

**PUBLIC DEFENDER OF GEORGIA
SPECIAL REPORT
ON**

**PRACTICE OF INVESTIGATION OF ALLEGED
CRIMES COMMITTED BY LAW ENFORCEMENT
OFFICIALS, REGULATIONS AND INTERNATIONAL
STANDARDS ON EFFECTIVE INVESTIGATION**

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INTRODUCTION

Deficient investigation of cases of torture, inhumane and degrading treatment of detainees has been one of the major gaps of the legal system in Georgia over the years. This issue has been constantly raised in the reports of the Public Defender of Georgia, though no significant steps have been taken to change the established practice. The intensity of the problem became especially evident following the release of video footages in September 2012 depicting prison torture. Later, new video materials on the cases of torture and ill treatment uncovered in Western Georgia, on the territory controlled by the Ministry of Internal Affairs of Georgia, made it evident that inhumane treatment and torture was much wider in scope and not confined solely to the penitentiary system. Impunity cultivated over the years have contributed to turning such actions of law enforcement bodies into an established practice – according to the reports of the Public Defender of Georgia, investigation on the cases of ill-treatment were either not carried out, and/or were qualified as abuse of power and authority.

Proceeding from the results of the study of the appeals submitted to the Public Defender's Office (PDO) during 2013 on the cases of alleged ill-treatment, we found expedient to prepare a special report to review the gaps existing in the current legislation and practice, content of the appeals submitted to the PDO and international standards for effective investigation.

In 2013 PDO studied up to forty appeals/complaints which referred to inhumane and degrading treatment of citizens during and/or after detention from the part of law enforcers. The results of the study by the PDO show that the cases were/are being conducted based on the signs of an offence stipulated by the Article 333 of the Criminal Code of Georgia (abuse of power); furthermore, there has been no criminal prosecution launched against individual representatives of law enforcement bodies, nor a final decision taken; while in separate incidents criminal investigation was ceased or was not launched due to the absence of signs of crime. It should also be noted that the letters submitted to the PDO from the bodies carrying out the investigation, are identical in their content, indicating general investigative actions, without going down into specifics of the cases.

This special report provides an overview of the complaints reviewed by PDO, legislation of Georgia regarding investigation of the cases of illegal and degrading treatment from the part of the State authority representatives and the practice of their investigation; the report also gives a detailed review of the issues of investigation jurisdiction of the Ministry of Justice of Georgia, the Prosecutor's Office of Georgia, the Ministry of Internal Affairs of Georgia and the Ministry of Penitentiary and Corrections of Georgia – in the context of effective investigation implementation against the gaps existing in practice and legislation, and international human rights standards with regards to effective investigation. Against the backdrop of this analysis, the Public Defender of Georgia finds it necessary to create a mechanism independent from law enforcement bodies for the investigation of the cases of killing/death and / or torture, inhuman and degrading treatment committed by the representatives of law enforcement bodies. As Thomas Hammarberg, EU Special Adviser on Constitutional and Legal Reform and Human Rights issues noted in his 2013 report – Georgia in Transition – ***“Such a mechanism should***

take into account the principles of independence, adequacy, promptness, public scrutiny and victim involvement developed by the European Court of Human Rights in its jurisprudence on Articles 2 and 3 of the ECHR.”¹

This report is based on the analysis of the human rights international mechanisms, including practices of the European Court of Human Rights and the UN Human Rights Committee, legislation of Georgia and cases reviewed by PDO.

1. THE CASES OF ALLEGED ILL-TREATMENT REVIEWED BY THE PDO IN 2013

During 2013 PDO examined up to 40 appeals/complaints where the citizens referred to the incidents of inhumane and degrading treatment from the part of the law enforcers (during 2013). In isolated incidents the appeal was filed along with the relevant medical documentation and/or the body injuries were recorded by PDO staff members.

The given chapter will review 12 cases randomly selected from the 40 appeals examined by PDO, with the purpose of displaying their content, actions of the PDO and response of the investigative bodies to the complaints filed.

According to the results of the study carried out by the PDO, data obtained from the temporary detention facilities show, that the majority of complaints on ill-treatment from the part of Police refer to the actions of the Police in Marneuli, Tbilisi, Gori, Zugdidi, Batumi, Mtskheta, Telavi and Kutaisi. On number of occasions, the detainees directly indicate the names of the policemen who during and/or after detention were physically or verbally abusing them. According to the data of Kutaisi temporary detention facility, 5-5 out of 17 detainees complained about the staff of the 2nd and 4th Divisions of the Kutaisi Main Police Unit of the Ministry of Internal Affairs of Georgia; in the rest of cases, against the staff of other police departments, as well as Patrol Police and various Regional Police Divisions.

1. Mr M.G. a citizen of Georgia was detained on 28.04.13 under Article 239 of the Criminal Code of Georgia, at 21.45 and was placed in the temporary detention facility (TDF) at 00.35 on 29.04.13. The staff of the 2nd Division of Kutaisi Main Police Unit physically and verbally abused him. He had multiple injuries - bruises, excoriations on the face and all over the body.

2. Mr Ts.G. a citizen of Georgia was detained on 08.05.13 under Article 173 of the Code of Administrative Offences of Georgia, at 01:10 hrs, was admitted to TDF at 07:25 hrs. The staff of the 4th Division of Kutaisi Main Police Unit physically and verbally abused him/her; had bruises over the body.

3. Mr G.E. citizen of Georgia was detained on 12.03.13 under Article 173 of the Code of Administrative Offences of Georgia, at 23:00 hrs, was admitted to TDF on 13.03.13 at 02:00 hrs. At Bolnisi Police premises the policemen verbally and physically abused him; he had excoriations on the upper and lower limbs, redness and swelling between eyebrows.

¹ GEORGIA IN TRANSITION, Report on the human rights dimension: background, steps taken and remaining challenges, Thomas Hammarberg, EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, 2013. p.22

4. Mr M.Ch. – citizen of Georgia was detained under Articles 166 and 173 of the Code of Administrative Offences on 10.04.13, at 19:00 hrs and was admitted to TDF at 22:00. Staff member of Sadakhlo Division of Marneuli Police Unit – Mr M.Sh. physically abused him; the detainee had injury of his right wrist joint.

THE CASE OF MR G.KH.

On 26 February 2013 Representative of the Public Defender of Georgia obtained a written statement from Mr G.Kh. According to him, on 2 January 2013, Gurjaani Police Detective-Investigator Mr D.V. verbally and physically abused him. In addition, G.Kh. claimed that V.D. detained him for disobedience to Police orders and never informed him about his procedural rights guaranteed under the law. According to the applicant, he addressed Gurjaani Prosecutor's Office with the complaint on 3 January 2013 and although the investigation was opened, Mr G.Kh. believed that it was ineffective and unduly delayed. By that time, Mr G.Kh. was not questioned and did not have the victim status.

On 12 March 2013, PDO addressed the Chief Prosecutor's Office of Georgia. On 28 March 2013 the Chief Prosecutor's Office of Georgia informed the PDO that based on the complaint filed by Mr G.Kh, on 3 January 2013 an investigation was opened by the Gurjaani Regional Prosecutor's Office on the fact of abuse of authority by the representatives of Gurjaani Regional Unit of the Ministry of Interior under Article 333 of the Criminal Code of Georgia. The letter also stated that there was no sufficient evidence gathered to grant victim status to Mr G.Kh.

THE CASE OF MR I.K.

On 26 February 2013 Representative of the Public Defender of Georgia obtained written statement from Mr I.K. According to I.K, on 8 December 2012 three staff members of Gurjaani Police Department – Mr R.K. and the other two policemen, physically and verbally abused him. Mr I.K. claimed that he was detained with the charges of disobedience to the police orders and never clarified his procedural rights guaranteed under the law.

On 12 March 2013 the PDO addressed the Prosecutor's Office of Georgia for a follow up, receiving a reply on 28 March 2013 that on 19 December 2012 investigation was launched at Gurjaani Regional Prosecutor's Office on the fact of abuse of authority by the representative of Gurjaani Police Unit under Article 333 of the Criminal Code of Georgia.

THE CASE OF MR V.K.

On 11 February 2013 Mr V.K. – a convict from the Penitentiary Department Facility No8 addressed the Public Defender of Georgia on alleged illegal actions against him committed by the law enforcers and requested meeting with the representative of the PDO. Hence, on 20 February 2013 a representative of the PDO visited Mr V.K at the No 8 Prison and drew up the protocol giving with the details of alleged crime. According to Mr V.K's statement and the protocol he was detained in mid-January 2013, at Sarpi border cross-point. The applicant claimed that after detention he was transferred to Gurjaani Regional Police Unit, where four policemen physically and verbally abused him, forcing

him to confess committing theft, resulting in dislocation of the right arm, suffering from headaches, pain in kidney area and neurosis.

On 13 March 2013, the PDO addressed the Chief Prosecutor's Office of Georgia for further follow up, receiving the response on 27 March 2013 that on 21 February 2013 there was an investigation initiated at Kakheti Regional Prosecutor's Office Investigation Department on the fact of abuse of authority from the police officers of Gurjaani Police Unit under Article 333 of the Criminal Code of Georgia.

THE CASE OF MR T.A.

On 23 January 2013 Representative of the Public Defender of Georgia obtained written statement from Mr T.A. stating that on 6 January 2013 policemen abused him verbally and physically, first in the police car, where he was pushed by force, and later in Vani Police Department, in addition violating his procedural rights.

On 27 February 2013, the PDO addressed the Chief Prosecutor's Office of Georgia, receiving the response on 13 March 2013 that on 11 March 2013 the investigation was opened by Samtredia Regional Prosecutor's Office on the fact of abuse of power by the Staff of Vani Regional Division of Ministry of Internal Affairs of Georgia, under Article 333, para. 1 of the Criminal Code of Georgia.

THE CASE OF MR Z.KH.

On 10 February 2013, representatives of the Public Defender of Georgia obtained written statement at Adjara and Guria regional TDF's from Mr Z.Kh., stating that on 8 February 2013 he was subject to ill-treatment from the part of law enforcers, having incurred physical and verbal abuse, as well as violation of procedural rights guaranteed under the law.

The PDO addressed the Chief Prosecutor's Office of Georgia for further follow up receiving the response on 21 February 2013 stating that on 20 February 2013 investigation was launched by the Investigation Unit of Adjara Autonomous Republic Prosecutor's Office on the fact of abuse of power by the staff of the Ministry of Internal Affairs of Georgia, under Article 333, para. 1 of the Criminal Code of Georgia.

THE CASE OF MR M.G.

On 5 September 2013 the Public Defender of Georgia was addressed by Mr M.G. , stating that on 10 March 2013 he was released from detention under the Law of Georgia on Amnesty, adopted on 28 December 2012. Within 10 days after being released, the Deputy Head of Tskhaltubo Police Department of the Ministry of Internal Affairs of Georgia summoned him to the Police Department and demanded that he leave the territory of Georgia, otherwise threatening his life. According to M.G., on 31 August 2013 he was detained near his house by the Head of Tskhaltubo Police Department Mr R.K and his deputy S. (could not recall the surname). The mentioned persons put Marihuana in the pocket of M.G.'s trouser and filled out the relevant protocol. According to M.G.'s accounts, the mentioned persons beat him in his head and legs, offering him to cooperate with the Police and promising to burn the protocol. M.G. submitted that later on, he was released; however, R.K. threatened him to kill and detain M.G.'s son if he would not

fulfil the task they gave to him within the following 5 days.

On the given case the Public Defender of Georgia was informed by the Chief Prosecutor's Office of Georgia that on 28 January 2014 investigation was launched at Kutaisi Regional Prosecutor's Office on the criminal case №041280114802, on the abuse of power from the part of the staff of the Tskaltubo Regional Division of the Ministry of Internal Affairs of Georgia, under Article 333, para. 1 of the Criminal Code of Georgia.

THE CASE OF MR V.L.

According to the statement of Mr V.L. on 27 October 2013 around 21:00 hrs he was in Rustavi, at A.G.'s residence on Balanchivadze Street. There was also the Head of Rustavi Police Division of the Ministry of Internal Affairs of Georgia Mr Z.A. who verbally abused him and left the place soon. As stated by Mr V.L. he again met with Mr Z.A. when leaving the house near the block of flats. V.L. was forcefully pushed in a car by Mr Z.A., beating him with hands and unidentified object in his hand, putting an unlocked gun to his face and trying to choke him with another hand. V.L. was released from Z.A.'s car by acquaintances and passers-by who took him to the place of one of the person's present at the scene of the incident. When leaving that house, V.L. again was met by Z.A. together with 10-12 policemen, who dropped V.L. on the ground and beat up mercilessly. V.L. lost consciousness and recovered at Rustavi Police Department No 2, where his beating continued. The same night V.L. was moved to Gardabani TDF where he required emergency medical care.

Based on the information obtained by the PDO from the Chief Prosecutor's Office, a criminal case was initiated against V.L. at Rustavi City Department of the Ministry of Internal Affairs of Georgia No2 on the incident involving elements of crime stipulated under Article 353¹ para. 1 of the Criminal Code of Georgia (assault on the policeman, other representative of government or public institution).² On 24 January 2014 a separate criminal case was opened on the fact of abuse of power by the staff of the Police Department, though charges were not brought against any specific person.³

THE CASE OF MR SH.K. AND MR A.J.

The appeal of the attorney of the citizens Sh.K. and A.J. to the PDO stated that on 27 October 2013 at 2 a.m. at Rose Square in Tbilisi, policemen dressed in civilian clothes beat up Sh.K. and A.J., moving them later to Old Tbilisi Regional Police Department, where they continued beating of the detainees. According to the information provided to PDO by the Ministry of Internal Affairs of Georgia, there has been a case initiated against the detainees on 28 October 2013 on the crimes stipulated by the Article 260 of the Criminal Code of Georgia, however Marihuana removed as a result of the personal search of Mr Sh.K. did not contain narcotic substances in the amount which would suffice to start the criminal proceedings. Hence, the case against Sh.K. was closed and he was released, while A.J. was never detained by the law enforcers.⁴

2 Letter of the Chief Prosecutor's Office of Georgia of 27 January 2014.

3 Letter of the Chief Prosecutor's Office of Georgia of 7 March 2014.

4 Letter of the Ministry of Internal Affairs of Georgia of 11 February 2014.

Sh. K.'s attorney presented a medical report prepared by Levan Samkharauli Bureau of Forensic Expertise based on the request of 29 October 2013 on the health condition of Mr Sh. K. The medical report states that Mr Sh.K. has injuries (bruises) in the face area, which time-wise do not conflict with the date indicated in the case materials. On 21 March 2014 the Public Defender of Georgia addressed the Chief Prosecutor's Office of Georgia with the request to initiate an investigation on the alleged ill-treatment of Mr Sh.K.

THE CASE OF MR Z.K.

According to the statement of Mr Z.K. since 2012 he had been subject to permanent psychological pressure and intimidation from the part of Rustavi Police staff to cooperate with the law enforcement bodies and provide them with the information about alleged perpetrators. Mr Z.K. also stated that on 6 February 2013 the head of Rustavi Police Department Mr D.S. and 15 other policemen physically abused him. He also claims that his procedural rights have been violated.

Based on the information received by the PDO from the Chief Prosecutor's Office of Georgia, on 22 February 2013 there was an investigation initiated at Kvemo Kartli Regional Prosecutor's Office Investigation Department on the criminal case involving abuse of power by the police staff members, as per Article 333, para. 3 (G) of the Criminal Code of Georgia. Z.K. was interrogated as a witness, along with his family members, neighbours and police staff; Z.K. underwent forensic examination. The criminal investigation continues. Z.K. was not granted the victim status in the case, and no criminal charges have been brought against any individual.

THE CASE OF MR K.K.

According to the statement provided to a representative of the Public Defender of Georgia from the convicted K.K, on 7 December 2012 he was detained in Poti and transferred to Zugdidi TDF where he was subject to physical and verbal abuse from the part of law enforcers. The applicant claimed that on 11 September 2013 he was released under bail, however, while transferring to Tbilisi Main Department of the Ministry of Internal Affairs of Georgia to supposedly sign the bail papers, while in police car and then at Tbilisi Main Department, he was physically and verbally abused, as a result of which he incurred injuries, namely, he had broken toes on his right feet. Furthermore, based on K.K.'s claims, he was subjected to physical and psychological pressure, even after being transferred to Penitentiary Facilities No 7 and No 8.

The PDO requested materials of the case from the Chief Prosecutor's Office of Georgia. The letter of the Chief Prosecutor's Office of Georgia sent to the PDO stated that on 14 May 2013 Tbilisi Prosecutor's Office's Investigation Department launched criminal investigation on the case #010140513801, on the abuse of power from the part of the staff of the Ministry of Internal Affairs of Georgia, under article 333 of the Criminal Code of Georgia. On 25 June 2013 the convict K.K. was questioned as a witness on the fact of his alleged ill-treatment committed by the police officers. The investigation on the case is ongoing.

THE CASE OF MR B.G.

Based on the information disseminated by media sources, on 16 January 2013, the Public Defender of Georgia, pursuant to Article 12 of the Organic Law of Georgia on Public Defender, started studying the fact of alleged ill-treatment of a juvenile B.G, by the representatives of the Ministry of Internal Affairs of Georgia. Namely, the juvenile B.G. accused the staff of Vake-Saburtalo Division of Tbilisi Main Police Unit of the Ministry of Internal Affairs of Georgia in inflicting pressure, intimidation and verbal abuse against him and his brother, during their interrogation as witnesses on 8 January 2013.

According to the verification results by the PDO no investigation has been initiated on this fact at the Chief Prosecutor's Office of Georgia.⁵ There has been no investigation carried out by the Ministry of Internal Affairs of Georgia either. The only response was internal inspection carried out by the General Inspection of the Ministry of Internal Affairs of Georgia.⁶

THE CASE OF MR V.B.

On 14 November 2013 the Public Defender of Georgia was addressed by Mr V.B. stating that on 12 November 2013 at about 13.15 hrs, he was in Tbilisi, in the office of his brothers T. and R. B. at 23 Mazniashvili Street, when two persons dressed in civilian clothes requested ID from certain G.M. working nearby. In reply to the quires of Mr V.B. what was the reason of their request, the men stated that they were policemen and showed their business cards. Mr V.B. joined in the conversation stating that he knew Mr G.M. very well. He had hardly finished the sentence when one of the policemen first abused him verbally, then dropped him down and forcefully pushed in the white Skoda Octavia car. V.B. stated that policemen continued beating him in the car, delivering him to Old Tbilisi Police Department while being already unconscious. Seeing the health condition of the detainee, his brother - T.B. requested from the Head of the Police Department to perform his medical examination, though V.B. was sent to Tbilisi City Court without medical assistance.

On 28 November 2013 PDO got Mr V.B.' administrative case materials from the Tbilisi City Court. According to the case file, on 22 November 2013 Administrative Collegium of Tbilisi City Court made a decision to issue a verbal note to V.B on the fact of committing administrative offence provided under Article 173 of the Code of Administrative Offences of Georgia (disobedience to lawful order or request).

On 20 November 2013 the PDO addressed the Chief Prosecutor's Office of Georgia with the request to follow up on V.B.'s complaint, attached with the medical report and the conclusion of the forensic examination conducted by Levan Samkharauli Bureau of Forensic Expertise on the damage incurred to Mr V.B.'s health. V.B.'s statement concerning his beating, made at the court hearing in Administrative Collegium of Tbilisi City Court while examining the case against him, is reflected in the protocol. Based on the information received from the Chief Prosecutor's Office of Georgia, on 30 December 2013 there was an investigation initiated on the criminal case №006301213801 on the abuse of power under article 333, para. 1 of the Criminal Code of Georgia.⁷

5 Letter of the Chief Prosecutor's Office of Georgia of 8 February 2013.

6 Letter of the Ministry of Internal Affairs of Georgia of 19 February 2013.

7 Letter of the Chief Prosecutor's Office of Georgia of 3 January 2014, №13/201.

Due to increased number of applicants and complaints submitted to the Office of public Defender on alleged ill-treatment committed by law enforcement officials, the Public Defender of Georgia addressed the Minister of Internal Affairs of Georgia, the Minister of Justice of Georgia and the Chief Prosecutor of Georgia on 29 May 2013⁸, and requested, on the one hand, to carry out preventive measures, in order to prevent committing criminal acts by police officers and on the other hand, to conduct effective and prompt investigation on alleged misconduct of law enforcers.

According to the information received from the Chief Prosecutor's Office of Georgia, out of 9 facts mentioned in the recommendation of the Public Defender of Georgia,⁹ the facts of crimes committed by the law enforcers were not confirmed in 2 cases, and hence, the investigation was ceased; while in the remaining cases, investigations was ongoing and relevant investigative agencies were given further instructions, through no final decisions were reached yet.¹⁰

According to the information obtained by the PDO from the Chief Prosecutor's Office of Georgia in the above-mentioned individual cases, as a rule, there is no criminal prosecution initiated against any individual, nor final decisions are reached. Initiation of criminal investigation on the facts of alleged ill-treatment and/or abuse of power by law enforcers, unreasonably delayed investigations and insufficient involvement of interested parties in the criminal proceedings, will not ensure fulfilment of Government's positive obligation to carry out timely, effective and independent investigation of such cases. Furthermore, the cases discussed above, reveal the same trend as it used to be the practice of investigative authorities for many years - giving qualification of abuse of power to the alleged facts of ill-treatment committed by police officers, and conducting investigation under Article 333 of the Criminal Code of Georgia (abuse of power).

2. INTERNATIONAL STANDARDS OF EFFECTIVE INVESTIGATION

Investigation is one of the composites of the State's police function and hence, is subject to State domestic law regulations. Nevertheless, there are obligations stemming from international human rights (prohibition of torture, the right to life) mechanisms and international cooperation against cross-border crimes, which domestic investigation mechanisms should comply with, so that the State meets its international commitments. According to the United Nations Human Rights Committee General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant),¹¹ "administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies [...] A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant [...]" While reviewing individual complaints, Human Rights Committee

8 In his statement of 29 May 2013 the Public Defender of Georgia described 10 facts of alleged ill-treatment from the part of the law enforcers being reviewed by the PDO.

9 Based on the Letter of the Chief Prosecutor's Office of 27 June 2013, identification of G.M's case failed.

10 Letter of the Chief Prosecutor's Office of 27 June 2013.

11 General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 26 May 2004 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en

often requests from the States to carry out comprehensive and prompt investigation, which will make it possible to bring perpetrators to justice.¹²

Number of UN General Assembly resolutions and declarations establishing standards and norms for crime prevention and criminal justice system,¹³ indicate on the obligation for conducting prompt, precise and unbiased investigation.¹⁴

More detailed standards related to investigation are established by Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁵ (hereinafter - Principles for the Investigation of Torture) and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions¹⁶, (hereinafter – Principles for Investigating Extra-legal Executions). The both documents require that¹⁷:

- The state should ensure prompt and effective investigation into the case, even if there is no formal statement about the alleged cases of ill-treatment or the extralegal death penalty;
- The investigators are independent from alleged violators and the bodies, where the suspects serve. They should be competent and unbiased. Alleged criminals should be freed from their posts, if they directly or indirectly oversee or exercise control over complainants, witnesses and their families, as well as investigative bodies;
- Investigative body should have authority and obligation to obtain all the information necessary for the investigation. It should have authority to summon officials connected with the case, carry out interrogation and request submission of all the relevant evidence. It should also have all the necessary budgetary and technical resources for ensuring effective investigation;
- Victims and their families should be protected from violence and have access to full information related to investigation;
- When the established investigation procedures are inadequate, expertise is poor or there's alleged bias or clear example of abuse of power, or based on other significant circumstances, the State must ensure that an independent in-

12 Main Cases Reviewed by Human Rights Committee, 2006, pp.. 55, pp. 81.

13 Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice. Can be accessed at: <http://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html>

14 E.g. see: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173, Annex, Principle 7 and Principle 9), Guidelines for Action on Children in Criminal Justice System (Economic and Social Council Resolution 1997/30, II.B.25), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution3452(XXX) Annex, Principle 8 and Principle 9).

15 Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 55/89, Annex).

16 Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, (Economic and Social Council resolution 1989/65, Annex).

17 Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, (Economic and Social Council resolution 1989/65, Annex).

vestigative body is created, whose members are selected based on their independence and competency, or have other similar procedure implemented for ensuring impartiality.

The principles for investigating torture are also part UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).¹⁸ Istanbul Protocol contains additional standards for the selection of adequate investigative body on the case of torture:

“In cases where involvement in torture by public officials is suspected, including possible orders for the use of torture by ministers, ministerial aides, officers acting with the knowledge of ministers, senior officers in State ministries, senior military leaders or tolerance of torture by such individuals, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise or the impartiality of the investigators is called into question.”¹⁹

Istanbul Protocol paragraph 86 lists the factors which can trigger the creation of a special impartial investigation mechanism:

- (a) Where the victim was last seen unharmed in police custody or detention;
- (b) Where the modus operandi is recognizably attributable to State-sponsored torture;
- (c) Where persons in the State or associated with the State have attempted to obstruct or delay the investigation of the torture;
- (d) Where public interest would be served by an independent inquiry;
- (e) Where investigation by regular investigative agencies is in question because of lack of expertise or lack of impartiality or for other reasons, including the importance of the matter, the apparent existence of a pattern of abuse, complaints from the person or the above inadequacies or other substantial reasons.”

Such independent investigative commissions should observe globally recognised procedural guarantees. They should be provided with technical and administrative staff and unbiased legal consultation, have full access to State resources and have the authority to garner the support of international experts in the fields of law and medicine.

UN 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment clearly points to the State’s obligation to conduct a prompt and impartial investigation, when there are reasonable grounds to assume that the act of torture is committed within its jurisdiction (article 12). While monitoring the implementation of the Convention, the Committee against Torture in its annual report to the UN GA noted that 15 month delay in investigating alleged torture claims is unreasonably long period and

18 Can be accessed at: <http://www.un.org/en/events/torturevictimsday/documents.shtml>

19 Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, 2004, para. 85-87.

violates the requirement for prompt investigation reflected in the Article 12. The Committee also highlighted that alleged victim's official statement should not be necessary for initiating a prompt and impartial investigation, after the victim's side reveals that torture took place.²⁰

Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 defines the obligation for the protection of human rights and states that the signatory parties within their jurisdiction must ensure protection of the rights and freedoms defined by the Chapter 1 of the Convention. European Court of Human Rights and Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as Council of Europe Human Rights Commissioner actively cooperate to develop constantly updated standards as to what criteria should investigations conducted by a State comply. The Joint Programme between the Council of Europe and the European Union - Reinforcing the Fight against Ill-treatment and Impunity produced a publication on the Effective Investigation of Ill-treatment: Guidelines on European Standards,²¹ which bring together the most significant criteria defining the effectiveness of investigation based on the practice of the European Court of Human Rights and reports of the Council of Europe Committee against Torture.

It is also important to underline a general approach of the European Court of Human Rights (ECHR) towards the State's positive obligations to carry out effective investigation according to Article 2 (the right to life), Article 3 (prohibition of torture) and Article 13 (right to effective domestic remedy). According to the established practice of ECHR, obligations refer to means rather than results²². According to ECHR, "State bodies should take effective steps to obtain reliable evidence (including witness accounts and forensic evidence, as well as autopsy if necessary), so that the investigation is able to identify and punish the criminals."²³ With regards to effective investigation, in the case *Enukidze and Girgvliani v. Georgia*, ECHR reiterated that "the investigation must be effective in the sense that it is capable of leading to the establishment of the relevant facts and the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure all the evidence concerning the incident. The investigation's conclusions must be based on thorough, objective and impartial analysis of all the relevant elements. [...]. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness."²⁴

According to the established practice of the ECHR, effectiveness of the investigation is defined according to the following criteria:

20 Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, 2004, para. 14.

21 Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards* p.8

22 E.g. see (*Avşar v Turkey*, No. 25657/94, 10.7.01, para. 404.

23 Philip Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, 2011, p. 200.

24 *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26.04.2011, para. 242.

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- independence and impartiality;
 - thoroughness;
 - promptness;
 - competence;
 - victim participation in public oversight

3. COMPLIANCE OF THE GEORGIAN LEGISLATION AND PRACTICE WITH EFFECTIVE INVESTIGATION STANDARDS

I. INDEPENDENCE AND IMPARTIALITY

The issue of investigation jurisdiction is directly linked with an essential component of effective investigation, i.e. its independence and impartiality.

In the case of *Enukidze and Girgvliani against Georgia*, ECHR stated: “For an investigation to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence. The effective investigation required under Article 2 serves to maintain public confidence in the authorities’ maintenance of the rule of law, to prevent any appearance of collusion in or tolerance of unlawful acts and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”²⁵

In the case of *Enukidze and Girgvliani against Georgia* “institutional connection and even hierarchical subordination between the implicated senior officers of the Ministry of the Interior and the investigators in charge of the case is even more striking when assessed against the fact that a member of the Minister’s wife’s group in the café and, at the same time direct superior, was subsequently the person responsible in the Ministry for the investigation of Sandro Girgvliani’s death.” It clearly represented a conflict of interest, which together with the other circumstances became basis to conclude that the investigation lacked independence and impartiality.

Due to institutional linkages, investigation was not deemed independent in *Mikiashvili’s* case either.²⁶ The investigation on ill-treatment in prison was carried out by the Investigation Department of the Ministry of Justice of Georgia, while the Ministry of Justice also represented a body responsible for penitentiary system at large.

Furthermore, the requirements of independence and impartiality extends not only over the persons carrying out investigation, but also all the persons who are engaged in the process of investigation and take respective decisions, “including persons, who are engaged only at a certain stage of investigation, forensic physicians, chief prosecutors and special agencies.”²⁷ For example, in the case of *Dvalishvili v Georgia*, the Court did not find two medical reports reliable and cited its established practice that “he medical ex-

25 *Enukidze and Girgvliani v Georgia*, No. 25091/07, 26.04.2011, para. 243.

26 *Mikiashvili v Georgia*, No. 18996/06, 09.10.2012, para. 87. See also *Tsintsabadze v Georgia*, No. 35403/06, 15.02.2011, para. 78.

27 Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards* p.53

aminations of presumed victims of ill-treatment should be conducted outside the presence of police officers and other government officials in order to attain the required standards of independence and thoroughness.”²⁸

Apart from additional institutional and hierarchical linkages, practical independence is also necessary, which is more difficult to trace and requires the analysis of the linkages between specific persons and institutions. In the assessment of independence, the Court takes into consideration whether an investigative body, prosecutor’s office or a court share without verification the version of suspected authorities or officials regarding the case under investigation, which, in itself, could indicate lack of practical independence.”²⁹

In this regard, reference made in Council of Europe Council against Torture General Recommendation 14, that: “combating impunity must start at home, that is within the agency (police or prison service, military authority, etc.) concerned. Too often the esprit de corps leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues.”³⁰ The esprit de corps has to be taken into account during the assessment of the possible practical linkages between the agency responsible for investigation and the suspected body.

ECHR practice indicates that the requirement of conspicuous impartiality differs from the requirement of independence. An example of investigator’s impartiality violation can be seen in the case of 97 Members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v Georgia.³¹ In response to the communication on ill-treatment of Jehovah’s Witnesses from the part of the group of Orthodox Christians, an investigator said that he could not have been impartial because of his Orthodox faith. Later, instead of clarifying the case of alleged perpetrators, he started interrogating the victim on the violation allegedly committed by him/her. Both the practice of ECHR as well as CPT indicate that the conflict of interest is evident when one and the same person is in charge of an investigation against a particular person and at the same time investigate the cases of ill treatment committed against the same person. This puts the impartiality of investigation under question mark.³²

i. LEGISLATION OF GEORGIA RELATED TO THE INVESTIGATION OF CRIMINAL CASES

To review independent and impartial investigation details in the Georgian legislation and practice, it is essential to review the existing legislative regulations.

According to the Constitution of Georgia,³³ investigation falls solely under special authority of Georgia’s highest State institutions. Georgian Criminal Procedure Code offers

28 Dvalishvili v Georgia No. 19634/07, 18/12/2012, para. 47.

29 For example, see Gharibashvili v Georgia, No. 11830/03, 29.07.2008, para. 73, Mikiashvili v Georgia, No. 18996/06, 09.10.2012, para. 87, Tsintsabadze v Georgia, No. 35403/06, 15.02.2011, para. 78.

30 14th General Report of the Committee Against Torture on CAT’s activities, 21 September 2004, Chapter 2 – Combating Impunity para. 26, can be accessed at: <http://www.cpt.coe.int/en/annual/rep-14.htm>

31 97 Members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v Georgia, No. 71156/01, 03.05.2007, para. 117.

32 Erik Svanidze, Effective Investigation of Ill-Treatment: Guidelines on European Standards p 56

33 Constitution of Georgia, Article 3, para. 1-R

legislative definition of the concept of investigation.³⁴ Investigation is a set of action carried out by an authorised person according to the rules set forth by the Code, with the aim of gathering crime-related evidence.³⁵ According to the same Code, an investigator is a State official who is entitled within the authority granted to him to pursue criminal investigation. A prosecutor personally conducting investigation assumes the status of an investigator.

Criminal Procedure Code of Georgia³⁶ gives exhaustive list of bodies and their investigators authorised to pursue criminal investigations. They are as follows:

1. Investigators of the Ministry of Justice of Georgia
2. Investigators of Ministry of Internal Affairs of Georgia
3. Investigators of the Ministry of Defence of Georgia
4. Investigators of Ministry of Penitentiary and Corrections of Georgia
5. Investigators of the Investigation Department of the Ministry of Finance of Georgia.

Unlike the Criminal Procedure Code of Georgia effective prior to 1 October 2010, the current Code does not include the rules for agency and territorial subordination, the Criminal Procedure Code of Georgia only indicates³⁷, that investigative subordination is defined by the Minister of Justice of Georgia based on the suggestion of the Chief Prosecutor of Georgia. Territorial subordination³⁸ is also defined by the Ministry of Justice upon the suggestion of the Chief Prosecutor of Georgia.

Agency and territorial subordination of investigation is regulated by the Order 34 of the Minister of Justice of Georgia issued on 7 July 2013 concerning determination of territorial and investigative jurisdiction of criminal cases.

Below we will discuss in detail investigative authorities and competencies of the Ministry of Internal Affairs of Georgia, the Ministry of Justice of Georgia, Chief Prosecutor's Office of Georgia and the Ministry of Penitentiary and Corrections of Georgia according to the above-mentioned order and other Georgian legislation, as well as authority of the Chief Prosecutor's Office of Georgia over investigative procedure, and authorities of the General Inspections of the listed institutions in terms of performing internal oversight and investigation.

THE MINISTRY OF INTERNAL AFFAIRS OF GEORGIA

According to the Resolution of the Government of Georgia No 337, Article 3 of 13 December 2013 on approving the Statute of the Ministry of Internal Affairs of Georgia, the Ministry's field of activities are: ensuring State security and public order, identifying crime and other violations of the State interests by foreign countries, organizations and individuals goals and actions, for prevention, investigation and analysis, as well as to ensure the protection of the State border. Article 4-B of the same resolution defines ob-

34 Criminal Procedure Code of Georgia, Article. 3, para. 10.

35 Criminal Procedure Code of Georgia, Article. 37

36 Criminal Procedure Code of Georgia, Article. 34-1.

37 Criminal Procedure Code of Georgia, Article 35.

38 Criminal Procedure Code of Georgia, Article 36.

jectives of the Ministry of Internal Affairs of Georgia, including: implementation of measures to prevent possible threat of crime and other offenses for their prevention and suppression, their detection, investigation, ensuring of search and arrest of accused and convicted, as well as identification of unidentified corpses, analysis of crime and other offenses, possible threats, risks and challenges and development of tactics and strategies for combating crime.

According to a general rule defined by para. 1 of the Order 34 of the Minister of Justice of Georgia dated 7 July 2013, criminal case falls under jurisdiction of the investigative departments of the Ministry of Internal Affairs of Georgia, unless otherwise stipulated by the same Order. I.e. all criminal cases are investigated by an investigator of the Ministry of Internal Affairs of Georgia, apart from the cases when a different rule is applied as per the mentioned Order.

Based on the para. 4 of the Annex to the same Order, investigative jurisdiction of an investigator of the bodies of the Ministry of Internal Affairs of Georgia also covers crimes described in the Articles 332, 335, 337 and 342 of the Criminal Code of Georgia³⁹ when these crimes have been revealed by the bodies of the Ministry of Internal Affairs of Georgia (apart from the cases defined by the para. 2 and para. 7 of the same Annex). The para. 2 and para. 7 of the same Annex defines the jurisdiction of the investigator of the Chief Prosecutor's Office of Georgia covering the crimes committed by the President of Georgia, Member of the Parliament of Georgia, a Judge, the Public Defender of Georgia, General Auditor, Member of the National Bank Board, Policeman, high military officers or officers having a special title, or persons equal to them in status. Hence, if the crimes committed by the above-mentioned persons are uncovered by the Ministry of Internal Affairs of Georgia, the investigation is carried out by the Chief Prosecutor's Office of Georgia. At the same time, para. 7 of the same Annex gives authority to the investigator of the respective department of the Ministry of Justice of Georgia to investigate the crimes committed by the staff of the same ministry (apart from Prosecutor's Office employees), irrespective whether it is uncovered by the Ministry of Internal Affairs of Georgia or not.

Pursuant to Article 9 of the Annex to Order No 34 of the Minister of Justice of Georgia dated 7 July 2013, if the crimes described in the Articles 383 – 403 of the Criminal Code of Georgia⁴⁰ are committed by the employee of the Ministry of Internal Affairs of

39 Malfeasance: Misuse of authority; Abuse of authority; illegal dismissal of the defendant's criminal responsibility; compulsion to interpret, give testimony or conclusion; taking part in unlawful business practices; accepting bribes; bribery; trading under the influence; accepting gifts prohibited by law; falsification and negligence;

40 Failure to comply with the chief's orders; resistance to the chief or compulsion to break his/her duties; violence against the chief; violation of subordination rules between subordinated military personnel; abuse of military personnel; abandoning the military service or other place without permission; desertion; avoidance of military service due to simulated illness or other forms of deception; avoidance of military-reserve service due to simulated illness or other forms of deception; leaving a distressed military ship; violation of combat rules (military service rules); violation of border service rules; violation of guard service rules; violation of service rules while guarding public order and public safety; violation of Internal Service Statute and the garrison patrol rules; intentionally damaging or destroying military property; violation of the rules for military property maintenance; violation of the rules for vessel management or operation; violation of handling of guns containing increased risk to the surrounding people.

Georgia, the crime is investigated by an investigation department of the same Ministry. Generally, the investigation of such crimes falls under the jurisdiction of the investigative department of the Ministry of Defence of Georgia.

THE MINISTRY OF JUSTICE OF GEORGIA

As per the Resolution No 389, Article 3 of the Resolution of the Government of Georgia regarding the Approval of the Statute of the Ministry of Justice of Georgia, the key governance areas and objectives of the Ministry are as follows: carrying out criminal prosecution; providing procedural guidance at the preliminary investigation stage of criminal prosecution (para.“S”); carrying out full investigation in the cases defined by Law. According to the Article 4 - H¹²-H¹³ of the same Resolution, the Ministry of Justice of Georgia has a jurisdiction to carry out criminal prosecution, ensure procedural guidance at the investigative stage to the provision of criminal prosecution; in the cases defined by Law, implementation of the full investigation; implementing operative-investigative activities according to the rules defined by the Georgian legislation; oversight over the operative-investigative bodies for ensuring precise and uniform implementation of the Law.

Pursuant to Article 7 of the Annex to Order No 34 of the Minister of Justice of Georgia dated 7 July 2013, investigators of the respective department of the Ministry of Justice of Georgia investigate crimes stipulated by 332, 333, 335, 337 and 342 Articles of the Criminal Code of Georgia committed by the employees of the system of the Ministry of Justice of Georgia (except the staff of the Prosecutor’s Office).

Prosecutor’s Office of Georgia

According to the Article 1 para. 1 of the Law of Georgia on Prosecutor’s Office, the Prosecutor’s Office of Georgia (hereinafter – Prosecutor’s Office) is a sub-agency within the system of the Ministry of Justice of Georgia, which exercises its authority within the framework of the legislation of Georgia.

Article 3 of the same Law defines the following objects of the Prosecutor’s Office: criminal prosecution, provision of procedural guidance at the investigation stage, implementation of full investigation on the cases defined by Law, inspection of the violations of the rights of the persons deprived of liberty, and carrying out procedural obligations at the detention facilities, prisons, penitentiary and other institutions, which execute punishment or carry out other compulsory measures defined by the Court.

Pursuant to Article 15 of the Law of Georgia on the Prosecutor’s Office, the Prosecutors Office carries out full investigation according to the rules defined by the Criminal Procedure Code of Georgia on the cases of crime and other illegal activities, and can implement operative-investigative activities.

Article 3 of the Order No 38 of the Minister of Justice of Georgia dated 10 July 2013 regarding the approval of the Statute of the Chief Prosecutor’s Office of Georgia, defines key areas of the Chief Prosecutor’s activities: implementation of criminal prosecution, for ensuring criminal prosecution, provision of procedural guidance at the investigative stage, implementation of full investigation in the cases defined by Law.

Investigative jurisdiction of the Prosecutor's Office investigator covers crimes defined by the Articles 332, 335, 337, 342 of the Criminal Code of Georgia (except the cases envisaged by the Articles 4 and 7 of the Order No 34 of the Minister of Justice of Georgia, dated 7 July 2013), as well as the crimes as per Articles 194 and 194¹. Article 4 of the Annex to Order No 34 of the Minister of Justice of Georgia of 7 July 2013 gives authority to the Ministry of Internal Affairs of Georgia to investigate the cases of malfeasance if they are uncovered by the Ministry of Internal Affairs of Georgia. However, if the crimes are committed by a staff serving in the system of the Ministry of Justice of Georgia (except the staff of the Prosecutor's Office), the investigation is carried out by the Ministry of Justice of Georgia, however if the crime is committed by the President of Georgia, Member of the Parliament of Georgia, Prosecutor of Georgia, the Public Defender of Georgia, General Auditor, Member of the National Bank Board, Georgia's Plenipotentiary Ambassador and Envoy, Staff of the Prosecutor's Office, Policeman, high military official, or an officer carrying a special title, or persons equal in status, the investigation is carried out by the Prosecutor's Office.

THE MINISTRY OF PENITENTIARY AND CORRECTIONS OF GEORGIA

Article 4-B of the Resolution No 8 of the Government of Georgia dated 30 January 2009 on the Approval of the Statute of the Ministry of Penitentiary and Corrections of Georgia, the Ministry jurisdiction includes: prevention in the stage of preparation within its competencies in the place of detention/imprisonment, elimination once already committed and identification of the crimes committed by the staff of the detention/imprisonment facility; together with the other authorised bodies, cooperation within the framework of their competencies for uncovering the crimes, which the convicted committed prior to the placement in the penitentiary facility; implementation of the operative-investigative activities according to the rules established by the Law.

Pursuant to Article 8 of the Annex to the Order No34 of the Minister of Justice of Georgia dated 7 July 2013, investigators of the Ministry of Penitentiary and Corrections of Georgia investigate crimes stipulated in the articles 342¹, 378, 378¹, 378², 379, 380 and 381 (in the part of the unfulfilled prison sentence) of the Criminal Code of Georgia, as well as the crimes committed on the territory of the institutions under the Penitentiary Department as well as territorial bodies of the Legal Entity of the Public Law –National Agency for the Execution of Non-custodial Sentences and Probation – of penal institutions.

In the Ministry of Penitentiary and Corrections of Georgia the authority for pursuing investigation is given to a structural sub-section specially created for this purpose – Investigation Division.

As per Article 18-A of the Resolution No 8 of the Government of Georgia dated 30 January 2009 on the Approval of the Statute of the Ministry of Penitentiary and Corrections of Georgia, the key objective of the Investigation Division is the investigation of the crimes envisaged by the Articles 342¹, 378, 378¹, 378², 379, 380 and 381 (in the part of the unfulfilled prison sentence) of the Criminal Code of Georgia, as well as the crimes committed on the territory of the detention/imprisonment facilities.

According to the Article 2 of the order No 152 of the Minister of Penitentiary, Corrections and Legal Aid of Georgia on the Approval of the Statute of the Investigation Division of the Ministry of Penitentiary, Corrections and Legal Aid of Georgia dated 16 April 2009, the Investigation Division is structural sub-agency under the Ministry of Penitentiary and Corrections of Georgia, which carries out preliminary investigation of the crimes stipulated by the Articles 342¹, 378, 378¹, 378², 379, 380 and 381 (in the part of the unfulfilled prison sentence) of the Criminal Code of Georgia, as well as the crimes committed on the territory of the detention/imprisonment facilities, studies the reasons contributing to crime, carries out respective analysis and develops subsequent recommendations.

PROCEDURAL OVERSIGHT OF THE INVESTIGATION

According to the Article 3, para. A and B of the Law of Georgia on the Prosecutor's Office, the Chief Prosecutor's Office of Georgia carries out criminal prosecution and procedural oversight at the investigation stage. Hence, the procedural oversight of all the criminal cases conducted by all the investigative bodies is carried out by the Prosecutor's Office of Georgia.

Article 32 of the Criminal Procedural Code of Georgia defining the competencies of the Prosecutor's Office states, that the Prosecutor's Office is the body for criminal prosecution. For ensuring the performance of this function, the Prosecutor's Office carries out procedural oversight. The Prosecutor's Office, on the cases defined by the Code, and according to the established rules, implements full investigation, and in the court supports State prosecution.

Pursuant to the Article 5, para. 2 of the Order No 38 of the Minister of Justice of Georgia on the Approval of the Statute of the Chief Prosecutor's Office of Georgia dated 10 July 2013, the following divisions of the Chief Prosecutor's Office of Georgia carry out procedural oversight of the investigation proceeding in various institutions:

1. In the General Inspection of the Ministry of Internal Affairs of Georgia, Central Criminal Police Department and Patrol Police Department –Department of Procedural Guidance of Investigation;
2. In the Territorial Bodies of the Ministry of Internal Affairs of Georgia, Division for Prosecutorial Oversight'
3. In the Ministry of Penitentiary and Corrections of Georgia and the Ministry of Defence, Department of Procedural Guidance of Investigation;
4. In the Public Security Service of the Ministry of Internal Affairs of Georgia, State Security Service and Intelligence Service – Department of Procedural Guidance of Investigation and Operational Investigative Activities 4.

As per Article 27 of the Law of Georgia on the Prosecutor's Office, the Prosecutor is entitled to, in the cases defined by Law, to give written instructions to investigation bodies. Fulfilment of the Prosecutor's instructions on the issues of investigations is compulsory.

According to the Article 33, para. 6 of the Criminal Procedure Code of Georgia, the Prosecutor is authorised to: delegate investigation of a criminal case to any of the law enforcement bodies or an investigator by ensuring the adherence of the requirements of investigative jurisdiction; deprive one investigator the right to investigate the case and hand it over to the other; take part in the implementation of investigative activities, or fully implement preliminary investigation; issue compulsory instructions to the staff of the law-enforcement body and/or subordinate prosecutor.

AUTHORITIES OF THE GENERAL INSPECTIONS

While discussing the issues of effective investigation and reviewing the legislation of Georgia, it is important to review the authorities of General Inspections of the Ministry of Internal Affairs of Georgia, the Ministry of Justice of Georgia, the Chief Prosecutor's Office of Georgia and the Ministry of Penitentiary and Corrections of Georgia, from the angle of criminal investigation implementation.

GENERAL INSPECTION OF THE MINISTRY OF INTERNAL AFFAIRS OF GEORGIA

According to the Article 10 –G of the Resolution No 337 of the Government of Georgia dated 13 December 2013 regarding the Approval of the Statute of the Ministry of Internal Affairs of Georgia, the key objectives of the General Inspection (Department) of the Ministry of Internal Affairs of Georgia are as follows: ensuring detection and adequate response to the facts of violation of ethics and disciplinary norms, improper fulfilment of official duties and of certain unlawful actions committed within the system of the Ministry; ensures legal procedural enforcement measures over the cases falling into the sphere of its competence in accordance with the basis and rule established by the Criminal Procedural Code; ensures detection of violations and deficiencies within the system of the Ministry; ensures counterintelligence accompaniment of the operative analytical and operational-searching activities conducted within the structural units of the Ministry; ensures inspection of legality and reasonability of expenditure of financial and material resources by the structural units of the Ministry; ensures conducting inspection of financial expenses, including operative expenses, within the system of the Ministry and ensures security of informational systems of the Ministry;

As the Statute of the Ministry of Internal Affairs of Georgia clarifies, the General Inspection of the Ministry of Internal Affairs of Georgia among other tasks, is also authorised on one hand to employ criminal procedure compulsory measures on the basis and rules provided by the Criminal Procedure Code of Georgia over the cases under its jurisdiction, as well as conducting investigation on the criminal cases, and on the other hand, implement internal inspection in case of disciplinary violations.

According to the Article 1, para. 3-T of the Annex to the Order No38 of the Minister of Justice of Georgia issued on 10 July 2013 regarding the Approval of the Statute of the Chief Prosecutor's Office of Georgia, the structural sub-agency of the Chief Prosecutor's Office of Georgia is the Department for Procedural Guidance of the Investigation in the General Inspection of the Ministry of Internal Affairs of Georgia, Central Criminal Police Department and Patrol Police Department.

Hence, the Statutes of the Chief Prosecutor’s Office of Georgia and Ministry of Internal Affairs of Georgia reveal that the authority to conduct investigation rests with the General Inspection of the Ministry of Internal Affairs of Georgia.

At the same time, the Statute of the General Inspection of the Ministry of Internal Affairs of Georgia is a classified document,⁴¹ while there is no legal ground for assigning the status of a classified document in the part of the Statute, which refers to the investigation of the criminal cases. Namely, according to the legislation of Georgia, the Minister of Internal Affairs of Georgia is entitled to approve the Statute of the General Inspection, as one of the sub-sections of the Ministry.⁴²

The Statute of the General Inspection (Department) of the Ministry of Internal Affairs of Georgia, according to the Article 2, para. 3 of the Law of Georgia on Normative Acts, constitutes a normative act, since it is a legal act issued by an authorised State body (official) according to the rules established by the Legislation of Georgia, which contains a general rule for its temporary, permanent or multiple use.

Article 26, para. 3 of the Law of Georgia on Normative Acts allows for non-disclosure of separate provisions of a normative act or sub-law only in the cases defined by the Law on State Secrets. However, the given law also provides a reservation that “non-disclosure of a normative act or its part is inadmissible when it limits the rights and freedoms or defines legal responsibilities.”

According to Article 1, para. 1 of the Law of Georgia on State Security, “State secret” is a kind of information that includes data containing a state secret in the areas of defence, economy, external relations, intelligence service, state security and protection of law and order disclosure or loss of which may inflict harm on the sovereignty, constitutional framework or political and economic interests of Georgia and which is deemed to constitute a state secret according to the rule prescribed by this Law and which is subject to the state protection.⁴³ Article 12 of the same Law defines the principles of Classification of Information as Secret, namely, the information is classified as secret in accordance with the principles of lawfulness, validity and timeliness. At the same time, the Law lists in detail the data, which can be subject to classification, and investigation

41 Letter of the Ministry of Internal Affairs of Georgia dated 6 February 2014.

42 According to the Article 7, para. G of the Resolution No 337 of the Government of Georgia dated 13 December 2013 on the Approval of the Statute of the Ministry of Internal Affairs of Georgia, the General Inspection (Department) represents a structural sub-unit of the Ministry. According to the Article 5, para. 2N of the same Resolution, the Minister of Internal Affairs of Georgia, according to the rules established by Law, issues orders, while according to para. “F.a” approves statutes of the structural sub-units of the Ministry and State subordinate bodies under the Ministry. At the same time, as per Article 13 para. 1 of the Law of Georgia on Normative Acts, the order of the Minister of Georgia can be issued only through a legislative act of Georgia, normative act of the President of Georgia and resolution of the Government of Georgia in the defined cases and frameworks. The order of the Georgian Minister should indicate based on and for the implementation of which normative acts has it been issued.

43 Furthermore, according to the Article, para. 5 of the Law of Georgia on State Secrets, the data marked “Secret” is the data disclosure or loss of which may negatively affect defence, state security, economic and political interests of Georgia, as well as the country or organization which is a party to international treaties and agreements.

and the rules for its implementation, is not among them.⁴⁴ Meanwhile, according to the Law of Georgia on State Secrets, only data pertaining to operative-investigative activity plans could be attributed to State Secrets.⁴⁵

Furthermore, Article 8 of the Law of Georgia on State Secrets lists the concepts, which cannot be classified as the state secret. Namely, according to the para. 1, defining any such information as a state secret that may prejudice or restrict basic human rights and freedoms or may cause harm to health and safety of population shall be prohibited.

Although PDO is unaware of the justification for defining the Statute of the General Inspection (Department) of the Ministry of Internal Affairs of Georgia of a classified document, the analysis of the above legislative norms reveals that a document limiting person's rights and freedoms cannot be secret. Acts regulating internal activities of the General Inspection of the Ministry could remain undisclosed in terms of operative-investigative activities, however not normative acts regulating the activities of one of the bodies implementing criminal case investigations. If the General Inspection of the Ministry of Internal Affairs of Georgia is a body implementing criminal investigations acting pursuant to the Criminal Procedure Legislation provisions, classifying the document regulating its activities is against the principle of transparency and definitiveness of the norms restricting human rights and freedoms.

It would be expedient to lift the status of a classified document off the section of the Statute of the General Inspection of the Ministry of Internal Affairs of Georgia, which regulates the authority of conducting investigation, rules for conducting criminal investigation and objectives of the General Inspection.

44 According to Article 7, para. 4 of the Law of Georgia on State Secrets, only the following information may be defined as a state secret in the spheres of intelligence service, state security and protection of law and order:

- a) The information on the plans, organization, material-technical supplies, forms, methods and results of the intelligence, counter-intelligence and dispatch-investigation operations, as well as on the financing of specific programs related thereto; the information on the persons who secretly cooperate or previously cooperated with the respective agencies of Georgia operating in these areas;
- b) The information on security systems and regime of guarding of the top officials, administrative buildings and governmental residences of Georgia defined by the law of Georgia "On the Special Service of State Guarding";
- c) The information on governmental and special systems of communication;
- d) The information on the development and use of the state encoding and on scientific research works in cryptography.
- e) The information on the possible threats for Georgia and measures to be taken to avert them;
- f) The information on the plan of activities and measures to be implemented by the Government of Georgia, as well as the Ministries and other agencies, preliminary disclosure of which shall harm State interests of Georgia.

45 According to Article 8, para. 2 of the Law of Georgia on State Secrets, normative acts may not be defined as state secrets, including international treaties and agreements of Georgia, except for the acts of the Acts of the President, Ministry of Defense, the Ministry of Internal Affairs, Justice, Finance and Environment and Natural Resources, State Intelligence Department, Special Service of State Guarding that regulate their internal activities directly related to state defense, security and operative-investigative issues;

GENERAL INSPECTION OF THE MINISTRY OF JUSTICE OF GEORGIA

General Inspection of the Ministry of Justice of Georgia is authorised to conduct investigation of the criminal cases when the crime is committed by an employee of the system of the same Ministry (apart from Prosecutor's Office). General Inspection of the Ministry of Justice of Georgia is also entitled to carry out internal inspections, in particular:

According to the Article 22 of the Resolution No 389 of the Government of Georgia dated 30 December 2013 regarding the Approval of the Statute of the Ministry of Justice of Georgia, key objectives of the General Inspection are as follows: according to the rules defined by law, carry out preliminary investigation on the crimes defined by the Articles 332, 333, 335, 337 and 342 of the Criminal Code of Georgia committed by an employee of a structural unit of the Ministry or LELP under the Ministry's authority⁴⁶; oversight of the strict fulfilment of the requirements set forth by the Georgian legislation by structural sub-divisions of the Ministry and LELP acting under the authority of the Ministry; internal control of discipline and adherence to rule of law by structural sub-divisions of the Ministry and LELP acting under the authority of the Ministry, identification of incidents of violating constitutional rights and legitimate interests of citizens and other official misconduct and unlawful activities from the part of the employees of the Ministry structural sub-divisions and LELPs under its authority, as well as study of the applications and complaints submitted over these incidents and ensuring the adequate response; internal inspection of the official misconduct of the staff of the Ministry structural sub-divisions and LELPs under its authority, their verification, drafting a respective report and submission to the Minister.

Objectives and functions of the General Inspection of the Ministry of Justice of Georgia are defined by the Article 7 of the Order No 63 of the Minister of Justice of Georgia dated 17 March 2008 regarding the Approval of the Statute of the General Inspection of the Ministry of Justice of Georgia. Article 7 para. G and T of the same Order envisages conducting internal inspection of the official misconduct of the staff of the Ministry structural sub-divisions and LELP under the Ministry authority, drafting a report on the results of the inspection and its submission to the Minister, according to the rules defined by law on the crimes stipulated by the Articles 332, 335, 337 and 342 of the Criminal Code of Georgia committed by the staff of the Ministry structural sub-divisions and LELP under the authority of the Ministry.

Furthermore, article 8, para. A of the Order states that in implementing these tasks and functions, the General Inspection is authorised to implementing internal inspection on the cases of infringement of citizens' rights and freedoms and lawful interests, disciplinary violations and other illegal activities committed by the staff of the Ministry sub-divisions or LELPs acting under the Ministry, while in service. According to the same article, para. O, in case the inspection reveals the signs of crime in the actions of a staff of the Ministry sub-divisions or LELP under its authority, excluding the cases defined

46 Old edition: according to the Article 17 of the Order No 541 of the President of Georgia issued on 7 November 2008 regarding the approval of the Statute of the Ministry of Justice of Georgia, the key objectives of the Ministry were: strict control over the implementation of the requirements of the legislation of Georgia in the Ministry system; implementation of preliminary investigation of the crimes committed by a prosecutor, an investigator of the Prosecutor's Office, advisor to the Prosecutor, as well as staff of the Ministry defined by the Articles 332, 335, 337 and 342 of the Criminal Code of Georgia [...].

by the Article 7, para. T of the Statute, all the gathered materials, in agreement with the Minister, have to be forwarded to the respective law enforcement bodies, as per established rules.

GENERAL INSPECTION OF THE CHIEF PROSECUTOR'S OFFICE OF GEORGIA

General Inspection of the Chief Prosecutor's Office of Georgia carries out criminal investigation on the crimes committed by a staff of the Prosecutor's Office, and implements internal inspection on the case of official misconduct. Namely, according to the Article 6, para. 2 of the Order No 38 of the Ministry of Justice of Georgia dated 10 July 2014 regarding the Approval of the Statute of the Chief Prosecutor's Office of Georgia, the key objective of the General Inspection of the Prosecutor's Office is to carry out investigation on the crime committed by the staff of the Prosecutor's Office according to the rules defined by legislation; uncovering the cases of the violation of constitutional rights and lawful interests of the citizens, official misconduct and other illegal activities committed by the staff of the Prosecutor's office; studying the applications and complaints submitted over these incidents and providing respective response; implementation of internal inspection on the official misconduct of the staff of the Prosecutor's Office, drafting a report on the results of the inspection and its submission to the Chief Prosecutor; implementation of prosecutorial oversight and procedural management of the operative-investigative activities conducted by the General Inspection of the Ministry of Justice of Georgia and General Inspection of the Chief Prosecutor's Office of Georgia; supporting the State prosecution in the court on the criminal cases investigated by the General Inspections of the Ministry of Justice of Georgia and the Chief Prosecutor's Office of Georgia.

According to the Article 2 of the Order No 44 of the Ministry of Justice of Georgia dated 13 August 2013 regarding the Approval of the Statute of the General Inspection of the Chief Prosecutor's Office of Georgia, the key functions and objectives of the General Inspection of the Georgia's Prosecutor's Office are: internal oversight of the discipline and rule of in the structures of the Prosecutor's Office, identification of the incidents of violations of constitutional rights and lawful interests from the part of the staff of the Prosecutor's Office, official misconduct and other illegal activities, studying applications and complaints submitted regarding these incidents and adequate response; implementation of the internal inspection on the official misconduct of the staff of the Prosecutor's Office, drafting reports on the inspection results and submission to the Chief Prosecutor; according to the rules established by law, carrying out investigation on the crimes committed by the staff of the Prosecutor's Office; provision of prosecutorial oversight and procedural management of the operative-investigative activities carried out by the General Inspections of the Ministry of Justice of Georgia and the Chief Prosecutor's Office; supporting State prosecution at the court on the criminal cases investigated by the General Inspections of the Ministry of Justice of Georgia and the Chief Prosecutor's Office of Georgia.

According to the Article 3 of the same order, the General Inspection is authorized to carry out internal investigation over the incidents of the abuse of authority from the part of the staff of the Prosecutor's Office while performing their duties, violating rights, freedoms and lawful interests of citizens, violation of ethics rules, misconduct unfit for

the staff of the Prosecutor's Office, disciplinary offences and other illegal activities; in case of the crime committed by the staff of the Prosecutor's office, according to the Criminal Procedure Code of Georgia, carry out full investigation; as per Criminal Procedure Code of Georgia, provide prosecutorial oversight and procedural management of the operative-investigative activities carried out by the General Inspections of the Ministry of Justice of Georgia and the Chief Prosecutor's Office; supporting State prosecution at the court on the criminal cases investigated by the General Inspections of the Ministry of Justice of Georgia and the Chief Prosecutor's Office of Georgia.

GENERAL INSPECTION OF THE MINISTRY OF PENITENTIARY AND CORRECTIONS OF GEORGIA

General Inspection of the Ministry of Penitentiary and Corrections of Georgia carries out internal inspection over the cases of official misconduct by the staff of the Ministry. General Inspection of the Ministry of Penitentiary and Corrections of Georgia does not have the authority to conduct investigation, with the Investigation Division being an investigative body.

Article 14 of the Resolution No 8 of the Government of Georgia dated 30 January 2009 regarding the Approval of the Statute of the Ministry of Penitentiary and Corrections of Georgia defines key objectives of the General Inspection of the Ministry of Penitentiary and Corrections of Georgia, namely: oversight over the implementation of the requirements of the Georgian legislation; internal oversight over the discipline and rule of law in the system of the Ministry, identification of the incidents of the infringement of the constitutional rights and lawful interests of the citizens from the part of the Ministry staff, official misconduct or other illegal activities, study of the applications and complaints submitted over these cases and ensuring adequate response to them; carrying out internal inspection of the official misconduct of the Ministry staff, drafting a report on the results of the inspection and presenting it to the Minister; exercising oversight over the implementation of the operative-investigative activities and ensuring security of the structures of the system of imprisonment and restriction of freedom.

ii. ISSUE OF INSTITUTIONAL INDEPENDENCE OF INVESTIGATION OF THE CRIMES ALLEGEDLY COMMITTED BY THE LAW ENFORCERS, BASED ON THE ANALYSIS OF THE LEGISLATION AND PRACTICE

One of the key principles of effective investigation is conducting investigation by an impartial and independent body, which implies both its structural, as well as personal independence. Detailed description of the legislative norms given above shows that in the majority of cases the issue of institutional independence can be raised.

When a crime is allegedly committed on the territory of the penitentiary institution and it is investigated by the Investigation Division of the same Ministry, legitimate questions arise with regards to independence and impartiality of the investigation. The argument that Investigation Department of the Ministry of Penitentiary and Corrections of Georgia is a separate entity investigating an alleged crime committed by the staff of another department is less relevant, as the other department still represents a structural part of the same Ministry. The case is similar, when a crime is presumably committed by an employee of the Chief Prosecutor's Office of Georgia or Ministry of Justice of Georgia.

According to the legislative norms discussed above, investigation of these cases falls under the authority of the same bodies – the Ministry of Justice of Georgia and the Chief Prosecutor’s Office of Georgia.

ECHR in its judgment over the case of Tsintsabadze stated that, “even setting aside any suppositions about the deliberate taking of the prisoner’s life, in the particular circumstances of the present case one of the possible lines of inquiry, calling for a careful and impartial analysis, was whether his death could have resulted from the negligent functioning of the prison authorities. The Court further notes that all the main investigative measures were conducted by the Western Georgian investigation department of the very same ministry, and that department’s findings were then straightforwardly endorsed by the public prosecutor, without any additional inquiries of his own, as the basis for dismissing the case [...] That institutional connection between the investigators of and those implicated in the incident, in the Court’s view, raises legitimate doubts as to the independence of the investigation conducted.”⁴⁷

The issue of institutional independence is questionable in the case of investigation of alleged criminal actions by the representatives of law enforcement bodies with the investigation being conducted by the General Inspection of the Ministry of Internal Affairs of Georgia.

As noted above, as per para. 2 of the Annex to the Order No 34 of the Minister of Justice of Georgia dated 7 July 2013 regarding the Definition of the Investigatory and Territorial Jurisdiction of Investigation of the Criminal Cases, conducting criminal investigation on the grave offenses committed by a policeman is the jurisdiction of an investigator of the Prosecutor’s Office. Until the issuance of the mentioned order, Order No 178 dated 29 September 2010 also granted the authority of criminal investigations over an alleged crime committed by a policeman to an investigator of the Prosecutor’s office. Nevertheless, number of cases studied by the PDO in the reporting period confirm, that in the majority of cases, alleged criminal actions committed by the representatives of the law enforcement bodies were investigated by the General Inspection of the Ministry of Internal Affairs of Georgia.

In this regard, the Public Defender of Georgia addressed the Minister of Internal Affairs of Georgia on 13 September 2013 with the recommendation regarding Investigatory Jurisdiction of the Criminal Cases on the Alleged Crimes Committed by the Policeman under the Investigation of the General Inspection of the Ministry of Internal Affairs of Georgia, indicated the Articles 35 and 36 of the Criminal Procedure Code of Georgia, according to which investigatory and territorial jurisdiction of investigation is defined by the Minister of Justice upon the suggestion of the Chief Prosecutor of Georgia, and requested transfer of the two ongoing criminal cases to the Chief Prosecutor’s Office of Georgia (cases of M.M.s death and exceeding the authority against R.I.).

The letter received in response to the recommendation from the Ministry of Internal Affairs of Georgia on 4 October 2013 describes the established practice with regards to the investigation of alleged criminal actions committed by the representatives of

47 TSINTSABADZE v. GEORGIA JUDGMENT of the European Court of the Human Rights, No 35403/06, para. 78.

law enforcement bodies. According to the letter “ General Inspection of the Ministry does not initiate investigation independently on the alleged crimes committed by the staff of the Ministry of Internal Affairs of Georgia , but rather the information on the actions containing the signs of crime are sent to the Chief Prosecutor’s Office of Georgia (application, complaint and data gathered to operative-investigative actions). The initiation of the investigation is ensured by the Prosecutor’s office, following which, based on the Article 33, para. 6-A of the Criminal Procedure Code of Georgia (the Chief Prosecutor’s Office of Georgia or its authorised representative is entitled to remove the case from one investigative body and hand it over to the other investigative body, irrespective of the investigatory jurisdiction), the criminal case against the employee of the Ministry of Internal Affairs of Georgia is handed over to the General Inspection for investigation.”⁴⁸

Despite the fact that Criminal Procedure Code of Georgia⁴⁹ gives authority to the Chief Prosecutor’s Office of Georgia to remove the criminal case on the offence allegedly committed by the staff of the Ministry of Internal Affairs of Georgia, as well as investiga-

48 By the letter of 4 October 2013 from the Ministry of Internal Affairs of Georgia, the Public Defender of Georgia was informed that “in the Main Division for Monitoring, Analysis and Coordination of the General Inspection of the Ministry of Internal Affairs of Georgia, there an Investigation Division which ensures that the cases that fall under the competency of the General Inspection are investigated based on the rules defined by the Criminal Procedure Code of Georgia and respective criminal procedure law enforcement procedures are applied. Preliminary investigation issues conducted by the General Inspection were regulated by the General Inspection Statute of the Ministry of Internal Affairs of Georgia approved by the order No 023 dated 28 March 2005 of the Ministry of Internal Affairs of Georgia and amendments (as a classified document) to the General Inspection Statute of the Ministry of Internal Affairs of Georgia enforced by the Order of the Minister of Internal Affairs No 066 dated 24 April 2013. As of today, the Statute of the General Inspection of the Ministry of Internal Affairs of Georgia approved by the Order No 066 dated 24 April 2013 of the Minister of Internal Affairs is in force. Furthermore, Annex №4¹ to the Order No 1016 dated 25 December 2012 of the Minister of Internal Affairs of Georgia regarding the Definition of the Monetary Premium (per title and post) and Additional Payments in the System of the Ministry of Internal Affairs of Georgia, defines a person authorised for conducting investigations in the Main Division for Monitoring, Analysis and Coordination of the General Inspection – i.e. an Investigator on Especially Serious Crimes. Besides, according to the Article 5-I of the Statute approved by the Order No38 dated 10 July 2013 of the Minister of Justice of Georgia regarding the Approval of the Statute of the Chief Prosecutor’s Office of Georgia, the Department for Procedural Management and Investigation in the Patrol Police Department and Central Criminal police Departments is the structural subdivision of the Chief Prosecutor’s Office. Investigators of the General Inspection while proceeding with criminal prosecution do not confine themselves only by conducting procedural activities, in addition, they are actively involved in the operative-investigative activities, which considerably increases the quality of the cases they investigate. In addition, considering the specifics of the structure of the Ministry of Internal Affairs of Georgia, there often arises a need to obtain evidence from the Ministry’s regime and secret institutions, or through interacting with a specific circle of respondents.

As to the criminal case №084130713801 on the abuse of authority from the part of the individual staff of Adigeni Regional Division and the criminal case №001060713003 on leading Mamuka Mikautadze to suicide, these cases were handed over to the General Inspection of the Ministry of Internal Affairs of Georgia for investigation based on the respective decision of the Deputy Chief Prosecutor of Georgia. It is noteworthy that the criminal case №001060713003 was transferred to the Chief Prosecutor’s Office of Georgia by the decision of the Prosecutor”. Letter of the Ministry of Internal Affairs of Georgia dated 4 October 2013, №2004044.

49 According to Article 33, para. 6-A of the Criminal Procedure Code of Georgia, the Chief Prosecutor of Georgia or a person authorized by him/her can, irrespective of the investigatory jurisdiction, remove one case from a certain investigative body and hand it over to the other investigative body; left the procedural management duties over the case to one prosecutor and assign his/her duties to the other prosecutor.

tion of the crime committed on the territory of the penitentiary institution and/or the crime allegedly committed by the employee of the Ministry of Justice of Georgia, from one investigative body and hand it over to the Prosecutor's Office of Georgia, which represents a sort of a guarantee for ensuring institutional independence of the investigation, based on the results of the examination of the cases by the Public Defender of Georgia and the cases discussed in this report, in practice it is used less and/or in altered form, namely, on several occasions, upon the decision of the Chief Prosecutor of Georgia, criminal cases were handed over to the General Inspection of the Ministry of Internal Affairs of Georgia when the crime could have possibly been committed by the staff of the Ministry of Internal Affairs of Georgia.

The Public Defender of Georgia examined several cases⁵⁰ in which, by our assessment, the investigation on the alleged criminal incident in the penitentiary institution should have been conducted by the Chief Prosecutor's Office of Georgia. However, it should also be noted, that in such cases, independence and impartiality of the investigation conducted by the Chief Prosecutor's Office of Georgia could have also become questionable, as the prisoners spoke about the intimidation and use of force from the part of the high officials of the Chief Prosecutor's Office.

Furthermore, there were several appeals submitted to the PDO where the applicants spoke about the alleged offences committed from the part of the high officials from the Prosecutor's Office. Like the cases discussed earlier, even if the investigation is initiated by the Chief Prosecutor's Office of Georgia, independence and impartiality of the investigation would still raise questions.

Regretfully, the current legislation of Georgia does not envisage regulation of such cases so that the effectiveness of the investigation, as well as its independence and impartiality are not questioned.

THE CASE OF GOGA DZVELAIA

On 8 October 2013 the Public Defender of Georgia started examining the death of juvenile Goga Dzvelaia who passed away in the penitentiary institution No2 on 7 October. The representatives of the PDO familiarised themselves with the documentation of the case in the penitentiary institution, surveyed the cell where the corps of the diseased Dzvelaia was found.

According to the information provided from the Chief Prosecutor's Office of Georgia, investigation was initiated by the Investigative Department of the Ministry of Penitentiary and Corrections of Georgia, Western Georgia Division, on the criminal case №073071013001, regarding the incident of bringing the convicted Goga Dzvelaia to the point of suicide (a crime defined by the Article 115 of the Criminal Code of Georgia).⁵¹ By the statement of the Ministry of Penitentiary and Corrections of Georgia, based on the preliminary information, it was a case of a suicide.⁵²

ECHR in the judgment of Tsnintsabadze's case noted: "In the light of the importance of the protection afforded under Article 2, the Court must subject the case of depriva-

50 Criminal case No 073071013001, on the death of Goga Dzvelaia at the 2nd penitentiary institution.

51 See the letter of the Chief Prosecutor's Office of Georgia dated 22 October 2013.

52 The position of the family of the juvenile who passed away in the prison and Sozar Subari's response. TS Press.ge, 13.10.2013, <http://www.tspress.ge/ka/site/articles/14836/>

tion of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them [...].

Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman*, cited above, § 100, and *Ertak v. Turkey*, no. 20764/92, § 32, ECHR 2000-V).

The obligation of States to protect the right to life under Article 2 of the Convention requires by implication that there should be an effective official investigation when individuals have been killed. The duty to conduct such an investigation arises in all cases of killing and other suspicious deaths, whether the perpetrators were private persons or State agents or are unknown (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V, and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII).⁵³

In cases of death of an inmate in Georgian penitentiary institutions, in order to ensure independent investigation in accordance with the ECHR standards,⁵⁴ the investigation is to be conducted by the Chief Prosecutor's Office of Georgia. Considering the institutional hierarchy, there will always remain legitimate questions regarding the independence of investigation, when it is conducted by the Investigation Department of the Ministry of Penitentiary and Corrections of Georgia.

It should also be noted that unlike the investigation carried out on the case of G. Dzvelaia's death, the case of death of the convicted Levan Kortava who passed away due to the injuries received from beating in the 14th penitentiary institution, was promptly handed over to the Chief Prosecutor's Office of Georgia,⁵⁵ which was the correct decision taken by the Ministry. Nevertheless, it should be noted that legislative regulations, as well as their implementation in practice should not leave the decisions similar to this in the discretion of the Ministry of Penitentiary and Corrections of Georgia, but rather, for ensuring effective investigation, investigation should be initiated and carried out by an institutionally independent investigative body.

*CASE OF MAMUKA IVANIADZE*⁵⁶

On 10 July 2013 the PDO forwarded for further follow up to the Chief Prosecutor's Office of Georgia copies of the statements provided by the convicts Mamuka Ivaniadze

53 *Tsintsabadze v. Georgia* No. 35403/06, para. 72–74.

54 “[...]all the main investigative measures were conducted by the Western Georgian investigation department of the very same ministry, and that department's findings were then straightforwardly endorsed by the public prosecutor, without any additional inquiries of his own, as the basis for dismissing the case [...]. That institutional connection between the investigators of and those implicated in the incident, in the Court's view, raises legitimate doubts as to the independence of the investigation conducted” *Tsintsabadze v. Georgia*, No 35403/06, para. 78.

55 According to the statement of the Ministry of Penitentiary and Corrections of Georgia made on 23 May 2013, L. Kortava case investigation was initiated by the Investigation Department of the Ministry, though later the case was handed over to the Chief Prosecutor's Office of Georgia. See *Levan Kortava* case resolved, the statement of the Chief Prosecutor's Office of Georgia dated 2 August 2013.

56 One of the persons charged for the so called „tractor case”.

and Zaza Makharoblidze, where they referred to the alleged illegal activities having taken place against them during their interrogation from the part of the employees of the law enforcement and prosecution bodies at Tbilisi temporary detention facility No 1. In reply, the PDO received a letter from the Chief Prosecutor's Office of Georgia dated 29 July 2013 informing that the Division of Prosecutorial Oversight of the General Inspection of the Ministry of Justice of Georgia and the Chief Prosecutor's Office of Georgia studied the statements of the convicts and the facts of intimidation against them were not confirmed. The same letter noted that for the purpose of exploring any possible misconduct from the part of the staff of the Ministry of Internal Affairs of Georgia, the materials were forwarded to the General Inspection of the Ministry of Internal Affairs of Georgia.

On 11 July 2013 media sources disseminated information and video materials regarding alleged misconduct towards the convicted Mamuka Ivaniadze from the part of the staff of the Chief Prosecutor's Office of Georgia at the penitentiary institution No 8.

The Chief Prosecutor's Office of Georgia disseminated information on 22 July 2013 stating that an investigation was carried out at the Chief Prosecutor's Office of Georgia on the allegedly committed crime defined by the Article 224 of the Criminal Code of Georgia (Giving Evidence or Submitting Opinion under Duress). However, a special investigation group found no evidence of the crime committed against Mamuka Ivaniadze. To confirm this, the Chief Prosecutor's Office of Georgia publicized a video depicting Ivaniadze giving a testimony.⁵⁷

It should be noted that despite the statement of the Chief Prosecutor's Office of Georgia of 22 July 2013⁵⁸, in the letters of 13 September 2013 and 21 March 2014 of the Chief Prosecutor's Office of Georgia to the PDO⁵⁹, it is stated that the investigation on the appeal of the M. Ivaniadze is still ongoing, due to which all the materials of the investigation of the case remain inaccessible for the PDO.

There are legitimate questions regarding M. Ivaniadze video footages disseminated by the Chief Prosecutor's Office of Georgia (whether M. Ivaniadze was informed that his testimony was video-taped, whether his consent was obtained or not, whether there are records of the date, time and place when the recording was made, etc), to which the statement of the Chief Prosecutor's Office of Georgia made on 24 July 2013 fails to give an exhaustive answer and which does not clarify that the testimony was given in compliance with the requirements stipulated in the law.⁶⁰

As noted earlier, according to the existing legislation, the authority over investigating crimes allegedly committed by the staff of the Prosecutor's Office, rests with the Chief

57 See the statement of the Chief Prosecutor's Office of Georgia of 22 July 2013, http://pog.gov.ge/geo/news?info_id=164

58 On 29 July 2013 PDO asked the Office of Chief Prosecutor of Georgia to provide it with the investigation case file, conducted on the basis of M. Ivaniadze's statement made on 11th of July 2013. However, the request was not upheld as according to the letter of the Office of Chief Prosecutor of Georgia, dated 14 September 2013, investigation was still ongoing.

59 By the letter of 21 March 2014 of the Chief Prosecutor's Office of Georgia, PDO was informed that on the fact of coercion against M. Ivaniadze, all the investigative activities have taken place as defined by Law and the investigation was ongoing.

60 See the statement of the Chief Prosecutor's Office of Georgia of 24 July 2013 http://pog.gov.ge/geo/news?info_id=165

Prosecutor's Office of Georgia, though legitimate questions arise in terms of its institutional independence and degree of impartiality.

THE CASE OF IVANE MERABISHVILI

On 17 December 2013 at the court proceedings taking place in Kutaisi City court, the defendant Ivane Merabishvili stated that he was taken out of the penitentiary facility during night hours and by violation of the law and that he was subjected to psychological pressure from the part of the Chief Prosecutor of Georgia and the staff of the Prosecutor's Office.

The Public Defender of Georgia made a public announcement on the same day on the need to initiate an investigation based on the statement made by Ivane Merabishvili and its effective implementation.⁶¹ Though the Chief Prosecutor's Office of Georgia did not conduct any investigation on this case.⁶²

According to the information disseminated by the Ministry of Penitentiary and Corrections of Georgia on 23 December 2013, "on 20 December 2013, considering the heightened interest of the public, and tasked by the Minister of Penitentiary and Corrections of Georgia Sozar Subari, the General Inspection of the Ministry based on the application of the attorney David Kazhalia, an investigation was initiated on the alleged misconduct from the part of the employees of the penitentiary institution No 9 committed against the defendant Ivane Merabishvili."⁶³ On 12 January 2014 the Ministry of Penitentiary and Corrections of Georgia made official statement that the internal examination did not confirm the facts mentioned in the statements of Ivane Merabishvili and his attorney, David Khazhali.⁶⁴

Although para. 8 of the Annex to the Order No 34 of the Minister of Justice of Geor-

61 On 25 December 2013 the PDO addressed with a letter to the Deputy Chief Prosecutor of Georgia and requested information on whether an investigation had been initiated upon the statement of Ivane Merabishvili made at the court room. In the case of a positive reply, the PDO was requesting provision of information on the investigative body, number of the criminal case file and the article/s of the Criminal Code of Georgia based on which the investigation was initiated, as well as detailed information on the implemented investigative action. In case the investigation had not been initiated, the PDO requested to notify on the respective reasons.

62 Statement of the Chief Prosecutor's Office of Georgia of 17 December 2013 and the Letter of the Chief Prosecutor's Office of Georgia of 3 January 2013.

63 See the statement of the Ministry of Penitentiary and Corrections of Georgia made on 23 December 2013. <http://mcla.gov.ge/?action=news&lang=geo&npid=1751>

64 „While conducting an internal inspection, based on the request of the General Inspection, 377 GB video materials were extracted which was recorded by 18 surveillance cameras installed between penitentiary department facility No 9 and the Penitentiary Department premises within the period of 12:00 13 December 2013 and 12:00 14 December 2013. The review of the video footages did not reveal any factual circumstances relevant to the case. As to the recordings of the camera recordings within the penitentiary facility No9 and the Penitentiary Department made on 17 December 2013, at the moment when Ivane Merabishvili made his statement, the records of 13-14 December did not exist, since surveillance cameras installed in the premises after 24 hours erase old records automatically and records the new footages. Within the framework of internal inspection staff of the penitentiary facility No9 were interrogated, who categorically denied the fact of Ivane Merabishvili leaving the territory of the penitentiary facility No 9 in the night hours of 14 December 2013. The written records describing movement of vehicles in and out of the facility as well as of defendants and convicts were also inspected at the penitentiary facility No0. Hence, the internal inspection did not confirm the facts mentioned at Ivane Merabishvili's statement and clarification letter". See the statement of the Ministry of Penitentiary and Corrections of Georgia of 23 December 2013, <http://mcla.gov.ge/?action=news&lang=geo&npid=1788>

gia, dated 7 July 2013, the investigation of the crimes committed on the territory of the penitentiary facility falls within jurisdiction of the Investigation Department of the Ministry of Penitentiary and Corrections of Georgia, taking into account the principle of independence and impartiality of investigation, the Prosecutor's Office of Georgia was authorised and at the same obligated to initiate and carry out investigation based on the information containing elements of crime without any delay. If the implemented investigative activities did not reveal elements of crime, or if it did not confirm the fact of committing a crime, the investigation could have been ceased.

Furthermore, based on the Article 14 of the Resolution No 8 of the Government of Georgia dated 30 January 2009 regarding the Approval of the Statute of the Ministry of Penitentiary and Corrections of Georgia, the General Inspection of the Ministry investigates only the lawfulness of issues related to the system of the same Ministry and their correspondence to the legislation⁶⁵. The misconduct allegedly committed by the employees of the Chief Prosecutor's Office of Georgia, which Iv. Merabishvili's statement referred to, would not fit the framework of its authority. This is also supported with the Ministry's statement, according to which the General Inspection of the Ministry, started internal inspection on the alleged misconduct of the staff of the penitentiary facility No9 committed against the defendant Ivane Merabishvili.⁶⁶

It should also be noted that according to the results of examination carried out by the General Inspection, video footages from the surveillance cameras installed in the penitentiary facility No9 and premises of the Penitentiary Department did not exist at the time of conducting internal inspection; furthermore, the review of the video materials from the eighteen surveillance cameras installed between the penitentiary facility No 9 and the premises of the Penitentiary Department revealed no factual circumstances relevant for the case.⁶⁷

In fact, the key evidence in such a case should have been the video footages recorded by the surveillance cameras installed at the penitentiary facility No9 and the Department of Penitentiary, though the Ministry could not give reasonable answers to the questions, as to how long the video footages were kept in penitentiary system, or in various penitentiary institutions; also, it is not known as to which legislative acts are to regulate these issues.⁶⁸

65 The key objectives of the General Inspection of the Ministry of Penitentiary and Corrections of Georgia, namely: oversight over the implementation of the requirements of the Georgian legislation; internal oversight over the discipline and rule of law in the system of the Ministry, identification of the incidents of the infringement of the constitutional rights and lawful interests of the citizens from the part of the Ministry staff, official misconduct or other illegal activities, study of the applications and complaints submitted over these cases and ensuring adequate response to them; carrying out internal inspection of the official misconduct of the Ministry staff, drafting a report on the results of the inspection and presenting it to the Minister.

66 See <http://mcla.gov.ge/?action=news&lang=geo&npid=1751>

67 See the statement of the Ministry of Penitentiary and Corrections of Georgia of 12 January 2014.

68 On 24 January 2014 the PDO requested from the Ministry of Penitentiary and Corrections of Georgia normative materials (bylaws) which regulate the use of surveillance video cameras installed at the Penitentiary Department of the Ministry of Penitentiary and Corrections of Georgia and penitentiary institutions (including, specifically penitentiary facility No9), as well as the timeframe and conditions for storing the recorded data. In addition, it was also requested to receive copies of all the materials of internal inspection carried out by the General Inspection, including 377 GB video footages, which captured 18 surveillance cameras installed between the penitentiary facility No9 and the Penitentiary Department facilities between 12:00 13 December 2013 and 12:00 14 December 2013. The PDO has not received the requested information to present day.

ECHR in its judgment on the case *Tsintsabadze v Georgia* noted, that “the investigation’s conclusions must be based on thorough, objective and impartial analysis of all the relevant elements. While the obligation to investigate relates only to the means to be employed and there is no absolute right to obtain a prosecution or conviction, any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness.”⁶⁹

Hence, with regards to the case of Ivane Merabishvili, the investigation and/or internal inspection conducted by any of the two bodies – General Inspection of the Chief Prosecutor’s Office of Georgia and General Inspection of the Ministry of Penitentiary and Corrections of Georgia, enjoying jurisdiction over the case under national legislation would always raise legitimate questions towards the degree of its independence and impartiality.

CASES OF G.S. AND J.V.

On 15 April 2014 G. S and J.V. who are the founders of TV Channel-25, appealed to the Public Defender of Georgia. They stated that on 17 December 2013 at 22.00, they were summoned to the Chief Prosecutor’s Office of Georgia, where they were kept until 5 am, 18 December 2013. There has been no procedural document drawn up during their stay in the Prosecutor’s office. They alleged that the representatives of the Prosecutor’s Office coerced them to give the testimony desirable to the investigative bodies, which did not correspond the truth, otherwise they were threatened to be detained and kept in penitentiary establishment and being subjected to ill treatment. Furthermore, they were categorically demanded to give false testimonies against former high officials as if they committed certain criminal acts. According to their statements, they were intimidated throughout the night, being coerced to give false testimonies. The applicants stated that they were subjected to psychological pressure and intimidation, inter alia, by the then head of the investigative unit at the Office of Chief Prosecutor of Georgia (currently the Chief Prosecutor of Georgia).

THE CASE OF R.K

On 15 April 2014 citizen of Georgia Mr R.K. applied to the Public Defender of Georgia. According to his statement, during the investigation of the criminal case on the appropriation of his funds through fraud, he received a notification from the Chief Prosecutor’s Office of Georgia on 14 September 2013, that the case was handed over for investigation to the Anti-Corruption Agency of the Ministry of Internal Affairs of Georgia. Several days later, he was summoned to then Deputy Head of the Anti-corruption Department (currently the Chief Prosecutor of Georgia). Being in his office, together with an investigator and two other officials, R.K. was subjected to coercion and psychological pressure of being detained.

THE CASE OF K.T.

On 25 November 2013 citizen of Georgia Mr K.T. applied to the Public Defender of Georgia and stated that on 24 November 2013 at 3 pm, the Patrol Police stopped him and

69 *Tsintsabadze v Georgia* No. 35403/06, para. 75.

moved him to narcology clinic for a check-up. The policeman were abusing him verbally and physically even at the clinic. According to K.T.'s claims, he was requesting a meeting with his lawyer for 10-15 hours, but without success. At the same time, according to K.T. during the entire detention period policeman treated him inhumanely. The abuse continued at the emergency vehicle, which was recorded by the policeman by a mobile. The names of the policeman are unknown to T.K. apart from the surname of one of the policeman that he mentioned in the report.

The PDO addressed the Chief Prosecutor's Office for a follow up; however, K.T.'s appeal from the Prosecutor's Office was forwarded to the General Inspection of the Ministry of Internal Affairs of Georgia.⁷⁰

Based on the letter received from the General Inspection of the Ministry of Internal Affairs of Georgia, as a result of internal inspection carried out in the General Inspection based on the appeal of the citizen K.T., the fact of disciplinary misconduct from the part of the policeman of the Patrol Police of the Ministry of Internal Affairs of Georgia was not confirmed.⁷¹

THE CASE OF MAMUKA MIKAUTADZE

On 5 July 2013 Mamuka Mikautadze was interrogated as a witness on the criminal case under investigation by the Central Criminal Police Department of the Ministry of Internal Affairs of Georgia. Next day, on 6 July 2013 his corps was found near Tbilisi Sea. According to the disseminated information, he hanged himself. At the same time, Mamuka Mikautadze's spouse and his friends stated that during interrogation policeman verbally and physically abused him, kept him under psychological pressure in order to obtain his testimony, which led him to suicide.

According to the results of the examination carried out by the PDO, the criminal case №001060713003 on bringing Mamuka Mikautadze to the verge of suicide was handed over to the General Inspection of the Ministry of Internal Affairs of Georgia for investigation, based on the respective order of the Deputy Chief Prosecutor.⁷² However, later, following the recommendation of the Public Defender of Georgia of 13 September 2013, the mentioned criminal case was returned back to the Chief Prosecutor's Office of Georgia.⁷³

THE CASE OF THE STAFF MEMBER OF THE GEORGIAN YOUNG LAWYER'S ASSOCIATION (GYLA)

PDO examined materials of internal inspection conducted by the General Inspection of the Ministry of Internal Affairs of Georgia over the incident between Mr Valerian Telia, Head of Ajara Main Division and GYLA staff member Mr R.F. which took place on 28 April 2013 in Batumi.

Internal inspection case №615085 contains conclusion against Police Captain Mr G.S. The conclusion is based on the reports of the policemen, concluding that Mr G.S. com-

70 Letter of the Chief Prosecutor's Office of Georgia dated 30 December 2013.

71 Letter of the Ministry of Internal Affairs of Georgia dated 27 January 2014.

72 Letters of the Ministry of Internal Affairs of Georgia dated 7 August and 4 October 2013.

73 Letter of the Ministry of Internal Affairs of Georgia dated 4 October 2013.

mitted misconduct under the Article 2, para. 2A (improper performance of duties) and B (negligence in performing duties) of the Disciplinary Statute of staff of the Ministry of Internal Affairs of Georgia, which was expressed in his lack of attention while copying video footage made at commercial premises of “Batumis Sakhli” at Gorgasali Street in Batumi, as a result of which the footage was destroyed. As to the Head of Ajara Main Division, Valerian Telia, in the internal inspection report there is nothing stated regarding his alleged misconduct and/or respective sanctions.

In the light of circumstances described above, it is essential to establish an independent body which will have the authority to investigate alleged crimes committed by the staff of the Ministry of Justice of Georgia, the Chief Prosecutor’s Office of Georgia, the Ministry of Internal Affairs of Georgia, and Ministry of Penitentiary and Corrections of Georgia, as well as the crimes committed on the territory of penitentiary establishments.

Thomas Hammarberg in his 2013 report – Georgia in Transition – also touched upon the issue of effective review of the complaints submitted against Police: “as part of the ongoing structural reforms, time has come for Georgia to decide, without delay and in the light of a history of past systematic abuses, on the best way to conduct independent and impartial investigations of violations of human rights whenever there is a suspicion that law enforcement agents may be involved. By doing so, decision-makers should try to minimise the pernicious consequences of “colleagues investigating colleagues” It has been previously recommended that Georgia seriously consider introducing an independent investigatory agency to investigate all ill-treatment or torture related complaints. Once again, considering the country’s recent past and the urgent need to build trust between the population and law enforcement, the introduction of a fully independent investigatory body appears to be necessary.”⁷⁴

II. THOROUGHNESS

According to the established practice of the ECHR, the necessary precondition for an effective investigation is that “[...] its conclusions must be based on a thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines the investigation’s ability to establish the circumstances of the case and the person responsible.”⁷⁵

In the case of *Bati and others v Turkey*, the court clarified that “the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, [...], a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard.”⁷⁶ The requirement

⁷⁴ GEORGIA IN TRANSITION, Report on the human rights dimension: background, steps taken and remaining challenges. Thomas Hammarberg, EU Special Adviser on Constitutional, Legal and Human Rights. 2013, p 23.

⁷⁵ *Tsintsabidze v Georgia*, No 35403/06, 15.02.2011, para. 85.

⁷⁶ Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards* p.57.

of thoroughness of investigation requires that all the relevant circumstances of the case are evaluated thoroughly, consecutively and impartially.⁷⁷ For instance, in the case of *Enukidze and Girgvliani v Georgia*, the Court discussed the circumstance when despite multiple requests of the injured party the investigation did not verify who four convicting and the Minister's wife referred to in the case were getting in touch with at the night the crime was committed: "the Court believes that identification of all the persons who the four convicted contacted in the relevant period is clearly relevant for thorough and objective investigation of the case."⁷⁸ Omission to detect other relevant circumstances served the basis for the judge's conclusion, that investigation conducted by Tbilisi City Prosecutor lacked sufficient thoroughness and impartiality.

Additionally, thoroughness implies that during investigation procedural requirements of the relevant law are adhered to,⁷⁹ and are defined during investigation in such a way, that significant circumstance indicating element of crime are not disregarded.⁸⁰

The requirement of conducting investigation thoroughly is defined under the Article 37, para. 2 of the Criminal Procedure Code of Georgia: an investigator is obligated to carry out the investigation comprehensively, fully and impartially. This single norm in Georgian legislation shall be fully sufficient for investigative body/person, as an imperative guideline principle when conducting investigation. As a minimum, it implies gathering of all evidence relevant for investigating the case through reasonable efforts, and for the same purposes conducting all necessary investigative measures in accordance to the rules established by the law.

Despite this imperative rule, in numerous appeals submitted to the PDO, complain that the certain investigative measures have not been conducted in their criminal cases, and/or have been carried out after the lapse of significant time period. This issue is especially significant in the sense that without the required standard of evidence and information, which is necessary for creating a reasonable supposition, launching criminal prosecution is impossible, while without high degree of probability of the evidence, the Judge at the pre-trial hearing will not send the case for examination on merits. Without effective investigation, one of the components of which is thoroughness, administration of justice is impossible.

III. PROMPTNESS

As in the case of acts issued by UN, various bodies of Council of Europe (ECHR, Committee Against Torture, Commissioner for Human Rights) require that the investigation is implemented promptly. This requirement is clarified in the case of *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*:

"Thus, the authorities have an obligation to take action as soon as an official complaint has been lodged. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness and reasonable expedition is

77 Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards*, p.63.

78 *Enukidze and Girgvliani v Georgia*, #. 25091/07, 26.04.2011, para. 255–258.

79 *Tsintsabadze v Georgia*, No 35403/06, 15.02.2011, para. 81.

80 Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards*, p.65.

implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”⁸¹

Considering that an official complaint on misconduct was sent out from one state institution to another without examination from the period of two months, and that the Police refused to timely interfere on the incident of misconduct, the Court deemed that the investigation failed to meet the requirement of promptness.

When assessing whether the promptness criteria has been met, the Court takes into consideration the time spent on initiation of official investigation, obtaining primary evidence and the time period for preliminary investigation as a whole.⁸²

Article 103 of the Criminal Procedure Code of Georgia states that the investigation shall be carried out within reasonable time, but no later than the statute of limitation set with regard to a certain crime under the Criminal Code of Georgia. Hence, according to its category (less grave, grave, especially grave), there are different time frames set for investigating certain crimes. Under Article 71 Para. 1 of the Criminal Code of Georgia the person shall be released from criminal liability if:

- Two years have passed since the crime for which the maximum sentence under article or part of the article of the private section of the criminal Code, does not exceed two years of imprisonment, have been committed;
- Six years have passed since any other criminal act has been committed;
- Ten years have passed since any other grave offense has been committed;
- Fifteen years have passed since the offences as per Article 332-342¹ have been committed, if they do not belong to especially grave crimes;
- Twenty-five years have passed since any especially grave offense has been committed.

It should be noted that according to section 6 of the same Article, the statute of limitation does not apply in the case of an international agreement.

Legislation of Georgia indicates the reasonable time for conducting investigation, though it is natural and understandable that “reasonable timeframe” is not defined. A reasonable timeframe constitutes an evaluative category. Considering the complexity of the case and other circumstances a timeframe for particular case proceedings may be assessed differently, though it should be noted that despite the complexity of the case (in factual and legal point of view), omission from the part of the investigative body/person (delaying investigative actions for certain period, not taking steps to obtain the evidence as per the rules defined by law) should be clearly assessed as delaying investigation which fails to meet one of the criteria of an effective investigation - promptness.

81 97 Members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others v Georgia), No. 71156/01, 03.05.2007, para. 96.

82 Erik Svanidze, Effective Investigation of Ill-Treatment: Guidelines on European Standards p.66

Thus, within the time limits prescribed for each crime, starting from the commitment of an offence prior to initiation of criminal prosecution, it is possible to have investigation ongoing. However, it provides no basis for delaying the investigation. The time limitation in Article 71 of the Criminal Code of Georgia is a maximum timeframe in which investigation can be carried out. The aforementioned Article establishes basis for releasing a person from criminal liability due to the expiry of a limitation period, since it is impossible to have investigation ongoing endlessly, also respond to the fact after a long period of time lacks significance and effect.

The Constitutional Court of Georgia with regard to the case - “Public Defender of Georgia, Citizen of Georgia Elguja Sabauri and Citizen of the Russian Federation Zviad Mania against the Parliament of Georgia”, observes the following:

“According to Article 71 of the Criminal Code, the limitations result in releasing from the criminal liability. The existence of this institution, on the one hand, is the recognition of the fact that administration of impartial justice and conduct of a fair trial after a certain period is impractical, since evidences together with the necessary circumstances are lost and testimonies of witnesses are not any longer compelling. Its aim is to legally ensure that the court would not be obliged to render a decision based on those evidences, which are considered to be incomplete due to the expiration of the term. With this, the legislator refuses questionable justice, decides the issue in favour of the person and relieves him/her from responsibility. This leads to a person’s right not to be convicted of criminal charges on account of expiration of the terms of limitations. This is the recognition that the criminal act has lost the quality of assessment ability that would be necessary for prosecuting a person, and secondly, the criminal action that is qualified as criminal offence not as the fact of factual reality, but that of legal reality, will lose its characteristic in relation to the concrete person.”

Therefore, the established practice in investigating authorities of Georgia that investigation continues within the period of limitation for criminal prosecution (2, 6, 10, 15 and 25 years), which can extend to unreasonably long period of time, does not meet the criteria of effective investigation, i.e. promptness. The majority of complaints submitted to the Public Defender’s office and concerning criminal cases are submitted precisely due to the delays in investigation.

IV. COMPETENCE

The practice of the ECHR, as well as the assessments of the Committee Against Torture indicate that for the effectiveness of investigation it is necessary for an investigative body to have full legal competencies to investigate the facts around the case, and legislative and practical barriers, such as the classification of information, prevention of identification of specific persons, should not obstruct investigation.⁸³

Furthermore, as in the case of UN acts, recommendations of the ECHR and Committee Against Torture indicate the importance of victims and witnesses protection authority, and in some cases, necessity of suspension of suspected officials from their posts to avoid pressure on investigation.⁸⁴

83 Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards*, p.68.

84 Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards*, p.69.

Council of Europe Commissioner for Human Rights, as well as the Committee Against Torture often note to “the need for ensuring adequate financial and technical resources as well as relevantly qualified specialists of law, medicine and other fields” for investigation. Discussing the competence to conduct the investigation it is necessary to highlight the obligation to launch an investigation upon the receipt of information on a crime. Furthermore, analysis and assessment of established practice is necessary according to which upon the study of the statement/complaint on the alleged misconduct of a staff member of the law enforcement body at the relevant institution, starts internal inspection, conducted by a General Inspection of the same institution, rather than an investigation.

The body with the authority to investigate must initiate and carry out an investigation. This rule derives from Article 100 of the Criminal Procedure Code of Georgia, which sets out the obligation to launch an investigation, in particular “upon receipt of information about a crime, investigator and prosecutor are entitled to start an investigation”. The information on initiating an investigation should be immediately sent to the Prosecutor. According to this rule, there is an obligation to launch an investigation and there is no mechanism to avoid the onset of the investigation.

In the case of presence of signs of a crime, the initiation of investigation and not an inspection is unconditional. Only if the conducted investigative actions fail to reveal or uncover the signs of crime, or confirm the fact of crime, can investigation cease.

In the case of the offences committed by law enforcers, in a number of cases reviewed by the PDO, the relevant structure initiates internal inspection rather than an investigation, which is a requirement of the Criminal Procedure Code of Georgia. While the investigation is initiated only once the internal inspection reveals the signs of a crime. Part of the cases was closed only based on the internal inspection.

Internal inspection should not be seen as an alternative to investigation. Initiation of the investigation is mandatory even in the absence of the signs of crime. As soon as an investigator or a prosecutor receives information on the office, he/she must initiate an investigation. The form and the way the information is received is irrelevant- whether it is oral or written, disseminated by media sources, or so on. Internal inspection does not represent a preliminary stage of the investigation. The Criminal Procedure Code of Georgia does not stipulate preliminary investigation stage as a precondition of investigation.

Initiating internal inspection instead of investigation is a violation of a positive obligation from the part of the State, as in case the crime is committed there is an obligation to initiate (carry out) investigation. As a minimum, this implies initiation of the investigation promptly, as soon as the information is received. Hence, in the case when various institutions (which at the same time are entitled to carry out an investigation) initiate internal inspection, by this disregards the obligation set by the legislation of Georgia on initiating an investigation.

V. VICTIM'S PARTICIPATION IN PUBLIC OVERSIGHT

ECHR acknowledged that “the Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement.”⁸⁵ “In the case of criminal justice, in terms of the location of the victim, this could mean that based on the Convention, he/she has the right to impose criminal liability on the perpetrator and punishment if the charges are confirmed. However, at the same time, the victim does not have any procedural rights. This raises the issue of the Article 13, right to effective remedy, to which all are entitled who have a substantiated complaint that he/she represents the victim of the violation of the rights guaranteed by the Convention. The remedies should be effective; they can be of any type, civil, administrative or pertaining to criminal justice. As a result, we have a situation, when based on the Convention a person can be required to go through criminal proceedings without having procedural rights]...[in its case law the Court acknowledged the importance of criminal prosecution for the protection of the rights stipulated by the Articles 2 and 3. According to the clarification provided by the Court, the States are obligated to carry out effective investigation and if need, resort to criminal prosecution when there is a case of death or there is sufficient evidence of inhumane treatment towards from the part of the perpetrators acting on behalf of the State.”⁸⁶

“The fact that human rights instruments should leave a victim without any rites against an alleged perpetrator in the ongoing prosecution should be deemed unsatisfactory. Political institutions are already acknowledging this problem. Ministerial Committee of the European Council adopted several recommendations on this issue, namely, on the legal aid of the victims, the place and time of the court hearings, as well as informing them on the results of the proceedings and assigning the right to appealing the denial of criminal prosecution.”⁸⁷

According to a well-established practice of the ECHR, in all cases of the violation of the right to life involvement of the immediate relatives of the victim must be insured in the proceedings, as it would be required to protect their legitimate interests.⁸⁸ In the case of Erukide and Girgvliani, taking into consideration denial to present information related to the case and its discussion to the second victim and the relatives of the deceased, the Court stated that “by not allowing the applicants and the second civil party to have access to the criminal file or at least to be regularly updated on the developments in the investigation, coupled with certain other serious omissions, the prosecution authority fell short of its obligation to safeguard the interests of the next of kin and to ensure that the investigation received the required level of public scrutiny.”⁸⁹

85 Ireland v United Kingdom, para. 239, Stefan Trechsel “Human Rights in Criminal Proceedings”, Tbilisi, 2009, p. 59

86 Stefan Trechsel “Human Rights in Criminal Proceedings”, Tbilisi, p. 60

87 Perez v France para. 26–9. Stefan Trechsel “Human Rights in Criminal Proceedings”, Tbilisi, 2009, p. 61.

88 See e.g. Khaindrava and Dzamashvili v Georgia No. 18183/05, 08.06.2010, para. 59–61.

89 Erukidze and Girgvliani v Georgia, No 25091/07, 26.04.2011, para. 258

The latest standards for the protection of victim's rights in criminal investigation are reflected in the DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. The Directive envisages the rights of the victim to be acknowledged and respected, the right to receive full information and support, the rights to participate in proceedings and right to defence. The four groups of these rights ensure that victims adequately participate in the protection of his/her legitimate interests and rehabilitation. At the same time, apart from the individual rights of the victim, his/her participation is the most significant means to ensure public oversight, which is an element of effective investigation.

European Council against Torture in its report on a visit to Bulgaria highlighted the importance of generating and processing statistical data related to the conducted investigation.⁹⁰ This should be ensured by investigative bodies in the State in a coordinated manner. Provision of such information to public is an effective leverage for appropriate public oversight.

In the process of investigation the victim his/her successor should have access to the proceedings of the investigation and have an opportunity to engage. One of the principles of the Article 2 of the Convention of the Human Rights and Basic Freedoms envisages engagement of a victim or a successor in the investigation unconditionally.

Participation of a victim/successor in the investigation does not imply handing over criminal prosecution into private person's hands and triggering revenge machine, rather it should serve the purpose of protecting their lawful interests and rights.

The Criminal Procedure Code of Georgia gives exhaustive list of victim's rights.⁹¹ Criminal Procedure Code of Georgia give practically no right to the victim at any stage of the investigation, he/she has no access to case materials, only is notified on the dates of the primary hearing of the defendant in the court, court sessions and substantive hearing session, is given copies of the final court decision and has the right to submit a complaint through civil procedure on the request for the reimbursement of the damage incurred, which cannot be assessed as effective participation of the victim and involvement in the investigation. It can be stated that the Criminal Procedure Code of Georgia excludes the possibility of victim's (injured party's) participation in the investigation process.

90 Erik Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards* p.84

91 According to the Criminal Procedure Code of Georgia, Article 57, the victim has the right to know the content of the charge brought against the defendant; testify on the damage suffered during the hearing at the court defining the charges; receive free of charge the copies of the criminal prosecution and / or termination of the investigation resolution (ruling), the judgment, or the final court decision; receive reimbursement of the expenses incurred for participating the process; claim back the property temporarily extracted for the purpose of the investigation and court proceedings; request special measures of protection if the lives, health and/or property of him/her and that of his/her family members are threatened; receive explanation on his/her the rights and responsibilities. According to the Article 106, para. 1 of the Criminal Procedure Code of Georgia, the victim has the right to appeal the decision of the Prosecutor on the suspension of the investigation and/or criminal prosecution on one-time basis with a senior Prosecutor.

As per Article 106 of the Criminal Procedure Code of Georgia, the victim has the right only to appeal the decision of the Prosecutor on the suspension of the investigation and/or criminal prosecution on one-time basis with a senior Prosecutor. Article 168 of the same Code, the denial of the Prosecutor on criminal prosecution is not subject to Court appeal by using discretionary authority. It can be appealed on a one time basis with the senior Prosecutor. Hence, if a person is recognised as a victim in the criminal case, and then the investigation or criminal prosecution is suspended, there is no judicial control mechanism to oversee the legitimacy of the Prosecutor's decision. The victim has the right to appeal the decision with a senior Prosecutor. According to the established practice, the decision on the suspension of the criminal case or prosecution is initially agreed upon with the senior Prosecutor, hence for the victim to appeal the decision in this form is useless.

There is high rate of appeals submitted to the PDO by the persons having the status of a victim, who request PDO's assistance in obtaining information on the progress of the investigation, including to find out whether certain investigative action has been carried out by respective investigative bodies, whether certain witness was interrogated, and/or certain types of expertise performed. High number of such requests submitted to PDO shows that provision of information to the victims in the framework of the current legislation is very limited.

Furthermore, in many of the cases reviewed by PDO, there were cases when the persons who suffered damage as a result of the committed crime, were not assigned the status of a victim, which is a result of incorrect interpretation and attitude towards the issue and the existing legislative norms.⁹²

It is important to consider the issue of disregarding victim's interests in that in case of plea bargaining. As per Article 217 of the Criminal Procedure Code of Georgia, prior to settling plea agreement, the Prosecutor is obligated to consult with the victim and inform him/her about the agreement. This article talks about consulting, provision information, rather than taking into account the opinion of the injured party. Although plea agreement is made between Prosecutor and defendant, identifying the position of the victim in terms of protection his/her rights is important, so that the agreement between the defence and prosecution does not violate victim's rights. It is especially important considering the fact that according to the Criminal Procedure Code of Georgia, plea agreement can be concluded irrespective of the nature of the crime committed. According to the criminal procedure legislation, the victim has not right to appeal the plea agreement, though it does not deprive him/her the right to file a civil suit. However, compensation of the damage when the case refers to the violated right to life or torture and/or inhumane treatment, cannot be considered as fair satisfaction.

It should also be noted that the Ministry of Justice of Georgia prepared a draft law on the amendments to the Criminal Procedure Code of Georgia, which will practically transform the institute of plea bargaining and increase the victim's rights. Initiation of these amendments should be assessed positively, since their adoption by the Parliament will significantly reduce the problems discussed earlier.

92 2013 Report of the Public Defender of Georgia, p. 213-219

CONCLUSION

Hence, the report presented by the Public Defender of Georgia prepared based on the study and analysis of numerous cases by the PDO, reveals and highlights the problems and gaps existing in the Georgian legislation and practice in the field of conducting effective investigation. In this regard it is necessary to start work on legislative changes and addendums, with the aim of creating an independent body, on one hand, which will lead the investigation on the crimes allegedly committed by the law enforcers (on the incidents of death, torture, inhumane and degrading treatment), and to ensure the protection of the rights and legitimate interests of the victims (on the incidents of death, torture, inhumane and degrading treatment) during the investigation process, so that the victims receive full information on the progress of the investigation.

It is also important that, even within the framework of the current legislation, the Chief Prosecutor's Office of Georgia conducts investigations on the alleged crimes committed by the staff of the Ministry of Internal Affairs of Georgia, the Ministry of Justice of Georgia, Ministry of Penitentiary and Corrections of Georgia and those committed on the territory of the penitentiary institutions. Furthermore, investigative body/person must ensure prompt and precise investigation proceedings. Considering all the circumstances described, it is necessary to take substantial steps for the improvement of the legislation and practice, so that effective investigation of the crimes allegedly committed by law enforcers is ensured.

RECOMMENDATIONS

1. To the Parliament of Georgia

Prepare and implement amendments and addendums to the relevant Georgian legislative acts and create an independent body, which will be the only authorised institution to conduct investigation on the crimes related to death, inhumane and degrading treatment allegedly committed by the law enforcers (the staff of the Ministry of Justice of Georgia, the Ministry of Penitentiary and Corrections of Georgia and crimes committed on the territory of the penitentiary institutions, the Ministry of Internal Affairs of Georgia (not only policeman), and of the Prosecutor's Office);

Furthermore, to implement legislative changes in the Criminal Code of Georgia to ensure the protection of the rights and legitimate interests of the victims in the process of criminal prosecution, namely, with the right of the victim to engage in the investigation process, have information on its progress, and have access to the documents containing the similar information.

2. To the Minister of Justice

Prior to the establishment of an independent institution, to clearly delineate and define the issues of institutional jurisdiction, namely, the investigation on the crimes committed by the staff of the Ministry of Justice of Georgia, the Ministry of Internal Affairs of Georgia, the Ministry of Penitentiary and Corrections of Georgia and those committed on the territory of the penitentiary institutions, the investigation to be carried out by the Prosecutor's Office of Georgia.

3. To the Chief Prosecutor's Office

The investigation of the cases on the crimes allegedly committed by the law enforcers, as well as those committed on the territory of the penitentiary institutions, to be handed over to the Chief Prosecutor's Office of Georgia.

4. To the Minister of Internal Affairs of Georgia

Lifting the status of a classified document (secret) from the part of the Statute of the General Inspection of the Ministry of Internal Affairs of Georgia, which pertains to the establishment of rules for investigation proceedings.

5. To the Ministry of Internal Affairs of Georgia, the Ministry of Penitentiary and Corrections of Georgia, the Ministry of Justice of Georgia, the Chief Prosecutor's Office of Georgia

Ensure initiation of the investigation and not internal inspection upon the receipt of the information about crime being committed. Internal inspection carried out by the General Inspections of the Ministries should not be considered as the preliminary stage of the investigation; ensure thoroughness and promptness of the investigation.

