis on the problem concerning the definition of torture in the material Criminal Law of Georgia. In contrast to classical definition of torture given in the 1984 UN Convention against Torture, Georgian Criminal Code in Article 1441 reads as follows:

1. According to the definition enshrined in Article 1 of the Convention against Torture, torture is committed by a special subject (at the instigation of or with the consent or acquiescence of a public official). According to Article 144¹ of the Criminal Code, torture may be committed by any person. The disposition of the Article mentioned above does not consider any instigation or acquiescence by the public official;²⁴

2. According to classical explanation of torture given in the Convention against Torture the term "refers to any act by which severe pain or suffering is intentionally inflicted on a person for purposes of obtaining from him or a third person information or confession, evidence, or

¹⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, September 23, 2005, E/CN.4/2006/6/Add.3, Par. 54.

¹⁹ Concluding comments related to Argentina - Observations of the Human Rights Committee - Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995), reprinted in U.N. Doc. A/50/40 (1995), Par. 146.

²⁰ See European Court of Human Rights decision of May 27, 2014, on the case Margus vs Croatia

²¹ Article 126, Beating

²² National Prevention Mechanism, Annual Reports for 2014, 2015, 2016

²³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, September 23, 2005, E/CN.4/2006/6/Add.3, Par. 15

²⁴ Ibid.

punishment, also entails any action motivated by discrimination of any kind. In the disposition of Article 144¹ of the Criminal Code of Georgia discrimination is not considered as aim of the code.²⁵

The role of a judge in the process of combating torture

According to amendments made to the code on criminal procedure, the responsibility of the judge has increased in plea bargain agreements. In particular, the judge was made responsible to ascertain that the plea bargain “has been concluded without torture, inhumane or degrading treatment or other forms of violence, threat or deception.”²⁶

However, the legal provisions still remain problematic, since they do not allow a judge to take actions without a motion at the first stage of trial or during other stages if there is a reasonable ground to suspect that the defendant/convict had been subject to torture or any other degrading treatment. The case law set by the European Court regarding Article 3 of the Convention as well as Article 14 of the Covenant on Civil and Political Rights and related legal norms, clearly oblige national judges to react ipso facto, without any motion, if the person in question bears the signs of ill-treatment and if the judge, being an unbiased observer has or had to have a suspicion that the person had been subjected to ill-treatment.

The Georgian legislation must clearly define the role of a judge with regard to prevention of torture and ill-treatment. When the defendant/convict is brought before the judge and the latter has a reasonable suspicion that a person might have been subjected to torture or ill-treatment, the judge should be afforded an opportunity to order the relevant body to conduct effective investigation, take measures to protect the person, transfer him/her to another detention facility and require the access to materials relevant to the case.

Healthcare and treatment in penitentiary institutions

As it has been mentioned above, over the past years important steps have been taken to increase efficiency of the penitentiary healthcare system. The European Committee Against Torture, Public Defender and a UN Special Rapporteur on Torture positively assessed the complete reorganization of the Medical Department, renewal of penitentiary health care standards and increase of health care budget, significant success has been achieved in programs targeting treatment of Hepatitis C and tuberculosis, improvement of medical

²⁵ This represents only an aggravating circumstance

²⁶ GCPC, Article 212 (amendments made on 24.07.2014)

infrastructure in penitentiary establishments #5 and #12, repair works and provision of relevant medical equipment in these facilities.²⁷

However, the above mentioned supervisory bodies still consider it a problem that no essential steps have been taken in terms of complete integration of penitentiary health care with public health system which negatively affects the independence and impartiality of medical personnel as regards to description of injuries and accurate documentation. There is still the lack of doctors and nurses and the number of regular visits in relevant facilities is insufficient.

Although it is true that a new rule of documenting prisoners' injuries in penitentiary institutions has been adopted, all oversight bodies (European Committee Against Torture, UN Special Rapporteur on Torture, and Public Defender) have unanimously stated that a new rule did not work in practice in previous years, and according to existent practice the documentation of injuries have many flaws and it does not ensure the efficient identification and documentation of the facts of alleged ill-treatment. The most important drawback relates to doctor's examination of a patient/prisoner in the presence of a prison administration representative.²⁸ The Public Defender has noted this issue in several of his annual reports presented to the Parliament as well as in the reports of the National Prevention Mechanism (2014-2016).

Additionally, all oversight bodies agree that doctor's competence and independence still remains an issue, which casts doubt on doctors' impartiality when documenting injuries and notifying investigation bodies in case of alleged ill-treatment of prisoners.²⁹

In 2014-2016 the Public Defender repeatedly addressed the relevant government agencies with the recommendation to make it mandatory for doctors to notify the General Prosecutor's Office of Georgia about the possible facts of ill-treatment regardless of

²⁷ According to the National Prevention Mechanism Annual Reports for 2015 and 2016, the number of inmates compared to the number of medical staff is high in Institutions #2, #14, #15, and #17.

²⁸ Public Defender of Georgia, Human Rights Conditions in the Closed Facilities, (National Prevention Mechanism), 2016

²⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, A/HRC/31/57/Add.3, Par 92. Regarding registration and documentation of injuries, the Special Rapporteur found that, as a rule, the records were insufficient, and did not contain correct and complete description, or photos of wounds or injuries, as well as possible reasons. The Special Rapporteur notes that only in one institution the chief doctor had a copy of the guidance on efficient investigation and documentation of torture and other cruel, inhuman, degrading treatment or punishment (Istanbul Protocol), which as the doctor noted was not used in practice

prisoner's consent, taking into consideration the prisoner's interest, as well as public interest.³⁰

Rehabilitation for torture victims

Rehabilitation for torture victims is one of the most important aspects of the government's positive obligations, which aims to restore the infringed rights of torture victims. In the past years state action plan(s) for combating torture aimed to eliminate the results of torture and ill-treatment, protect and rehabilitate victims, create a state program and implement relevant activities. These activities have also included provision of an efficient legal aid and protection to torture victims, analyzing and improvement of current legislation.

Unfortunately, state bodies have not taken any tangible steps concerning the above. No state program is being implemented currently in Georgia that would ensure rehabilitation of torture victims in penitentiary institutions.³¹ Only a few NGOs are engaged in activities related to rehabilitation of torture victims within the respective projects.

Detention/imprisonment conditions

As it has been mentioned above, national and international organizations working in the sphere of human rights have positively evaluated the changes and attempts that have taken place in Georgia in terms of improvement of detention/imprisonment conditions. However, the reports also place emphasis on the fact that the minimum standard of 4² square meters set for detention/imprisonment facility is not observed.³²

As the supervisory bodies note, it is possible to accommodate the detained persons for a short period of time (72 hours) in temporary confinement cells taking into account the existing conditions, but they are not suitable for a longer detention as the conditions do not meet

³⁰ Public Defender of Georgia, Human Rights Conditions in the Closed Institutions, (National Prevention Mechanism), 2016

³¹ National Prevention Mechanism, Annual Report for 2015

³² (1) Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 December 2014, CPT/Inf (2015) 42, December 15, 2015. Par 43; (2) Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, September 23, 2005, E/CN.4/2006/6/Add.3 par 91.

international standards. However, the latter is common practice with regard to administrative arrest.³³

Although in general, the situation regarding prisoners' treatment in penitentiary institutions is noted to have improved the oversight bodies still draw special attention to several penitentiary institutions where prisoners are frequently subjected to ill-treatment. Among such institutions, as mentioned by the CPT and Public Defender³⁴, is Gldani Institution #8, in which the new prisoners are often subjected to the so called "welcome beating" and Batumi institution #3, where, as the UN Special Rapporteur on Torture and the members of the NPM have stated based on reliable and credible information, ill-treatment is widely practiced.³⁵

During recent years prisoners were systematically placed into solitary confinement cells for a long period without observing the procedure prescribed by law.³⁶The problem has been highlighted by the European Committee against Torture as well as the Public Defender. According to amendments made to the Imprisonment Code on 30 June 2017, the maximum term for retaining a prisoner in a solitary cell for a disciplinary violation is 14 days, however, the above change will only enter into force from 1 January 2018. According to the statement of the European Committee against Torture, complete social isolation and placement of prisoners in solitary cells for a long period constitutes inhuman treatment.³⁷

At the same time, the Public Defender deems that the problem of poor natural and artificial ventilation, lighting and heating still remains a challenge. Providing a prisoner with seasonal clothes, affording them recreation time outside and arranging recreation spaces are also problematic. In institutions #14 and #17, where the accommodation is of barrack type no

³³ (1) Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 December 2014, CPT/Inf (2015) 42, December 15, 2015. Par 43; (2) Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, September 23, 2005, E/CN.4/2006/6/Add.3 par 91.

³⁴ The incident of November 12, 2014, is of particular significance, when the National Prevention mechanism members immediately witnessed ill-treatment of handcuffed prisoners on the part of the prison administration

³⁵ Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 December 2014, CPT/Inf (2015) 42, December 15, 2015, page 7.

³⁶ Regarding this please see the Report for 2015 of the European Committee against Torture, as well as the Annual Report for 2015-2016 of the National Prevention Mechanism

³⁷ According to the statements of the interviewed prisoners in the institutions, the institution staff members provoke them in order to place in the solitary confinement cells or de-escalation room as a disciplinary measure for violation. The prisoners feel their placement in de-escalation rooms is done for their punishment for violating the institution regulations and not for security reasons. In Institutions #3 and #6 studying the documentation revealed that in a number of cases the prisoners were awarded disciplinary sanctions while being in the de-escalation period.

privacy is provided, smoker and non-smoker prisoners share the same space, it is hard to observe sanitary and hygienic conditions and the risk of spreading infectious diseases is high; besides, providing security constantly remains as a challenge.³⁸

The rights of the detained persons

Before 2012, conditions in penitentiary institutions and the manner of treatment of inmates were the primary challenge regarding torture and ill-treatment in Georgia. existing. After 2012, the authorities have paid special attention to the improvement of the existing conditions in penitentiary establishments and the treatment of prisoners by the administration since the latter was considered the primary place where ill-treatment was widespread. Despite substantial progress achieved in the penitentiary sphere after 2012, the facts of ill-treatment during arrest or individuals transfer to law enforcement agency (before he/she is transferred to temporary detention facility) have become more frequent. The latter also caused raise in the number of received complaints received by the Public Defender's Office.³⁹

According to the report of the UN Special Rapporteur on Torture⁴⁰, so called taking individuals on so called “strolls” was a common practice during which a person was placed in a police vehicle before formal detention and was subjected to physical or psychological pressure for the first few hours before obtaining the desirable confession/information. Parallel to that, certain provisions from the legislation of Georgia were interpreted in a way that it was obligatory to take a detained person to the police station for the initial interrogation and after interrogation and investigative actions the person was to be transferred to a temporary detention cell. As practice shows, the most complaints about the alleged ill-treatment are made within the period before a person is transferred to the temporary detention cell.

The UN Special Rapporteur Public Defender and Georgian NGOs have strongly appealed to the Georgian government to transfer detained persons to the temporary detention facility in

³⁸ National Prevention Mechanism, Annual Reports for 2015 and 2016,

³⁹ Public Defender of Georgia, Report on the State of Human Rights and Freedoms in Georgia, 2016, page 239

⁴⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia. A/HRC/31/57/add3. Regarding this issue also see a study supported by the Open Society Georgia Foundation “Procedural Rights of the Defendants in Georgia”, 2016. Besarion Bokhashvili, Giorgi Mshvenieradze, Irakli Kandashvili.

the shortest possible time.⁴¹ Since the infrastructure, conditions, and regulations present in temporary detention facility allows identification of the possible facts of ill-treatment. At the same time, it is necessary to eliminate the so called practice of “strolls” and “unofficial interviews” In this period a person is under the effective police control with restricted freedom of movement and no procedural regulation applies.

Alternative Monitoring Mechanism The only external mechanism of monitoring the closed institutions in Georgia is the National Preventive Mechanism at the Public Defender of Georgia. Legislation does not envisage other options. Any expert, representative of civil society, or interested person can only observe a penitentiary institution if specially authorized by the Public Defender. At first glance the latter does not seem problematic, however unfortunately, considering Georgian context, it is important to have alternative monitoring mechanism in place..

- a. It is important that the Public Defender is not the only actor in charge of monitoring closed institutions but this responsibility should rather be delegated to other interested organizations as well. Public Defender’s resources are not inexhaustible and he is unable to monitor all institutions permanently. The involvement of other interested organizations will ensure greater level of effective control.
- b. Certain cases of disagreements between the Public Defender and various NGOs were reported last year in the exercise of expert power within the National Preventive Mechanism. The latter resulted in depriving others of the authority to conduct monitoring.
- c. Various organizations have different specifications, sphere of activity and experience. Thus, it is important that all of them have the opportunity to be involved in the process complex process of monitoring and observation.
- d. Many international organizations and reputable professionals emphasize the fact that this type of mechanism must be created in Georgia so that any possible ill-treatment is precluded by stronger control and at the same time it will allow to establish institutional experience of monitoring in the country.

NGOs currently operating in Georgia are engaged in intensive activities with the aim of creating the mechanism of alternative monitoring. The research has been conducted which

⁴¹ Inter alia, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, December 1, 2015, A/HRC/31/57/Add.3, 113.a.

studied alternative monitoring mechanism regulations in different countries.⁴² At the same time, organizations have presented a draft bill which envisages establishment of an authorization council and the admittance of the relevant NGOs to closed institutions according to pre-determined criteria. The draft bill contains detailed regulations on the termination of authorization, accountability and other issues. The aim of the bill is to increase protection of human rights and at the same time to secure state interests

IV. Investigation of torture, inhumane and degrading treatment

There is an international agreement on the importance of effective prevention of ill-treatment. But at the same time, it curtail that state responds to any fact of torture, inhumane or degrading treatment in a strict manner. Impunity of a single person perpetrating torture always creates ground for commission of more crimes in the future. Effective prevention of torture is therefore essential; besides all public servants should receive a clear message that ill-treatment is strictly punishable. Impunity was one of the major factors contributing to the situation that existed before 2012.. Almost all facts remained without response and nobody was punished, which encouraged commission of new illegal actions.

There are several important factors regarding the investigation of ill-treatment that deserve due evaluation and analysis. In the case of the alleged ill-treatment it is important to determine:

- Under which Article is the investigation launched and proceeded;
- What are the rights of potential victim/aggrieved party during the investigation process?
- Who is responsible for the investigation;

Crime qualification problem: The problem of qualifying the crime in Georgia has always been a significant problem. Investigation on the information provided by the Public Defender or various organizations was frequently launched under the Articles regulating abuse of authority and not under the provisions that set responsibility for torture, threat of torture and inhuman and degrading treatment. According to Public Defender's 2016 report , out of ten applications to launch investigation, only in two cases the investigation was launched under Article (144³), the remaining cases were qualified by investigative bodies as

⁴² Institute for Democracy and Security Development, Types and Authorities of the National Prevention Mechanisms, can be assessed at <https://idsdge.files.wordpress.com/2016/09/>

“abuse of power”, which is the crime under another Article.⁴³ The later consists of three parts. The first two parts belong to a less grave category of crimes. Only the third part belongs to the category of particularly serious crimes (but not particularly grave).⁴⁴At the same time, no additional guarantees are applied (such as restriction on application of plea bargaining, limitation period, etc.).

The Rights of the Victim: Legal status of the victim is a very important factor. Any person who claims to be subjected to torture must have an opportunity to lodge a complaint with the relevant investigative body with the request to launch investigation. At the same time, victim should be informed about the ongoing process and he /she should be able to react if the investigation is ineffective. From 2010, after a new Criminal Procedure Code entered into force in Georgia, the rights of victims were clearly minimized.

The legislative amendments that increased victim’s rights in 2014 are fully welcome. Among them, a victim is now entitled to appeal to court the decision to terminate or not to initiate criminal prosecution. However, these guarantees only apply if the investigation is initiated under parts 2 and 3 of Article 144¹. In other cases Articles on threat of torture or degrading or inhuman treatment do not belong to an particularly serious crime category and consequently the legal status of the victim is only limited to provision of information.⁴⁵These additional guarantees are also inefficient due to the fact that investigation mainly starts under the Articles of abuse of authority (which belongs to offences of minor gravity).

Identifying agency responsible for conducting investigation remains challenging in Georgia. Prior and after 2012 the same decree of the Minister of Justice is in force, which grants Prosecutor’s Office of Georgia the authority to investigate the criminal offence committed by a police official or the employee of a prosecutor’s office. It should be hereby emphasized that the prosecutor’s office was in charge of investigations even prior to 2012 and the number of perpetrators brought to justice was almost zero. The main problem in this regard was the fact that ill-treatment was politically supported. Since prosecutor’s office did not hold a neutral position it was impossible for them to investigate this type of crimes, as a result investigations were absolutely ineffective.⁴⁶ Consequently, after 2012 many international and local

⁴³ Public Defender of Georgia, Report on the State of Human Rights and Freedoms in Georgia, 2016, page 366, can be accessed at www.ombudsman.ge/uploads/other/4/4494.pdf

⁴⁴ For comparison, the special article on torture (144¹) stipulates even life sentence.

⁴⁵ Regarding this please see GYLA, Aggrieved Persons’ Rights in the in the GCC, 2016, Page 10, can be accessed at goo.gl/6j5gFD

⁴⁶ Gavin Slade, Iago Kachkaschishvili, Lela Tsiskarishvili, Nika Jeiranashvili, Nino Gobronidze, Crime and Exaggerated Punishment: Scale and Reasons of Human Rights Violation in the Georgian Penitentiary Institutions, 2014, Page 41, can be accessed OSGF website

organizations urged the Georgian government to develop an adequate mechanism for the investigation of torture.⁴⁷ The mechanism should not have been dependent on the political authorities and had to have absolute freedom to conduct full-fledged, adequate, independent, and unbiased criminal prosecution and investigation.

Prosecutor's Office of Georgia is facing a serious challenge in terms of public confidence. The Past experiences that are based on political partiality and ineffectiveness diminishes the probability of support by wider public. The existing model of legal regulations of prosecutor's office should also be noted. In 2015 within the scope of legal reform the attempt was made to distance Prosecutor's Office from the Ministry of Justice. But unfortunately this attempt failed and the Venice Commission directly noted in its latest opinion that de-politicization of the Prosecutor's Office was not achieved.⁴⁸ It was specifically emphasized that that the Minister of Justice is the only state official authorized to nominate candidates for the Prosecutorial Council. Additionally it was stressed out that the existing rule of formation of prosecutorial council could not ensure firm guarantees for independence, which makes the necessity of establishing this body meaningless. Existing regulations still allow the possibility of political influence and the risks related to torture that had existed before, still remains. Additionally, it is important to assess whether the existing investigative bodies are fully independent from political influence or not. Civil Society Organizations directly state in their reports that for instance, in the Ministry of Internal Affairs, the minister has immense influence on everyday activities of ordinary law enforcement officers.⁴⁹ Consequently, implementation of any politically encouraged violence is quite realistic and there is no relevant politically independent/ neutral institution which would investigate the above.⁵⁰

The need for creation of an independent investigative mechanism

Thomas Hammarberg, the EU Special Adviser on Constitutional/Legal Reforms and Human Right Issues directly called on the Georgian government to establish an independent investigative mechanism and investigate offences committed by law enforcement agents⁵¹.

⁴⁷ Thomas Hammerberg, (Advisor to the Georgian Government on Constitutional and Human Rights), Navi Pilai (UN High Commissioner for Human Rights), Juan Mendes (UN Special Rapporteur on Torture) UN Human Rights High Committee (2014 Concluding Comments on Georgia), Georgia's Commitments, Periodic Review (2015-2016)

⁴⁸ Venice Commission, CCPE, OSCE/ODIHR, Joint Opinion on the Draft Amendments to the Law on Prosecutor's Office, CDL-AD (2-15) 039

⁴⁹ Coalition for Independent and Transparent Judiciary. Statement on September 28, 2015

⁵⁰ Human Rights Monitoring and Teaching Center. Police Neutrality in the Police System. 2016, page 26

⁵¹ Thomas Hammarberg, Georgia in Transition, 2013, Page 26, can be accessed at eeas.europa.eu/archives/delegations/Georgia/documents/human_rights_2012/2013092

The Public Defender of Georgia published a special report in 2014⁵² on the investigation of the facts of ill-treatment in which he pointed to the need of establishing independent investigative mechanism. In 2005, Manfred Novak⁵³, UN Special Rapporteur on Torture, urged the Georgian government to create this type of mechanism.⁵⁴ The same was repeated in 2015 by Juan Mendes, who at that time held the status of UN Special Rapporteur.

It is important to hereby note recent investigative practice. According to the statements of NGOs and the Public Defender of Georgia, since 2014 they have requested the investigation into the facts of ill-treatment on 91 occasions. The result is the same as it was before 2012, prosecution started only on two cases and no person was held criminally liable.⁵⁵

A special report published by the Georgian Young Lawyers' Association reviewed over 20 cases of ill-treatment. In contrast, the report of the Prosecutor General of Georgia says that investigation was launched into 184 criminal cases and criminal prosecution was initiated against ten persons. It also indicates that within six months of 2017, investigation into the facts of ill-treatment was launched on 99 criminal cases and criminal prosecution was initiated against eight persons.⁵⁶ Under Article 144³ of the Criminal Code of Georgia (degrading or inhuman treatment) prosecution was initiated against the employee of a penitentiary institution #7 and under Article 333 of the Criminal Code of Georgia (abuse of power) against one police official.⁵⁷ Unfortunately, this data mostly reflects only those crimes that had been committed before 2012 and not the crimes committed afterwards. However, statistical data provided by NGOs and Public Defender's Office prove the opposite that the prosecutor's office less effective in dealing with alleged facts committed after 2014.

Considering the lack of effective investigation into allegations of ill-treatment, NGO's called for creation of an independent investigative mechanism and respective bill was drafted.⁵⁸ Agency must have mandate to exercise exclusive jurisdiction on cases of alleged ill-treatment or death. At the same time independent investigative mechanism should have additional jurisdiction regarding cases where conflict of interests arises. It is well worth mentioning that the draft bill envisages that the function of independent investigative mechanism will be

⁵² Public Defender of Georgia, Special Report on Investigation Practice of Potential Crimes Committed by Law Enforcement Officials, Legislative Regulations and International Practice in Effective Investigation. 2014

⁵³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, September 223, 2005, E/CN.4/2006/6/Add.3

⁵⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, December 1, 2015, E/CNHRC/31/57/Add.3

⁵⁵ Information can be accessed as info graphics at goo.gl/UwSWkm

⁵⁶ Report can be accessed at goo.gl/oybqko

⁵⁷ Report of the Chief Prosecutor of Georgia, pog.gov.ge/res/docs/angarisi19_07_2017.pdf

⁵⁸ Can be accessed at [www.osgf.ge/files/2015/Draft_Law_Independent_investigation_mehcanism_\(GEO\).pdf](http://www.osgf.ge/files/2015/Draft_Law_Independent_investigation_mehcanism_(GEO).pdf)

to support the process of investigation, criminal prosecution, and indictment. According to the offered model, two departments responsible for investigation and prosecution will be operating within mechanism.

According to the draft bill, the independent investigative mechanism shall be an independent agency accountable to the Parliament. Its head (commissioner) shall be elected for a fixed term. Detailed description of selection procedures is provided and participation of minorities in the process is ensured. After the election, it will be possible to discharge the head of the independent investigative mechanism only pursuant to prescribed legal grounds.

Dismissal from office is subjected to judicial review in the constitutional court, as in the case of MPs. The alleged crimes committed by the representatives of these institutions will be investigated by General Prosecutor's Office of Georgia and other currently functioning investigative structures.

The bill drafted by NGOs was positively assessed by Manfred Novak, international expert, former UN Special Rapporteur on Torture. He considered the draft bill to be "the most refined way of policing police".⁵⁹

Contrary to this model, the Ministry of Justice of Georgia drafted a bill, according to which a separate department could be created at the Prosecutor's Office of Georgia which will investigate the facts of torture and ill-treatment. The head of the department reports to the Prosecutorial Council once in six months on the conducted activities. According to the draft head of the department and other officials will be appointed in compliance with the existing rule and pursuant to the decision of the Chief Prosecutor. The only novelty in this structure is the procedure of dismissal of an official from office, which requires the consent of the Prosecutorial Council and after that the resolution of the Chief Prosecutor. Otherwise the department has the same authority as other currently functioning units and no novelty has been offered so far.

Additionally, it should be mentioned that special department within the Prosecutor's Office has been created, responsible for investigating the facts of ill-treatment committed in the past (Department for Investigation into Crimes Committed throughout the Legal Process). Georgian government attempted to declare the department as an institution specialized in the investigation into the facts of ill-treatment. Namely, in a letter sent to the European Committee against Torture, the Georgian government pointed out that the aim of this

⁵⁹ Manfred Novak, Council of Europe's Expert Opinion on the Model of an Independent Torture Investigative Mechanism, 2015

department was to conduct effective investigation into crimes committed by state officials, inter alia, the facts of ill-treatment.⁶⁰ However, it should be noted that at a legislative level, the crimes committed during the judicial process are not defined separately and the cases are assigned by the Chief Prosecutor or his Deputy on an ad hoc basis. It is natural that this type of legal regulation cannot serve as the effective means for the fight against ill-treatment.

It must be noted that the draft bill offered by the Ministry of Justice, as well as the present legal framework cannot ensure coping with challenges which Georgia is currently facing as regards to the investigation of ill-treatment:

- 1) In terms of practical outcome, the victims have the same rights regarding the impact on investigation results;
- 2) According to statistical data, the effectiveness of outcome of the investigations still amounts to zero as it was the case before 2012. The prosecutor's office only pays special attention to crimes committed only before 2012.
- 3) Institutionally, Prosecutor's Office cannot be considered an impartial body, which would allow it to conduct effective criminal investigation and prosecution. **Firstly**, the allegations of ill-treatment should not be investigated by the body that has investigative powers in other areas (Prosecutor's Office conducts investigation into certain crimes and =the natural conflict of interests arises if a potential perpetrator of ill-treatment (investigator) and the investigation into the fact of alleged ill-treatment are dealt within the competence of the same agency). **Secondly**, Prosecutor's Office in Georgia is the body which provides general oversight over criminal proceedings. Consequently, if the prosecutor does not/cannot pay a special attention to obvious signs of ill-treatment (for instance when bringing a charge against the detained person), it will still be prosecutor's office's mandate to investigate a complaint about ill-treatment, among them about the prosecutor's inactivity who actually knew about or ought to have known ill-treatment. And **thirdly**, the body conducting investigation of certain crimes stipulated by Criminal Code, supervising and supporting the state prosecution in the court, cannot be independent and unbiased during the investigation of ill-treatment. To ensure effective investigation into the facts of ill-treatment, it is necessary to have an adequate legal framework and have institutionally independent and

⁶⁰ Response of the Georgian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Georgia from 1 to 11 December 2014, CPT/Inf (2015) 43

impartial body in place (certainly such an investigation should be conducted by experienced professionals).

4) **Separation of law-enforcement agencies from politics**, -given the legislation and relevant provisions, it can be considered that law-enforcement agencies are not distanced from political influence , whereas state officials are able to exert their influence on everyday activities of investigators. Consequently, politically supported potentially illegal action will remain unaddressed in any case. The latter leads to the problem that prohibition of torture and ill-treatment and prevention should not depend on the goodwill of particular officials, but there must be an institutional system in place that will preclude this practice.

Given the above, it is important to introduce such model of investigative mechanism which will be distanced from the existing investigative agencies. This will duly guarantee ruling out committing ill-treatment preventively. With this clear message all law-enforcement officials will know that their action will not remain unpunished and that nobody can defend them if they commit illegal action. At the same time, this will enhance the image and reputation of the existing law enforcement agencies in the public. If the citizens know police officials can also be held liable for illegal actions, this will build confidence toward their activities and population will have more desire to cooperate with them. ⁶¹

Recommendations

In light of the above mentioned, it is important that the Parliament and government implement the following measures in order to eliminate torture and ill-treatment:

- **Allowing the National Prevention Mechanism to have a free access to audio-video and electronic recordings;**
- **Changing the existing rules on video control of NPM meetings conducted by the with inmate while allowing taping only if the member of the National Prevention Mechanism requires so, for security reasons (without listening) ;**
- **Eliminating vague legislative provisions regarding special means provided by Imprisonment Code ;**
- **Precluding prisoners' retention in a solitary confinement/de-escalation cell for a long period or putting handcuffs on inmates as a form of punishment;**

⁶¹ Trust in police dramatically increased when in the UK, Canada, and Jamaica were formed the bodies investigating crime committed by the police

- Precluding the presence of administrative staff (as a rule in all cases) at a medical examination of prisoners.
- Specifying relevant provisions of Criminal Code of Georgia with regard to torture and ill-treatment, in order to eliminate certain vagueness, overlapping of existing provisions as well as adding relevant provisions to the legislation in order to bring it in full compliance with the essence of torture;
- Increasing the role of a judge regarding torture and ill-treatment. In particular, if a judge has a reasonable doubt that a person had been subjected to torture or ill-treatment, the judge must be afforded the possibility to order the relevant agencies conduct efficient investigation, take measures to protect the victim, transfer the person to another detention facility and allowing a person to bring relevant materials before a judge.
- Implementing/hastening penitentiary health care system into public health system;
- Implementation of relevant state programs on rehabilitation of torture victims;
- Imprisoning persons charged for administrative offences in conditions suitable for a long-term imprisonment;
- Eliminating compulsive “let’s walk” and “let’s chat” practices in the process of criminal procedures and the time of detention should be conceived the moment when the right to freedom of movement has been restricted;
- Transferring persons detained under criminal charges to the temporary detention facility in the shortest possible time;
- Creating alternative monitoring mechanism for penitentiary and other closed type facilities, which will enable relevant NGOs to conduct effective monitoring and assessment procedures;
- Extending the rights of victims in criminal procedures as in case of ill-treatment, the victim is able to appeal to the Court decision on the termination of investigation, denial of initiating/terminating criminal prosecution regardless of the crime committed.
- Creating independent investigative mechanism with the mandate to investigate and prosecute the cases regarding torture and ill-treatment.





