Special Report of the Public Defender of Georgia

Practical Analysis of Qualification of Ill-treatment under General and Special Provisions

Prepared in accordance with Article 21, Subparagraph "g" of the Organic Law of Georgia "On the Public Defender of Georgia"

2023

Contents

Introduction

According to the standard established by the European Court of Human Rights, protection of the absolute right of prohibition of torture, inhuman and degrading treatment and punishment (hereinafter - "ill-treatment") implies the legal criminalization of ill-treatment and subsequent effective investigation.[1] At the same time, it is necessary to conduct the investigation under the right qualifications so that all cases of ill-treatment are properly examines. The right qualifications are of particular importance for the purpose of conducting investigative/prosecution activities, obtaining evidence and ultimately administering justice.

In the past years, the special reports prepared by the Public Defender of Georgia underlined the shortcomings of the investigation of alleged facts of torture, including the problem of qualification of act during the investigation.[2] In the majority of cases the investigation was launched not under special provisions,[3] but under the general provisions addressing official misconduct.[4] The present report examines the regulatory framework of such norms, their practical application and subsequent shortcomings.[5]

The report will initially focus on negative and positive obligations of the state in relation to ill-treatment. The important aspects established by the case law of the European Court of Human Rights will be reviewed. The analysis of the judgments of the general courts of Georgia shows the compliance of the practice of investigative and judicial bodies with the international obligation on the issue of ill-treatment. The purpose of studying the the court practice is to determine the causes of the identified problems, including the legal interpretation of norms that criminalize ill-treatment. Accordingly, the research covers gaps in legislation and practice.

In addition, the Special Report examines the proportionality and enforceability of penalties for ill-treatment in terms of the use of plea bargain, amnesties and pardons.

Ultimately, this Special Report made it possible to identify legislative gaps, analyze the shortcomings in practice, and to develop appropriate recommendations to eliminate them. In addition, using this report, it will be possible to generalize the legal interpretation of general courts and to prepare guidelines for investigative bodies.

Since November 1, 2019, the State Inspector Service has been investigating the facts of ill-treatment committed by the state representatives, whereas since March 1, 2022 – this task was commissioned by the Special Investigation Service. A positive trend was revealed as a result of the study of cases in the proceedings of the

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[1] Judgments of the European Court of Human Rights: October 28, 1998 "Assenov and others v. Bulgaria" (application N 90/1997/874/1086) §102, April 6, 2000 "Labita v. Italy" (application N26772/95), §131, October 2, 2012 "Virabian v. Armenia" (application N40094/05) §161; February 2, 2021 "X and others v. Bulgaria" GC (application N22457/16) §178.

[2] Special Reports for 2014 (< https://bit.ly/3sIEbak >) and 2019 (< https://bit.ly/3wipq05 >)

[3] Torture, threat of torture, inhuman and degrading treatment, Criminal Code of Georgia, Art. 144[1], 144[2] and 144[3].

[4] Exceeding official powers, abusing official powers using violence or weapon, by offending personal dignity of a victim, Article 332 (Paragraph 3 (b and c)), Article 333 (Paragraph 3 (b and c)) of the Criminal Code of Georgia.

[5] Pursuant to Article 12 of the Organic Law of Georgia on Public Defender, The Public Defender of Georgia shall independently examine the situation with regard to the protection of human rights and freedoms, and the facts of their violation, based on both received statements and appeals and on his/her own initiative.

State Inspectorate,[6] in particular, the investigation on the facts of ill-treatment was not launched under the general provisions of the official misconduct, as a pattern of the previous period. As a result, the study of investigative and judicial practice of the past years was a subject of interest. We express our hope that an effective investigation into the facts of ill-treatment will be conducted without flaws, with the right qualifications, and with the obtained evidence, it will be possible to administer justice properly. The present report will help the Special Investigation Service to fully see the practices of the past years, the challenges in the country, and to avoid making similar mistakes in its investigations.

Methodology

The study is based on the findings of analysis of the judgments issued by the general courts of Georgia under Articles 144[1]-144[3] and the Subparagraphs "b" and "c" of the 3rd Paragraph of Articles 332-333 of the Criminal Code of Georgia, during 2013-2019. The judgments, that have been examined for the report, were obtained from several district/city[7] and appeal[8] courts, as well as from the archives of general courts.[9] Despite the fact that the Tbilisi City Court[10] refused to provide the judgments to the Office and offered to familiarize them on the spot, the Office received a part of the verdicts issued by the Tbilisi City Court[11] from the archives of the general courts and the Tbilisi Court of Appeal. According to the information of the Supreme Court of Georgia,[12] judgments are not stored in the court and they can only be found through the search program. Accordingly, throughout the preparation of the report, the judgments/decisions of the Supreme Court were studied[13] as a result of receiving them from archives and courts of lower instances, as well as through searching in an electronic program.

Hereby, we would like to express our gratitude toward those agencies that cooperated with the Public Defender's Office and supported it to prepare this report, by providing relevant information and documentation in a timely manner.

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[6] See 2021 Activity Report of the Criminal Justice Department of the Office of the Public Defender of Georgia, p. 22-28; <https://www.ombudsman.ge/res/docs/2022040420075286303.pdf >

[7] Annexes to the letters N5878-1 of the Kutaisi City Court dated June 4, 2020, N504/g of May 29, 2020 and N512/g of June 03, 2020 of the Rustavi City Court, N142 of May 28, 2020 of the Telavi District Court, N247 of dated June 01, 2020 of the Zugdidi District Court, N1035 of 03 June of Gori District Court 2020. It is significant that the verdict of the higher instance court on several cases was passed in the following period, however, taking into account the final result of the case, they were reflected in the report.

[8] Annexes to the letters N1/3132 of the Tbilisi Court of Appeal dated June 03, 2020 and N411-2/10 of the Kutaisi Court of Appeal dated June 03, 2020.

[9] Annex to letter N07-5163 dated July 29, 2020 of the General Courts Department of the Supreme Council of Justice of Georgia.

[10] Letter N10365 of Tbilisi City Court dated June 1, 2020.

[11] By the letter N10365 of Tbilisi City Court of June 01, 2020, in the given period, the judgment was rendered in 62 criminal cases under the above-mentioned articles. The judgments issued by the Tbilisi City Court in 20 cases were obtained from the archives and the Court of Appeal; The judgments on 13 cases were received by the Court of Appeal as a result of the appeal of the decisions made by the Tbilisi City Court. Accordingly, we had the opportunity to get acquainted with the judgments of 33 cases out of 62 cases considered by the Tbilisi City Court.

[12] Letter of the Supreme Court of Georgia dated May 5, 2020 N-21-20.

[13] In addition to the judgments of the district/city courts studied in the framework of the report, it is possible that other courts of first instance have considered similar cases.

Within the framework of the research, 131 verdicts/judgments were studied that have been issued on 68 criminal cases:

- Judgments of the courts of all three instances - 27 cases;
- Judgments of the Court of First Instance and Court of Appeal – 2 cases;
- Judgments of the Court of Appeal and Cassation – 4 cases;
- Judgments of the Court of First and Cassation instances - 1 case;
- Only the judgments of the District/City Court - 21 cases;
- Only the judgments of the Appellate instance - 13 cases.

Judgments studied by courts:

- Tbilisi City Court - 20 judgments;
- Kutaisi City Court - 5 judgments;
- Batumi City Court - 1 case;
- Rustavi City Court - 8 judgments;
- Zugdidi District Court - 6 judgments;
- Gori District Court - 6 judgments;
- Bolnisi District Court - 2 judgments;
- Akhaltsikhe District Court - 1 judgments
- Khelvachauri District Court - 1 judgment;
- Telavi District Court - 1 judgment;
- Tbilisi Court of Appeal - 37 judgments;
- Court of Appeal of Kutaisi - 11 judgments;
- Supreme Court of Georgia - 32 verdicts/decisions.

Out of the 68 studied cases, in 50 cases the defendants were representatives of the state as defined by subparagraphs "b" and "c" of paragraph 3 of Articles 332-333 and Articles 144^1-144^3 of the Criminal Code; in 18 cases – the defendants were individuals according to Articles 144^1-144^3 of the Criminal Code. The time of the

alleged crime is noteworthy in relation to the subject and the qualification of the act under the special provisions of ill-treatment. Out of 18 criminal cases against individuals, all alleged crimes were committed in 2013-2019. Out of 50 cases considered against state representatives, former officials were indicted for alleged acts only in 3 cases committed in the period of 2013-2018, and in the remaining 37 cases, former officials were accused for an alleged criminal act committed during 2004-2012.

In terms of the international obligation of the state, the issue of imposing a proportional punishment on a person guilty of ill-treatment is analyzed by studying the conditions of the plea bargain and the use of amnesty in the above-mentioned judgments; as to the issue of pardon in 2013-2019, it is discussed by reviewing the information and decrees[14] provided by the administration of the President of Georgia.

The necessity of punishing ill-treatment and international obligations

Prohibition of torture, inhuman and degrading treatment and punishment is an absolute human right.[15] Its violation cannot be justified on the grounds of fighting terrorism or organized crime.[16] The prohibition applies regardless of the behavior of the person concerned[17] and it is not allowed to deviate from it in times of war or emergency.[18] The order of an official with a higher rank or a state authority cannot be used to justify torture.[19]

The negative obligation imposed on the state by Article 3 of the Convention on the Protection of Human Rights and Fundamental Freedoms implies that the representatives of the state refrain from and do not carry out actions prohibited by this article.[20] The state is responsible for the ill-treatment carried out by all of its representatives (law enforcement officers, military personnel, prison employees), despite referring to the motive of not having the information about the given fact.

The European Court of Human Rights (hereinafter - the European Court) considered it unacceptable that the state authorities did not know or had the right not to know about the existence of practices contrary to Article 3, because they were responsible for the actions of persons subordinate to them and have the obligation of constant control over them.[21]

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[14] Letters and attachments of the Administration of the President of Georgia dated May 21, 2020 N2593, October 9, 2019 N7979 and January 14, 2020 N208.

[15] Article 3 of the 1959 "Convention for the Protection of Human Rights and Fundamental Freedoms" of the Council of Europe; 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

[16] Judgments of the European Court of Human Rights: December 18, 1996 "Aksoy v. Turkey" (application N21987/93) §62, April 6, 2000 "Labita v. Italy" (application N26772/95) §119; February 19, 2009 "A. and Others v. the United Kingdom" [GC] (application N 3455/05) §126; December 13, 2012 "El-Masri v. the former Yugoslav Republic of Macedonia" [GC] (application N39630/09) §195.

[17] Judgments of the European Court of Human Rights: Judgment of 15 November 1996 "Chahal v. UK" (Application N22414/93) §79; The judgments of November 21, 2019 "Z.A. and Others v. Russia" [GC] (application N.61411/15, 61420/15, 61427/15, 3028/16) §188.

[18] Article 15 (2) of the "Convention on the Protection of Human Rights and Fundamental Rights" of the Council of Europe; Article 2 (2) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[19] Article 2 (2) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[20] The Judgment of the Grand Chamber of the European Court of Human Rights of November 13, 2012 on "Hristozov and others v. Bulgaria" (application N47039/11 and 358/12) §111

[21] The Judgment of the European Court of Human Rights of January 18, 1978 "Ireland v. the UK" (application N5310/71) §159.

The systematic accumulation/repetition of numerous facts of identical or similar violations (not isolated incidents or exceptions)[22] and the official tolerance of these cases, when the persons responsible do not immediately take measures to punish the perpetrators or to prevent their repetition, will be considered a practice contrary to the Convention; or if senior officials, despite numerous allegations, show indifference to establish the truth or falsity by refusing to conduct an adequate investigation, or in such a way that such complaints are denied a fair hearing in court proceedings.[23]

The failure of the state to act leads to its responsibility due to the failure to use appropriate measures to prevent frequent (non-uniform) cases of acts prohibited by Article 3 on the part of government officials. In addition, the responsibility of the state may be excluded if there is a separate individual case, which is followed by imposing a responsibility on the offender and implementation of preventive measures in order to prevent its repetition. Any action taken by senior government officials must be of a magnitude sufficient to end the repetition of such acts or to terminate such a pattern or system.[24]

The positive obligation of the state includes the material aspect: the criminalization of ill-treatment by national legislation, the existence of appropriate regulations for its prevention and eradication, and conducting trainings for state representatives; the procedural obligation of a positive nature implies conducting an effective investigation in order to identify and punish the guilty persons.[25]

The UN Convention obliges the state to treat all acts of torture, attempts to commit it and complicity of any person in it as a crime under criminal law.[26]

It also imposes an obligation on the State to conduct a prompt and impartial investigation by the competent authorities when there are reasonable grounds to believe that an act of ill-treatment or punishment has been committed.[27] The State must ensure that any person making a complaint has the right to appeal and have his case expeditiously and impartially reviewed by its competent authorities.[28] The state must systematically ensure that victims of acts of torture receive fair and adequate compensation.[29]

According to the case law of the European Court, the states are obliged to announce the actions prohibited by

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[22] The Judgments of the European Court of Human Rights: January 18, 1978 "Ireland v. the UK" (application N5310/71) §159, 10 May 2001 "Cyprus v. Turkey" application (25781/94) §115.

[23] Judmgnets of the European Court of Human Rights: December 6, 1983 "France, Norway, Denmark, Sweden and the Netherlands v. Turkey" (application N9940-9944/82) §19, July 03, 2014 "Georgia v. Russia" (application N13255/07) §124.

[24] Judgments of the European Court of Human Rights: December 6, 1983 "France, Norway, Denmark, Sweden and the Netherlands v. Turkey" (application N9940-9944/82) DR 143, July 03, 2014 "Georgia v. Russia" (application N13255/07) §124.

[25] Judgment of the European Court of Human Rights of December 13, 2012 2 and El-Masri v. the former Yugoslav Republic of Macedonia [GC], (application N39630/09) §182; September 28, 2015 "Bouyid v. Belgium" [GC], (application N23380/09) §117.

[26] The first paragraph of Article 4 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[27] Article 12, paragraph 1 of Article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[28] Ibid

[29] Paragraph 1 of Article 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 3 punishable under criminal law,[30] including those committed by individuals.[31] The court also considers the failure of the police to act as a violation of a positive obligation, when there is information about an imminent attack.[32]

States enjoy a certain freedom in determining effective means of protection,[33] however, at the national level they must ensure the availability of means to enforce the substance of the rights guaranteed by the Convention.[34] This implies effective investigation in case of ill-treatment,[35] access to investigative procedures[36] and receiving appropriate compensation when the fact is confirmed.

The state has an obligation to create a legal framework for the accountability of those who commit ill-treatment, to take all possible measures to punish the offender to the full extent. In accordance with the UN Convention, the state is obliged to impose an appropriate punishment for such crimes, taking into account the seriousness of their nature.[37]

The importance of separating general and special provisions[38]

In the process of legal proceedings on the facts of ill-treatment, the correct qualification of the actions is necessary. For this, it is important, on the one hand, to accurately identify the fact of ill-treatment, to determine its specific type, and at the same time, to clearly separate ill-treatment from other allegedly similar criminal acts. The actions provided for in the special provisions of ill-treatment in the Georgian legislation are significantly different from the crimes defined by the general provisions of official misconduct - abuse and exceeding of official powers using violence or weapons or by offending the personal dignity of a victim. Nevertheless, there are certain similarities and overlaps between the acts prohibited by the general norms of official misconduct and the special provisions on ill-treatment.

In order to analyze the existing norms for the prohibition of ill-treatment at the national level, it is necessary to

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[30] Judgments of the European Court of Human Rights: September 23, 1998 "A v. UK" (application N100/1997/884/1096) §22, May 10, 2001 "Z v. UK" (29392/95) §73, January 31, 2012 "Kovaļkovs v. Latvia" (application N35021/05) §47.

[31] Judgments of the European Court of Human Rights: May 10, 2001 "Z v. UK" (29392/95) §73, May 12, 2015 "Identoba et al. v. Georgia" (Application N73235/12) §66, December 04, 2003 "M.C. v. Bulgaria" (application N39272/98) §150,151,153; January 28, 2014 "T.M. and C.M. v. the Republic of Moldova" (application N26608/11) §38. Regarding penitentiary institutions, see: "Pantea v Romania" judgment of September 9, 2003 (application N33343/96), "Rodić and Others v Bosnia and Herzegovina" Judgment of December 01, 2008 (application N22893/05) §71-73; 2021 decision "X and Others v. Bulgaria" [GC], (application N22457/16) §184.

[32] Judgment of the European Court of Human Rights of May 12, 2015 "Identoba and others v. Georgia" (application N73235/12) §70,71,72,73.

[33] Judgment of the European Court of Human Rights of November 15, 1996 "Chahal v. the UK" (case N22414/93) §145.

[34] Judgment of the European Court of Human Rights of October 30, 1991 "Vilvarajah v. the United Kingdom" (application N 13163/87; 13164/87; 13165/87; 13447/87; 13448/87) §122.

[35] Judgments of the European Court of Human Rights: December 18, 1996 "Aksoy v. Turkey" (application N21987/93) §98, July 28, 1999 "Selmouni v. France" (application N 25803/94) §79, decision of October 9, 2012 "Mikiashvili v. Georgia" (application N 18996/06) §72.

[36] Judgment of the European Court of Human Rights of June 27, 2000 "Ilhan v. Turkey" (application N22277/93) §97.

[37] Article 4, paragraph 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[38] This chapter, together with the national legislation, will review the case law of the European Court of Human Rights.

review the international legal aspects, with which the national legislation and practice must be consistent.

According to the case law of the European Court of Human Rights, there is no universal standard for determining the difference between ill-treatment. As a general rule, to fall within the scope of Article 3, the treatment must reach the minimum level of severity. The assessment shall take into account the content, nature, form, duration, physical and mental harm, gender, age and state of health of the victim.[39]

The European Convention on Human Rights does not offer definitions of these concepts. The Court's position is consistent with the definition of "torture" defined in the UN Convention: "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[40]

According to the case law of the European Court of Human Rights, torture is carried out for a specific purpose: to obtain information or confession or for punishment,[41] with premeditated intent and causes severe and cruel suffering in the victim;[42] it is "on the basis of the intensity of the suffering inflicted"[43] that the act is considered as torture.

The Court refers to the distinction between torture and inhuman and degrading treatment in Article 3 of the Convention. Unlike torture, inhumane treatment is not characterized by a specific purpose and differs from it in the intensity of pain/suffering.[44] The court considers inhumane treatment committed with premeditated intent, which causes bodily harm or severe physical or mental suffering; it considers an act as degrading treatment when it insults or humiliates a person, or degrades his dignity or arouses in him a feeling of fear, suffering and inferiority, which can break moral or physical endurance.[45] Discriminatory treatment can be evaluated as humiliating[46] in accordance with Article 3 of the Convention.

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[39] Judgments of the European Court of Human Rights: October 28, 1998 "Assenov and others v. Bulgaria" (Application No. 90/1997/874/1086) §94; October 20, 2016 " Muršić v. Croatia [GC] (Application N7334/13) §97.

[40] Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[41] Judgments of the European Court of Human Rights: July 28, 1999 "Selmouni v. France" (application N25803/94) §114, October 02, 2012 "Virabyan v. Armenia" (application N40094/05) §156; 2014 Judgment "Al Nashiri v. Poland" (application N) §508 and the Judgment of November 4, 2021 "Petrosyan v. Azerbaijan" (application N32427/16) §68.

[42] Judgments of the European Court of Human Rights: January 18, 1978 "Ireland v. the UK (application N5310/71) §167, October 2, 2012 "Virabyan v. Armenia" (application N40094/05) §157.

[43] Judgments of the European Court of Human Rights: January 18, 1978 "Ireland v. the UK (application N5310/71) §167, July 28, 1999 "Selmouni v. France" (Application N25803/94) §97, 100, 104,105.

[44] Judgment of the European Court of Human Rights of January 18, 1978 "Ireland v. the UK (application N5310/71) §167.

[45] The Judgments of the European Court of Human Rights of July 29, 2002 "Pretty v. the UK" (application N2346/02) §52, judgment of June 10, 2001 "Price v. The UK" (application N33394/96) §30; June 1, 2010 "Gäfgen v. Germany [GC], (application N22978/05) §89; July 8, 2004 "Ilaşcu and Others v. Moldova and Russia" [GC], (application N 48787/99) §425; January 21, 2011 "M.S.S. v. Belgium and Greece" [GC], (application N 30696/09) §220.

[46] Judgments of the European Court of Human Rights: July 12, 2005 "Moldovan and others v. Romania" (application N41138/98, N64320/01) §111-113; December 16, 2021 Women's Initiatives Supporting Group and Others v. Georgia (Application N73204/13, N74959/13) §60-61; May 17, 2022 "Oganezova v. Armenia" (application N71367/12,72961/12) §97.

The European Court of Human Rights considers the use of disproportionate, excessive force by law enforcement officers as ill-treatment.[47]

The UN Convention also distinguishes other acts of cruel, inhuman or degrading treatment or punishment, which do not amount to torture and are committed with the authority of a state official, or with his permission, or with his tacit consent.[48]

The special provisions of ill-treatment (Articles 1441-1443 of the Criminal Code) in the legislation of Georgia reflect the criminalized actions defined by international legal acts. At the same time, ill-treatment includes circumstances qualifying for official misconduct addressed by general provisions (subparagraphs "b" and "c" of paragraph 3 of Articles 332-333 of the Criminal Code): abusing and exceeding of official powers by using violence and weapons or by offending the personal dignity of the victim. Actions prohibited by other articles are also possible. [49]

In such a case, the assessment of the European Court of the issue of the application of the special provisions on ill-treatment and the norm on excess of powers in the context of the fulfillment of the positive obligation of the state is particularly noteworthy. For example, in one of the cases reviewed by the European Court, the Moldovan national courts found ill-treatment of the applicants by the police and issued a guilty verdict for clear abuse of authority (Article 185, Paragraph 2 of the Criminal Code[50]).[51] The European Court of Human Rights noted that the preventive effect of the legislation specially established to eliminate the phenomenon of torture can be realized only if this legislation is applied when the circumstances require it. Beating a person on the soles of the feet is always an intentional act and qualifies as torture. In such circumstances, launching an investigation under another article (excess of power) instead of torture, without indicating the basis of its application, is insufficient to ensure the preventive effect of the legislation specifically created to eliminate ill-treatment.[52] The court found a violation of Article 3 of the Convention, jointly with other circumstances, because the proceedings against the policemen - considering the lightness of the punishment given to them - and the fact that the legal norms prohibiting torture were not specifically applied when determining the policemen's guilt, could not provide a sufficient deterrent effect to prevent such actions in the future.[53]

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[47] The Judgments of the European Court of Human Rights of October 9, 2012 "Mikiashvili v. Georgia" application N18996/06 §77; April 28, 2022 "Kvirikashvili v. Georgia" (application N34720/16) §14-17.

[48] Article 16 (1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[49] Article 335 of the Criminal Code - Providing explanation, evidence or opinion under duress Article 378 (2) of the Criminal Code - Coercion of a person placed in a penitentiary institution into changing evidence or refusing to give evidence.

[50] "Article 185: Exceeding authority or ultra vires actions "Public officials shall be punished due to exceeding authority or ultra vires actions, that is, actions that clearly exceed the scope of the rights and authorities granted to them by law, if they thereby harm the public interest or the rights and legal interests of natural or legal persons [...] Exceeding the authority or ultra vires actions, which are accompanied by violence or the use of weapons or torture and damage the personal dignity of the victim, are punished [...]" see The Judgment of October 20, 2009 "Valeriu and Nicolae Roşca v. Moldova", application N41704/02, §37.

[51] Judgment of of the European Court of Human Rights of October 20, 2009 "Valeriu and Nicolae Roşca v. Moldova", application N41704/02, §32-33.

[52] Judgment of the European Court of Human Rights of October 20, 2009 "Valeriu and Nicolae Roşca v. Moldova", application N41704/02, §74

[53] Judgment of of the European Court of Human Rights of October 20, 2009 "Valeriu and Nicolae Roşca v. Moldova", application N41704/02, §76

A similar position was taken by the Court in another case against Moldova: Moldova's national courts found that the applicant had been ill-treated, and the government sent a report to the UN Committee against Torture describing the treatment of the applicant as torture. It is worth noting that the medical report confirmed that this caused injury and damage, which was consistent with applicant's complaint. All actions against the applicant were carried out for the purpose of confession. The European Court of Human Rights considered these acts only as torture (within the meaning of Article 3 of the Convention). It found that in these circumstances, to ensure the preventive effect of the legislation related to the problem of ill-treatment, it is not sufficient to initiate criminal proceedings under Article 101 of the less serious crime (bodily injury), and not under Article 101/1 of the Criminal Code (torture), without the relevant justification.[54]

Thus, at the national level, investigations shall be launched under special provisions of ill-treatment, they shall be conducted effectively and justice administered. For this, first of all, there is a need for legislation that is predictable, excludes any ambiguities and protects against duplication of the elements of criminal acts, which creates an opportunity for the development of a uniform practice. Otherwise, it is impossible to fulfill the international obligation of the state, such as achieving the preventive effect of special norms prohibiting torture.

The problem described by the European Court in the cases discussed above is typical for the Georgian justice system as well.

In a report published in 2015, the UN Special Rapporteur expressed concern that an independent investigative mechanism/inspector (the State Inspectorate was not in place at the time of the report's publication) might not have jurisdiction over relevant cases simply because the cases were not processed under the qualification of torture or inhuman or degrading treatment, but under the qualification of another crime. The rapporteur was informed of cases in which police or prison officials were suspected of ill-treatment, although the investigation was carried out under article related to the excess of official power, which carried a lighter sentence.[55]

Criminalization of ill-treatment in the legislation of Georgia

Authorities responsible for the qualification of the act

First, we will discuss who qualifies the action under to the national legislation; in the following subsections, an overview and analysis of the qualifications provided for by the legislation will be presented.

The investigator and the prosecutor have the obligation to start the investigation.[56] Accordingly, the primary qualification of the action is the authority of the investigative body. As for the stage of criminal prosecution, only the prosecutor's office is authorized to issue a decree of indictment,[57] where, among other circumstances, the article, paragraph and sub-paragraph of the Criminal Code[58] is indicated.

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[54] Judgment of the European Court of Human Rights of January 5, 2010 "Paduret v. Moldova application N33134/03, para. 74.

[55] See< https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/273/24/PDF/G1527324.pdf?OpenElement> last visited on 19.09.2022, Para. 67.

[56] Criminal Procedure Code of Georgia, Art. 100.

[57] Ibid, Article 169 (2)

[58] Ibid, Article 169 (3, (d))

The prosecutor also has the right to change the charge.[59] In addition, altering the charge to a more serious one is allowed before the pre-trial session;[60] the prosecutor enjoys the right to refuse the charge or its part, or to change it to a lighter charge, with the consent of the superior prosecutor before rendering the judgment by the court of any instance.[61] In addition, based on the plea-agreement, the prosecutor has the right to request a reduction of the sentence or, in the case of a cumulation of crimes, to make a decision on the reduction or partial removal of the charge.[62] The plea bargain is the basis for the court's sentencing without considering the merits of the case,[63] if it is approved by the court and reflected in the court's verdict.[64]

Thus, at the stage of criminal prosecution, before the judgment is rendered, as well as during the plea bargain, the resolution of the issue of qualification of an act as a crime under a specific provision is the exclusive authority of the prosecutor.

During the substantive consideration of the case, the court makes a final decision on the question of the qualification of the act; in particular, at the time of sentencing, it decides whether the accused has committed an act stipulated by the criminal law.[65]

In the judgment on acquittal, the decision on the finding of innocence and acquittal in the charge presented is indicated;[66] the judgment on finding a person guilty – foresees the article (paragraph, subparagraph) of the Criminal Code of Georgia, under which a person is found guilty;[67] In addition, it is permissible to change the charge in favor of the accused when the part of the charge in the guilty verdict is considered unfounded or the qualification of the crime is incorrect.[68] The judgment of the court of first instance can be appealed if it is considered illegal and/or unfounded by the appellant;[69] the verdict of the court of appeal is appealed if it is considered illegal by the casator, which means even if the action of the convicted person was wrongly qualified.[70]

The Court of Appeals[71] and then the Supreme Court[72] upholds, modifies or overturns the judgment of the lower court. In addition, the courts of appeal and cassation do not have the right to issue a guilty verdict instead of an acquittal, to apply a stricter article of the Criminal Code, to assign a harsher sentence or to make a decision unfavorable to the convicted person, if the case is considered based on the complaint of the defense and the prosecution has not filed a complaint.[73] The mentioned rule does not apply if the prosecution filed this request

[59] Ibid, Article 33 (6, (i))
[60] Ibid, Article 219 (1)
[61] Ibid, Article 250 (1, 2)
[62] Ibid, Article 210 (2)
[63] Ibid, Article 209 (1)
[64] Ibid, Article 212 (1)
[65] Ibid, Article 260 (1 (a))
[66] Ibid, Article 276 (b)
[67] Ibid, Article 274 (c)
[68] Ibid, Article 273 (1)
[69] Ibid, Article 292 (1)
[70] Ibid, Article 300 (b)
[71] Ibid, Article 298 (1)
[72] Ibid, Article 307 (1)
[73] Ibid, Article 298 (3) and Article 308 (1)

and took such a position in the lower courts.[74]

The judgment of the court of cassation is final and cannot be appealed.[75] Accordingly, the Supreme Court of Georgia has the right to make a final decision on the issue of qualification of the act.

Special provisions prohibiting ill-treatment

Torture, inhuman and degrading treatment prohibited by the conventions of the UN and the Council of Europe and by the case law of the European Court are covered by the special provisions outlined in the chapter of the crimes committed against human rights and freedoms of the Criminal Code of Georgia - 144^1 (torture), 144^2 (threat of torture) and 144^3 (humiliating or inhumane treatment).

The mentioned articles address severe physical, mental pain or mental or moral suffering of a person as a result of the action taken. According to the literature, the subject of protection of the mentioned norms include the mental and physical health of a person, his honor and dignity, as well as equality of people. The objective composition of the crime is expressed in the act (action or omission), the result (severe physical, mental pain or moral suffering) and the causal link between the act and the result. Therefore, it constitutes a material crime[76] (except for the threat of torture).

According to the Georgian legislation, torture (Article 144^1 of the Criminal Code) is the creation of such conditions or such a treatment of a person or a third person, which by its nature, intensity or duration causes severe physical pain or mental or moral suffering, and the purpose of which is to obtain information, evidence or confession, to intimidate a person or coerce or punish a person for an act committed or likely to be committed by him or a third person; The legislator establishes as a separate crime - the threat of torture (Article 144^2 of the Criminal Code) - the threat of creating above mentioned conditions, of treating or punishing, carried out for the same purpose, if this threat is real and imminent; Inhumane and degrading treatment (Article 144^3 of the Criminal Code) refers to humiliating or forcing a person, putting him in an inhumane, honor- and dignity-defying position, which causes him severe physical, mental pain or moral suffering.

Regarding forms of ill-treatment less severe than torture, it should be noted that the forms of ill-treatment criminalized by Article 144^3 of the Criminal Code of Georgia are not separated. The authors of the judicial practice analysis prepared by the Supreme Court of Georgia[77] draw attention to the gap in the legislation. Article 144^3 of the Criminal Code, in contrast to international legal acts, provides for the definition of inhuman and degrading treatment, despite the difference between these actions. As to the forms of ill-treatment less severe than torture, the forms of ill-treatment criminalized by Article 144^3 of the Criminal Code of Georgia are not separated.

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[74] Ibid, Article 298 (4) and Article 308 (2)

[75] Ibid, Article 307 (3)

[76] Mzia Lekveishvili, Nona Todua, Gocha Mamulashvili "Substantive Part of Criminal Law" first book, 2011. "Meridian" publishing house, p. 247, 258.

[77] See "Prohibition of Torture: Reflection of the Standards Under Articles 3 and 6 of the European Convention on Human Rights in National Judicial Practice", Supreme Court of Georgia, Human Rights Center of the Analytical Division, Tbilisi, 2019. p. 56 < https://rm.coe.int/turtore-geo/1680993fe0 > [last seen: 27.06.2023]

According to the case law of the European Court, the treatment prohibited by Article 3 of the Convention is separated and assessed as either inhuman[78] or degrading[79], although in several decisions the Court considered the treatment of the victim as inhuman and degrading[80] together. Accordingly, we consider it necessary to formulate the Article 144^3 of the Criminal Code with the wording of inhuman and/or degrading treatment, so that in practice, it is possible to accurately and correctly qualify the action according to the actual circumstances of the case.

The dispositions of the main components of Articles 144^1, 144^2, and 144^3 of the Criminal Code do not specify the subject of the crime, therefore, the subject is general - It can be both a civil servant and an individual. However, the same act, committed by an official or a person equal to him, also through using the official position,[81] constitutes aggravating circumstance (in the case of torture, it is an especially serious crime). The presence of a special subject in articles 144^1 and 144^3 defines a more significant public danger and, therefore, creates the basis for a more severe punishment.

The correct qualification of both the action and omission of the representative of the state in case of ill-treatment is important: the European Court of Human Rights refers to the provisions of the UN Convention[82] and considers the act committed by a state official or another person acting in an official capacity, with incitement, consent or knowledge,[83] as torture. According to the UN Convention, torture implies its commission by a representative of the State, or with its instigation, or with its permission, or with its tacit consent,[84] without prejudice to any international instrument or national legislation that contains or may contain provisions for wider application.[85] Thus, this does not contradict the convention and it is permissible for the national legislation to consider the subject of torture more widely than the international agreement.

In the report prepared by the UN Special Rapporteur as a result of his visit to Georgia,[86] the difference between the definition of torture provided for by the UN Convention and the provision contained in the Criminal Code of Georgia is noted in certain respects. According to the report, the convention has an inclusive list of the purposes of torture, while the list mentioned in the Criminal Code is exclusive;[87] Also, the definition of offenders in the first part of Article 144^1 of the Criminal Code does not include the commission of this crime with the instigation, consent/tacit consent of an official or another person performing official duties. According to the report, an act committed by an official or a person equal to him or motivated by racial, religious, national or ethnic intolerance

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[78] Judgment of the European Court of Human Rights of June 1, 2010 case "Gäfgen v. Germany" application N22978/05 §131.

[79] Judgment of the European Court of Human Rights of October 31, 2019 case "Ulemek v. Croatia" application N21613/16, §130.

[80] Judgments of the European Court of Human Rights: December 4, 1995 "Ribitsch v. Austria" application N18896/91 §39, October 4, 2016 "Yaroslav Belousov v. Russia" application N 2653/13, 60980/14 § 111.

[81] Articles 144^1, 144^2, and 144^3 of the Criminal Code of Georgia

[82] Judgment of the European Court of Human Rights of July 28, 1999, "Selmouni v. France" (application N25803/94) §97.

[83] Judgment of the European Court of Human Rights on July 8, 2004. "Ilascu and others v. Moldova and Russia" (application N48787/99) §426.

[84] Article 1, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[85] Ibid, Article 1 (2)

[86] See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/273/24/PDF/G1527324.pdf?OpenElement> last visited on 19.09.2020

[87] Ibid, Para 15

is considered torture under aggravating circumstances.[88] The rapporteur recommended the Government of Georgia to ensure the elimination of deficiencies that would enable the offender to receive a more lenient sentence due to inadequate use of the plea bargain or misinterpretation of Article 144^1 of the Criminal Code of Georgia.[89] Despite the absence of a direct reference in the articles, 144^1 - 144^3 of the Criminal Code of Georgia, the possibility of punishment for torture, inhuman and degrading treatment for actions committed by a representative of a government body, with his instigation, permission or tacit consent, is provided for by the relevant norms of the general part of the Code related to perpetrator/co-perpetrator,[90] accomplice (organizer, abettor and aider)[91] and by omission[92] (i.e. with tacit consent) by a legal (supervisor) guarantor.

Regarding the discrimination provided for under the UN Convention as the purpose of torture, Articles 144^1 and 144^3 of the Criminal Code defines the following as aggraviating circumstance for the commission of torture, inhuman and degrading treatment: violating the equality of persons, or due to their race, colour, language, sex, religion, belief, political and other views, national, ethnic, social belonging, origin, place of residence, material status or title.[93]

According to the European Court of Human Rights, discriminatory treatment, based on the content of Article 3, may constitute humiliating treatment if such treatment reaches such a level of severity that constitutes a violation of human dignity.[94] The court in its judgments against Georgia focuses on the state's obligation to reveal possible discriminatory intent.[95] Inasmuch as the criminal legislation clearly indicates that discrimination based on sexual orientation and gender is a motive and an aggravating circumstance of the crime, a full-fledged investigation in this direction was necessary.[96]

Thus, the main and qualifying components of the crimes provided for in Articles 144^1-144^3 of the Criminal Code fully and exhaustively include possible cases of ill-treatment, although the legislation does not exclude the possibility of subsuming the facts of ill-treatment with other norms. The law does not provide a clear line between actions provided for by special provisions of ill-treatment and other norms of the Code. It is this vagueness that becomes the basis of a serious problem for law enforcement agencies when determining the qualification of an act as a crime.

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[88] Ibid, Para 17

[89] Ibid, Para 112 "b"

[90] Article 22, Criminal Code of Georgia

[91] Articles 24 and 25, Criminal Code of Georgia

[92] Article 8 (3) of the Criminal Code of Georgia: Omission shall be considered to be a necessary condition for the occurrence of an unlawful result or a specific threat provided for under the relevant article of this Code, when a person had a special legal obligation to act, was able to act and the result would have been avoided by taking mandatory and possible action.

[93] Article 144^1 (2, "f") and Article 144^3 (2, "f") of the Criminal Code of Georgia

[94] Judgments of the European Court of Human Rights: May 12, 2015 "Identoba and others v. Georgia" application N73235/12 Par. 65; December 16, 2021 "Women's initiatives supporting group and others v. Georgia" applications N73204/13 and N74959/13 par. 59

[95] Judgment of the European Court of Human Rights: May 12, 2015 "Identoba and others v. Georgia" application N73235/12 Par. 67; December 16, 2021 "Women's initiatives supporting group and others v. Georgia" applications N73204/13 and N74959/13 par. 63

[96] Judgment of the European Court of Human Rights: May 12, 2015 "Identoba and others v. Georgia" application N73235/12 Par. 76-77; December 16, 2021 "Women's initiatives supporting group and others v. Georgia" applications N73204/13 and N74959/13 par. 66

General provisions of official misconduct (Articles 332 and 333 of the Criminal Code)

As already mentioned, under the Criminal Code of Georgia, ill-treatment is criminalized by special provisions (Articles 144^1, 144^2, and 144^3 of the Criminal Code), although some of the mentioned acts are also covered by the general norms of official misconduct (Articles 332[97] and 333[98] of the Criminal Code), and other articles: Coercion to provide an explanation, evidence or opinion (Article 335 of the Criminal Code), forcing a person placed in a penitentiary institution to change the testimony or refuse to give a testimony (Part 2 of Article 378 of the Criminal Code).

Abuse of official power (Article 332) and exceeding official powers (Article 333) can be committed only by an official or a person equal to him, another person can be an accomplice (organizer, abettor, aider). For the existence of the mentioned crimes, it is necessary that the action of the official or a person equal to him is related to his official status, derives from it and is committed in the process of official activity of the person and in connection with it.

Abuse of official power is an action taken against the public interest, to gain some benefit or advantage for oneself or others, which caused a substantial violation of the right of a natural or legal person, the legal interest of society or the state; exceeding the authority leads to a substantial violation of the right of a natural or legal person, the legal interest of society or the state. The aggravating circumstances of the mentioned crimes are considered to be an act committed by using violence or a weapon or by offending the personal dignity of the victim.[99]

According to the academic view, the use of violence is manifested in the physical or mental coercion of the victim. Beating the victim, inflicting physical pain, damage to health, restriction of freedom and others can be considered as violence.[100] The essential violation of human rights can be expressed in the form of both physical and moral damage.

It should be noted that the crimes stipulated by the general norms of official crimes and the special articles of ill-treatment differ in the elements of the objective and subjective composition of the act:

- The composition of the criminal act determined by the general provisions of official misconduct includes abuse of official powers or excess of official authority by using violence[101] and weapons or insulting dignity; Torture implies the creation of conditions or the treatment that is characterized by character, intensity or duration; while inhuman or degrading treatment imply humiliation or coercion, putting in an inhumane, honor and dignity degrading condition;
- Torture is a delict committed with direct intent, determined by the purpose (obtaining information, evidence or confession, intimidation, or coercion or punishment), inhuman and degrading treatment

[97] Abuse of official powers

[98] Exceeding official powers

[99] Articles 332 and 333 (3, ("b" and "c")) of the Criminal Code of Georgia

[100] Substantive Part of Criminal Law, Book II, 5th Edition, 2017, p. 325.

[101] According to the Article 126 (1) of the Criminal Code of Georgia, violence includes beating or other violence that causes physical pain (not intentional minor health damage).

does not have a stated purpose, while exceeding official power is carried out without such purpose, and abuse of authority is for oneself or it is characterized by the goal of being superior or gaining an advantage for others and has a special executor - an official or a person equal to him. The subject of torture, as well as inhuman and degrading treatment, is general - any person who has reached the age of criminal responsibility; the commission of improper treatment by a public official is a qualifying circumstance;

- Both the special provisions of ill-treatment and the general norms of official misconduct belong to intentional, material and consequential crimes, although they differ in the damage caused as a result of the criminal act: torture causes severe physical pain, mental or moral suffering; inhuman and degrading treatment - severe physical, mental pain or moral suffering, the excess and abuse of power - a substantial violation of legal interest and rights.

  Despite the above-mentioned difference, obvious similarities can be observed between these crimes, in particular, the composition of special provisions (Articles 144^1 144^2 and 144^3 of the Criminal Code) addressing ill-treatment might be present while inflicting physical or moral harm through abusing official authority or exceeding official powers (violence, bodily injury, etc.).

The general norms of official misconduct (Articles 332 and 333) provide for an act committed by an official that involves violence, the use of weapons or offending the personal dignity of the victim, which may cause uncertainty in the qualification of the act, since the special provisions for ill-treatment foresee crimes committed by any person, that clearly determines the result - severe physical/psychological pain or moral suffering.

According to the general principle of criminal law, the special provisions of crimes of ill-treatment (Articles 144^1, 144^2 and 144^3 of the Criminal Code) are given priority in competition with the general norms of official misconduct (Articles 332, 333 of the Criminal Code) and do not form a cumulation of crimes.[102]

Accordingly, the action should be qualified by the general provisions of an official misconduct, if the relevant criminal action is not regulated by the special norms of ill-treatment under the Criminal Code. However, in Articles 332 and 333 of the Criminal Code, in contrast to Articles 144^1-144^3, the subjective composition does not include intentional infliction of pain or suffering on the victim; The victim is not asked to make a confession or any other type of testimony; The objects of violence are not persons with limited rights due to certain reasons (prisoners, captives, military personnel, persons placed in closed or special institutions, etc.).

From the point of view of the foreseeability of the law establishing the crime, special importance is given to the possibility of determining the true content and scope of each of its elements.[103] Accordingly, the legislation should clearly and unambiguously define the components of the act and exclude the possibility of qualifying the facts of ill-treatment under other articles, apart from the special provisions. According to the current regulation, the qualifying circumstances under Articles 332-333 of the Criminal Code create the basis for such

[102] Article 16 (2) of the Criminal Code of Georgia.

[103] Judgment of the Constitutional Court of Georgia of 14.05.2013 on the case "Georgian citizens Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaya against the Parliament of Georgia", § II - §31.

ambiguity and vagueness.

Other related norms (Articles 335 and 378 of the Criminal Code)

It is true that the study does not include the analysis of judgments issued by general courts under Article 335 (providing explanation, evidence or opinion under duress) and Paragraph 2 of Article 378 (coercion of a person placed in a penitentiary institution into changing evidence or refusing to give evidence) of the Criminal Code, although the actions provided for by these articles include the actions prohibited by the special provisions of ill-treatment.

The disposition of Article 335 of the Criminal Code[104] uniquely contains the content of Articles 144^1 and 144^2 of the Criminal Code (torture, threat of torture). The first part of Article 335 of the Criminal Code criminalizes coercing a person to give an explanation or testimony or to give an expert's opinion by threat, deception, blackmail or other illegal actions by an official or a person equal to him; And the 2nd part declares as a crime the same action committed by violence dangerous to life or health or by threatening to use of such violence. It is difficult to imagine what other action could be the coercion by an officer to give an explanation, testimony or opinion by violence or threat of violence, while under Article 144^1 of the Criminal Code, an action carried out for the purpose of obtaining information, evidence or confession, which by its nature, intensity or duration causes severe physical pain or mental or moral suffering over a long period of time.

As for the crime provided for by Article 378 (2) of the Criminal Code - forcing a person placed in a penitentiary institution to change his testimony or refuse to testify, the purpose of the mentioned act coincides with the purpose of torture (Article 144^1), the objective composition (in the form of coercion) – with the disposition of inhumane and degrading treatment (Article 144^3 of the Criminal Code). Therefore, if a prisoner is forced to change or to refuse to testify, it is important to determine the form of the coercion, e.g. by creating inhumane or degrading conditions in the cell. Accordingly, it is possible to qualify the mentioned action under the special provision of ill-treatment, taking into account the nature, intensity and duration of the treatment.

The need to eliminate legislative gaps

According to the legislation of Georgia, the crimes stipulated by the special provisions of ill-treatment (Articles 144^1-144^3 of the Criminal Code) - torture, threats of torture, inhuman and degrading treatment fully and exhaustively include the actions prohibited by Article 3 of the Convention. At the same time, ill-treatment includes abusing and exceeding an official authority committed by an official with violence, use of weapons, and insults (subparagraphs "b" and "c" of parts 3 of Articles 332-333 of the Criminal Code); Also, forcing a person placed in a penitentiary institution to give an explanation, testimony or opinion (Article 335 of the Criminal Code) and to change the testimony or refuse to give a testimony (Part 2 of Article 378 of the Criminal Code).

[104] "Coercion of a person by deception, blackmail or other unlawful act by an official or by a person equal thereto to provide an explanation or evidence"

The general norms of official crime include a wide range of actions, and its qualifying circumstances, in particular, abuse of authority and abuse of power with weapons, violence, indignity, depending on the degree, intensity, duration and inflicted suffering, can give us the composition of both torture and, at least, inhuman and degrading treatment. The same can be said about the compulsion to give, change or refuse to give testimony.

The mentioned legal loophole creates a problem in practice and allows investigative, prosecutorial and judicial authorities to qualify the facts of ill-treatment with lighter articles.

In order to eliminate ambiguities and develop a uniform practice, it is necessary to implement legislative changes so that only the provisions of special norms of ill-treatment (Articles 144^1-144^3 of the Criminal Code) include actions prohibited by Article 3 of the Convention and to reduce the risks of duplication with crimes provided for by other articles.

We consider such means to be the existence of punishment under the special provisions of ill-treatment for the acts of exceeding and abusing power by an official with violence, use of weapons, offending dignity; Also, for coercion for the purpose of giving an explanation, testimony or opinion, changing the testimony of a person placed in a penitentiary institution or refusing to give a testimony. Therefore, it is necessary to introduce legislative changes, in particular, to remove subparagraphs "b" and "c" of parts 3 of articles 332 and 333, article 335 and part 2 of article 378 of the Criminal Code.

In addition, the legislative change does not imply the decriminalization of the given actions, because as already said, the facts of abusing and exceeding official authority committed by an official with violence, use of weapons and offending the personal dignity, as well as the coercion to give an explanation, testimony or opinion constitute ill-treatment. It is significant that the legislative change will not create problems for ongoing and completed cases: ill-treatment was and is a crime, changing the qualifications during the pending investigation is allowed, it is also possible to replace the charge under Articles 332-333 and 335 with Articles 144^1-1443 before the pre-trial hearing.[105] As for the existing and completed cases, due to the fact that the action is not decriminalized, the accused will not be released from responsibility, however, due to the inadmissibility of aggravation at the stage of the substantive consideration of the charge, the punishment must be determined within the sanction of the given charge, and for the convicted, the sentence will not be revised, because the change will not cancel or mitigate the responsibility.[106]

Under the current regulation, there are a number of gaps in the practice of general courts, which is caused by the legislative shortcoming and we will discuss it in detail.

Analysis of existing practice

As already mentioned, out of 68 studied cases, 140 persons representing the state were accused in 50 cases, and 41 individuals in 18 cases, respectively.

[105] Articles 219 (1) and 250 (1) of the Criminal Procedure Code of Georgia.

[106] Article 310 (f) of the Criminal Procedure Code of Georgia.

Out of 18 criminal cases against individuals considered by general courts:

The accusation was presented:

- 12 cases - under Article 144^1 of the Criminal Code
- 6 cases - under Article 144^3
- 7 cases were alleged criminal acts committed by one family member against another member.[107]

The judgment of acquittal was issued:

- Article 144^1 - 1 case (for 1 person)
- 144^3 – 2 cases[108] (for 3 persons)

The following guilty judgments were issued:

- Under Article 1441 of the Criminal Code - 26 persons in 7 cases
- Under Article 1443 of the Criminal Code - 10 persons in 8 cases

In 4 cases, the courts changed the qualifications

- in 3 cases from Article 1441 of the Criminal Code into Article 1443 of the Criminal Code
- in 1 case - into Article 120 of the Criminal Code

Out of 50 cases considered against state representatives:

In 22 cases, charges were filed under the 3rd paragraph of Articles 332-333 of the Criminal Code,

from which:

- In 17 cases, guilty verdicts were issued against 29 persons
- 6 persons were acquitted in 5 cases
- In one case, the act against 3 persons was reclassified into Article 160 of the Criminal Code.
- In 28 cases (several defendants/episodes), charges were filed:
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[107] Articles 11^1-144^1-144^3 of the Criminal Code of Georgia.

[108] In one case, 2 out of 3 defendants were acquitted, 1 was found guilty in the charge presented under Article 144^3

- under Articles 1441-1443 of the Criminal Code in 18 cases
- with the combination of the 3rd paragraph of Articles 1441-1443 and 332-332 of the Criminal Code in 10 cases
- Sentences rendered:
- Guilty verdict - in 14 cases
- Acquittal - in 8 cases
- Partial acquittal/changed qualification - in 6 cases

From the mentioned 28 cases:

- ✓ 9 persons are found guilty, 7 persons - innocent under Article 144^1 of the Criminal Code.
- ✓ 41 persons are found guilty, 9 persons - innocent under Article 144^3 of the Criminal Code.
- ✓ 6 persons are found guilty under Articles 144^1 and 144^3 of the Criminal Code.
- ✓ 2 persons are found guilty under paragraph 3 of Article 144^3 and Article 332 of the Criminal Code.
- ✓ 3 persons were acquitted under Articles 144^1 and 333 (Paragraph 3) of the Criminal Code, 5 persons under Article 333 (paragraph 3) and Article 144^3 of the Criminal Code, 8 persons - under Articles 144^1 and 144^3 of the Criminal Code, 1 person - in the accusations presented under Article 332 (paragraph 3), Articles 144^1 and 144^3.
- ✓ Qualifications of acts of 4 persons were changed from Article 144^1 of the Criminal Code into Article 144^3 of the Criminal Code, of 2 persons from Article 144^3 of the Criminal Code into Article 376, Paragraph 3 of Article 333 of the Criminal Code was reclassified in case of 1 person: into paragraph 3 of Article 332, into Article 125 of the Criminal Code in case of 2 persons, into Article 126 of the Criminal Code in case of 1 person.

Cases of ill-treatment necessarily require the administration of justice through the collection of relevant evidence and the imposition of an adequate punishment. The preventive result of the legislation prohibiting ill-treatment cannot be achieved without the correct qualification of the criminal act, which requires the initiation of investigation and criminal prosecution on the given facts under special provisions.

Application of general provisions of official misconduct (Articles 332-333 of the Criminal Code)

The heads and employees of various structural subdivisions of the Ministry of Internal Affairs, as well as the Ministry of Defense, and state political officials, have been convicted for the crimes of abuse of official authority using violence and weapons and offending the personal dignity of the victim. Out of the studied cases, only in 8 cases the convicts committed the crime individually, in the remaining cases it was committed by a group. As for the places where the crime was committed, the actions were carried out both in private property (apartments), in public space (street, cemetery, polling station), as well as in closed institutions (penitentiary, police department, constitutional security department, military unit).

The study of the judgments confirm that the actions for which the officials were convicted under parts 3 of Articles 332 and 333 of the Criminal Code, were cases of ill-treatment and could be qualified under special provisions. It is the obligation of the state to use special legislation prohibiting ill-treatment during determination of qualifications.

The following actions, when the victims received minor injuries as a result of physical violence and use of weapons by the policemen, were assessed as exceeding their official powers (subparagraph "b" of Article 333 of the Criminal Code):

- The police officer physically assaulted the observer at the polling station;
- Police officer argued with the lawyer in the department, exceeded his authority with violence;
- During the performance of official duty the firearm registered with the right to keep and carry was fired 2 times in the direction of the asphalt (in the absence of necessity) during a verbal argument with a citizen, despite the fact that the citizens did not physically assault the police.

We think that in cases where law enforcement officers committed violent actions against citizens while performing their duties, the qualification should be determined not by the general provisions of official misconduct, but under the provision of ill-treatment. In the above-mentioned cases, at least there was a basis for qualifying the act under degrading treatment.

The court found the employee of the penitentiary institution guilty under subparagraphs "b" and "c" of paragraph 3 of Article 333 of the Criminal Code (exceeding power by using violence and offending dignity), because the accused, together with other employees, urged the prisoner to stay in the bathroom changing room, after which he ordered the accused to confess; after receiving the refusal, he hit him with the so-called handheld radio in the nose, the accused fell down, and for 10 minutes he, together with other employees, beat the head, body and limbs excessively, cursing, humiliating him, due to which the accused suffered severe and unbearable pain. After that, the prisoner was threatened not to tell anyone about the beating, otherwise the same thing would happen to his cellmates. The staff asked the accused again in the cell whether he would confess the crime, and after he refused, they verbally abused him and slapped him several times in the face. The given factual circumstances made it possible to evaluate the action taken by the prison staff as inhumane and humiliating treatment, although the accusation and conviction was made under the general provision of official misconduct instead of Article 144^3 of the Criminal Code. Such a qualification is inconsistent with the absolute right to prohibit ill-treatment, leading to a relatively light responsibility for grave facts of human rights violations.

Courts have developed uniform reasoning on the issue of official authority, in particular, that in order to qualify under Article 333 of the Criminal Code, the offender's action must be related to his official status, stem from it, and must be committed in the course of official activity and in connection with it. In addition, it is mandatory to have an illegal result, which must be causally related to the official's action, which is beyond the scope of his authority. This identical interpretation has been used by courts in several cases with different results:

- The judgment of acquittal was based on the lack of evidence for the fact that the police officer, injured

the health of passengers as a result of shooting from an official firearm not during the performance of his official duties, but while traveling by public transport for personal purposes;

- The court had a similar position in another case, where the employees of the Ministry of Internal Affairs, who for personal reasons, illegally prevented the freedom of citizens and treated them inhumanely and humiliatingly in the territory of the cemetery, were found guilty of illegal deprivation of liberty and inhumane and humiliating treatment, and were acquitted of the charge of exceeding their authority with violence and insulting dignity. The court pointed out that the actions of the defendants were not carried out directly during the performance of their official functions and activities (regardless of the use of official status), but in an unofficial, non-service environment. The reasoning developed in the mentioned 2 cases is in compliance with the definition of Article 333 of the Criminal Code. However, this last action should be qualified as ill-treatment committed by the official and using the official position. We believe that when an official abuses a person, insults his dignity and/or uses a weapon against him, this constitutes ill-treatment and should be qualified under the special provision according to the intensity and quality of the suffering and the purpose;

- The court found the high-ranking officials of the Ministry of Internal Affairs guilty under subparagraphs "b" and "c" of Article 333 of the Criminal Code, who, on the grounds of verbally insulting a family member of a high-ranking political official, brought 3 employees of the Ministry of Internal Affairs to the administrative building of the agency and placed them on a chair with their hands tied, lying on the floor, and have beaten them in three stages (10 minutes each); individuals had swelling and bruises from the beating, and one of them was beaten in the ribs and face with feet for 10 minutes, while they threatened to inject drugs. The court stated that the motive and purpose of the action is not a mandatory sign of the composition of the crime, and it can also be personal. It is the official who clearly goes beyond the scope of his authority and causes a clear violation of the interests of citizens, society or the state. In this case, the factual circumstances (treatment in the premises of the agency regardless of the personal purpose) became the basis for the qualification of the act as exceeding the official authority. In addition, the treatment in the case - episodes of physical violence, being tied to a chair and verbal abuse are inhuman and degrading. Therefore, the accusation and then conviction under the general provision of official misconduct can be considered as an example of wrong qualification.

- In contrast with the above interpretation, in relation to the charge presented to the military commanders under Article 333 of the Criminal Code for beating soldiers, the court explained that this article is a special provision, by which an official can be punished for committing the act provided for, but this article should not be applied for any misdemeanor. Beating a person in itself is a violent crime against human health. One of the aggravating circumstances of Article 333 of the Criminal Code is violence, i.e. if there is a significant excess of official authority, which is accompanied by violence, it is clearly the mentioned qualifying sign; but when it is unsubstantiated, what exactly was the excess of official authority and we have a beating at stake, act must be qualified under Article 125 of the Criminal Code. According to the assessment of the appellate court in the mentioned case, Article 333 is a general provision and it is used when a specific norm is not applicable. If the injuries to the victims

resulted in a more severe consequence that would not be legally consistent with the aggravating qualifiers of Article 333, then the action would be qualified as a combination of crimes, depending on the outcome. In the same case, according to the explanation of the court of cassation, since the convicts beat the military personnel for an unknown reason, despite the use of their official authority, the beating was not carried out directly during the performance of their official functions and in the conditions of their activities, but in an unofficial, non-service environment - in the yard of the brigade, which took the form of personal revenge. This excludes the act provided for in Article 333 of the Criminal Code and the court reclassified it to subparagraph "h" of Paragraph 2 of Article 126 of the Criminal Code. We consider that beatings or other forms of violence by a military commander of a subordinate person, a law enforcement officer towards citizens, are inhumane or humiliating treatment. Accordingly, we cannot agree with the reasoning of the court.

Thus, the actions qualified under the general provisions of official misconduct by the prosecution and judicial bodies are related to the person's official authority and shall be committed in the process of exercising such authority. It is important to note that violence, insulting a person's dignity is always beyond the authority of an official. As for the disproportionate use of force, such cases also constitute ill-treatment. Accordingly, the dispositions under Articles 144^1-144^3 of the Criminal Code include actions qualified by subparagraphs "b" and "c" of paragraph 3 of Articles 332-333 of the Criminal Code. This is confirmed by the studied cases, where the actions committed by the officials provide a basis for qualifying them as ill treatment, although for some reason they were accused and convicted according to the general provision of more lennient, official misconduct. In accordance with the right guaranteed by Article 9 of the Constitution of Georgia and international obligations, there are separate norms criminalizing torture, inhuman and degrading treatment in the legislation of Georgia. The existence of special articles aims to establish the responsibility of state representatives for ill treatment according to these articles. Accordingly, the responsibility of the officials for the facts of torture, inhuman and degrading treatment should be defined only according to the relevant special articles and not on the basis of other norms.

The failure to apply special provisions addressing ill-treatment will not lead to the preventive effect of such legislation. Therefore, the existence of such general norms of official misconduct in the legislation, which are already included by special articles on ill-treatment, is unnecessary and only creates a basis for non-uniform practice.

Application of special provisions (144^1-144^3 of the Criminal Code).

According to the judgments reviewed by the Office on charges under articles 144^1-144^3 of the Criminal Code, actions of both private individuals and public officials (policemen, heads of the penitentiary system, penitentiary institutions and their employees, representatives of the Ministry of Defense, military personnel, actions committed by the heads and employees of structural divisions of the Ministry of Internal Affairs, political officials) are qualified as torture, inhumane and degrading treatment. As already mentioned, in the vast majority of cases (except for 3 cases), the alleged time of committing ill-treatment by officials is from an earlier period (2006-2012), while the perpetrators of torture and inhuman treatment carried out in recent years

(2014-2018) are private individuals.

The places of crime were the buildings of state agencies (police, penitentiary institution, military unit), as well as cars and residential houses owned by private individuals, as well as public space. In 12 cases, ill-treatment was carried out individually, in other cases - it was committed by a group, when the number of members of the criminal group was 2-8 people.

When qualifying ill-treatment, first of all, the court assesses the nature, intensity and duration of the treatment of the victim. In addition, the courts indicate the manner of treatment, the physical result, the age of the victim. It is important to determine the threshold of cruelty. According to the courts, cruelty is a relative concept and depends on all the circumstances of the case.

According to the court, torture, as well as inhuman and degrading treatment may include several components; the execution of separate actions by persons complicit in the action, for example: beating, coercion, which, taken separately, may not lead to the perception of torture or inhuman and degrading treatment, but in a complex and overall manner provides for the composition of the crime.

Torture

Torture is a determined delict when committed with direct intent and purpose. Courts are following right path when trying to determine and confirm the existence relevant purpose. In the judgments, there are actions committed for the purpose of admitting one or another real or alleged act, including crime, punishment for private life, cooperation and crime, accomplices. Torture was used in penitentiaries to intimidate and coerce (along with punishment) prisoners to force them do or refrain from doing something they were legally entitled to do.

It should be noted that courts assign special importance to the consequences of mistreatment. In the majority of cases, the treatment towards the victim caused severe physical pain, although in many judgments there is a reference to causing mental or moral suffering along with severe physical pain. Without proof of such pain or suffer, in several cases of ill-treatment for the above-mentioned purposes, the action was not assessed as torture, but as inhumane treatment.

According to the definition of the courts, physical pain means the troubles caused by long-term physical pain, the need for medical assistance, and mental or moral suffering refers to an action that causes a breakdown of the nervous system, when a person loses mental peace, suffers from a nervous illness, develops an inferiority complex, experiences severe psychological trauma, is stressed, avoids leaving home and appearing in society. Also, the courts focus attention on the psychological stress during the treatment - the fear of expected unbearable pain, the psycho-emotional depression of the victim, the feeling of unbearable pain in the process of torture.

The court assessed the action[109] as torture and noted that the actions carried out by different persons

[109] Beating with the butt of a machine gun, beating by the special forces, dragging in the yard of the penitentiary,

participating in the torture may not individually constitute torture, each participant in the action may not evaluate the action committed by him as torture, but a considerable share in the evaluation comes on the side of victim's perception (perception, awareness, understanding), which comprehensively evaluates the actions taken by all the participants towards him in unity, the victim reflects reality in the psyche as a strong physical or mental/moral suffering. Such an assessment of court is absolutely correct, since the main emphasis, among other circumstances, is placed on the victim's perception of the action against him, on the suffering he experienced, to qualify the action as torture.

According to the practice of the courts, the determination of the degree of damage is not a mandatory aspect under the Article 144^1 of the Criminal Code, the victim may not suffer a specific degree of health damage at all. To be assessed as torture, it is mandatory and necessary for the victim to experience severe physical pain, mental and moral suffering, which is not determined automatically and by itself by the degree of health damage. The court focuses attention on the degree of cruelty along with the purpose of the action. Torture can cause mild damage to health (visible bruises, bruises, lacerations, concussions) as well as less severe damage (declared closed brain trauma, jaw fracture, multiple hematomas, contusions). In such cases, no additional qualification is found. The said position is correct, because injuries of mild or less severe degree caused by torture are included in such treatment

Contrary to the above, the cases when torture caused severe, life-threatening injuries to healthy people (closed chest trauma, rib fracture, pneumothorax, bruised wounds in the occipital region, open wound in the abdomen, 36 wounds in both on the upper limb and forehead) and caused injury or permanent facial disfigurement (ear cut) due to combination of crimes was qualified under Article 117 in addition to Article 144^1 of the Criminal Code. It is significant that the aggravating circumstance provided in subsection 3 (c) of Article 144^1 of the Criminal Code is torture which caused the death of the victim or other serious consequences. Accordingly, additional qualification is not required under Article 117 of the Criminal Code, but with the aggravating circumstance of torture, because other serious consequences include severe damage to health. This follows from the disposition of the norm and the high sanction imposed for these circumstances (up to 12-20 years or life imprisonment) confirms it.

Different qualifications were observed in the cases of torture in the form of rape: in one case, the action was qualified by subsection 3 (a) of Article 144^1 of the Criminal Code (torture committed using sexual violence), in another case by a combination of crimes: torture (Article 144^1 of the Criminal Code) and sexual Violent action (Article 138 of the Criminal Code, version valid until 2013). The point is that at the time of committing the defamatory act in the second case, Article 144^1 of the Criminal Code did not provide for the mentioned qualifying circumstance. And after the legislative change of December 1, 2016, torture committed with sexual violence is punishable by up to 20 years or life imprisonment. Therefore, the qualification of the crimes together is not necessary.

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taking to the "vakhta", placing against the wall, stripping of his clothes, putting on the floor again, the so-called nakedness. He put himself in a varonka, after 3-4 minutes thrown down again and became dressed again, standing naked in the snow for 15-20 minutes.

In the studied cases, a number of actions really reached the line of cruelty to be assessed as torture, accordingly the approaches of the prosecutor's office and the courts are acceptable. Therefore, here we provide description of the acts committed for the purpose of admitting or punishment qualified as torture by the courts in guilty verdicts:

- In order to admit and punish the relationship between the victim and the spouse of accused person, committed in a combination for about 3 hours: punching in the face, forcing one to the ground, tying one's hands and feet with ropes, injuring various parts of the body with an iron rod, punching one in the face, pouring water on victim and nailing in the foot, when one lost consciousness;
- Systematic beating of the back and head of the victim in the car (his head was split between the seats; his hands were held behind his back) in order to admit and punish the theft of one of the victim's belongings. After being brought home - group beating for about 1 hour, putting a bag on the head, cutting off the air supply, tightly holding a towel around the throat and threatening to strangle, stabbing the face with a knife, cutting off part of the ear using a cold weapon for the victim who fell on the floor, had his hands twisted and bound;
- In order to punish the minor victim by the spouse because of talking with another person and in order to force her to admit, hitting in the face 2 times by a hand, hit on the body with a dense blunt object, and dropping of a burning polyethylene bag on victim's hand and leg for 10 minutes;
- In order to punish the victim due to moving in with accused's spouse - hitting victim's head several times with a stone, brutally beating with legs and hands in a group manner to different parts of the body, continuing to beat the victim with a rope, and also inflicting multiple wounds on different parts of the body with a knife, dragging the victim to the car with her hands and feet tied; putting him in a trunk, beating again in a group in the village area, hitting several times on the head with a stone, inflicting wounds with a knife, throwing into a pit in the forest and leaving handcuffed;
- Illegal detention of the victim in order to punish the victim's relationship with the spouse of one of the accused persons and a relative of the other one, brutally beating in the village, publicly in from of many people and raping a helpless person, video recording of the act and distribution of the footage;
- Development of illegal methods of treatment towards convicts by the deputy director of the prison and the head of the regime together with a group of persons, organization of beatings, humiliation and coercion for the purpose of suppression, intimidation, demoralization, punishment of the convicts, direct implementation together with other employees;
- In order to obtain information by the police, the use of electric shocks, beatings, threats of rape against a person who was illegally detained and placed in the forest, ordering and executing sexual violence against the detainee by the other person.
- Group beating of naked prisoners with batons, feet, hands, for about 10-15 minutes, handcuffing the prisoner to the bars, enforced sexual acts;
- In order to obtain information from the victim, inflicting physical insults on the face and body, inflicting injuries, dropping pieces of a burning polyethylene bag on the abdomen and chest, reaching the verge of drowning by immersing the head in water, inflicting multiple blows on the limbs with blunt objects, inflicting a cut wound on the left leg using a sharp object;
- Beating the prisoner repeatedly, so that for two weeks after one of the beatings, it was difficult for him to move, eat, talk; beating another prisoner with hands and then breaking fingers using a cane;
- In order to admit sexual relations with another man, inflicting physical and verbal abuse several

times, extinguishing a cigarette on the leg skin in two places and biting in different areas of the body, causing mental and moral suffering to the victim;
- Beating for several hours at certain intervals, causing severe physical pain

Inhuman and humiliating treatment

In a number of cases, the court explains that the objective composition of the act of this crime involves humiliation, coercion, putting in inhumane, harmful to dignity and honour conditions, i.e., committing an act that clearly contradicts the moral rules of treating a person, reaches a certain level of cruelty, but not the level of cruelty to be qualified as turture. Coercion under Article 144^3 of the Criminal Code, unlike Article 150 of the Criminal Code, must result in severe physical or mental pain or moral suffering.

The severity of pain and mental suffering are important in terms of the intensity of its implementation. A level of cruelty may be reached by the feeling and restraint caused by the use of force that was not necessary or strictly necessary based on the victim's conduct. In the studied cases, we found physical injuries inflicted on the victims: skull-brain injury, brain concussion, general bruises, bruising in the eyeball area.

Mental or spiritual suffering result from treatment. The humiliating element is related to the specific feeling associated with the result of being treated, degraded and humiliated. An act is considered humiliating if it causes fear, suffering and a sense of humiliation that can humiliate a person and violates the person's ability to physically and morally resist. An act is considered humiliating even when the victim is humiliated in his own eyes, even if he is not humiliated in the eyes of others. The explanation by victim that he is scared, ashamed to go out and sleeps with the light on, was considered as treatment causing severe mental pain and mental suffering. In addition, the injury causes mental suffering at the time of the injury, which may continue during the treatment period. A person's realization of his inferiority, that he cannot follow normal life, causes mental suffering. The above-mentioned feelings, both physical and mental suffering, represent the moral damage felt by victim; e.g., The juvenile victims obey to follow the instructions of the offender regarding their punishment, one victim was so depressed and frightened that he stayed silent when his finger was cut off. The court assessed the act as suffering of the victim because the children made fun of him.

In another case, the court found that the actions committed by accused persons collectively - cruelly beating the victims for an hour by several people, putting them on their knees in order to apologize, slapping and kicking the back of the head, spitting, swearing, aiming firearms, putting sticks on their heads further degrades the dignity of a person. The purpose of carrying out the mentioned actions was to humiliate the victims and diminish their dignity, high-ranking official of the Ministry of Internal Affairs, was trying to prove his superiority and powerfulness to victims. The statement of victim about his perception highlights humiliating element of act, related to feeling of physical and mental suffering: “if you want to

humiliate one and equal him to earth, there is nothing more to do, further action is already cutting the throat, and that would be it". The court considered the action committed against victim that caused physical and mental suffering of such level that he denied his identity and wished a death as humiliation and putting one in conditions insulting his honour and dignity both in front of others and in front of himself.

In one of the studied following actions were qualified as a combination of a crimes – beating of the victim (Article 126 of the Criminal Code) - several slaps in the face, a punch to the ear, several hard blows to the head and back, and urinating on the body of the victim who fell as a result of the beating, thereby putting the victim in a position of diminishing his honour and dignity, resulting in suffering severe mental pain was considered as inhuman and humiliating treatment (Article 144^3 of the Criminal Code). Obviously, the described actions constitute inhumane and degrading treatment, although we think that in this case the qualification under Article 126 of the Criminal Code was unnecessary. Actions against the victim in same space and period, including blows to the face and body, constituted inhumane and degrading treatment.

In another case, the action of a person was qualified under articles 144^3 and 118 of the Criminal Code (less serious damage to health), when accused one forcibly took 3 underage and tied them with ropes in the yard in order to punish them and return the money, where they suffered severe physical and mental pain from rope hold. Accused person put the minors in inhumane, dignity and honor-destroying conditions, threatened and intimidated them, asked them to return the money, poured cold water on their heads for 20-25 minutes in severe weather conditions (temperature from -2 to -10 degrees), forced them to endure the cold, subjected them to strong mental and physical suffering. Was threatening them that they deserved harder punishment, demanded a refund. After receiving part of the money, he took one of the minors to the 2nd floor of the store and started asking him for money, threatening to stab him to death with a knife in the abdomen, cutting off a part of his finger with the knife.

In the other cases following actions were qualified as inhuman and humiliating treatment:

- The head of the penitentiary department, together with his employees and members of the special squad, in order to humiliate the convicts, put them in a state that undermined their honour and dignity, initially beat the prisoners in the office of the director of the institution, then their physical abuse and beating continued in the corridor, causing severe physical and mental pain and moral suffering to the victims;
- The head of the legal regime and employees of the institution had developed the rules for treating prisoners and with a common goal and common intention they put the prisoners in inhumane and humiliating conditions, in particular, they systematically committed physical and mental violence against the prisoners, illegally restricted them from walking, hygiene, doctor's services, rest, the rights to receive mass information on the radio, which were carried out by violent methods to induce fear, pain and inferiority in the victim, and ultimately silent submission. In the corridor created by the employees, the prisoners were beaten with hands and feet and batons, humiliated

and subjected to verbal abuse, and were divided into cells; Also, they were systematically beaten, verbally insulted and humiliated for the artificial reason, as if noise was coming from the cell, for asking to be taken to the doctor, for praying loudly, for pretending to turn on the radio loudly, for drying bread on the radiator and cutting it with a plastic card, for laughing loudly, for hanging a picture of the child on the closet, for playing chess. Prisoners in one cell were beaten because their cellmate could not get to the bathroom timely due to disabilities. In the bath they stripped the prisoners and beat them; Also, beating the prisoner in the cell and in the bath, tying the prisoner to the chair for several hours;

- During the physical training military was physically assaulted due to non-compliance with physical norms, and forced to lie face down in a trench, covered with soil up to his neck for about 10-15 minutes, then forced him to enter a canal full of water and lie down for 20 minutes. The next day, the same employee, who could not fulfil the physical norms due to exhaustion, was held by the sergeant by the belt and, as a punishment, was pushed on the over slabs for about 10 minutes, then he was forced to wear an armor-vest and run around in this equipment for about 5-6 hours;
- MIA employees illegally prevented the freedom of the victim, took him by car to the cemetery area, where they first hit him on the head, than beat up to 10 people were beating him in the kneeling position, forced him to lie on the ground, kneel down, kicked him, threatened to kill him, and shot in the air. The beating was accompanied by verbal abuse, spitting, victim was forced to apologize, and 1 and 2 GEL bills were laid on this head.
- The director of the penitentiary along with his employees verbally and physically abused the convict. The director threw a coin at the prisoner and told him to bring it, the prisoner refused to do so, as a result the director verbally abused him, slapped him, spat on him, then told the staff to rub him and do whatever they wanted with him. The prisoner was initially beaten in the same room, where he lost consciousness and suffered health problems. The court explained that tossing a coin, taking an order, inflicting verbal and physical abuse by hitting and watching how employees were beaten victim constituted the composition of Article 144^3 of the Criminal Code;
- During the walk, the prisoner greeted the prisoners in another cell, due to this reason he was returned to the cell, this caused the protest of prisoner. The employee, offended by the protest, took him out of the cell to the duty room, where he verbally and physically abused him along with other employees, then transferred him to another cell, stripped him along with the employees, handcuffed him and locked him in the cell;
- The prisoner refused to receive a ration of food, the head of the legal regime first verbally abused him and threatened retribution, then the prisoner used self-harm to avoid retribution. On the same day, the prisoner was beaten in the director's room by the head of the legal regime and staff for self-harm and refusal of food for about 1 hour - 3 times for 20 minutes. Also, threats, intimidation, manipulation of family members took place. The degree of psychological impact also reaches the level that would cause the self-esteem of the victim to be suppressed and cause a reasonable fear of the realization of the threat;
- During the search of the prisoner, torn clothes were found, there was a quarrel between the

prisoner and the employee, as a result prisoner harmed himself due to excitement. On the instructions of the head of the legal regime, the employees took the prisoner to the duty room, where they physically assaulted him by punching him several times in the face, which caused severe pain;

- The prisoner announced a hunger strike demanding a change of cell. For the purpose of coercion and punishment, the head of the legal regime verbally abused the prisoner who was under surgery recently, and then beat him, which caused him severe physical and mental pain. Against the background of the victim's state of health, the form of violence applied to him may belong to the category of inhumane and humiliating treatment, to the extent that it caused severe physical pain, worsened the state of health, and instilled fear, suppressing the ability to resist physically or mentally, this might explain the fact of swallowing of iron pieces by prisoner;
- The head of the legal regime department together with the employees took the prisoners out of the cell for an unknown reason, to the so-called Fukses, where he and his employees beat and physically assaulted the prisoner for no reason;
- The prisoner asked for painkillers, a dispute began between the employee and the prisoner, who was irritated by this, after which the prisoner harmed himself, after this he was left in the underwear, searched him, then the employees beat him with hands and feet both when he was standing and when he fell down, and verbally insulted him;
- Group beating of prisoners for 5, 10 minutes and 1 hour for turning on the radio at a high volume, for arguing, for self-harm and for refusing to take food, then leaving them naked for 2 days;
- The convicted person sewed his mouth and addressed various structures, due to which the deputy director of the institution severely beat him in different parts of the body using his hands and feet; Also, he and his staff severely beat one of the accused, took him out of the cell the next day, ordered him to strip and dance. On the basis of disobedience, the prisoner was again mercilessly beaten, his clothes were wrapped around him and he was beaten naked in different parts of the bodies. He was dragged into the cell and thrown on the wet floor. The defendant cut his veins, after which the deputy director beat him again; The same persons stripped another convict, beat him mercilessly, forced him to change his underwear, to make a mask, to be in a position with his mouth facing the wall, to move forwards and backwards;
- Employees of the penitentiary institution put the prisoners in a degrading, inhuman condition, humiliated them. 24 victims were systematically subjected to physical and psychological pressure, which was manifested in beatings, stripping, closing the cell on Sundays, forcing them to write cooperation documents, closing the window of the cell in high heat, and other actions;
- The accused, together with other persons, met the victim in a residential house, and due to his love relationship with his underage niece, put a lit cigarette butt in victim’s nose, hit his face several times with a lit cigarette, forced him to kneel down and to apologize, opened his mouth and spat, and brought her genitals to her face and threatened to rape him, wipe the beer liquid with his T-shirt, and forced victim to wear it. Such an action lasted 2-3 hours, which caused severe physical, mental and moral suffering to the victim;

- Stripping of prisoners, verbal abuse, beating for the purpose of intimidation and silent obedience, persuading them to cooperate with blackmail and threats, banning them from speaking in a normal voice in the cells (they had to speak in a whisper), limited use of television and telephone, duration of meetings, relations with representatives of the People's Deputies, writing complaints to various agencies , to use medical services, they were taken out of the cell and beaten, during which they were forced to scream loudly so that other prisoners could hear. They systematically forced them to undress before going on walks, forced them to move hunched over and laughed at when they told them that the prisoners in the cell were obliged to enter 1 sq.m toilet, they stood on top of each other, and those who stayed outside were beaten.

In all of the above-mentioned cases, the treatment of the victims amounted to inhuman and humiliating treatment, but did not reach the degree of cruelty characteristic and necessary for torture

Motivation to change qualifications

The appeal court reclassified following actions from the accusation of torture under Article 144^3 of the Criminal Code as inhuman and degrading treatment under Article 144^1 of the Criminal Code:

- The director of the penitentiary institution beat the prisoner with a wooden stick in the work room in order to obtain information and admitting. The prisoner was taken to the director's office 2 times, the first time for 20-25 minutes, physical violence was manifested not only by hitting with a stick, but also by being kicked by employees;

- 2 prisoners (separately) were taken to the so-called Fukses, they were left there in underwear, and after 30/40 minutes, they were taken to the duty room, where the head of the legal regime, together with other employees, beat the prisoners with their feet for 5 minutes, in order to punish them for turning on the radio at a high volume, causing severe physical pain. On the 2nd day, they were again taken to the duty room, where the head of the legal regime together with others beat the prisoners with a wooden stick;

- A prisoner who was beaten by employees for greeting prisoners in another cell during a walk was taken out of the cell by the head of the legal regime and brought into the so-called Fukses together with other employees, where he was demanded to kneel down, after disobeying, victim was beaten for 20-25 minutes. After the violence, the naked and bound prisoner was taken to the cell by the head of the legal regime, where he was left on the floor for 3 hours.

In relation to the mentioned episodes, the Court of Appeal explained that torture is intentional inhumane treatment that causes unbearable and cruel suffering. Whether or not the actions taken against mentioned prisoners can be described as cruel within the meaning of the UN Convention depends on the duration of the treatment, the degree of damage inflicted and the psychological consequences. The prosecution did not present evidence that would confirm the severity of the physical harm inflicted on the victims, which would enable the court to judge the intensity of the physical pain, the quality and intensity of the suffering, according to which it might be possible to qualify it as torture. The goal was to obtain information and punish, the goal is one of the main circumstances for qualifying as torture, but the presence of this sign alone cannot be the basis for qualification. It is necessary to establish the intensity and duration of the violence, the degree and strength of the suffering. In this case, we shared the position of the Court of Appeal.

The Court of First Instance properly reclassified actions from Article 144^1 to Article 144^3 of the Criminal Code in the following cases:

- Beating of the arrested suspect[110] in the police station - several blows to the face, after which the detainee received an injury in the lip area. The court focused on the treatment of the detained woman, also, the detainee was in the police station and had no opportunity to escape, which caused a feeling of inferiority, humiliation and putting her in an inhumane and humiliating situation. Unlike torture, inhuman and humiliating treatment does not require intent with respect to the suffering caused, nor was intent proven in the case;

- The actions of the prison staff, who forced the prisoners to change their pants in the corridor, to walk on their knees, during which they were beaten and subjected to verbal abuse. The Court pointed to the distinction between torture and other forms of prohibited treatment, involving criteria of quality and intensity; Also, a certain level of severity of physical pain or mental suffering. In the case of torture, the level is very high, pain and suffering are caused by special methods or special circumstances. In Inhuman and humiliating treatment, the intensity of pain or mental suffering is important, but less serious than torture, and the element of purpose is also important. The treatment of the prisoner led to his humiliation, degradation, insult, thus he found himself in inhumane and degrading conditions to his honor and dignity, being under mental suffering. He did not have the opportunity to escape from the penitentiary institution and caused a feeling of inferiority. This action is not characterized by the stigma, intensity, quality and duration characteristic to torture, did not cause serious damage to health. Article 125 of the Criminal Code, as well as Article 126, beating or other violence does not have a purpose and does not involve humiliating or forcing a person, as well as putting a person in a situation that violates his dignity and honor, thereby causing severe mental pain or mental suffering. Dignity and honor determine human actions as well, and being forced to act opposite of this attitude has a negative impact on the mental state;

- The action assessed as torture by the prosecution was qualified as inhumane and humiliating treatment (together with the illegal acquisition, storage and dissemination of personal information) in a case where convicted person was accusing the victim that he misappropriated the company's money, cooperated with competitors, transferred information, attempted to bankrupt the company and demanded a admitting from him, interfered In his life, checked his mobile phone, followed him, threatened to send the video of the victim to his family if he will refuse to continue the relationship with offender, due to which the victim was forced to continue the relationship with him. Also, the victim was threatened with the distribution of an intimate video, which caused him severe mental pain and moral suffering. The convict sent a video depicting the victim to his relatives and family members, distributed naked photos of the victim to his employees during a meeting at work. The victim experienced severe mental pain and moral suffering due to coercion of sexual intercourse, information and confession, filming and distribution of photo-video material. The Court of Appeal explained that in distinguishing between torture and inhuman treatment, the presence of the signs characteristic of torture, inhuman and humiliating treatment should be assessed individually. Attention should be focused on the circumstances in which the victim is at the time of the action against him. Torture involves severe pain and suffering. Suffering can be physical or mental. The threshold of cruelty to define torture is very high. The difference between torture and inhuman treatment is based on the difference in the severity

[110] Effective until October 1, 2010, the Criminal Procedure Code of Georgia (1998 Law of February 20) provided for the concept of a suspect.

and intensity of the suffering. The court considered that the defendant's action may include the purposes characteristic of torture: targeted actions, intimidation, punishment, gaining recognition, although the action did not reach the highest threshold of cruelty. The victim suffered physical and psychological pain and mental suffering from these actions, although they differ in severity from the actions on the basis of which the European Court found torture. The environment where the victim was at the time of the actions is noteworthy. The limitation of resistance and self-defence in the closed environment of detention proportionally increases the level of cruelty of the ill-treatment, which has been assessed as torture by the European Court. The victim did not have a limited range of action depending on the situation. Despite the long period of time, as well as the purpose, the court evaluated the actions as inhumane;

- The appeal court also assessed the action qualified as torture by the first instance as inhumane treatment and explained that it cannot agree with the fact that the violence perpetrated by the defendants on the victim was related to the theft of a "laptop", in which case the goal of the convicts was to get a confession from the victim for the given action, as well as to intimidate or punishment (the testimony of the victim himself is emphasized, which states that the convicts themselves knew that he did not commit theft and that there was a motive for him not to pay one of them the money). The Court emphasizes the 1984 Convention and the European Court definition of "torture" and states that for an act to be considered torture, the purpose must be to obtain information, evidence or confession, to intimidate, coerce or punish a person for an act committed by him or a third person. Accordingly, the chamber considered that the action should be reclassified to subsection "e" of section 2 of Article 144^3 of the Criminal Code.

Unlike the given cases, we cannot support the motivation of the appeals court to change the qualification in another case, where the wife and neighbour were beaten for a long time on the grounds of jealousy with hands, feet, batons, causing injuries incompatible with life, cutting the left ear of both of them, as a result of which one of them died , and the spouse received multiple injuries, the person was charged under Article $11\text{-}144^1$, Section 2, Sub-paragraph "d" (torture against 2 persons) and Article 117, Section 7, Sub-paragraph "b" and Section 8 (intentional harm to health grievous bodily harm with particular cruelty resulting in loss of life). The City Court fully shared the position of the prosecution and explained that it can be said with certainty that the intention of the accused included the awareness that the purpose of this crime was to torture persons, to cause them bodily harm, to treat them in such a way that by its nature, intensity and duration caused severe physical pain; the purpose of which was to punish these persons for the actions they committed, and the fact mentioned is enough to qualify this crime - torture and life-threatening intentional serious injury to the body. In the mentioned case, the opposite reasoning was developed by the court of appeals, which qualified the committed action under subsection "b" of part 7 and part 8 of Article 117 of the Criminal Code, while (torture) was reclassified under Articles 11^1-120 of the Criminal Code and explained, that the injuries caused to the deceased victim were fully covered by the crime against health, and the qualification for the surviving victim should be based on the standing result. According to the court's reasoning, the additional qualification of the action as torture in case of inflicting multiple injuries leads to an inferior result, because in this context, each crime directed against health and life would be an automatic prerequisite for qualification as torture, which is not correct in the Chamber's opinion. According to the court's assessment, in order to qualify an action as torture, it is necessary to establish the subject's intention to torture a person. For the most part, a person is driven by a special goal, which can be the goal of punishment or revenge, although not every action can be qualified additionally as torture. Regardless of the position of the court, we believe that the elements of torture were evident in this case: the purpose of punishing him and his neighbour on the basis of jealousy towards his wife, the action reached the limit of cruelty: the nature and intensity of the treatment (physical violence with the use

of objects and with such severe injuries that one victim died), duration (beating with hands and objects for a long time). Therefore, the position of the court of appeals is unequivocally wrong, because the factual circumstances of the case were torture, which resulted in the loss of life of one victim. We believe that from the point of view of the absolute right to prohibit torture, such a definition of the court is dangerous and may be used as a basis for the release or mitigation of the punishment of criminals.

Combination of general and special clauses

It has been noticed that the same act was qualified with a combination of general and special articles:

- The employees of the Ministry of Internal Affairs, who, for personal reasons, illegally prevented the freedom of citizens and treated them inhumanely and humiliatingly in the territory of the cemetery, were charged with a combination of articles 143, 144^3 and 333. The court found the defendants guilty in illegal deprivation of liberty and inhumane and humiliating treatment, and proclaimed innocent in abuse of authority by violence and insulting dignity. The mentioned position is legal, because one fact of inhuman treatment does not require additional qualification under Article 333, Part 3;

- In another case, the prosecution qualified the action of the military police officers under Article 333, Part 3, Sub-Clause "C" and Article 144^1 together. In this case, the court proclaimed innocent verdict on the charges of torture and abuse of power due to the lack of evidence and did not judge the qualifications;

- In one case, persons were accused with the same action under articles 144^1 (special) and 333 (general) of the Criminal Code. According to the court's explanation, in a specific case, Article 144^1 included 333 and did not require separate consideration;

- The accusation took place under a combination of Article 144^3 and subsections "b" and "c" of section 3 of Article 333 of the Criminal Code, although the court correctly dismissed it as not necessary. The court concluded that the 2 actions specified in the indictment, subparagraphs "b" and "c" of Article 333 of the Criminal Code and part 2 of Article 144^3, in terms of content, time, circumstances, place and chronology, represent 1 action and qualification of one action with several articles is not legally correct. It is essential that the action is qualified by a special norm, despite the fact that the content of the criminal action includes the composition of the 2nd norm, namely, "a", "b", "d", "e" of the 2nd part of Article 144^3 of the Criminal Code "g" sub-paragraphs in their content include the action provided for by the sub-paragraphs "b" and "g" of part 3 of Article 333.

The mentioned definitions of the courts correspond to the established principle in criminal law, according to which, if the action is provided for by general and special norms, there is no combination of crimes and the qualification should be made by a special norm.[111] When improper treatment is carried out by an official, the qualification according to Articles 144^1-144^3 of the Criminal Code is sufficient and there is not necessity additionally qualify under the article of misuse of power or misuse of power with violence or insult to dignity.

[111] Criminal Law Code of Georgia, Art. 16, article 2.

Contrary to the aforementioned legal provision and in contrast to the above-mentioned judicial practice, in another case[112], the court upheld the combination of general and special articles: the person was accused in the actions carried out under Articles 333 and 144^3 of the Criminal Code, and the court requalified actions from Article 333, Part 3, "b" to the subsections "b" and "c" of part 3 of Article 332. According to the court's explanation, the accused, as a high-ranking official of the Constitutional Security Department, carried out all actions (moved in official vehicles, the action was planned using official telephones, the patrol police escaped by misuse of official authority) by abusing official authority. It is significant that the court found the accused guilty of the abuse of state resources, both physical and material-technical, for the actions provided in the first part of Article 332 of the Criminal Code and, in addition, the actions taken against the victim, contrary to the principle of legality, as a combination of crimes: 144^3 and Article 332, Part 3. In the mentioned case, the action qualified by Article 144^3 of the Civil Code uniquely included the composition defined by Part 3 of Article 332 of the Criminal Code, and the use of a special and general norm for the same action contradicts the legislation.

Limitation, proportionality of punishment and usage of plea bargain/pardon/amnesty (international obligation)

Considering that specific standards in the context of the prohibition of torture apply to the so-called on the relief mechanisms, this chapter will be devoted to the issues of statute of limitations, proportionality of punishment, plea bargain, pardon or amnesty.

According to the case law of the European Court, considering the absolute nature of the prohibition of torture, the extension of the statute of limitations, the use of amnesties and pardons are not allowed in cased if: the Court found that when a representative of the State is charged with crimes involving torture and ill-treatment, it is particularly important that the criminal proceedings and punishment are not time-limited and inadmissible distribution of amnesty or pardon.[113] National state authorities should not give the impression that they wish to allow such treatment to go unpunished.[114] Amnesty is generally inconsistent with a state's obligation to investigate torture. The state's obligation to prosecute criminals should not be weakened by impunity for offenders through amnesty laws, which is considered contrary to international law.[115]

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[112] In the forest near the cemetery, the accused and more than 10 employees of the criminal security department physically and verbally assaulted the person for 1 hour, made him kneel down, kicked him in the face, put 1 and 2 GEL bills on his head while he was kneeling, so that he would need it for a taxi. They threatened with physical retribution in case of publicizing the said fact.

[113] Decisions of the European Court of Human Rights: November 4, 2004 decision "Abdülsamet Yaman v. Turkey" (application N32446/96) §55, decision of October 17, 2006 "Okkalı v. Turkey" (application N52067/99) § 76, decision of June 5, 2007 "Yeşil and Sevim v. Turkey" (application N3434738/04) §38; The decision of September 17, 2014 "Mocanu and Others v. Romania" [GC], application N10865/09, 45886/07, 32431/08) §326. This principle has also been extended to actions committed by private individuals when there is a serious violation of a fundamental right (decisions of the European Court of Human Rights: the decision of November 20, 2018 "Pulfer v. Albania" (application N31959/13) §83; 2022 "M.S. v. Italy" §144)

[114] Decisions of the European Court of Human Rights: December 21, 2000 decision "Egmez v. Cyprus" (application N30873/96) §71, decision of March 10, 2009 "Turan Cakir v. Belgium" (application N44256/06) § 69.

[115] The decision of the European Court of Human Rights of March 17, 2009 "Old Dah v. France" (application N13113/03).

The distribution of amnesty based on Articles 2 and 3 of the Convention would be contrary to the Court's obligations, as it would jeopardize the investigation of such actions and would inevitably lead to impunity for those responsible. Such a result would endanger the purpose of the protection guaranteed by these articles and will make illusory the guarantees regarding the right to human life and the right to protection from ill-treatment.[116]

The European Court assesses the release of a person convicted of a crime under the amnesty act as "actual impunity" as a violation of the rights protected by Articles 2 and 3 of the Convention. According to the court's assessment in the precedent case, amnesty was improperly extended to the applicant for actions that amounted to a violation of basic human rights protected under Articles 2 and 3 of the Convention.[117] The Grand Chamber held that even if the possibility of amnesty were acceptable under certain circumstances, such as a reconciliation process and/or a form of compensation for the victim, an amnesty extended to the applicant in the present case would still be unacceptable, as there was nothing to indicate the existence of such circumstances.[118]

The correct qualification of ill-treatment is of particular importance in terms of imposing a proportionate punishment: the European Court of Human Rights has noted in relation to Article 2 of the Convention that the issue of the size of the relative punishments is essentially related to the issue of qualification of the crimes committed by the domestic courts. Normally, its functions do not include checking whether the provisions of the criminal law have been correctly applied in determining the sentence or judging what degree of individual responsibility should be imposed on individuals, but the court cannot ignore the fact that the investigating authorities have not prepared a sufficient evidentiary basis, and the courts have not worried themselves and did not discuss in their decisions what the nature of the actions committed by the criminals were.[119]

It is significant that the European Court of Human Rights discusses the issue of the use of amnesty in relation to punishment on the compliance of the committed act with Article 3 of the Convention[120] and not on the basis of qualifications at the national level.

The UN Special Rapporteur emphasizes that obstacles to criminal prosecution, such as amnesty, pardon, statute of limitations or prosecutorial discretion to refuse prosecution, are not permitted under international law.[121] Although plea bargaining is not prohibited in principle, any exercise of prosecutorial discretion in this

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[116] The decision of the European Court of Human Rights of May 27, 2014 "Margus v. Croatia" (application N4455/10) §127,138-140.

[117] The decision of the European Court of Human Rights of May 27, 2014, "Marguš v. Croatia" application N4455/10, § 127

[118] The decision of the European Court of Human Rights of May 27, 2014, "Marguš v. Croatia" application N4455/10, § 139.

[119] The decision of the European Court of Human Rights of April 26, 2011 "Enukidze and Girgvliani v. Georgia" (application N25091/07) §270.

[120] The decision of the European Court of Human Rights of May 27, 2014 "Margus v. Croatia" (application N4455/10) §124.

[121] <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/273/24/PDF/G1527324.pdf?OpenElement> last seen: 19.09.2022 phar 53.

regard should be subject to scrutiny and consultation with victims and their families. It is important that plea bargain are not used by defendants who bear or share responsibility for torture to testify against other co-defendants in order to escape serious punishment.[122]

Exemption from criminal responsibility due to expiration of the statute of limitations, use of amnesty/pardon and plea bargain (Georgian legislation)

It should be mentioned that, according to the Criminal Code,[123] the statute of limitations for exemption from criminal liability is not applied to the special articles of mistreatment crimes (Articles 144^1, 144^2 and 144^3 of the Criminal Code) , which unequivocally confirms the special importance of investigating acts of torture and inhuman treatment.

According to the legislation of Georgia, diversion[124] is not used in cases of crimes of torture, threat of torture, inhuman and humiliating treatment (unlike official crimes); Also, it is not allowed to completely release the accused/convicted person from the punishment when concluding a plea bargain on special cooperation[125]. In addition, it is allowed[126] to sign a plea bargain with persons accused/convicted under the same articles by reducing the sentence or imposing a suspended sentence.

The legislation of Georgia does not restrict the use of diversion against the accused in cases of official crime, as well as the complete release from punishment by signing a plea bargain with the accused/convicted.

In the 2013 report of the Public Defender[127], attention was focused on the problem of absolving person guilty of torture with signing a plea bargain by the prosecutor's office and upon its approval by the court.

In addition, the size of the punishment is also significantly different: the sanction for exceeding or abusing official authority by violence and/or insulting dignity is lighter (imprisonment for a period of 5-8 years) than for torture committed by an official, using his official position, against a person deprived of his liberty (imprisonment of 9 - up to 15 years) and for inhuman and degrading treatment[128] (deprivation of liberty up to 5-10 years).

The law does not directly prohibit the use of amnesty against those accused/convicted of improper treatment,[129] but the Parliament of Georgia makes a decision by adopting the amnesty law. It is necessary to take into account the state's obligation in the legislative process, so that there is no place for the policy of official tolerance for the violations of absolute human rights.

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[122] Id, phar 54

[123] Criminal Law Code of Georgia, Art. 71, article 5^1

[124] Criminal Procedure Code of Georgia, Art. 1681, written 2.

[125][125] Criminal Procedure Code of Georgia, Art. 218, article 8; Criminal Law Code of Georgia, Art. 73^1

[126] Articles 209-218 of the Criminal Procedure Code of Georgia, Criminal Code of Georgia, Art. 55 and 63.

[127] see. <https://drive.google.com/file/d/19AjSGIOHEQkzJ0HV-rxQ56sXgFx0E6d7/view> p.175-178.

[128] It is significant that the 2nd part of Article 144^3 (inhuman and humiliating treatment by an official or a person equal to him) using the official status, as amended on December 01, 2016, stipulated imprisonment for a term of up to 4-6 years as a punishment.

[129] Criminal Code of Georgia, Art. 77.

As for the pardon, the President of Georgia carries it out in the manner[130] established by the decree. It is true that when applying pardon, it is appropriate to take into account[131] the fact of mistreatment by the convicted person and the fact that it was committed by an employee of the law enforcement body, however, the President of Georgia is authorized to make a decision on pardoning a person without meeting the requirements established in the same manner.[132]

In such a situation, the violence carried out by the representatives of the state, whose duty is to protect the citizens, has a particularly depressing effect on the victim and makes him feel insecure. Accordingly, it is necessary to correctly qualify the allegedly committed action at the initial stage of the investigation, so that the victim can be convinced of the effectiveness of the investigation, and the alleged crime can be adequately evaluated.

Proportionality of punishment, use of plea bargain/amnesty (practice analysis)

In the studied judgments, the justification of the use of the punishment or the discussion on specific details is rarely found. Courts generally indicate the grounds defined by law as a template and do not consider each of them in relation to a specific convict. In some cases, the court referred to the individual circumstances of determining the punishment. For example: a higher sentence was assigned to the convicts whose actions directly caused irreparable damage than accomplices, as well as a higher sentence was assigned to the convict taking into account the large number of victims of his actions. The court of superior instance removed the fine considering the economic and financial circumstances. In other cases, the court pointed to the increased responsibility of the management of the penitentiary institution to protect the rights of the convicts and their crimes committed in a closed institution, from which the victims had no way to escape; on the marital status of the convict (having minor children).

Plea Bargain

From reviewed court judgements, plea bargain were signed with 23 defendants/convicts (19 public officials, 4 private persons) in 8 criminal cases of torture, inhuman and humiliating treatment were approved. Almost all plea bargain were made on accusation and sentences. A special cooperation agreement was signed with one person by the chief prosecutor, as a result of which 4 episodes of torture committed under aggravating circumstances (Article 144^1, Part 2 of the Criminal Code) and 3 episodes of inhuman and humiliating treatment under aggravating circumstances (Article 144^3, Part 2 of the Criminal Code) the convicted was fully released from criminal liability. The above clearly contradicts the international obligation of the state and

[130] Criminal Code of Georgia, Art. 78, Phar. 1.
[131] Decree of the President of Georgia N556 of November 26, 2019 "On the Approval of the Rule of Pardon", Article "b", "d".
[132] Decree of the President of Georgia N556 of November 26, 2019 "On Approval of the Rule of Pardon", Art. 5, point 2.

rightfully became the subject of criticism of human rights organizations and the public defender.[133]

A kind of tolerant attitude towards the improper treatment committed by public officials is indicated by the fact that the punishment under the terms of the plea bargain concluded with them is significantly lighter than the punishment determined by the agreement signed with other individuals. As a result of the plea bargain, 4 other persons convicted for improper treatment were determined to the following:

- Real and high punishment in the form of imprisonment imposed on 2 persons for torture committed in collectively - imprisonment for a term of 7 years;
- 1 person was sentenced to 2 years and 6 months of imprisonment (real) and 5 years suspended for torture committed against a family member and illegal deprivation of liberty under aggravating circumstances;
- For inhumane and humiliating treatment, 1 person was sentenced to imprisonment for 1 year and 6 months (real) and 2 years suspended.

According to the plea bargain, the final punishment determined in the form of imprisonment[134] for public officials convicted of several episodes of torture, inhuman and humiliating treatment (taking into account the amnesty) ranges from 6 months to 5 years:

- Accused person was fully released from criminal liability for 4 episodes of torture committed under aggravating circumstances (Part 2 of Article 144^1 of the Criminal Code) and 3 episodes of inhuman and humiliating treatment committed under aggravating circumstances (Part 2 of Article 144^3 of the Criminal Code);
- Person convicted for 4 episodes of torture committed under aggravating circumstances (Part 2 of Article 144^1 of the Criminal Code) and 3 episodes of inhuman and humiliating treatment under aggravating circumstances (Part 2 of Article 144^3), was sentenced to 9 months of imprisonment;
- Accused person for 2 episodes of torture committed under aggravating circumstances (Part 2 of Article 144^1 of the Criminal Code) and for inhuman and humiliating treatment under aggravating circumstances (Part 2 of Article 144^3 of the Criminal Code) and 1 person convicted of 3 episodes of torture under aggravating circumstances (Part 2 of Article 144^1 of the Criminal Code) were sentenced to 5 years imprisonment;
- For the preparation of inhuman and humiliating treatment committed under aggravating circumstances (Part 2 of Article 25-144^3 of the Criminal Code) the convicted person was sentenced to 7 months and 11 days of imprisonment (4 years, 1

[133] see 2013 Parliamentary Report of the Public Defender of Georgia, p. 175-178 <https://drive.google.com/file/d/19AjSGIOHEQkzJ0HV-rxQ56sXgFx0E6d7/view>

[134] As an additional punishment, the right to hold office and a fine were determined for several convicts.

month and 19 days of conditional probation);

- For inhumane and degrading treatment committed under aggravating circumstances (Part 2 of Article 144[3] of the Criminal Code), following was defined for convicted persons:

  - ✓ 2 persons - imprisonment for 6 months;
  - ✓ 1 person - imprisonment for 9 months;
  - ✓ 5 persons - imprisonment for a term of 1 year and 6 months (out of which 4 persons were additionally sentenced to conditional imprisonment for a term of 1 year and 6 months);
  - ✓ 1 person - imprisonment for 2 years;
  - ✓ 2 persons - imprisonment for 3 years;
  - ✓ 1 person - imprisonment for 3 years and 6 months;
  - ✓ 1 person - imprisonment for 4 years;
  - ✓ 1 person - imprisonment for 4 years and 6 months.

As for the general articles of official crimes - subsections "b" and "c" of part 3 of articles 332-333 of the Ccriminal Code (abuse and misuse of official authority committed by violence or use of weapons, insulting the personal dignity of the victim) with the plea bargain concluded with the defendants a significantly lenient attitude towards the prescribed punishment was observed on the part of the state - in various cases against 12 persons:

- 3 persons were sentenced to prison - 2 years (plus 1 year and 9 months suspended), 1 year and 6 months, 1 year and 4 months;
- 8 persons[135] sentenced to imprisonment (from 2 years and 3 months to 5 years) was considered conditional.
- 1 person - a fine as the main punishment, as an additional punishment - deprivation of the right to hold office and confiscation of firearms.

Use of amnesty

As a result of the spreading of the Law of Georgia "On Amnesty" of December 28, 2012, the sentences of those convicted for crimes committed before October 1, 2012 were reduced by ¼. In should be considered, that the courts knew that the sentence imposed by them should be reduced by ¼ according to the amnesty law, and thus the final sentence would be imposed. Nevertheless, on the one hand, they did not determine the maximum term of punishment for torture committed under aggravating circumstances (taking into account

[135] Deprivation of the right to hold office and a fine as an additional punishment.

that the amnesty law would reduce the punishment); On the other hand, there were several episodes of ill-treatment or a combination of ill-treatment and other crimes and due to the absence of recidivism (the convicts were civil servants with no previous convictions), the principle of absorption of sentences[136] was applied. In the case of conviction by the courts under special articles of improper treatment, the following punishments were determined using amnesty:

- Convicted for torture committed under aggravating circumstances (Part 2 of 144[1] of the Criminal Code):
  - ✓ 2 persons - imprisonment for 6 years and 9 months;
  - ✓ 2 persons - imprisonment for 7 years and 6 months;
  - ✓ 1 person - imprisonment for 8 years and 3 months;

- One person convicted of 3 episodes of torture committed under aggravating circumstances (Part 2 of Article 144[1]) and inhuman and humiliating treatment committed under aggravating circumstances - imprisonment for a term of 6 years and 9 months;

- For torture committed under aggravating circumstances, as well as inhuman and degrading treatment:
  - ✓ 1 person - imprisonment for 7 years and 6 months;
  - ✓ 1 person - imprisonment for 6 years and 9 months,
- 4 persons convicted of torture committed under aggravating circumstances (Part 2 of Article 144[1]) and a combination of other crimes (Articles 143 and/or 138 of the Criminal Code) - imprisonment for 9 years.
- 1 person for inhumane and humiliating treatment committed under aggravating circumstances, illegal deprivation of liberty and abuse of authority with violence and insult to dignity - imprisonment for a term of 7 years and 6 months (the higher penalty for deprivation of liberty absorbed the penalty determined for inhumane treatment (4 years and 6 months);
- Those convicted of inhumane and humiliating treatment under aggravating circumstances were defined as:
  - ✓ 5 persons - imprisonment for 3 years and 9 months;
  - ✓ 2 persons - imprisonment for 3 years;
  - ✓ 6 persons - imprisonment for 3 years and 3 months;
  - ✓ 4 persons - imprisonment for 3 years, 4 months and 15 days;
  - ✓ 3 persons - imprisonment for 3 years and 6 months;
  - ✓ 1 person - imprisonment for 4 years;
- Inhuman and humiliating treatment committed under aggravating circumstances
  - ✓ 1 person convicted for 2 episodes - imprisonment for 3 years and 9 months, 1 person for a period of one month, 1 person - imprisonment for a period of 3 years and 3 months;
  - ✓ 1 person convicted for 4 episodes - imprisonment for 4 years;
  - ✓ 1 person convicted for 6 episodes - imprisonment for 4 years;
- A person convicted of 3 episodes of inhuman and humiliating treatment committed under aggravating circumstances shall be imprisoned for a term of 5 years and 4 months;

[136] Criminal Law Code of Georgia, Art. 59.

- 2 persons convicted of inhuman and humiliating treatment and illegal deprivation of liberty under aggravating circumstances were sentenced to 4 years and 6 months in prison.

According to the general articles of official crimes – for 15 persons convicted under "b" and "c" subparagraphs of Article 333, Part 3 of the Criminal Code determined term of imprisonment constitutes from 3 years and 9 months to 5 years and 3 months. For one person convicted under subsection "b" of part 3 of Article 333 of the Criminal Code (together with part 5 of Article 25, 117 of the Criminal Code) - imprisonment for a term of 6 years.

Without amnesty

Within the scope of the research, we will separately consider the issue of the proportionality of the punishment in those cases when the plea bargain was not concluded with the convicts, and there was no reason to apply the amnesty law due to the time of the act - the amnesty law does not apply to the acts of ill-treatment committed after October 1, 2012. The cases given below are committed by private individuals, only in one case of conviction under Article 333, Part 3 of the Criminal Code is a public official (policeman) is an actor.

- 5 persons were sentenced to imprisonment for group torture for a period of 10 years;
- 4 convicts were sentenced to 9 years of imprisonment for group torture and other crimes (Articles 117 and 143 of the Criminal Code);
- 2 convicts were sentenced to imprisonment for 11 years, 2 persons - for 10 years, for the combination of torture and other crimes under Article 117 committed in a group.
- 4 persons convicted for the combination of torture committed under aggravating circumstances and Article 143 - imprisonment for a term of 13 years, 4 persons - for a term of 12 years;
- 1 person was sentenced to imprisonment for 9 years, the 2nd convict was sentenced to 10 years imprisonment for the combination of Article 143 and torture committed individually against a minor and a helpless person.
- For the combination of torture committed under aggravating circumstances and Article 143, the person convicted was sentenced to imprisonment for 7 years and 6 months;
- For inhuman and humiliating treatment committed under aggravating circumstances:
    - ✓ 1 person - imprisonment for 5 years;
    - ✓ 3 persons - imprisonment for 4 years and 6 months;
    - ✓ A juvenile convict - imprisonment for 2 years and 3 months;
- For inhuman and humiliating treatment:
    - ✓ 1 person - imprisonment for 5 years;
    - ✓ 1 person - imprisonment for 5 years and 6 months.

The person convicted for inhumane and degrading treatment committed using his official position and illegally obtaining, storing and distributing personal life data was sentenced to 6 years of imprisonment. For the combination of inhumane and humiliating treatment of minors, illegal deprivation of liberty and less severe damage to health, the convicted person was sentenced to 7 years in prison. The judge indicated as mitigating circumstances the lack of previous convictions, the partial recognition of the crime and the fact that they are

reconciled with the victims and have no complaints. The fact of reconciliation with the victims has no influence on the size of the punishment in case of improper treatment.[137] In one case, the court imposed a fine (15,000 GEL) as the main punishment on a person convicted for inhuman and humiliating treatment and beating, and, taking into account the term of imprisonment - 8 months and 8 days, he was completely released from serving the sentence. In one case, the convicted person was sentenced to 5 years of imprisonment under Article 333, Part 3, Sub-paragraph "b" of the Criminal Code.

Pardon

In the period from January 01, 2013 to January 06, 2020[138], among 9 convicts pardoned by the President of Georgia for the crimes committed under these articles.[139]

- One person convicted of torture committed under aggravating circumstances (Part 2 of Article 144^1 of the Criminal Code) had his remaining prison sentence halved;
- 2 persons convicted for inhuman and humiliating treatment committed under aggravating circumstances (Part 2 of Article 144^3 of the Criminal Code) were released from further serving the main and additional punishment and the conviction was removed;
- Article 333 of the Civil Code, Part 3, Sub-Clause "B" (exceeding official authority by violence or using weapons)
    - ✓ 4 persons were released from further serving the main sentence;
    - ✓ 1 person was released from further serving the prison sentence,
    - ✓ The remaining prison sentence of 1 convict was halved.

The Constitution of Georgia grants the President the exclusive power to pardon convicted persons. In addition, it is important to enforce the punishment determined by the court and to fulfil the state obligation[140] against the persons convicted for torture, inhuman and humiliating treatment, because pardoning the person convicted for the crime committed within the framework of Article 3 of the Convention does not serve the purpose of adequate punishment and creates the impression of leaving improper treatment unpunished.

Conclusion

Within the scope of this special report, the serious and important problem of effective investigation/justice on facts of improper treatment was again clearly identified.

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[137] Criminal Code of Georgia, ch. 13-14.

[138] Letters of the Administration of the President of Georgia dated May 21, 2020 N2593, October 9, 2019 N7979 and January 14, 2020 N208.

[139] According to the letter N2593 of the administration of the President of Georgia dated May 21, 2020, in the decrees of October 2 and 25, 2013, November 13, on the basis of which the suspended sentence and conviction of convicted persons were removed, the articles of the Criminal Code are not specified. In addition, the aforementioned decrees did not affect the crime provided for in Article 1441 (torture) of the Criminal Code of Georgia.

[140] The decision of November 4, 2004 "Abdülsamet Yaman v. Turkey" (application N32446/96) §55, decision of October 17, 2006 "Okkalı v. Turkey" (application N52067/99) § 76, decision of June 5, 2007 "Yeşil and Sevim v. Turkey" (application N3434738/04) §38.

It should be noted that the initial qualification of the case is done by the investigative body. At the stage of criminal prosecution, the exclusive authority of the prosecutor is to qualify the action, its change and refusal to accuse, while the final qualification of the action as a crime belongs to the authority of the court.

In the studied cases, the cases of qualification of the facts of improper treatment by the officials as official crimes were identified. The aforementioned practice is caused by a legislative flaw, in particular, the actions provided for by subsections "b" and "c" of parts 3 of articles 332-333 of the Criminal Code, which implies the abuse and misuse of authority committed by an official with violence, use of weapons, insulting dignity, Includes the special legal definition of ill-treatment - Articles 144^1-144^3 of the Criminal Code. In addition, the problematic nature of other articles was also highlighted - the compulsion to give an explanation, testimony, or conclusion (Article 335 of the Criminal Code), forcing a person placed in a penitentiary institution to change his testimony or refuse to testify (Article 378 of the Criminal Code, part 2).

Accordingly, in the context of the positive obligation of the state, in order to ensure the preventive effect of improper treatment, the legislation must clearly, without ambiguity, exhaustively criminalize improper treatment only with special norms (Articles 144^1-144^3 of the Criminal Code) and in practice exclude the possibility of qualifying these crimes with other articles. For this, it is necessary to remove from the Code Articles 332-333, Sections 3, “b” and “c”, as well as Article 335 and Section 2 of Article 378, without decriminalizing the mentioned actions.

In addition, it is significant that under Article 144^3 of the Criminal Code, inhuman and humiliating treatment is a crime, and according to the precedent law of the European Court of Human Rights, it is possible to assess the treatment as inhuman and/or degrading (both individually and collectively). Accordingly, it is necessary to reflect the mentioned circumstance in the legislation.

When qualifying, the courts mainly focus on the intensity of the treatment and the degree of inflicted pain and suffering, and regardless of the existence of goals qualifying torture, they evaluate the act as inhuman and humiliating treatment if the treatment does not reach the level of cruelty characteristic to torture. Not unified and incorrect practice of the courts was revealed in several cases of reclassification of ill-treatment under other minor charges. In addition, in several cases, the prosecutor's office, using a combination of general (Article 333) and special (Articles 144^1-144^3 of the Criminal Code) articles, qualified the same action, which is often removed by courts as the accusation additionally, but in single case the guilty verdict was also made.

When determining the punishment, the courts do not take into account the harsher measure of punishment in cases where there are several episodes of ill-treatment and/or aggravating circumstances, and/or there is a combination of ill-treatment and other crimes, and they must use the principle of absorption of sentences due to lack of conviction.