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Meeting: 1369th meeting (March 2020) (DH)

Communication from an NHRI (24/01/2020) in the case of Merabishvili v. Georgia (Application No. 72508/13)

Information made available under Rule 9.3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1369^e réunion (mars 2020) (DH)

Communication d'une INDH (24/01/2020) relative à l'affaire Merabishvili c. Géorgie (requête n° 72508/13)
[anglais uniquement]

Informations mises à disposition en vertu de la Règle 9.3 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



საქართველოს სახალხო დამცველი
PUBLIC DEFENDER (OMBUDSMAN) OF GEORGIA

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Communication of the Public Defender of Georgia

MERABISHVILI v. Georgia (application no. 72508/13)

Made under Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the
Execution of Judgments and of the terms of Friendly Settlements

Introduction

The Public Defender's (Ombudsman's) Office of Georgia (hereinafter PDO) presents this submission pursuant to Rule 9.2 of the Rules of Committee of Ministers for the supervision of the execution of judgment. This submission is communicated for the supervision of the execution of judgments for consideration at the next meeting.

The Public Defender's (Ombudsman's) Office of Georgia is an independent National Human Rights Institution mandated by Constitution and Organic Law to oversee the observance of human rights in Georgia. By the Organic Law of Georgia, the Public Defender is authorized to conduct inquiry and obtain information regarding criminal cases where the decisions have entered into force. The Public Defender frequently employs this competence and studies the criminal cases it is alleged that the right to a fair trial has been breached or an investigation regarding a serious human rights violation has failed to meet effectiveness criteria.

The PDO presented a communication before the Committee in November 2018 regarding one of the matters arising in relation to the general measures of the judgment in *Merabishvili v. Georgia*. Recently the representatives of the Public Defender were allowed to study the case files of the ongoing investigation regarding the alleged removal of Mr. Merabishvili from the N9 penitentiary facility on an ad hoc basis. Hence, the present communication addresses matters arising in relation to the individual measures as well as one of the issues relating to the general measures of this judgment.

Therefore, we would like to present our findings before the Committee to assist the process of overseeing the effective execution of the judgment of the European Court of Human Rights.

Individual measures following *Merabishvili* judgment

The Government of Georgia has submitted information on the execution of *Merabishvili* judgment on 19 February 2018¹ and relevant action plans on 4 June 2018,² 26 October 2018,³ 29 March 2019,⁴ and 17 May 2019.⁵

In the last communication, the government provided the Committee with updated information on individual measures. The government indicated that the goal of the renewed investigation is to fully and thoroughly examine the alleged incident of 14 December 2013. The government assured the Committee that "all relevant witnesses were being questioned/re-questioned by the new investigative team" and "the applicant was interviewed in the presence of his lawyer and will be granted the

¹ [DH-DD\(2018\)181](#)

² [DH-DD\(2018\)602](#)

³ [DH-DD\(2018\)1056](#)

⁴ [DH-DD\(2019\)345](#)

⁵ [DH-DD\(2019\)565](#)

access to the re-opened criminal case materials through his lawyer by the end of May 2019”.⁶

The Committee noted in the 1348th meeting (4-6 June 2019) that the investigation had made only limited progress since December 2018 and “the efforts had been limited” to addressing some of the specific deficiencies which the European Court identified in relation to the previous investigations of the incident. The committee reiterated the importance of a sufficiently comprehensive investigation “which explored all reasonable leads and took all necessary steps with the required level of diligence to enable the identity and criminal liability of those responsible to be established”.⁷

Furthermore, the Committee urged the authorities to ensure that the new investigation “is capable of establishing the identity and criminal liability of those responsible; sufficiently broad in scope to determine whether the events had any impact on the criminal proceedings; and completed with diligence and speed”.⁸

Findings of the investigation case file

Following the communication with the relevant representatives of the Prosecutor’s Service of Georgia in August and September 2019, a representative of the Public Defender’s Office was allowed to study the case files on October 1st and October 30th. Additionally, the case file was examined once again in January 20th 2020 to look into the measures that had been taken since October.

The criminal case files were examined with the view of both international and domestic standards of effective investigation. The standards of an effective investigation identified by the European Court of Human Rights regarding the timing, thoroughness and involvement of the victim in the investigation served as the main guideline. Moreover, the PDO also took into account the relevant articles of the Criminal Procedure Code of Georgia that require the investigation to be thorough, full and impartial.⁹

The findings indicate that the investigation has suffered from various flaws which require further steps to be taken in order to consider the ongoing investigation effective. The manner in which the investigation has currently been conducted cannot be regarded as fulfilling the obligations before the Committee. Such conclusions regarding the thoroughness of the investigation and the lack of determination of the state officials can be drawn from the shortcomings related to the non-questioning of major witnesses, not reacting to the crucial objective information undermining the alibis of G.G. and I.M. and insufficient involvement of the victim in the proceedings. Moreover, the Public Defender considers that sufficient attention should be paid to the involvement of G.G. and I.M. in “Kortebi” Case¹⁰.

- **Non-questioning of the witnesses**

I.K. represents one of the witnesses who claimed to have information regarding the removal of Mr. Merabishvili from the prison cell. In his testimonies of December 10-18, 2018, he recalled that in 2014 he was employed as a Head of PR Department of the Ministry of Corrections. He claimed to

⁶ [DH-DD\(2019\)565](#)

⁷ Available online: < <http://hudoc.exec.coe.int/eng?i=004-48437> > [Accessed 20/01/2020].

⁸ Ibid.

⁹ Article 37.2 of the Code of Criminal Procedure of Georgia

¹⁰ Merabishvili v Georgia, 72508/13 GC, para 96, 108.

have overheard a number of conversations of S.S.¹¹ and other high ranking officials in the Ministry, such as M.S.¹² A.T.¹³ and O.P.¹⁴ where they planned to conceal what had occurred to Mr. Merabishvili. It is remarkable that despite such testimony from a former high ranking official of the Ministry none of the persons named by I.K. have been re-questioned in light of I.K.s testimony yet.

Moreover, still no proper explanation has been given for the exorbitant bonuses paid to various prison officials in December 2013. The investigation asked only one or two brief questions regarding this matter to relevant witnesses with no follow-up or an attempt to verify it. Hence, this flaw of the investigation initially identified by the Court¹⁵ remains the same.

- **Insufficient inquiries regarding the phone records**

In their action plan of March 2019, the Government reported that a number of investigative measures had been conducted. These measures mainly revolved around G.G. and I.M. – two special-forces officers who have been alleged to have been part of the incident.¹⁶ It was reported that “G.G.’s deputy was questioned, and confirmed G.G.’s statement that they had been together on the night in question at the Special Forces building in Rustavi. Members of the family of I.M. were also questioned and confirmed that I.M. had been at home with them in Tsilkani”.¹⁷

The legislative changes¹⁸ allowed the investigation access to mobile telephone data to establish the whereabouts of G.G. and I.M. on the night of the incident. This data was subsequently obtained and examined on September 17, 2019.

The obtained data greatly contradicts the testimonies of I.M. and his family members. While they all claim that I.M. was in Tsilkani, the data shows that his phone was located in Tbilisi both on the evening of December 13¹⁹ and the morning of December 14²⁰. Despite this contradiction, neither I.M. nor his family members have been re-questioned as of January 20, 2020.

Furthermore, the last call to G.G. on December 13 was made by a phone number attributed to the Ministry. It seems quite curious that the investigation has yet to attempt to find out to which official of the Ministry the number belonged.

Unfortunately, no investigative measures have taken place since obtaining this information that directly contradicts the testimony of I.M. and his family members. The investigation did not re-question them or inquire who called G.G. in the evening of December 13. Instead, since September 17, seven unrelated witnesses (former low-ranking prison and ministry staff) have been questioned, none regarding the phone records.

- **Insufficient involvement of the victim in the investigation**

¹¹ Then acting Minister, now the councilor of the Government of Georgia.

¹² A controversial figure later moved to the Prosecutor’s Service of Georgia who was later sentenced to prison for his role in the unrelated investigation of the murders of adolescents on Khorava street. M.S. was the head of the General Inspection body of the Ministry, which oversaw the first investigation launched regarding the *Merabishvili* incident.

¹³ Current Chairman of the Parliament of Georgia.

¹⁴ Former Chief Prosecutor of Georgia.

¹⁵ *Merabishvili v Georgia*, 72508/13 GC, para 254.

¹⁶ *Merabishvili v Georgia*, 72508/13 GC, para 96.

¹⁷ Available online: < <http://hudoc.exec.coe.int/eng?i=004-48437> > [Accessed 20/01/2020].

¹⁸ Another individual measure emerging from *Merabishvili* judgment.

¹⁹ On 23:37 I.M.-s phone was located near Grmagele, Tbilisi.

²⁰ On 10:02 I.M.-s phone was located near Mziuri, Tbilisi.

The Committee noted that “it is a matter of concern that the prosecuting authorities have refused to grant the applicant victim status, with all the rights which it entails and that this decision was upheld by the domestic court” and declared that “the authorities should be requested to re-examine the applicant’s victim status and in any event to ensure that he continues to enjoy these rights throughout the investigation”.²¹

Not only has the matter of the victim status not been dealt with appropriately, the case file clearly shows that the investigative body has failed to adequately involve Mr. Merabishvili in the investigation.

Mr. Merabishvili was re-questioned on May 14, 2019. He recalled many facial and bodily characteristics of the persons that he met on the night of the incident. He also claimed that he was ready to participate in the identification process of the alleged perpetrators. It seems odd that Mr. Merabishvili was mostly questioned about why he had not provided this information earlier. Mr. Merabishvili responded that he was ready to let the detectives know of this information during his last questioning in 2016, but they refused to listen to him and bluntly finished the procedure.

The Public Defender considers it peculiar that the investigation did not attempt to conduct the facial composition of the suspects despite Mr. Merabishvili providing a great many details of their appearance. Albeit there is no specific article in the Code of Criminal Procedure of Georgia regarding such power of the investigative body, the Code acknowledges the power to conduct the identification of a suspect.²² Therefore there was no barrier for the investigative body to conduct facial composition and then allow Mr. Merabishvili to participate in the identification process of the alleged suspects (especially G.G. and I.M.).

It must be reiterated that during the questioning Mr. Merabishvili was eager to participate in the identification process and it was the investigative body that refused to sufficiently guarantee the participation of the victim in the investigation. He has still not been offered to identify perpetrators. Hence, the flaw of the investigation initially identified by the Court²³ remains unresolved.

- **The link between G.G. and I.M. with the “Kortebi” case**

While the Committee is aware of the fact that I.P., G.Ts, G.G., I.M., and several other ex-special forces officers were imprisoned in the “Kortebi” case,²⁴ the Public Defender deems it necessary to notify the Committee with more details of this case to highlight the curious link between G.G., I.M. and the prosecution.

The PDO has been closely monitoring the “Kortebi” case for years not only due to the astounding public attention and its political implications stemming from it but also because of the peculiar bonds with the *Merabishvili* case and intertwined identities of the main actors. The Public Defender has found quite peculiar how favorably G.G. and I.M. been treated in both cases while I.P., G.Ts. and others have suffered the harsh consequences.

The case of G.G., I.M. and 5 other officers, who had been charged with aggravated murder in “Kortebi” case, was first split from the same charge against I.P., G.Ts. and other officers. The first

²¹ Available online: < <http://hudoc.exec.coe.int/eng?i=004-48437> > [Accessed 20/01/2020].

²² Article 131 of the Code of Criminal Procedure of Georgia.

²³ *Merabishvili v Georgia*, 72508/13 GC, para 340.

²⁴ *Merabishvili v Georgia*, 72508/13 GC, para 96.

group of officers identified and testified against the latter and were then released in August 2015 under personal surety.²⁵ Based largely on the testimonies the Tbilisi City Court found I.P., G.Ts. and others guilty in October 2015. The convicted officers notified the PDO that the former group had been placed in the same cell of the N9 Penitentiary for months where they were persuaded by the state officials to testify against them and even rehearsed the testimonies together.

The Public Defender's Office inquired into this allegation as it represented a clear and major breach of the Code of Criminal Procedure²⁶ and the Imprisonment Code²⁷. Both the internal files kept within the PDO and the records requested from the Ministry clearly indicated that the allegation was true. 3 staff members of the PDO testified before the Court of Appeals and provided the files proving the same. Nevertheless, neither the Court of Appeals, nor the Supreme Court of Georgia dismissed the testimonies of the seven officers against I.P., G.Ts. and others.

The Public Defender awaited for an investigation to examine how this violation was committed. However, the Prosecutor's Office did not initiate the investigation. The Ministry did not impose disciplinary measures on the prison staff either as more than a year had passed from the breach. Therefore, to date it is unknown whether the placement of the seven inmates together as well as their subsequent, simultaneous decision to alter their previous testimonies and testify against I.P., G.Ts. and others were merely a coincidence or a part of a premeditated scheme. The PDO found out in 2017 that the prosecution had completely dropped the murder charge in "Kortebi" case against all these officers.

In sum, G.G. and I.M. were under great leverage not in solely the present, but in "Kortebi" Case as well where they were charged with murder, imprisoned, later released under personal surety and completely freed from the charge. Reminiscent of the judgment, the Public Defender considers the involvement of G.G. and I.M. in the "Kortebi" case (especially during their presence in the penitentiary facility) relevant to this case and maintains doubts over the weight of their testimonies in both instances.

General measures following Merabishvili judgment

Georgian Government undertook the following 3 general measures in order to implement the Court's judgment in the present case: 1) adoption of the legislative changes aimed at allowing the investigation to access the relevant mobile telephone data, 2) extension of the five-day time-limit for retention of surveillance video footages in penitentiary establishments and 3) insurance of the institutional independence of the Prosecutor's Office of Georgia.

In regard with the abovementioned undertakings by the Government of Georgia, the Committee of Ministers welcomed the adoption of legislative amendments into the Code of Criminal Procedure to allow mobile telephone data to be accessed in relation to investigations into offences of "official misconduct", come into force on 3 June 2019; the decree of the Minister of Justice, extending the five-day time-limit for retention of surveillance videos to 30 days in all prison establishments, to be phased in between 1 July 2019 until 1 January 2021 and constitutional amendments entered into force on 16 December 2018, with the effect that the Prosecutor's Office is now accountable only to Parliament and is no longer part of the executive²⁸.

²⁵ Merabishvili v Georgia, 72508/13 GC, para 108.

²⁶ Article 75.4 of the Code of Criminal Procedure of Georgia.

²⁷ Article 205.4 of the Imprisonment Code of Georgia.

²⁸ Available online: < <http://hudoc.exec.coe.int/eng?i=004-48437> > [Accessed 20/01/2020].

The Committee of Ministers last examined the implementation of the Court's judgment in the case of Merabishvili v. Georgia in June 2019. At that meeting, the Committee of Ministers invited the Georgian authorities to reflect on the need for further general measures, taking into account also the outcome of the new investigation.

Hereby, the Public Defender's Office of Georgia would like to present its opinion on the need to take further measures to strengthen the independence of the Prosecutor's Office as one of the general measure undertaken by the Georgian Government. Despite some positive amendments taken into the Constitution of Georgia in regard with institutional reforms of the Prosecutor's Office, the PDO considers that various problems still remain and therefore some further measures need to be adopted in order to ensure institutional independence and accountability of the prosecutor's office. The relevant arguments are dealt with below.

In 2018, the reform of the Office of the Prosecutor General was accomplished. The reform was aimed at ensuring institutional impartiality and independence of the prosecutor's office in conformity with the new wording of the constitution.

Under Article 65.2 of the Constitution of Georgia, the prosecutor's office is led by the Prosecutor General. In parallel, at the constitutional level, there is the Prosecutors' Council which comprises of 15 members (8 of them are prosecutors). In accordance with the Constitution, the Prosecutors' Council shall be established to ensure the independence, transparency and efficiency of the prosecutor's office. However, this goal cannot be achieved in practice since according to the Organic Law on Prosecutor's Office, adopted on 30 November 2018, the Prosecutor General is the central figure in the Prosecutor's Office of Georgia and his/her authority cannot be balanced by the limited powers of the Prosecutors' Council.

The Prosecutors' Council is not involved in the organisation of the structure and system of the prosecutor's office which implies jurisdiction or separation of competences among structural units²⁹. It neither approves the guidelines stemming from the Criminal Law Policy³⁰ nor participates in the adoption of the normative acts governing systemic issues of the prosecutor's office. All the issues mentioned above fall within the competence of the Prosecutor General of Georgia. Moreover, since the Prosecutors' Council has no leverage over the Prosecutor General, the work of the Prosecutors' Council cannot not be efficient.

In addition, composition of the Prosecutors' Council is also faulty. It does not sufficiently enhance public credibility of independence.

According to the assessment given by the Venice commission, this is an ambitious goal (to ensure the independence, transparency and efficiency of the prosecutor's office) which will be difficult to achieve with the powers granted by the national legislature to the Prosecutorial Council³¹.

In the light of the above, the Public Defender of Georgia called upon the Parliament of Georgia to start the reform of the Office of the Prosecutor General of Georgia, to take into consideration the council's constitutional role and vest it with the relevant competence for ensuring the effectiveness,

²⁹ The Organic Law on Prosecutor's Office of Georgia, Article 7.

³⁰ Ibid. Article 15.2.

³¹ Opinion of the Venice Commission of 17 December 2018, CDL-AD(2018)029, para. 31.

independence and transparency of the prosecutor's office³².

Lastly, the Public Defender's Office of Georgia would like to draw the Committees' attention to the fact that in addition to the present case, the Government of Georgia undertook to ensure the institutional independence of the Prosecutor's Office as one of the general measure in Tsintsabadze group of cases as well (relating to the implementation of the Court's judgments delivered against Georgia in numerous individual applications concerning the failure to conduct effective investigations into allegations of violations of the right to life and ill-treatment by law enforcement officials). We would like to underline that while examining the Tsintsabadze group of cases in September 2018, the Committee of Ministers held that it welcomed the constitutional changes adopted to strengthen the independence of the Prosecutor's Office but expressed regret that certain recommendations made by the Venice Commission on this issue were not followed³³.

Conclusion

With all the aforementioned details in mind, the Public Defender considers the ongoing investigation has not been sufficiently comprehensive and the authorities have not taken all reasonable steps to identify the perpetrators and establish criminal liability of those responsible. The Public Defender strongly believes that the efforts of the investigative body have not addressed the specific deficiencies, which the European Court identified in relation to the previous investigations of the incident.

As for the General measure to ensure the institutional independence of the Prosecutor's Office, the Public Defender underlines that the composition of the Prosecutorial Council and existing legislation fails to ensure effectiveness, independence and transparency of the prosecutor's office.

The Public Defender hopes that the Committee addresses serious concerns raised in this submission and in the light of these concerns calls upon the Government to undertake individual and general measures for the full and proper implementation of the judgment on this case.

Sincerely,

Nino LOMJARIA



³² The Report of the Public Defender of Georgia, "On The situation of Protection of Human Rights and Freedoms in Georgia", 2018, p. 70. Available online: < <http://ombudsman.ge/res/docs/2019101108583612469.pdf> > > [Accessed 20/01/2020].

³³ Available online: < [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22004-5830%22%5D%2C%22DocumentIdentifier%22:%5B%22DH-DD\(2020\)106%22%5D%2C%22Section%22:%5B%22Conclusion%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22004-5830%22%5D%2C%22DocumentIdentifier%22:%5B%22DH-DD(2020)106%22%5D%2C%22Section%22:%5B%22Conclusion%22%5D%7D) > [Accessed 20/01/2020].