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Contact: Clare Ovey
Tel: 03 88 41 36 45

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Communication from an NHRI (05/09/2017) and reply from the authorities (12/09/2017) in the case of GHARIBASHVILI v. Georgia (Application No. 11830/03)

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1294e réunion (septembre 2017) (DH)

Communication d'une INDH (05/09/2017) et réponse des autorités (12/09/2017) dans l'affaire GHARIBASHVILI c. Géorgie (Requête n° 11830/03) ***[anglais uniquement]***

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Committee of Ministers
Department for the Execution of Judgments of the
European Court of Human Rights

Communication of the Public Defender of Georgia

Gharibashvili Group of cases

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

5 September 2017

Contents

1. Introduction

This document recapitulates the steps taken by Georgia towards ensuring effective investigation of torture and inhuman treatment and review the systemic problems of legislative and practical nature that are characteristic to the procedural obligations (to conduct an independent and effective investigation) under Article 2 and Article 3 of the European Convention on Human Rights.

Furthermore, the Public Defender of Georgia also wishes to follow up on the letter sent by the Government of Georgia to the Committee of Ministers on 21 August 2017 and address the arguments adduced therein.

2. Independence of Investigation

Based on the judgments and decisions adopted in the *Gharibashvili* group cases,[1] Georgia undertook the commitment to implement individual and general measures to honour its obligations under the ECHR. The execution of the aforementioned cases requires the adoption of individual and general measures to eradicate systemic problems in the country.

Initially it worth to note that the investigation conducted in the majority of the cases falling within the group at stake, still fails to comply with the principle of effectiveness. Despite that many years have passed, investigation is still pending in the absolute majority of the cases. Investigation has failed to bring about concrete results, *inter alia*, in those cases, where the violations of the substantive limb of Article 2 and Article 3 of the Convention were found.

In terms of the implementation of general measures, there exist problems that are even more serious. The legislation concerning independence of an investigative body is still defective and does not incorporate any safeguards for independent investigation of cases of ill-treatment. To this date, the Government of Georgia failed to take a number of legislative and other measures to eradicate this systemic problem.

2.1. Legislative Safeguards

The Office of the Public Defender of Georgia informed the Committee of Ministers, through the communication previous communication of 28 November 2016, that the legislative realm of Georgia did not afford sufficient safeguards in terms of an independent investigation of torture or other ill-treatments.[2]

The legislation entitles the Office of the Chief Prosecutor of Georgia, the Ministry of Internal Affairs, the State Security Service, and the Ministry of Corrections to investigate crimes related to torture and other ill-treatments allegedly committed by the representatives of their respective agencies.[3] This rule contradicts directly the standard of institutional independence established by the European Court of Human Rights.[4]

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[1] Judgments: *Gharibashvili* (application no. 11830/03*); Khaindrava and Dzamashvili* (application no. 18183/05); *Mikiashvili* (application no. 18996/06); *Dvalishvili* (application no. 19634/07)*; Tsintsabadze* (application no. 35403/06); *Enukidze and Girgvliani* (application no. 25091/07); and decisions: *Kiziria* (application no. 4728/08); *Baghashvili* (application no. 5168/06); *Surmanidze and Others* (application no. 11323/08); *Molashvili* (application no. 39726/04); *Mzekalishvili* (application no. 8177/12); *Kopadze* (application no. 58228/09)*; Lanchava* (application no. 28103/11); *Studio Maestro Ltd. and Others* (application no. 22318/10); *Chantladze* (application no. 60864/10); *Bekauri and Others* (application no. 312/10); *and Gegenava and Others* (application no. 65128/10).

[2] The Letter of the Office of the Public Defender of Georgia to the Committee of Ministers, dated 28 November 2016.

[3] Order no. 34 of the Minister of Justice of Georgia, dated 29 September 2010, paras. 4; 4a–b; 7-8 respectively.

[4] See, for example, *Ramsahai and Others v. the Netherlands* , application no. 52391/99, judgment of the Grand Chamber of the European Court of Human Rights of 15 May 2007, paras. 321-332; *Khaindrava and Dzamashvili v. Georgia*, application no. 18183/05, judgment of the European Court of Human Rights of 8 June 2010, paras. 59-61;

To ensure institutional independence, the Public Defender of Georgia advocates establishment of an independent investigative mechanism, which has not been accomplished to this date. Due to the nonexistence of such a mechanism, there will always be a risk of biased investigations. This risk is indeed often realised in the cases studied by the Office of the Public Defender. Below are just a few examples for illustration:

- The case of N.B.: after having studied the medical history of N.B. - a prisoner who died in a penitentiary establishment - the Office of the Public Defender suggested to the prosecutor's office to conduct investigation itself, as there were the signs of official negligence by medical personnel. The prosecutor's office did not follow this suggestion and referred the case to the investigative department of the Ministry of Corrections for conducting the investigation;
- The case of G.B.: Following the request of the Public Defender of Georgia, investigation was instituted by the Office of the Chief Prosecutor on the alleged ill-treatment of convict G.B. However, it is clear from the case-file that a number of investigative actions (including the questioning of the personnel of penitentiary establishment no. 6) were carried out by the investigators of the investigative department of the Ministry of Corrections; and
- The case of D.B.: in May 2015, police officer D.B. and his wife lodged several complaints with the prosecutor's office, alleging that high-ranking officers of the Inspectorate General of the Ministry of Internal Affairs subjected them to torture and other ill-treatment. The prosecutor's office did not institute investigation itself but referred these complaints to the Inspectorate General of the Ministry of Internal Affairs. The Prosecutor's Office started investigation only on 13 September 2013, after the involvement of the Office of the Public Defender in this case.

The Georgian legislation entitles the law enforcement agencies to investigate the alleged crimes of their own personnel and it is apparent from the cases studied that this entitlement is often realised in practice as well. Therefore, the statement made by the government that investigations related to torture and other ill-treatments are conducted by independent agencies is not true.[5]

2.2. Institutional Independence

According to the position taken by the Government of Georgia, the objective of independence and depoliticising the prosecutor's office was accomplished with the termination of prosecutorial power of the Minister of Justice of Georgia in 2013 and the adoption of the new law by the Parliament on Prosecutor's Office on 18 September 2015.[6]

Despite the elaboration of the new model of the Prosecutorial Council and electing the Chief Prosecutor, this objective has not been attained yet, which was noted by the Venice Commission[7] and non-governmental organisations.[8] It is impossible to attain institutional independence of the prosecutor's office in those conditions, where the Minister of Justice enjoys tremendous influence over the Prosecutorial Council.

Tahsin Acar v. Turkey , application no. 26307/95, judgment of the Grand Chamber of the European Court of Human Rights of 6 May 2003, paras. 222-225; and *Güleç v. Turkey*, application no. 21593/93, judgment of the European Court of Human Rights of 27 July 1998, para. 82.

[5] The Letter of the Government of Georgia to the Committee of Ministers, dated 21 August 2017, p. 2.

[6] *Idem*.

[7] Preliminary Joint Opinion on the Draft Amendments to the Law on the Prosecutor's Office of Georgia, Venice Commission Opinion no. 811/2015, 7 July 2015, CDL-PI(2015)014, p. 4.

[8] Coalition for an Independent and Transparent Judiciary, Opinions on Reforming the Prosecutor's Office, 2015, pp. 2-3.

According to the model in force, the Minister of Justice is not only a member of the Prosecutorial Council but also the Prosecutorial Council's president *ex officio*.[9] The Minister of Justice nominates the candidates for the position of the Chief Prosecutor, and in doing so, is not constrained by any previously established criteria except for those that are limited to citizenship, criminal record and professional experience. These are excessively broad requirements for the office. The Minister of Justice enjoys tremendous influence in terms of allocating logistic and financial resources to an *ad hoc* prosecutor.[10] In the election procedure of the Chief Prosecutor, the government has disproportionate advantage.[11]

On 30 March 2017, the Public Defender of Georgia presented his model of Prosecutorial Council to the Minister of Justice of Georgia. This model envisages the participation of all three branches of powers in the formation of the Prosecutorial Council as well as the involvement of the civil society and academia. The model proposes the improvement of the election procedure of the Chief Prosecutor that would strip the prosecutor's office of political overshadow. Unfortunately, this model has not been accepted.

Accordingly, the Public Defender of Georgia cannot agree with the viewpoint of the Government of Georgia. He believes that the introduction of the institution of the Prosecutorial Council alone, without curbing the influence of the Minister of Justice and improving the election procedure of the Chief Prosecutor of Georgia, cannot ensure the accomplishment of the task of depoliticising the prosecutor's office.

3. Effectiveness of Investigation

The Public Defender of Georgia welcomes the trends of considerable decrease in the statistics of alleged torture and other ill-treatment by state agents. Since 2013, the Public Defender of Georgia has been pointing out in his annual parliamentary reports that torture is no more a systemic problem in Georgia.

It is, however, to be mentioned that this statistics is in relation to the substantive limb and not the procedural limb of Article 3 of the ECHR. The Public Defender does not share the viewpoint of the government[12] that the prosecutor's office duly responds to its challenges and the investigations conducted by it meet the standards of effective investigation.

The Office of the Public Defender studied the individual measures implemented in 23 criminal cases, where the decisions adopted by the ECtHR (*inter alia*, 11 decisions on the *Gharibashvili* group cases[13]) served as the ground for reopening investigation.

In 23 cases struck off through a friendly settlement or a unilateral declaration, Georgia stated it would conduct fresh investigation as an individual measure. According to the information received from the Office of the Chief Prosecutor of Georgia, investigation is still pending without any result in 22 of these cases.

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[9] According to the opinion of the Venice Commission, the president should be elected by the members of the Prosecutorial Council. See Joint Opinion on the Draft Amendments to the Law on the Prosecutor's Office of Georgia, Endorsed by the Venice Commission at its 104th Plenary Session, Venice, 23-24 October 2015, pp. 10-11. There are similar models of the Prosecutorial Council, for instance, in Poland and Croatia.

[10] Joint Opinion by the Venice Commission, para. 37.

[11] Joint Opinion by the Venice Commission, para. 31.

[12] The Letter of the Government of Georgia to the Committee of Ministers on 21 August 2017, pp. 1, 4.

[13] *Kiziria* (application no. 4728/08); *Baghashvili* (application no .5168/06)*; Surmanidze and Others* (application no. 11323/08); *Molashvili* (application no. 39726/04); *Mzekalishvili* (application no. 8177/12); *Kopadze* (application no. 58228/09); *Lanchava* (application no. 28103/11); *Studio Maestro Ltd. and Others* (application no. 22318/10); *Chantladze* (application no. 60864/10); *Bekauri and Others (application no. 312/10); and Gegenava and Others* (application no. 65128/10).

The effectiveness of investigation in these cases raises considerable misgiving due to the following circumstances:

- To this date, conviction has been secured only in one case, whereas investigation in 22 other cases is still pending and criminal prosecution has not been instituted against any person;
- Victim/indirect victim have been recognised **only in nine cases**;[14] and
- The state does not attempt to make transparent the progress of investigation of the cases at stake for the Office of the Public Defender and refuses to impart to it comprehensive information concerning investigative actions that have been carried out.[15]

See in annex 1 the additional information concerning the investigation of criminal cases instituted and pending in the *Gharibashvili* group cases.

Furthermore, the Office of the Public Defender also studied several criminal cases investigated by the Prosecutor's Office; these cases are related to the complaints of citizens on alleged torture and inhuman treatment in 2015-2016. The shortcomings revealed as the result of the study of these cases clearly show that a prompt and thorough investigation of such complaints remains a significant challenge. The following cases can be pointed out from the studied case-files.

- The case of G.O.: within the scope of the investigation instituted on 8 June 2015, the prosecutor's office failed to ensure that the only neutral evidence (the recording of the video camera installed outside G.O.'s cell) was obtained. The main witnesses (including G.O.) were questioned only after 80 days from the incident; G.O. was not allowed to take part in the investigation and his request to have the witnesses questioned again remained unanswered;
- The case of M.P.: within the scope of the investigation instituted on 22 December 2015, an identification parade was not arranged to identify the police officers named by M.P.; the scene of the incident was not examined and samples were not taken; a forensic examination was not conducted to establish the trace of violence and the search was conducted by a person of the opposite sex; and
- The case of T.Ts.: on 3 November 2016, the head of the temporary detention isolator notified the Prosecutor's Office of Tbilisi that injuries had been found on T. Ts. that were alleged by the latter to have been sustained during the arrest. The prosecutor's office instituted investigation in this incident only on 21 November, in three days after the referral was made by the Office of the Public Defender of Georgia.

In none of the three cases mentioned above, the applicant was either recognised as a victim or allowed to participate fully in the investigation. Furthermore, the cases of G.O. and M.P. were included in the Parliamentary Report by the Public Defender of Georgia of 2016 (see the annex for further details).

[14] The cases of *Molashvili* (application no. 39726/04); *Dzidziguri-Chantladze-Botchorishvili* (applications nos. 60814/10; 652/10, and 60864/10); *Beridze* (application no. 28297/10); *Chkotua* (application no. 60909/08); *Tedliashvili* (application no. 64987/14); *Tabagari* (applications nos. 70820/10 and 60870/11); *Baghashvili* (application no. 5168/06); *Kiziria-Butkhuzi* (application no. 4728/08); *Artmelidze-Surmanidze* (application no. 11323/08). See annex 1 for details.

[15] The Office of the Chief Prosecutor of Georgia has not submitted information following letter no. 15–12/10778 of the Office of the Public Defender of Georgia, dated 3 August 2017, where we requested additional information regarding ongoing investigations.

In the report of 2016, as well as the previous annual parliamentary reports, the Public Defender constantly states that the prosecutor's office refuses to impart information on the progress of investigation of the cases concerning ill-treatment.[16] The reports also discuss specific cases where pending investigation was ineffective.[17]

In total, in 2014-2017, the Public Defender made 60 suggestions on institution of investigation to the Office of the Chief Prosecutor of Georgia. In each case, there were objective circumstances, which confirmed the commission of alleged ill-treatment. According to the information submitted by the prosecutor's office, investigation started in 59 cases; however, not even one has been referred to the court.

The above-mentioned clearly shows the failure of the Office of the Chief Prosecutor of Georgia to conduct an effective investigation, *inter alia*, in those cases, with respect to which the state undertook the responsibility to implement an individual measure in the form of investigation. A prompt, thorough and effective investigation has not been conducted in those complaints either that were filed with the prosecutor's office by citizens in the recent past.

In the light of the foregoing, the position taken by the Government of Georgia that investigation of torture and other ill-treatment is effective[18] does not correspond to the reality.

4. Conclusion

The Public Defender of Georgia believes that the Government of Georgia ought to implement numerous measures of legislative and practical nature for the full execution of judgments of the European Court of Human Rights adopted in the cases of torture and other ill-treatments.

Firstly, it is imperative to conduct an effective investigation as individual measures in the *Gharibashvili* group cases and other cases, with regard to which the state undertook respective commitments. Furthermore, it is necessary that investigation in each case was conducted in a transparent manner and the prosecutor's office provided the Office of the Public Defender of Georgia with specific information regarding investigative actions carried out.

As regards the changes of systemic nature, Georgia ought to implement reforms for ensuring independent and effective investigation with regard to each complaint.

Institutional independence cannot be guaranteed without changing the relevant legislation, which entitles the law enforcement agencies to investigate the crimes allegedly committed by their own personnel; this possibility is actually realised, as the study of the cases by the Office of the Public Defender illustrates. Similarly, the measures aimed at ensuring institutional independence and depoliticising prosecutor's office are insufficient.

Furthermore, investigation conducted in the above cases, regarding the complaints before 2012 and after, cannot be considered as meeting the standard of effectiveness established by the ECtHR. Therefore, the Public Defender of Georgia reiterates his own viewpoint concerning the necessity of establishing an independent investigative mechanism.

[16] See the Parliamentary Report by the Public Defender of Georgia of 2015, p. 402; the Parliamentary Report of 2014, p. 330.
[17] See the Parliamentary Report by the Public Defender of Georgia of 2016, pp. 371–373; the Parliamentary Report of 2015, pp. 410–424; the Parliamentary Report of 2014, pp. 337–339.
[18] The Letter of the Government of Georgia to the Committee of Ministers, dated 21 August 2017, p. 4.

Annex N2

I. The Case of G.O.

Investigation of the alleged inhuman treatment of the accused, G.O., placed in penitentiary establishment no. 6 started on 8 June 2015 under Article 144^3.1 of the Criminal Code of Georgia.[1] On 13 August 2016, investigation was discontinued by the resolution of a prosecutor due to the nonexistence of the elements of the crime.

Both during the investigation and after its discontinuation, the Office of the Public Defender of Georgia maintained communication with various competent state authorities; studied the files of the completed case and met representatives[2] of the Office of the Chief Prosecutor of Georgia, concerning the identified shortcomings. The analysis of the case-files showed that the investigation was not effective.

1. The Facts

According to accused G.O., placed in cell no. 63 of penitentiary establishment no. 6, on 7 June 2015, the Head of the Security Division of penitentiary establishment no. 6, S.M., when in G.O.'s cell, torn his official uniform and inflicted self-harm. According to G.O., staging the attack on the establishment's staff member was aimed at bringing new charges against him.

According to G.O., his nine-month detention term was to expire on 12 June 2015 and bringing new charges against him would make it possible to keep him in detention. It should be noted that, on 8 June 2015, new charges were brought against G.O. under Article 373 of the Criminal Code of Georgia.[3] The new charges are related to another incident and G.O. was kept in detention, based on a court decision.

It should be noted particularly that this analysis only concerns the effectiveness of investigation and does not include the analysis and credibility of G.O.'s statements mentioned above.

2. Compatibility of the Investigation with International Standards

Under the Constitution of Georgia, investigation falls within the exclusive competence of the state authorities.[4] The state has the obligation to investigate allegations about violations promptly, comprehensively and effectively, through independent and impartial bodies. Failure by the state to investigate allegations of violations could in itself give rise to a separate breach of the violation.[5]

It is noteworthy that in this case, G.O. did not claim of torture or inhuman treatment against him. However, the investigation progressed under Article 144^3 of the Criminal Code of Georgia. Accordingly, the investigation should have been conducted in accordance with the standards emanating from the contents of the positive obligation incorporated in Article 3 of the European Convention on Human Rights.

According to the well-established case-law of the European Court of Human Rights, 'in order for an investigation to be effective, its conclusions must be based on a thorough, objective and impartial analysis of

[1] The Criminal Code of Georgia, Article 144^3 – degrading or inhuman treatment.
[2] The meeting was attended, among other representatives, by the First Deputy Public Defender and Deputy Chief Prosecutor. During the meeting, since the prosecutor's office failed to adduce arguments against shortcomings of the investigations, the questions about shortcomings in the investigation remained unanswered.
[3] The Criminal Code of Georgia, Article 373 – false denunciation.
[4] The Constitution of Georgia, Article 3.1.q).
[5] The United Nations Human Rights Committee, General Comment no. 31 [80].

all relevant elements.'[6] The investigation must be comprehensive, prompt and allow a victim's participation proportionally to the interests of investigation.[7]

a) Investigation was not Thorough

The Code of Criminal Procedure of Georgia sets forth the obligation of an investigator to conduct thorough, full and objective investigation.[8] The investigation must be effective in the sense that it is capable of leading to the establishment of the relevant facts and the identification and punishment of those responsible.[9]

According to the jurisprudence of the European Court of Human Rights, any deficiency in the investigation, which undermines its ability to establish the cause of injury or the person responsible, will risk falling short of this standard.[10] The investigation's conclusions must be based on thorough, objective and impartial analysis of all the relevant elements.[11] It is impermissible to conduct investigations that are perfunctory and superficial and do not reflect any serious effort to discover the truth.[12]

Despite the fact that the Office of the Chief Prosecutor of Georgia conducted a number of investigative actions, it is obvious that the criterion of thoroughness has not been met.

Despite the numerous requests from both G.O. and the Office of the Public Defender of Georgia, as well as actual necessity, the Prosecutor's Office has not obtained and studied the video recordings of the external premises of cell no. 63. The evidence existing in the case-files clearly show that it would be impossible to establish the elements of the crime based on the video recordings obtained from the cell only.

It should be pointed out that the Office of the Chief Prosecutor of Georgia, similar to G.O. and the Office of the Public Defender of Georgia, not only could request the video recordings from cell no. 63 but also request from the very outset to have the recordings depicting the external premises and G.O.'s movements fully archived.

Even assuming that the Prosecutor's Office was initially interested only in the video recording from cell no. 63, the office was already aware as early as on 8th June about the request from both G.O. and the Office of the Public Defender. The Prosecutor's Office was also aware of the fact that the video recordings were archived following the request from the Office of the Public Defender of Georgia, since there are letters in the case-file both from the Office of the Public Defender and the response from the Penitentiary Department of the Ministry of Corrections.

Despite the above-mentioned, due to unknown reasons, the Prosecutor's Office has not requested the video recordings. In the course of the investigation, the Prosecutor's Office has not even enquired whether the Penitentiary Department of the Ministry of Corrections fulfilled its statutory obligations.[13] The Prosecutor's Office neither obtained the recordings nor adduced any good reason for this failure. Such negligence towards

[6] *Tsintsabadze v. Georgia*, (35403/06), judgment of the European Court of Human Rights of 15 November 2011, para. 85.
7 Cf. Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989 1, etc.
[8] The Criminal Procedure Code of Georgia, Article 37.2.
[9] *Enukidze and Girgvliani v. Georgia*, application no. 25091/07, judgment of the European Court of Human Rights of para. 242.
[10] *Bati and Others v. Turkey*, (33097/96 and 57834/00), judgment of the European Court of Human Rights, para. 134.
[11] *Enukidze and Girgvliani v. Georgia*, application no. 25091/07, judgment of the European Court of Human Rights of para 242.
[12] *Poltoratskiy v. Ukraine*, application no. 38812/97, judgment of the European Court of Human Rights of 29 April 2003.
[13] Order no. 35 of the Minister of Corrections of Georgia, dated 16 May 2015.

securing the major piece of evidence of the case despite numerous requests submitted by G.O. for obtaining the video recordings is astonishing.

Accordingly, the failure to obtain and examine the video recordings of the external premises of cell no. 63 is a violation of particular implications, since only this way it would have been possible to recreate the chain of events.

In this regard, it is important to clear up the discrepancy in the letters of the Penitentiary Department of the Ministry of Corrections;[14] whether the video recordings were actually archived and what happened to them. Furthermore, if the requests of the prisoner and of the Office of the Public Defender of Georgia were not followed, whether there was a credible reason for this inaction needs to be established.

Another particularly noteworthy fact is that the principal witnesses were interviewed only once and only after 80 days from the incident. The statements by the personnel of penitentiary establishment no. 6 are different with regard to several significant details, which had to be cleared up through additional interviews. However, these witnesses were not interviewed further. It should be pointed out that G.O. requested multiple times in his applications and complaints to have the said witnesses interviewed further.

b) Investigation was not Prompt

Under the Criminal Procedure Code of Georgia, an investigation shall be conducted within reasonable terms.[15] The requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law.[16]

For the assessment of the promptness of investigation, the relevant factors are the time taken for starting the investigation and collection of evidence. The duration of the investigation in itself is not an unconditional ground for finding a violation. In this regard, it is important that prosecution does not delay obtaining evidence and statements.[17]

In the given case, the personnel of penitentiary establishment no. 6 and accused person– D.S. – placed there were interviewed after 80 days from the incident. The delay in interviewing the witnesses made it impossible for them to remember a number of factual circumstances. It should also be pointed out that there seems to be no explanation in the case-files why the interviewing witnesses was delayed until 26-27 August.

It is unclear why the witnesses were interviewed with such an obvious delay. Due to the delay, not only the important information and data perceived by them was distorted and lost, it gave rise to the significant risk of witnesses being subjected to pressure of some sort.

[14] The letters of the Penitentiary Department of the Ministry of Corrections of Georgia dated 8/6/2015 and 22/11/2016.
[15] The Criminal Procedure Code of Georgia, Article 103.
[16] *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, application no. 71156/01, judgment of the European Court of Human Rights of 3 May 2007, para. 96.
[17] *Aydın v. Turkey*, applications nos. 28293/95, 29494/95 and 30219/96, judgment of the Grand Chamber of the European Court of Human Rights of 25 September 1997, para. 106; *Aksoy v. Turkey*, application no. 21987/93, judgment of the European Court of Human Rights of 18 December 1996, para. 189; *Çakıcı v. Turkey*, application no. 23657/94, judgment of the Grand Chamber of the European Court of Human Rights of 8 July 1999, para. 284.

It is likewise impossible to justify the three-month delay due to the complexity of the investigation. Interview is one of the simplest investigative actions that allow establishing various circumstances significant for the case within the shortest time possible. The same is true with regard to other investigative actions that were also conducted with astonishing delay.[18]

c) The victim was Unable to Participate in Investigation

The European Court of Human Rights imposes an obligation on the states to take positive actions for securing the rights of victims.[19] The states must ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.[20]

In this case, the Office of the Chief Prosecutor of Georgia, except for one occasion,[21] has not responded to the requests of the victim to look into the circumstances indicated by him. G.O. pointed to the contradictions among the witness statements numerous times; requested to be shown the seized video recording; and re-interviewing witnesses. However, there was no adequate follow-up to these requests. Therefore, G.O. could not fully participate in the investigation.

3. Conclusion

In the course of the investigation conducted on criminal case no. 074080615802, the Office of the Chief Prosecutor of Georgia obtained a number of evidences, interviewed numerous witnesses and conducted various investigative actions. However, despite these investigative actions, the investigation cannot be considered as effective in accordance with international standards, especially, in terms of thoroughness, promptness and participation of the victim.

The Office of the Chief Prosecutor of Georgia has not obtained the major evidence, which would enable establishing the truth. The failure to obtain the video recordings from the external premises of cell no. 63 is unjustifiable. This was requested both by G.O. and by the Office of the Public Defender of Georgia. The Prosecutor's Office was aware of the letter of the Penitentiary Department of 8 June 2015, according to which the video recording of the external premises had been archived. The Prosecutor's Office had to take steps to obtain this recording. However, in the course of 14 months, the Prosecutor's Office did nothing to obtain the major piece of evidence.

The Office of the Chief Prosecutor of Georgia failed to act promptly regarding the fact indicated by G.O. It is not clear why witnesses were questioned only after 80 days from the incident. This is an unjustifiably long period. The three-month delay in questioning witnesses caused distorting/forgetting the perceived information. In this connection, it is also noteworthy that such delay may result in pressure being exerted on penitentiary staff.

The actions of the Office of the Chief Prosecutor of Georgia additionally show that G.O. was not afforded sufficient possibility to participate in the investigation. He could not have any influence on the direction of the investigation in any way. Despite numerous applications and complaints, all his requests (apart from ordering forensic examination) remained unanswered.

[18] E.g., the video recording from cell no. 63 was examined on 24 September 2015, after 4 months from the incident.
[19] *Ireland v. the United Kingdom*, application no. 5310/78, para. 239.
[20] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012.
[21] To order composite drawing forensic examination.

II. The Case of M.P.

The Public Defender of Georgia studied on his own initiative the criminal case of the alleged treatment of M.P.[22] The investigation started on 22 December under abuse of official power[23] and discontinued on 2 June 2016. Despite the fact that investigative/procedural acts have been conducted, the study of the case showed that the investigation was not effective.

I. Thoroughness

The failure to conduct investigative actions for obtaining evidence was found to be in violation of the standard of thoroughness of effective investigation by the European Court of Human Rights, *inter alia,* in the judgments delivered against Georgia.

a) No Investigative Actions taken to Identify Persons of Interest

When questioned as a witness, M.P. referred to a specific room, where police officers committed criminal acts against her; she also described in detail four persons (their approximate age, height, body structure, and facial features, colour of eyes and hair, and clothes). However, no investigative actions have been taken to identify those persons.

The Court considered that the applicant's allegations made before the domestic authorities contained enough specific information – the date, place and nature of the ill-treatment, the identity of the alleged perpetrators, the causality between the alleged beatings and the asserted health problems, etc., to constitute an arguable claim in respect of which those authorities were under an obligation to conduct an effective investigation.[24]

b) The Crime Scene has not been Examined and no Samples Collected

M.P. was questioned in relation to the above incident on 23th December. Accordingly, not much time passed from the alleged incident to make it meaningless to examine the scene. To the contrary, this was both necessary and possible to examine the room in the police station, as well as getting sample(s) (if there were any) from the items in the room) and/or seizing items relevant to the case for obtaining fingerprints on them and or obtaining samples for examining/establishing the circumstances indicated by the accused in her statements. Furthermore, M.P.'s clothes have not been seized;[25] neither the sample(s) (if there were any) on the clothes have been obtained. Moreover, M.P. alleged that the police officers forcefully undressed her and the clothes could bear such traces.

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[22] According to the statement given by M.P., on 20 December 2015, at approximately 03:00–04:00 a.m., she was taken from her house to one of the rooms of a police station. A few minutes later, 4-5 police officers requested her to confess to the crime and subjected her to physical violence after she refused. She later was stripped and thrown on a sofa and threatened with rape in case she did not confess to the crime. One of the police officers indeed attempted to rape her but 'N.' who entered the room ordered the police officers to stop, which they did. The accused remain in the police station and the said four persons were hitting her with their hands on the various areas of the head and the body in order to get the confession from her.

[23] On 21 December 2015, a letter from Tbilisi temporary detention isolator no. 1 was sent to the Office of the Chief Prosecutor of Georgia. The letter contained a copy of the external examination report describing the injuries found on M.P.'s body: 'there are small cyanotic areas and the right shoulder and the left thigh; excoriation covered with scabs on both palms; bruises on the right side and near navel; hyperaemic areas of various sides on both wrists and left knee. According to the accused, the police officers assaulted her physically and verbally during the arrest.'

[24] *Gharibashvili v. Georgia*, (11830/03), judgment of the European Court of Human Rights of 29 July 2008, para. 64.

[25] On 21/12/2015, in the period of 16:20–16:50, in Tbilisi temporary detention isolator no. 1 investigative action was carried out in criminal case no. 010201215001 against M.P. –the clothes and shoes (worn by her on 19-20 December 2015) were seized.

When assessing the effectiveness of investigation, the European Court of Human Rights takes into consideration the failure to examine a crime scene[26]; investigator's failure to take fingerprints;[27] Istanbul Protocol also indicates the need for examining the alleged crime scene and clothes thoroughly for obtaining physical evidence, finding/seizing fingerprints, biological trace and other evidence.[28]

c) Not all Possible Documents/Information have been Obtained

There was no information obtained as to who was present in the police station, where she claimed she had been subjected to physical violence, in the time-frame indicated by the accused on 20 December 2015 (police officers, their work places and positions[29]). No information was obtained from either electronic or hardcopy of the log entries (if there was any) registering entry and departure of personnel/individuals to and from the police station.

Under the Istanbul Protocol, it is necessary to draw up the list of all the persons present at the alleged crime scene (full names, addresses, telephone numbers other contact details).[30]

d) Not every Person Present in the Police Station and Involved in Investigation Actions have been Questioned

In the course of investigation, the head of police station no. 4 and its two staff members as well as the deputy head of the detectives' unit and its two staff members were questioned/interviewed. For the purposes of effective investigation, it was necessary to obtain information from the Ministry of Internal Affairs of Georgia about all the persons involved in the investigative actions carried out in the criminal case against M.P. as well as the police officers present at the police station; it was necessary to question/interview all those above-mentioned persons through posing detailed and exhaustive questions to them.

According to the interpretation given by the European Court of Human Rights, the thoroughness and impartiality of an investigation is preconditioned by identifying all the persons related to the act at stake.[31] The European Court considers an investigation to be ineffective when the persons having information about alleged incidents are not identified and questioned.[32] For identifying the possible witnesses to alleged torture, it is necessary under the Istanbul Protocol to question all the persons that were in the facilities or the premises concerned,[33] as well as all persons of interest.[34]

e) No Identification Parade has been Held

Despite the fact that M.P. described in detail the police officers who subjected her to violence, no investigative/procedural act was conducted to identify those persons and no identification parade was held. It is noteworthy that M.P. was requested to give the names and surnames of specific persons for conducting

[26] *Dvalishvili v. Georgia*, (19634/07), judgment of the European Court of Human Rights of 18 December 2012, para. 49.
[27] *Tsintsabadze v. Georgia*, application no. 35403/06, judgment of the European Court of Human Rights of 15 November 2011, para 80. 'The Court has no doubt that such a simple but, in the circumstances, indispensable investigative measure could have significantly elucidated the facts'.
[28] Istanbul Protocol, para. 101.
[29] It should be taken into consideration that according to the statements given by police officers, the case against M.P. was investigated by the staff members of Police Station no. 4 of Vake-Saburtalo Division were also involved in the investigation.
[30] Istanbul Protocol, para. 102.
[31] *Enukidze and Girgvliani v. Georgia*, application no. 25091/07, judgment of the European Court of Human Rights of para. 255.
[32] *Danelia v. Georgia*, application no. 68622/01, judgment of the European Court of Human Rights of 17 October 2006, para. 64. *Tsintsabadze v. Georgia*, (35403/06), judgment of the European Court of Human Rights of 15 November 2011, para. 80.
[33] Istanbul Protocol, para. 102.
[34] *Ibid*., para. 100.

investigative actions.[35] The legislation does not stipulate the obligation to provide names and surnames of those persons to be identified. Before identification, the person identifying should be questioned/interviewed regarding individual and generic features of those to be identified.[36]

f) Forensic Examination was not Conducted for Establishing a Specific Incident of Violence

Despite the fact that M.P. underwent forensic examination[37], the problem is that no examination was conducted for establishing the reason for the termination of her pregnancy. On 12 January 2016, the O. Ghudushauri Medical Centre sent to the investigative authorities M.P.'s medical files, which confirmed the termination of pregnancy within a few days after the accused was arrested.[38] The investigative authorities have not sent the relevant medical documents of the case-file to the forensics bureau and have not requested forensics examination for identifying the reasons for the termination of her pregnancy (could the pregnancy be terminated due to the physical violence indicated by the accused). Furthermore, no forensic examination has been appointed/conducted to check that allegation in M.P.'s statement according to which she was the victim of an attempted sexual assault. The investigative authorities relied on the statement given by M.P. during the additional questioning on 25 December 2015 where she said no injury has been caused by this act and needed no forensic examination.

The significance of medical examination/documentation of injures and conducting forensic examination is pointed out by the European Court of Human Rights. The Court finds the violation of the obligation to conduct an effective investigation when an adequate medical forensic examination is not carried out.[39] The importance of medical forensic examination is also highlighted by Istanbul Protocol.[40]

g) The Witness has not been Fully Questioned

Apart from the above-mentioned, there was the problem related to the failure to ask one of the witnesses the questions necessary for obtaining comprehensive information. According to the statements given by M.P., during the violence inflicted on her, the person named 'N' (possibly a superior officer) who entered the room, ordered the police officers to stop the illegal act. It is noteworthy that when questioning N.O. - Deputy Head of the firs police station of the Detectives' Unit - he was not asked about the situation in which he saw the accused, the room, and the police officers who were present in the room with her and if he witnessed the fact alleged by M.P. in her statement.

The European Court of Human Rights in the context of ineffective investigation also refers to superficial nature of questioning the failure to attempt specific questions to police officers.[41]

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[35] On 20 May 2016, letter no. 13/01–31863 of Tbilisi Prosecutor's Office notified M.P.: 'as regards identification, please, indicate the names and surnames of the persons who committed any illegal acts against you (and who you request to be identified).
[36] The Criminal Procedure Code of Georgia, Article 131.2.
[37] According to conclusion no. 000071416 of LEPL Levan Samkharauli National Forensics Bureau, dated 13 January 2016, on 24 December 2015, the personal examination of M.P. showed injuries in the form of bruises and synulosis that are inflicted by a solid, blunt object. The injuries both taken together and individually fall under mild injuries without damage to health. The possible time of inflicting the injuries corresponds the date indicated in the preliminary information.
[38] According to the medical notice (form no. 100), the patient was in the clinic from 21:30 23, 23 December 2015 until 22:30, 26 December 2015. On 23 December 2015, at 23:30, an examination was conducted and consultation provided concerning possible pregnancy (ultrasound examination showed amniotic sac). On 26 December 2015, at 17:00, an examination conducted concerning the 'possible' termination of pregnancy showed that there was no amniotic sac.
[39] *Dvalishvili v. Georgia*, application no. 19634/07, judgment of the European Court of Human Rights of 18 December 2012, paras. 42, 46; *Enukidze and Girgvliani v. Georgia*, (25091/07), judgment of the European Court of Human Rights of para. 256.
[40] Istanbul Protocol, para. 103.
[41] *Dvalishvili v. Georgia*, (19634/07), judgment of the European Court of Human Rights of 18 December 2012, para. 49.

h) The Involvement of a Person of Opposite Gender in an Act Involving Undressing has not been Examined

When M.P. was placed in Tbilisi no. 1 temporary detention isolator, the external examination report was drawn up by Chief Inspector G.A. with the participation of doctor M.M. Apart from the doctor of the same sex as the accused, there was another person of the opposite sex that took part in the external examination – the isolator's inspector. The investigation that was conducted did not examine whether the external examination of the accused was conducted by the male inspector or the doctor of the same sex, while the inspector only wrote the report; whether the examination by the inspector would subject the accused to degrading treatment was not established. In case there were no elements of the crime, the Inspectorate General of the Ministry of Internal Affairs was not notified to address the issue.

The examination of the person by a person of the same sex serves the purpose of respecting the dignity of the former, a domestic and international standard. Therefore, the contradiction in the existing documents should have been studied by the competent authorities.[42]

II. Promptness

Despite the fact that investigative actions were carried out soon after the investigation commenced, the activity to obtain the video recordings should be assessed as a violation of the criterion of promptness of investigation. On 18 January 2016, the investigative body applied to the State Security Service of Georgia with the request for providing the video recording from the internal and external premises of the police station (from 02:00-22:00 on 20 December 2015). The video recordings are the importance evidence for establishing the circumstances of the incident. However, the request was sent by the investigative authorities to the Service of the State Security of Georgia only on the 27th day after the investigation was started.[43]

It is noteworthy that when assessing the promptness of investigation and the diligence of instigative authorities, the European Court takes into account the time that was needed for the collection of preliminary evidence and the investigation in its entirety.[44]

III. The Involvement of the Victim in the Investigation

M.P. did not have any information about the progress of the investigation or its discontinuation, apart from the investigative acts that were carried out with her participation (she was questioned twice as a witness and a forensic expert examined her). Following M.P.'s two requests filed with the Prosecutor's Office,[45] she was notified that she was not a party to the proceedings and she would not be able to study the case-files.[46] M.P. only had the status of a witness and has not been recognised as a victim due to which she was not given any possibility to exercise the rights afforded by the criminal procedural legislation for victims.[47] It is important

[42] Istanbul Protocol, para. 173; the Criminal Procedure Code of Georgia, Article 111, Article 121.
[43] According to the letter received from the State Protection Service of Georgia, dated 21 January 2016, the recording could not be found. The letter does not contain the reasons as to why the recording could not be found (*inter alia*, the letter did not specify if recordings are not kept or are erased after certain period).
[44] Eric Svanidze, Effective Investigation of Ill-Treatment: the manual of the guiding European standards, p. 66.
[45] On 1 March 2016, the application of M.P. was sent from the Office of the Chief Prosecutor of Georgia to Tbilisi Prosecutor's Office. On 3 May 2016, she lodged a complaint.
[46] Letter no. 13/01–31863 of Tbilisi Prosecutor's Office, dated 20 May 20016.
[47] The Criminal Procedure Code of Georgia, Article 57.1.d): 'a victim shall have the right to obtain a copy of the resolution on discontinuation of investigation;' Article 57.1.h): 'a victim shall have the right to receive information about the progress of investigation and study case-files, unless this contradicts the interests of investigation.' The Criminal Procedure Code of Georgia, Article 106.1[1]: 'a victim shall have the right to one time appeal of a resolution on discontinuation of investigation/criminal prosecution before a superior prosecutor'.

to recognise a person as a victim[48] from the very beginning of investigation so that he/she is involved in the investigation and not prevented from the exercise of his/her rights. For recognising a person as a victim, it is not necessary to have a crime established beyond a reasonable doubt at the moment of adopting a respective resolution.

The European Court of Human Rights pointed out in numerous cases the necessity to have victims involved in the progress of investigation. The following was held in violation of the obligation to conduct an effective investigation: the refusal to grant leave to the applicants to take part in important investigative measures and the failure to inform the applicants of the findings made in the course of the investigation measures conducted in their absence;[49] denial of access to the case-files,[50] the failure to recognise the status of a victim;[51] the failure to notify the termination of proceedings[52] and the inability to safeguard statutory procedural rights after the termination of investigation.[53]

IV. The Resolution on Discontinuation of Investigation

According to the investigation discontinuation resolution, the injuries are established to have been found M.P.'s body. However, it was not established that the police officers inflicted the injuries on M.P. or committed any illegal act; M.P. did not allege any breach of her rights during the investigative and procedural actions carried out in the police station. Furthermore, the resolution on discontinuation of investigation relies on the police officers' statements, according to which there has been no illegal act committed against M.P.

According to the police officers' statements, on 20 December 2015, at around 2-3 a.m., they brought M.P. from her house to the police station. According to the case-files, M.P. was questioned as a witness[54] on 20 December 2015, from 11:01–15:00 and on the same day at 15:37 was arrested. During the arrest, the following injuries were identified: excoriations on a palm, bruises; she complained about shoulder pain and stated that she got the injuries during stress.[55] M.P. was practically arrested from the moment she was taken from her house. Furthermore, she was kept until the start of questioning for more than 8 hours so that no investigative action was carried out with her participation. By the time the arrest report was drawn up, she was under police supervision and surveillance for more than 12 hours and she claimed to have been subjected to ill-treatment during this very period. It is noteworthy that in this period, M.P. did not have a lawyer.[56] This could explain the absence of the respective comments/statements in the reports of investigative actions. Later, when being admitted to a temporary detention isolator, placed in a penitentiary establishment and meeting an investigator of the Prosecutor's Office, M.P. explained that the injuries were sustained as the result of police brutality. However, there is no evidence in the case-file confirming that the injuries concerned were sustained before the arrest.[57]

[48] The Criminal Procedure Code of Georgia, Article 3.22: 'a victim shall imply a public, physical or a legal person sustaining moral, physical or property damage as the immediate result of a crime.'
[49] *Enukidze and Girgvliani v. Georgia*, (25091/07), judgment of the European Court of Human Rights of para 250.
[50] *Enukidze and Girgvliani v. Georgia*, (25091/07), judgment of the European Court of Human Rights of para 250.
[51] *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, application no. 71156/01, judgment of the European Court of Human Rights of 3 May 2007, para. 113.
[52] *Mikiashvili v. Georgia*, para. 91. *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, (71156/01), judgment of the European Court of Human Rights of 3 May 2007, paras. 122–123.
[53] *Enukidze and Girgvliani v. Georgia*, (25091/07), judgment of the European Court of Human Rights of para 251.
[54] Criminal Case no. 010201215001 against M.P., the report on interrogation.
[55] Reports on arrest and search of an accused.
[56] A lawyer attended the interrogation of M.P. as an accused person conducted on 20/12/2015, from 16:05–16:15.
[57] According to the resolution, the evidence did not show the injuries caused to M.P. by police officers, which certified the fact that the injuries had been sustained before M.P.'s transportation to the police station. It is noteworthy that according to the statement given by M.P., only one injury (in the form of a scab) had been sustained before the arrest.

The European Court of Human Rights noted the inconsistent approach to the assessment of evidence by the domestic authorities in the following cases: when the prosecution and judicial authorities accepted the credibility of the police officers' testimonies without giving any convincing reasons for doing so, despite the fact that those officers' statements might have been subjective and aimed at evading criminal liability for the purported ill-treatment of the applicant[58] when a judgement was based on the testimonies of the police officers involved in the incident;[59] and the officer in charge of the investigation was satisfied with the testimonies given by the police officers who denied the fact of ill-treatment, and explanations given by persons involved in the alleged ill-treatment.[60] In this respect, the credibility of the police officers' statements should have been questioned, as the investigation was supposed to establish whether the officers were liable on the basis of disciplinary or criminal charges.[61] The investigation must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded findings or conclusions to close their investigation.[62]

V. Conclusion

Thus, in the course of the investigation, there has been no examination of the crime scene, no sample(s) (if there were any) obtained and no items seized; no investigative actions have been conducted for identifying alleged perpetrators; every police officer present during the incident has not been questioned; no identification parade has been held; M.P.'s clothes have not been seized; no fingerprints from the clothes have been obtained; and no forensic medical examination has been conducted for establishing the reason for termination of her pregnancy or the fact of alleged attempted sexual violence. The steps for obtaining video recordings from the police station were made only after 27 days from the start of the investigation. From the start to the end of investigation, M.P. was not recognised as a witness, due to which she was not allowed to be involved in the investigation and obtain information about its progress. In the light of the forgoing, the investigation conducted on the incident of alleged ill-treatment of M.P. cannot be considered to be thorough and effective.

[58] *Dvalishvili v. Georgia*, (19634/07), judgment of the European Court of Human Rights of 18/10/2012, para. 50.
[59] *Mikiashvili v. Georgia*, (18996/06), judgment of the European Court of Human Rights of 9 October 2012, para. 82.
[60] *Davtian v. Georgia*, (73241/01), judgment of the European Court of Human Rights of 27 July 2006, para. 46.
[61] *Mikiashvili v. Georgia*, (18996/06), judgment of the European Court of Human Rights of 9 October 2012, para. 82.
[62] *Gharibashvili v. Georgia*, (11830/03), judgment of the European Court of Human Rights of 29 July 2008, para. 62.

საქართველოს იუსტიციის სამინისტრო
MINISTRY OF JUSTICE OF GEORGIA

საქართველო, ქ. თბილისი, 0114, გორგასლის ქ.24 ა. ტელ.: 2 40–51–48, 2 40-58-36; ელ.ფოსტა: info@justice.gov.ge
24 a, Gorgasali str., 0114, Tbilisi, Tel.: 2 40–51–48, 2 40-58-36, E-MAIL: info@justice.gov.ge

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Department for the Execution of Judgments
of the European Court of Human Rights

Subject: Group of cases Gharibashvili v. Georgia (Application no. 11830/03) – Judgment of 29/07/2008, final on 29/10/2008

Dear Sir/Madam,

With reference to your letter dated 6 September 2017 (reference: DGI/OD/MLO), the Government of Georgia would like to repeatedly present the letter with the brief comments on the communication received from the Public Defender of Georgia in respect of the execution of judgments in the above-mentioned group of cases in accordance with the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

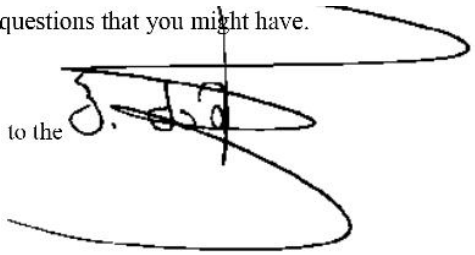
It should be noted anew that the Public Defender's observations and recommendations in respect of execution of Gharibashvili group of cases are valued by the Government of Georgia.

However, the Government wish to clarify that they have already provided a detailed response in respect of the issues presented in the Public Defender's latest communication regarding the reform of the Prosecutor's Office of Georgia and the creation of an independent investigative mechanism in the context of their previous letters dated 22.03.2017 (http://hudoc.exec.coe.int/eng?i=DH-DD(2017)359E) and 21.08.2017 (http://hudoc.exec.coe.int/eng?i=DH-DD(2017)873E).

As regards, the specific cases of Gharibashvili group, the Government have already presented to the Committee of Ministers the exhaustive information about the progress of execution of the aforementioned cases on 11 August 2017 (http://hudoc.exec.coe.int/eng?i=DH-DD(2017)879E).

Lastly, it should be noted that the further information and the Government's position on the issues raised in the latest communication of the Public Defender of Georgia will be reflected in the forthcoming action plan relating to the execution of Gharibashvili Group. Consequently, the Government would like to emphasize that in order to avoid repetitive exchange of communication, the Government's observations will be presented within the framework of official communication format between the Committee of Ministers and the Government of Georgia.

I remain at your disposal for any requests or questions that you might have.



Head of the Department of State Representation to the International Courts

Beka DZAMASHVILI