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**THE DUTIES OF PUBLIC PROSECUTOR TOWARDS PERSONS DEPRIVED  
OF THEIR LIBERTY**

**Presentation**

prepared by

**Mr Eric Svanidze**

Expert of the Council of Europe European Committee  
for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment (CPT)  
(Georgia)

The subject of my presentation is related to duties of prosecutors towards persons deprived of their liberty. It should be borne in mind that they are entitled to the majority of, if not all rights and fundamental freedoms. However, One of the main issues that rise in the given context is related to the prohibition of torture, inhuman or degrading treatment or punishment. With some of you we had already an opportunity to discuss the topic in detail during visits of the European Committee for the Prevention of Torture to your countries. On this occasion I will try to cover the matter from more global perspective and offer an overview of international, primarily European, standards and approaches that have been developed in this regard.

Taking into account the nature of the event we are participating, there is no need to elaborate on the negative obligation to refrain from ill-treatment. However, certain worrying developments that took place in the course of vital for the survival of democratic societies counter-terrorism measures, make it necessary to underline once more the unacceptability of ill-treatment or such special arrangements as indefinite deprivation of liberty, extraordinary renditions and other forms of violation of the peremptory norm of international law that absolutely prohibits torture, inhuman or degrading treatment. Everyone has to agree that it does not really matter how terrorists will be able to achieve their goals of destroying democratic societies, be it a direct result of direct threats or making us to give up democratic values in response to them.

Of course, human rights standards oblige us to be more professional and skilful and meet respective additional requirements, but it the only way in which the phenomenon of terrorism can be defeated. Without going into thickets of this complicated matter, I would like to mention that counter-terrorism and human rights are not incompatible. The first framework can and should be attuned to the second one.

These were some remarks on negative obligations to refrain from ill-treatment. Normally prosecutors are not concerned, when we are talking about this aspect of the prohibition. As to routine duties of prosecutors towards persons deprived of their liberty, they concern their role in averting respective breaches of their rights. Indeed, public prosecutors apply laws themselves and see that they are applied.

Article 1 of the European Convention on Human Rights is the key norm that in conjunction with its Article 3 obliges states to secure to everyone within their jurisdiction freedom from torture, inhuman or degrading treatment or punishment. Unique position of public prosecution converts it into one of main actors and responsible authorities in fulfilling this obligation. The specificity lies in the fact that in addition to the task of ensuring effectiveness of the criminal justice system, prosecutors are entrusted with the function of striking a fair balance between it and the duty to ensure protection of human rights. In spite of the fact that particular proportion of these elements differs from country to country, this feature of public prosecution is reflected in paragraph 24 of the Recommendation of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System.

On that basis two main European Human Rights Mechanisms dealing with the protection of persons deprived of their liberty, namely the European Court of Human Rights and the European Committee for Prevention of Torture, Inhuman or Degrading Treatment or Punishment, have elaborated quiet detailed standards and requirements in respect of the role of prosecutors in this field.

Be it inquisitorial or adversarial, mandatory or discretionary systems, but prosecutors are delegated the function of dealing with investigation and prosecution of crimes related to torture, inhuman and degrading treatment. You and your colleagues are either directing or supervising, or conducting investigations, initiating and continuing prosecutions, arguing cases in courts. That is why prosecutors have to carry out the lion's share of duties in respect of combating impunity for ill-treatment. In this regard I would like to invite you to consult the substantial section of the CPT's

14<sup>th</sup> General Report, where you can find the set of standards under the respective title, namely “Combating Impunity”.

It is a well-established requirement under jurisprudences of both the European Court of Human Rights and the CPT that there is an obligation to carry out an effective investigation whenever an “arguable claim” of ill-treatment is put forward. That means that an investigation has to be conducted in case of raising a claim that is not clearly implausible. The CPT has gone even further and stated in its 14<sup>th</sup> General Report that in the Committee’s view, even in the absence of a formal complaint, prosecutorial authorities should be under a legal obligation to undertake an investigation whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred.

The obligation of conducting an effective investigation is a composite standard. The list of basic criteria for a criminal investigation into possible ill-treatment to be adequate contains requirements on independence of the persons responsible for and carrying out the investigation from those implicated in the events; it must be thorough/diligent and comprehensive; it should be conducted in a prompt and reasonably expeditious manner with a sufficient element of public scrutiny.

Due to the time limit, I will touch upon the first criterion only. Sometimes we can face the argument that prosecutors do not meet the criteria of independence. It is done with reference to the case law of the European Court of Human Rights. However, this statement is true in respect of Article 5 only, in particular the point that applies to decisions on arrest.

As to cases or instances concerning issues under Article 3, as well as Article 2, the Court has not found that prosecutors lack institutional independence. I would like to use as an example the case *Assenov v Bugaria* (1998). The Court found violation of Article 5 due to lack of independence of prosecution when deciding on prolonged detention. At the same time it did not operate with the same argument when dealing with violations of Article 3. The court found that the investigation carried out by prosecutors was ineffective (slow, not comprehensive and so on). But it did not object to the fact that issues related to treatment during deprivation of liberty, that is falling under Article 3, were dealt by prosecutors. It is not an isolated case. Thus in the judgment on *Ergi v. Turkey* (1998) the arrangements for investigation were criticized not because they involved a prosecutor. To the contrary, it was found inadequate due to inactivity of the prosecutor that heavily relied on the inquiry performed by gendarmes, whose actions had to be investigated. In general, it can be said, that the Court does not see problems in the arrangements according to which investigative functions on respective issues and, therefore, other forms of supervision are carried out by prosecutors.

The CPT considers investigation or its supervision as an important function to be performed fully or partially by prosecutors. That is why in its reports and the general jurisprudence, public prosecution is regarded as its main counterpart in respect of combating impunity for respective human rights violations. For example, one of its standards requires that all information (complaints, medical records and so on) indicative of ill-treatment, should be brought to the attention of prosecutors (14<sup>th</sup> General Report).

Both the Court and the CPT are very demanding in respect of effectiveness of investigations. Very often they find it inadequate, slow and lacking thoroughness.

In addition to the obligation in respect of mentioned category of crimes, prosecutors should seek to protect human rights when deciding or being involved in decision-making procedures on different issues concerning deprivation of liberty as a component of criminal process and punishment. These duties cover the whole chain of different stages of deprivation of liberty, starting from the period of police custody. The mentioned Recommendation of the Council of Europe, its paragraph 21 envisages that, in general, public prosecutors should scrutinize the lawfulness of police investigations at the latest when deciding whether a prosecution should

commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police.

According to the CPT standard prosecutors have to ensure that, when remanded, suspects are brought before or seen by them and a judge in person. It entails obligation to react to allegations of ill-treatment, visible injuries or other grounds to believe that a person have been subjected to it.

At this or earlier stages, where applicable, prosecutors are supposed to ensure or at least check proper implementation of three fundamental safeguards against ill-treatment. Those are notification of custody, access to a lawyer and a doctor of the detainee's choice, as well as proper information on rights. All safeguards should normally apply from the very outset of detention.

There are number of issues that may require prosecutor's decision or reference during remand or subsequent periods of imprisonment. Matters related to disciplinary sanctions or imposition of restrictions on visits, correspondence and so on are among them. They can concern possession of elementary items such as radios and TVs.

In many legal systems this kind of outside scrutiny on particular issues is logically supplemented by inspecting places of deprivation of liberty by prosecutors. Where applicable, the CPT is keen on making recommendations with the view of improving its effectiveness. The CPT has got elaborated standards on the visiting arrangements. Its 12<sup>th</sup> General report contains a paragraph (50) where they are formulated in respect of police establishments. It is stated that inspections can make an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. To be fully effective, visits should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Analogous jurisprudence has been spelled out in relation to prisons, psychiatric hospitals and other types of places of deprivation of liberty.

To sum up, prosecutors are entrusted with considerable duties towards persons deprived of their liberty. At the same time, based on the CPT's findings and personal experience, it should be stated that there is a room for improvement in this regard. Prosecutors can and have to be more active in fulfilling positive obligations They are related to corresponding positive obligations aimed at their protection from deliberate ill-treatment in hands of law-enforcement officers or other state agents, as well as other fellow prisoners, securing adequate conditions of detention and regime. Although in a different degree, but they are present in all legal systems and models of public prosecution and have to be fully applied, where appropriate.

We have not touched upon the scope of substantive content of the right in question, but that is a topic for a separate event and even a set of conferences or seminars. Using this opportunity, I would like to invite you to make a recommendation on redoubling efforts on professional training on this particular issue, as well as human rights in general. It requires considerable resources and time, especially for large countries. But the experience of Ukraine can serve as a good example of such activities, where within the 3 years programme jointly carried with the Council of Europe and the EU 5000 prosecutors underwent training on the European Convention on Human Rights.