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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

1. 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 judgment for consideration at the next meeting.
2. The Committee of Ministers last examined the implementation of the Court's judgment in the case of Merabishvili v. Georgia in October 2020. At the meeting, the Committee of Ministers strongly encouraged the authorities to continue reforms aimed at further enhancing the independence, effectiveness and accountability of the prosecution service, including considering whether further legislative changes are required. The Committee of Ministers invited the Georgian authorities to clarify the possibilities for the investigative remit of the State Inspector's Service to encompass cases in which the European Court found a violation of Article 18.
3. This submission provides information on the implementation of individual and general measures by the Government of Georgia in the course of the execution of the present judgement.
4. With this submission the Public Defender's Office of Georgia would like to reiterate that despite some positive legislative amendments with regards to the institutional reform of the Prosecutor's Office, considerable problems still remain in the system which is confirmed by the majority of active CSOs operating in Georgia and International bodies, including Venice commission.
5. Further, PDO will furnish the Committee with the information on the challenges faced by the State Inspector's Service in terms of effectively performing its mandate.

General Measures

Shortcomings of the Prosecution Reform

1. For years, in its reports, PDO has been addressing the problem of delayed and ineffective investigation conducted by Prosecutor's Office not only with regards to torture and ill-treatment cases, but in relation to almost every human rights. For many years, we only had an information that certain investigations were ongoing, however, didn't had any exact information what was actually ongoing. Thus, from the human rights perspective it is crucial to increase the accountability of the Prosecutor's Office and to ensure the transparency of its work in terms of investigation. Unfortunately, the constitutional reform of 2017 could not solve the above-mentioned challenges.
2. As already noted in PDO's communications submitted in this case earlier, with the 2016-2018 constitutional reforms, the status of the Prosecutor's Office was redefined. As a result of the amendments, the Prosecutor's Office is no longer a part of the Cabinet of Ministers and it has acquired the status of an independent body. The Prosecutorial Council, a collective body, was established within the framework of the Office to ensure the **independence, transparency** and **efficiency** of the system.
3. 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 Prosecutorial Council.

4. The Prosecutorial Council is not involved in the organization of the structure and system of the prosecutor's office which implies jurisdiction or separation of competences among structural units.¹ It neither approves the guidelines stemming from the Criminal Law Policy² nor participates in the adoption of the normative acts governing systemic issues of the prosecutor's office. According to the Organic Law, appointment, promotion, disciplining and dismissal of prosecutors is a competence of the Prosecutor General. Even though the advisory body is formed in relation to above-mentioned issues, its decisions are not mandatory and the final decision is made by the Prosecutor General.
5. In 2018 and 2019 Parliamentary Reports the Public Defender of Georgia addressed the Parliament with the proposal to start the reform of the Office of the Prosecutor General of Georgia to the effect to involve the Prosecutorial Council in the process of determination of jurisdiction and separation of competences among structural units; approving guidelines and adopting normative acts stemming from criminal law policy that regulate systemic aspects of the prosecutor's office. Unfortunately, the Parliament of Georgia failed to fulfil the Public Defender's proposal.
6. In the light of the above, the Public Defender of Georgia deems that the work of the Prosecutorial Council cannot not be efficient since the Prosecutorial' Council has no leverage over the Prosecutor General and the constitutional mandate entrusted to the Prosecutorial Council of transparency and accountability, can't be achieved through existing legislative framework.
7. Concerns voiced by PDO is fully shared by the Coalition for an Independent and Transparent Judiciary³ in their assessment of the prosecution reform.⁴ According to their statement, the final version of the law does not significantly differ from the provisions of the law that were in force prior to the Constitutional reform. In addition, adopted legislative amendments do not address critical issues that create major challenges for the system; these issues are the politicization of the composition of the Prosecutorial Council and excessive authority of Prosecutor General.
8. The Coalition notes with concern that the reform was confined to mostly technical and insufficient amendments and that such small-scale changes and revisions do not ensure harmonization of the Organic law with the new edition of the Constitution and do not correspond to its intention to ensure independence and effectiveness of the Prosecutor's Office through a depoliticized collegial body, the Prosecutorial Council.
9. The Venice Commission commented on the functions of the Prosecutorial Council, stating that its new constitutional role – to ensure independence, transparency, and effectiveness of the Prosecutor's Office – will be difficult to accomplish through the new law. Just selecting a candidate for the Prosecutor General cannot be considered as an effective tool of fulfilling the Council's constitutional role.⁵

¹ The Organic Law on Prosecutor's Office of Georgia, Article 7.

² Ibid. Article 15.2.

³ Coalition for an Independent and Transparent Judiciary was formed in April 2011. Currently it unites 40 member NGOs. The goal of the Coalition is to consolidate the efforts of legal professional associations, legal rights NGOs, business associations, and media into a joint advocacy for an independent, transparent and accountable justice system.

⁴ The Coalition for an Independent and Transparent Judiciary Assesses the Prosecution Reform Results - available at: <https://bit.ly/3soyCyh>

⁵ Opinion of the Venice Commission of 17 December 2018, CDL-AD(2018)029 Available at:< <https://bit.ly/2XM0gHk>>

10. It is noteworthy that defining the scope of the Prosecutorial Council's authority is largely dependent on the rules of its composition. The various proposals for the composition and appointment of the Council members made to Parliament by various interest groups at different times aimed at creating a politically neutral Council on the basis of consensus, which would then serve as a firm guarantee for the independence and openness of the Prosecutor's Office. However, these major proposals and comments were not taken into consideration by the Parliament.⁶
11. The Prosecutorial Council consists of 15 members and the majority of its members (8 members) are prosecutors. The non-prosecutor members include MPs (creating the risks of politicizing the Council, especially that it is based on a system of party quotas), a member appointed by the Ministry of Justice (creating the risk of the interference by the government with the activities of the Prosecutor's Office), as well as third parties elected through parliamentary quota. The election rule of the third parties is not based on a political consensus. The presence of judges and lawyers within the Council also poses a risk of conflict of interests. Involvement of political actors and the maintenance of party quotas in this process were considered undesirable by non-governmental and international organizations.⁷
12. Venice Commission draw its attention to the composition of the Prosecutorial Council and significantly criticized respective provisions in reference with the newly defined Constitutional role of the Council. According to the opinion of the Venice Commission the presence of 8 prosecutors forming the majority of the council is faulty taken into consideration the vertical nature of authority and the professional subordination within the prosecutor's office. Thus, the majority representation of prosecutors in the council undermines the independence of the prosecution service. The Venice Commission also points out the fact that the majority representation of the council by prosecutors is not balanced out by the participation of civil society.⁸
13. The non-governmental organizations pointed⁹ to the high number of high ranking political officials in the council (Minister of Justice, Members of the Parliament) and criticized¹⁰ inclusion of judges in the Council.
14. The international experience and recommendations in this regard clearly point out that the main reason for Prosecutorial Council's establishment is ensuring depoliticization and autonomy¹¹ of the prosecution service from all branches of government. As noted above, this objective cannot be met with the current rules of the Council's composition.
15. In terms of accountability of Prosecutor General it should also be pointed out that the Organic Law of Georgia on the Prosecutor's Office requires the Prosecutor General to present an annual report to the Prosecutorial Council and the Parliament. It also

⁶ The Coalition for an Independent and Transparent Judiciary Assesses the Prosecution Reform Results - available at: <https://bit.ly/3soyCyh>

⁷ NGO coalition joint UPR submission on Institutional Challenges in Judiciary and Law Enforcement System; Critical Issues of Criminal Justice. Para. 2.4. Available at: <https://bit.ly/2XQNTDm> >

⁸ Opinion of the Venice Commission of 17 December 2018, CDL-AD(2018)029 Available at: < <https://bit.ly/2XM0gHk>

> ⁹ IDFI - Opinion on the Draft Organic Law on Prosecutor's Office. Available at: <https://bit.ly/3oVFb95> >

¹⁰ EMC's opinion on the Draft Law on Prosecutor's Office available at: < <https://bit.ly/3p6Fo9T> > ; Reform of the Prosecution System, Human Rights Education and Monitoring Center (EMC). 2018. Available at: < <https://bit.ly/39zeQXW> >

¹¹ Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), Available at: < <https://bit.ly/35LQDwr> >

defines the scope of the report. Under this regulation, the Prosecutor's Office is obliged to inform the Parliament and public about the criminal situation existing in the country, types of widespread crimes, trends and other issues. The report should not include information about investigations into specific criminal cases, judicial review or specific circumstances of individual cases. It should be noted that Prosecutorial Council does not have an actionable role in preparing the annual report on the Prosecutor's Office. Contrary to the view of the Venice Commission, the Prosecutorial Council is not authorized to offer a written opinion to the report of the activities of the Prosecution System.

16. Furthermore, it should be noted that the Prosecutor General or deputies are required, if requested, to attend parliamentary, committee and commission sessions, answer questions and present a report on its activities. However, the Parliament is required to submit in advance the questions and issues to be discussed during the sessions to the Prosecutor General, and the General Prosecutor is permitted not to respond to topics unknown to them in advance.
17. An effective investigation into incidents of alleged ill-treatment by law enforcement officers has been a systemic problem for the country for years. Before the State Inspector's Service became operational on 1st November 2019, the prosecutor's office was the only agency in charge of the investigation and criminal prosecution of such crimes. Investigations initiated by Prosecutor's Office are usually protracted without an outcome for years. Since Public Defender of Georgia has no mandate to have access to criminal case-files in ongoing investigations, Public Defender's Office of Georgia applied to Parliament asking for the extension of its mandate with the purpose to study and ensure accountability of the activity of the Prosecutor's Office concerning particular cases, though Parliament rejected this proposal.
18. In addition, as noted by the Institute for Development of Freedom of Information (IDFI) in its submission,¹² individual prosecutors' independence remains a challenge. Prosecutors need effective and functional legislative guarantees to ensure their neutrality and impartiality while carrying out criminal proceedings. Chief Prosecutor's orders are obligatory for all prosecutors. It is important to further empower individual prosecutors and enhance the independence of the lower level prosecutors.
19. To sum up, Public Defender of Georgia maintains that it is of an utmost importance in terms of realization almost every human right that the independence, transparency and efficiency of activities of the Prosecutor's Office is guaranteed and that the State resume the talks regarding the mandate of the Prosecutorial Council and determine its powers so that it can actually fulfill its constitutional obligations. In addition, the Parliament shall introduce amendments to the law requiring the support of both a majority and a minority to elect the Prosecutor General.

Challenges faced by the State Inspector's Service of Georgia

20. In relation to the challenges faced by the State Inspector's Service PDO will cover two issues: shortcomings identified by PDO, namely, failure to investigate the cases concerning the Minister of Internal Affairs and several high-ranking officials and

¹² IDFI Submission to the Third Cycle of Universal Periodic Review Administration of Justice and Fair Trial Freedom of Expression/Access to Information Right to Privacy para. 18. – Available at: < <https://bit.ly/39J58ST> >

existing influence of the Prosecutor's Office on the State Inspector's investigation activities.

21. According to the 2019 annual report¹³ of the State Inspector's Service of Georgia, the analysis of the cases and activities of the Investigative Department of the Institution shows that it faces a number of (including legislative) challenges;
22. It is highlighted in the report that victims / potential victims of criminal cases pending before the State Inspector's Service are mainly persons detained for administrative or criminal offences. Consequently, the perpetrators of alleged violence against them are directly and / or indirectly involved in the process of imposing administrative / criminal liability on victims / potential victims of criminal cases. Because of these circumstances, they (victims / potential victims) usually refrain from testifying against perpetrators of violence;¹⁴
23. It is also mentioned in the report that in some cases, the Investigative Department of the Service fails to obtain substantial neutral evidence. There were instances when State Inspector's Service was not provided with audio-video recordings on a particular criminal case and that was reasoned by the fact that the records could not be obtained on hard drive. Since records are being requested by the Inspector from agencies whose employees may have been exposed for illegal activities, failure to provide requested records raises legitimate questions. (Especially when records are requested immediately, within a few days from the possible commission of a crime).¹⁵
24. The Inspector highlights that in order for the State Inspector's Service to ensure effective investigations, the law enforcement bodies must apply special measures to eradicate potential cases of deleting video recordings. They should also ensure that video surveillance system encompasses fully the space within their administrative buildings, where participants of proceedings are held/or where they are able to move. In many cases, the quality of video recordings carried out at the administrative buildings of the law enforcement bodies is rather low. Low quality of the recording makes it difficult to identify specific individuals and their actions. According to the State Inspector, the Ministry of Internal Affairs should take steps to equip police cars with video cameras covering internal space within the cars and to replace/upgrade low quality video cameras at its administrative buildings; the period of time during which the recording is kept should be prolonged or a mechanism for temporarily archiving the material should be put in place.¹⁶
25. Furthermore, the law does not specify the authority of the State Inspector's Service to submit a substantiated proposal to the General Inspection of the relevant agency if a disciplinary misconduct by official has been confirmed, also law does not provide the responsibility of the agency receiving such a proposal and the procedures for its consideration. In one criminal case, the Service appealed to the General Inspectorate of the Law Enforcement Agency, and in the absence of such rules, the decision is still unknown;¹⁷
26. It should be noted that the investigative powers of the Inspector are limited to specific types of crimes that do not ensure effective, credible and unbiased investigations into all types of offences committed by law enforcement officers. It is noteworthy that the

¹³ 2019 Annual report of the State Inspector's Service of Georgia. Available at: < <https://bit.ly/39PU6LJ> >

¹⁴ Ibid. p. 123

¹⁵ Ibid. p. 124

¹⁶ Ibid.

¹⁷ Ibid. p. 125

Inspector is not entitled to investigate cases related to the Minister of Interior Affairs, the Prosecutor General, or the Head of the State Security Service of Georgia.¹⁸

27. The State Inspector's Service which is an independent investigative body accountable before the Parliament of Georgia and responsible for effective and impartial investigation, is not entitled to independently (without engagement of the Prosecutor's Office) decide on carrying out important investigative actions, such as search, seizure, in certain cases – inspection, witness examination at the court during investigation. State Inspector's Service is unable to carry out investigative actions related to computer data (including requesting provision of documents and information) and to conduct covert investigative actions. The Service can also not decide independently on carrying out operative-investigative activities. At the same time, a prosecutor is entitled to issue a mandatory instruction to an investigator concerning the conduct of investigative activities, including those that, according to current legislation are carried out by the decision of an investigator independently. Such dependency on another institution cannot fully guarantee institutional independence of the Service.¹⁹ It should be highlighted that the Systemic deficiencies on the part of the Prosecutor's Office to investigate human rights violations adequately and thoroughly gave rise to the need of setting up an independent investigative mechanism. Thus, the State Inspector's Service was created to eradicate the concerns with regards to the independence and effectiveness of the Prosecutor's Office. Therefore, it is imperative to allow the State Inspector to conduct investigation independently, and without a prosecutor's mandatory instructions.²⁰
28. It is noteworthy that, in 2018, the Ministry of Internal Affairs started the reform to separate investigative and prosecutorial functions from each other. Hopefully, this reform will be accomplished successfully in near future and the Office of the State Inspector will be able to conduct investigative actions independently from the prosecutor's office. The Public Defender positively assessed the adoption of the Law on the State Inspector Service. However, above mentioned legal shortcomings were pointed in a public reports. PDO believes that addressing these challenges are instrumental for orderly and effective functioning of the State Inspector's Service and for ensuring independent and effective investigation of human rights violations.
29. To conclude, PDO deems it critical that abovementioned legal and practical shortcomings are eliminated in order to guarantee the effectiveness of the investigative work of the State Inspector.

Individual measures

30. The present communication also addresses one of the matters arising in relation to the individual measures in *Merabishvili v. Georgia*. On January 18, 2021 the representatives of the PDO studied the case files of the investigation regarding the alleged removal of Mr. Merabishvili from the N9 penitentiary facility and examined the investigative measures conducted since the last visit on August 4, 2020.

¹⁸ 2017 Annual Report of the Public Defender of Georgia. p.59 Available at: < <https://bit.ly/3sJz1eD> >

¹⁹ 2019 Annual report of the State Inspector's Service of Georgia. P. 125. Available at: < <https://bit.ly/39PU6LJ> >.

²⁰ 2017 Annual Report of the Public Defender of Georgia. p.59 Available at: < <https://bit.ly/3sJz1eD> >

31. In the previous communication the PDO noted that the manner in which the investigation had been conducted could not be regarded as fulfilling the obligations before the Committee. The concerns such as insufficient inquiries regarding the phone records of G.G. and I.M., and insufficient involvement of the victim in the investigation, namely not taking adequate steps to conduct facial composition and then allow Mr. Merabishvili to participate in the identification process of the alleged suspects²¹ still remain. As of now, no action has been taken to allow Mr. Merabishvili to identify the alleged perpetrators while the investigation faced an objective obstacle on questioning I.M.'s parents. As stated, they reside on the territory currently occupied by Russian and Tskhinvali region forces and thereby are unable to cross the so called border.
32. There has been, however, an important development regarding the questioning and subsequent investigatory experiment of Mr. K. T. He is a former inmate of penitentiary facility N9 where Mr. Merabishvili was located. On August 11, 2016 Mr. K. T. stated in the court of law that around midnight of December 14, 2013 he saw from a narrow space of his own cell Mr. Merabishvili and the head of the prison facility (with possibly other persons) walk past Mr. K. T.'s cell, most likely on their way out of the prison. Despite his stated willingness to participate in an investigatory experiment (after consulting with his lawyer) he was never asked to do so up until 2020.
33. Following the revitalized efforts of the investigation, on September 15, 2020 Mr. K. T. testified before the judge again, recalling the events of the relevant night in a very thorough manner. Mr. K. T. confirmed the testimony he gave in 2016 and recalled again the facial and body features of Mr. Merabishvili and the head of the prison facility, which allowed him to claim in certainty that he saw these two persons at the night of December 14, 2013. He described the placement of his and Mr. Merabishvili's cells. He recounted a narrow space that appeared after the guards closed his cell door in the upper and middle, but not in the lower end of the door, and how the inmates used to put a bottle cap at the bottom of the door to be able to look outside. In a lengthy statement Mr. K. T. also told the court that he was ready to participate in the experiment and had the relevant remarks written down for this exact purpose years ago.
34. On December 17, 2020 the experiment was held. Mr. K. T. showed the investigators that his cell was placed so that Mr. Merabishvili would have to walk past it if he was to leave the facility. He demonstrated where the inmates would place the bottle cap to raise the visibility from the inside of the cell. There is no mention in the report of the investigatory experiment that he failed to do so.
35. The investigators had organized an experiment in which a person that Mr. K. T. had never seen before would walk past Mr. K. T.'s cell and Mr. K. T. would be asked to describe him. Using the narrow space near the cell door, Mr. K. T. correctly described many characteristics of said person, including his height, hair, clothes and approximate age.
36. Ultimately he was unable to directly point to the person who had walked past. However, Mr. K. T. noted in the experiment report that this was the first time seeing the man he was asked to identify. He noted that in 2013 he saw Mr. Merabishvili and the head of the prison facility – the people he frequently saw walk by his cell before that night. Therefore, he concluded that if they were to participate in the experiment he would not have any problem identifying them.

²¹Communication from PDO (24/01/2020) in the case of Merabishvili v. Georgia (Application No. 72508/13). Available at: < <https://bit.ly/3iROR2q> >

37. The PDO considers that Mr. K. T.'s testimony corroborated by the investigatory experiment points at the clear possibility that Mr. Merabishvili's claim could have been confirmed had the investigation acted in a timely and diligent manner. Notably, as no relevant steps were taken for years to conduct crucial investigatory actions the PDO maintains that the investigation now must compensate for the undue delays by first and foremost offering Mr. Merabishvili to identify the persons escorting him and otherwise let him participate meaningfully in the investigatory proceedings.