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Investigating ill-treatment

stocktaking report on Georgia

Jim Murdoch

February 2013

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INVESTIGATING ILL-TREATMENT:

STOCKTAKING REPORT ON GEORGIA

JIM MURDOCH

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INTRODUCTION

The prohibition against the infliction of torture is a peremptory norm of international law. Key international treaties such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR) stress the right not to be subjected to torture or to inhuman or degrading treatment or punishment is absolute. According to the European Court of Human Rights, Article 3 of the European Convention on Human Rights 'enshrines one of the fundamental values of the democratic societies making up the Council of Europe'.[1] The text of Article 3 is succinct; the prohibition against torture or inhuman or degrading treatment or punishment is absolute. It is thus expected that States have in place clear legal norms rendering criminal the infliction of ill-treatment and given effect to by an effective system of criminal justice, including an appropriate level of criminal sanction.

Allegations or indications of ill-treatment that arise while an individual is deprived of his liberty are of particular concern. Places of detention are by definition closed institutions. It is often difficult for outside agencies – including prosecutors and courts – to discern what has occurred. A determination that there has been a failure to carry out an effective investigation that meets the requirements of Article 3 of the European Convention on Human Rights will highlight shortcomings in a particular instance, but while case-specific indicators of failures in investigations into credible allegations of ill-treatment are readily found in the Court's jurisprudence, they do not address why ill-treatment took place, nor what institutional changes may be required.

The opportunity to examine the situation in the prison system in Georgia, and to consider what reforms had taken place in places of detention operated by the police system following an earlier visit, permitted discussion with a number of officials and others working in the criminal justice system. Their openness, and the clear commitment to effecting real change, indicated that Georgia is making progress, but that further action (as is the case in most European States) is required. The report that follows is one contribution to a wider debate.

The research was conducted and the report produced under the framework of the European Union and Council of Europe joint programme "Reinforcing the Fight against ill-treatment and Impunity".

1. Soering v United Kingdom (1989) A 161 at para 88.

1. THE SCOPE OF THE RESEARCH INVESTIGATION; DOMESTIC LAW AND PRACTICE; AND EUROPEAN EXPECTATIONS

1. The visit sought to examine the extent to which the legal framework and actual operation of regulatory arrangements for investigating complaints of ill-treatment involving police and prison staff met European expectations with a view to making further recommendations to strengthen domestic arrangements.

2. The report is based largely upon interviews that took place in Tbilisi over the period of 11-16 February 2013. It was clear that this was a time when several key reforms were being introduced by the Ministry of Corrections and Legal Assistance[1]. While the focus of the visit was upon prison arrangements, the opportunity was taken to review the situation in respect of police detention (this had been extensively reviewed by the author in 2009). It was also possible to visit two prisons, and two temporary detention isolators in the Tbilisi area. These research interviews included discussions with professionals working in or with a responsibility for certain aspects of relevance to the prisons system.[2]

3. The cooperation and assistance given to the research team was exceptionally high, particularly at ministerial and senior official level. Relevant governmental departments were able to comment upon a draft of this report and to provide any factual clarification necessary as well as helpful comment and guidance on recent legislative amendments to the Criminal Procedure Code. There was an obvious and ready willingness to engage with our team and with the topic of the research. We are most grateful for this continuing and extensive help. The project team consisted of: Jim Murdoch (Expert), and Tinatin Uplisashvili (Project Officer). The normal disclaimer applies: that is, the views expressed in this report are not those of the Council of Europe but of the expert.

4. International law requires a range of substantive and procedural measures in domestic law to ensure the prohibition of torture is effective in practice.[3] The

1. Several of these key reforms introduced since October 2012 are discussed below, including reforms in the provision of healthcare services and inspection arrangements.
2. Follow-up discussions with senior officials from the Ministry of Internal Affairs also took place in respect of an earlier report in 2009 into the investigation of complaints concerning the police. This also permitted visits to two facilities under the control of the MIA. See paras 57-61 below.
3. Eg, obligations assumed by state parties in terms of the UN Convention against Torture: in addition to the duty to investigate allegations of ill-treatment (found in Article 12 of this treaty), the elements incorporated in the CAT includes a reference to the taking of necessary 'legislative, administrative, judicial or other measures' (Article 2); the criminalisation of acts of torture in domestic law (Article 4); the introduction of universal jurisdiction or making torture an extraditable offence, and the responsibility to assist other States in criminal proceedings brought in respect of torture (Articles 5, 7 and 8); the taking those implicated in torture into custody or the application of other legal measures to

most obvious starting-point is the existence of domestic legislation criminalising the infliction of ill-treatment. The most crucial legislative provisions are found in the Georgian Criminal Code as amended. The General Part specifies the extent of criminal responsibility[4] which also arises in respect of omissions (so that the failure to prevent[5] or to report the use of unwarranted force upon a detainee would involve criminal liability[6]). This Code provides for the prescription of criminal liability after certain periods of time depending upon the gravity of the offence.[7]

5. Two sets of provisions in practice form the basis of prosecutions of officials for the unwarranted use of force.[8] First, certain articles cover the infliction of torture or other ill-treatment. The Criminal Code differentiates between differing grades of abuse depending upon the level of harm caused to the victim.[9] In particular, 'torture' is defined by article 144^1 of the Criminal Code in a manner which seeks to reflect the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[10] Separate provision is made for threats to inflict torture and for infliction of inhuman and degrading treatment.[11] Torture or inhuman or degrading treatment carried out by a state official is always treated as

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ensure their presence before a tribunal (Article 6); the training of law enforcement and other relevant personnel (Article 10); the systematic review of rules, instructions, methods and practices, and law enforcement arrangements (Article 11); the operation of an adequate complaint systems (Article 13); the availability of fair and adequate compensation in the event of torture (article 14); and ensuring that any statement that is established to have been made as a result of torture shall not be invoked as evidence against its victims (Article 15).

4. The Criminal Code penalises not only the principal wrongdoer (the person who organised the commission of a crime or directed its execution or the one who created an organised group or directed it) but also any person who aids or abets the commission of an offence: Criminal Code, art 24. The extent of the responsibility of an accomplice or co-executor is determined by the nature and degree of participation in the crime: Criminal Code, art 25.
5. Criminal Code, art 375.
6. Criminal Code, art 376.
7. Criminal Code, art 71(1): criminal liability ceases after 2 years from the perpetration of the crime when the maximum sentence does not exceed 2 years of imprisonment, after 6 years after the perpetration of any misdemeanour; 10 years after the perpetration of any grave offence; 15 years in respect of arts 332-342 for crimes that are not especially grave ones; and 25 years after the perpetration of any especially grave offence.
8. At the time of discussions in February 2013, there was some suggestion that the prosecutor would make use of provisions in the Criminal Code relating to crimes against humanity. Our discussions did not cover the appropriateness of such.
9. Criminal Code, art 117 (intentional grave injury to health) or art 118 (intentional less grave injury to health); the former was punishable by up to 8 years' imprisonment, and the latter by up to 5 years' imprisonment.
10. I.e., subjecting an individual, his or her close relative, or the person financially or otherwise dependant on the individual to treatment or conditions of such nature, intensity or duration as to cause severe physical pain or mental or moral suffering, for the purpose of obtaining information, evidence or confession, or intimidating or coercing or punishing a person for an act he or a third person has committed or is suspected of having committed.
11. Criminal Code, art 144^{1-3}.

an aggravating factor.[12] Secondly, provisions of the Criminal Code apply criminal sanctions to offences applicable to public officials in respect of abuse of authority. In particular, article 332 refers to abuse of official authority and article 333 to exceeding the limits of official authority. These two provisions are considered by prosecutors to be broad enough to cover physical or psychological abuse of detainees. But it appears that in the past, prosecutorial practice was to proceed against officials for ill-treatment of detainees under abuse of authority provisions rather than as 'torture' or other serious physical assaults, at least in respect of assaults committed by police officers.[13]

6. The mere enactment of provisions in domestic law prohibiting torture and the infliction of inhuman or degrading treatment or punishment is unlikely in itself to provide sufficient protection for the individual. In particular, the duty to initiate an investigation in terms of Article 3 of the European Convention on Human Rights will arise when circumstances come to the attention of the relevant authorities suggesting that ill-treatment of sufficient severity so as to fall within the scope of Article 3 has occurred. For the European Court of Human Rights, the essence is the existence of 'sufficiently clear indications that torture or ill-treatment has been used',[14] or of an 'arguable claim' of the infliction of ill-treatment giving rise to 'a reasonable suspicion'.[15] The focus is thus upon the *deliberate* use of ill-treatment. The requirement of effective investigation is an application of a *positive* obligation placed upon States by ratification of the European Convention on Human Rights.

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12. Criminal Code, art 144^{1}: aggravated circumstances include torture committed by state official, or by a person with a similar status (art 144(2)(a)) while acting in an official capacity (art 144^{1}(2)(b)). The prescribed punishment is imprisonment for 9 to 15 years, and for 12 to 17 years if aggravated. Art 144^{2} also prohibits the making of a threat to torture (punishable by a fine or deprivation of liberty up to 2 years). Art 144^{3} prohibits inhuman and degrading treatment or punishment (punishable by a fine or restriction of liberty up to 3 years or deprivation of liberty from 2 to 5 years; if treated as aggravated in the circumstances outlined above, the punishment is between 4 and 6 years of imprisonment. The statute of limitations does not apply to these crimes.
13. Information supplied by Ministry of Justice, Aug 2009: 'in practice torture cases were prosecuted under article 335 ... and also [under] articles 332 [and] 333'. Internal guidelines of 2005 issued by the Chief Prosecutor's Office to prosecutors attempt to encourage the initiation of investigations into allegations of ill-treatment by reference to article 144^{1-3} (that is, either as torture or as inhuman and degrading treatment) rather than under articles 332 or 333: Office of Chief Prosecutor, Guidelines, issued 7 October 2005. These guidelines still appear not to have been officially published, but these stress the key aspects of the definition of 'torture' as (a) serious physical pain or mental suffering (directly inflicting pain or suffering or creation of conditions causing physical or mental pain or suffering, such as starvation, lack of air), and (b) inflicted with the aim of obtaining information, evidence or a confession, or intimidation, coercion or punishment (including pain or suffering inflicted upon a relative or a person dependent upon the victim for these purposes).
14. *Bati and Others v Turkey* 2004-IV, at para 133 (reference to the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Istanbul Protocol').
15. Eg *Gharibashvili v Georgia* (29 July 2008), at para 64: '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'.

It is also based upon the important principle that it is for the state authorities initially to explain the presence of injury upon a person deprived of their liberty, rather than for the individual to establish its cause. This procedural obligation is thus properly considered as a separate and autonomous duty (and thus a 'detachable obligation'). The *purpose* of the requirement - to hold officials to account - is inseparable from its justification.[16] The obligation to investigate is categorised as 'not an obligation of result, but of means',[17] but determination of the establishment of procedures for the effective investigation of ill-treatment is a matter for States. The obligation covers a range components starting from the securing of avenues of initiation of investigation, and ending where applicable with the imposition of an appropriate punishment. Discharge of the responsibility is thus best considered as a shared responsibility, and one in which policy-makers, independent investigators, prosecutorial authorities and judges each have a part to play.

7. More specifically, the domestic framework adopted must meet the key criteria of effectiveness (independence and impartiality; adequacy; promptness; sufficient victim involvement; and openness via public scrutiny); be coordinated; subject to checks (in cases of discontinuation or termination of proceedings or refusal to prosecute, the obligation extends to consideration of the judicial review of the legality of such decisions, or the possibility of triggering judicial proceedings by means of lodging a criminal complaint where this is provided for by domestic legislation); and be motivated by a determination to root out ill-treatment.[18] At the heart of this is the determination to act with a sense of purpose. Thus 'authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries', as '[a]ny deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard'.[19]

8. In Georgia, an investigator or public prosecutor has a responsibility to investigate allegations or indications of excessive use of force amounting to an offence under

16. *Bekos and Koutropoulos v Greece (*13 December 2005), para 53: 'where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with [Article 1] requires by implication that there should be an effective official investigation. … Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity'.
17. *Barabanshchikov v Russia* (8 January 2009), at para 54.
18. See further Svanidze *Guidelines on International Standards on the Effective Investigation of Ill-treatment* (2010).
19. *Bati and Others v Turkey* (3 June 2004), para. 134.

the Criminal Code. Such indications may arise from a complaint, a referral from another body, or from other information suggesting unlawful force has been used (for example, information from medical examinations suggesting that injury has been sustained by a prisoner).[20] An investigation may also start on the basis of information from an anonymous source.[21] There is no discretion - an investigator or prosecutor is required to commence an investigation when information is received as to the commission of a crime. An investigation is to be carried out 'within a reasonable time',[22] and the Criminal Procedure Code does not now explicitly lay down a timescale for the commencement of the investigation.[23] The Criminal Procedure Code provides a number of circumstances in which an investigation must be terminated or a decision taken not to prosecute (or to terminate a prosecution).[24] The decision not to order a full investigation may now not be challenged in court, but the decision can be appealed to a superior prosecutor[25] An individual who alleges that he was the victim of ill-treatment will be interviewed as would be eye-witnesses and the alleged perpetrators, and a forensic examination can be ordered by the prosecutor. The individual alleging ill-treatment can be re-examined by the prosecutor if discrepancies subsequently arose between different accounts of events, but there would be no opportunity for 'confrontation' via cross-examination by the person alleging ill-treatment of the alleged perpetrator unless this occurs during criminal proceedings.[26]

9. One important legal development in Georgian law is worth highlighting, as this may be of significance in effective investigations.[27] It has been recognised that there was a problem that the finality of previous determinations that complaints were ill-founded precluded the re-examination of these complaints since the crim-

20. Criminal Procedure Code, art 101 (preliminary investigation may also be commenced on the basis of the facts ascertained in the course of investigation of criminal cases.
21. Information may thus originate from a number of sources (including a natural or legal person; a State or self-governance organ; a State official; an operative investigative body; an accused confessing his guilt; a media source; or an anonymous source providing that the facts are reliable and susceptible to confirmation); information can be provided in oral or written form: Criminal Procedure Code, art 101.
22. Criminal Procedure Code, art 103 (and periods must not exceed the statutory limitations for criminal responsibility as determined by the Criminal Code).
23. The timescale that previously was prescribed in the Criminal Procedure Code has now been repealed.
24. Criminal Procedure Code, art 105 (including in para (1)(h) the existence of a determination by a prosecutor to do so).
25. Criminal Procedure Code, art 106(1).
26. See Criminal Procedure Code, art 113 which refers to the rights of any party to interview 'on a voluntary basis any person who may possess important information', but no such person may be so compelled. See also information received from the Ministry of Internal Affairs, November 2009: 'With regard to a cross-examination, the [Criminal Procedure Code of Georgia then in force] does not stipulate the mentioned legal institute. However, the new Criminal Procedure Code, [in force from 1October 2010], prescribes the cross-examination institute in line with the other new novelties of the criminal law.' The examination of witnesses (both direct and by cross- examination) thus can only take place during court proceedings. This procedure is now regulated by art. 115 (general rules of examination).
27. It was reported that at the time of the discussions in February 2013 some 440 cases in which death or ill-treatment is alleged to have occurred in prisons are being investigated by the domestic authorities, some 33 individuals have now been charged with torture.

inal procedural code apparently did not permit such cases to be re-opened. Individuals who had previously had complaints dismissed after investigation would only have the right to legal assistance in cases where their appeal rights (that is, the right to seek to challenge a prosecutorial decision to close the case) have not expired. Since 2012, the Criminal Procedure Code has allowed the case to be re-opened in certain circumstances (although the scope of this reform was not entirely clear to certain interlocutors).[28]

2. DOMESTIC CONTEXTS AND ISSUES IDENTIFIED – INVESTIGATION INTO COMPLAINTS OF ILL-TREATMENT IN PRISONS

10. At the outset of this part of the report, it is important to stress that there has been a significant reduction in the prison population in Georgia. Statistics[29] showed that by 2009, Georgia had the second highest per capita incarceration rate in the Council of Europe (at 452 per 100k inhabitants),[30] a figure that was reported to us to have peaked at or around 830 per 100k, in some contrast to the situation earlier (of 147 per 100k inhabitants in 2003).[31] The increase seems to have been exacerbated by cumulative sentencing (as opposed to concurrent sentencing) policies, and led the CPT to make remarks as to the effects of prison overcrowding[32] and the risk of inter-prisoner intimidation.[33] Since this time, however, the prison popu-

28. Cf Criminal Procedure Code, art 108(1) (a superior prosecutor or court may revoke an order terminating a prosecution; and art 106(1) (while a decision to terminate an investigation cannot now be appealed in court, a victim may now on one occasion appeal the determination to a superior prosecutor). Note though that a prosecutor may appeal to a court against a court order terminating a prosecution : Criminal Procedure Code, art 107.
29. See SPACE reports, available at http://www.coe.int/t/dghl/standardsetting/prisons/space_i_EN.asp Note that certain SPACE figures refer to the territory of Georgia without taking into account Abkhazia and South Ossetia.
30. See SPACE 2011, available at http://www.coe.int/t/dghl/standardsetting/prisons/Conferences/CDAP%20Marcelo%20F%20Aebi_Natalia%20Delgrande%20Speech.pdf
31. See Doc PC-CP (2004) 6 rev available at http://www.coe.int/t/dghl/standardsetting/prisons/SPACEI/pc-cp%20_2004_%206rev%20-%20e%20_SPACE%20I%202003_.pdf
32. See eg CPT/Inf (2007) 42, para 32: this factor was having ‘a negative impact on all aspects of life in the prisons – access to sanitary and laundry facilities, provision of outdoor exercise, possibilities for visits and telephone calls, access to health care – the list is far from exhaustive’. Overcrowding was most apparent at the main pre-trial facility in Georgia: here ‘the most extraordinary overcrowding (surpassing 400%)’ in a prison holding a quarter of the country’s prison population was of particular concern.’ Further, ‘the delegation witnessed the most extraordinary overcrowding (surpassing 400%) at the main pre-trial facility, Prison No. 5, which was holding a quarter of the country’s prison population.’
33. It was put to us in discussions that inter-prisoner violence in the past had been facilitated by prison administrations specifically in order to punish prisoners. The phenomenon was noted in reports of the NPM, the Ombudsman. Problems had also been identified by the CPT: CPT/Inf (2005) 12, para 62: ‘It should be noted nevertheless that the severe shortage of prison staff and the low proportion of staff working in prisoner accommodation areas at the Strict-regime penitentiary establishment No. 2 in Rustavi and Prison No. 5 in Tbilisi made it difficult to control the situation and increased the risk of inter-prisoner violence. Prison staff recognised this problem and tried to prevent it through identifying upon arrival prisoners potentially at risk and accommodating them separately, as well as recording violent episodes and injuries sustained by inmates within the prison. Nevertheless, the delegation’s observations suggest that the existence of informal power structures among prisoners, controlling life inside the establishments, gave rise to cases of extortion and intimidation. The presence of such structures was conspicuous in all of the establishments visited, with the exception of the establish-

lation has declined significantly.[34] (However, within the two prisons visited, it was apparent to us that prison management feels it still has not established a 'proper balance' between internal security and good order on the one hand and respect for the rights of prisoners on the other. While it was not properly within the scope of the review to consider this matter, assistance in helping identify appropriate strategies - in particular, in the handling of long-term prisoners who begin to pose a challenge to internal security primarily on account of the very length of their sentences - may be appropriate, and this is one particular area in which external assistance and consultancy may be helpful).

11. Discussions in February 2013 focused upon the arrangements for investigating allegations of ill-treatment in prisons, and the main concerns identified included both the channels for communicating concerns (including the lack of alternative mechanisms that would allow the airing of grievances or concerns as to possible ill-treatment) as well as shortcomings in the handling of complaints or indications of ill-treatment (and in particular, as to the adequacy of the response of prosecutors in determining whether there was sufficient evidence to continue to the full investigations stage).

a. blockages in channels for communicating concerns

12. The obvious first prerequisite for a system of investigation is an effective means for the raising and for the transmission of complaints or other indications of possible ill-treatment to relevant authorities. Discussions suggested several blockages in the transmission of reports, for it is only in the five or so months before our visit that substantial numbers of complaints were now emerging concerning allegations of past ill-treatment inflicted during imprisonment. The lack of any statistically-significant number of formal complaints from prisoners before this time suggests that domestic mechanisms designed to attract complaints were ineffective. It was also reported that prisoners would refuse the opportunity to communicate their concerns to monitoring groups on account of a climate of fear of likely reprisals. Whether actual reprisal was likely is not strictly relevant to this report: the fact that the perception appears strongly held is sufficient to conclude that the most obvious source for complaint – the prisoner himself - was effectively neutered. Prisoners were afraid that anything they said might be overheard, a fear based upon the well-founded suspicion that prison officials had established a system of illegal electronic monitoring of conversations between prisoners and outsiders such as legal representatives, NGOs, and monitoring bodies[35] and by

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ment for women; the inmates belonging to these structures generally enjoyed better material conditions and moved freely within the detention areas.'

34. Statistics for January 2013 indicate a total prison population of 14077, of whom 928 were unconvicted prisoners.
35. We were advised that there had been the discovery of illegally-installed video and audio surveillance

the belief that the authorities were also able to rely upon certain prisoners who were 'planted' in cells holding a number of prisoners in order to eavesdrop and thereafter to report on what prisoners were discussing. On top of this, there was some suggestion that complaints that are determined by a prosecutor to have been ill-founded could attract in turn criminal sanctions.

13. The corresponding impact was significant. Previously successful initiatives were compromised – in particular, the new system of complaints forms (following a Council of Europe-sponsored initiative that were to be made readily available and which could be sealed and sent to relevant external bodies competent to handle complaints).[36] Nor was there any obvious confidential access to telephone facilities to alert others, for telephone facilities were highly restricted and precluded confidentiality.[37]

14. These crucial blockages in the direct communication by prisoners of concern were not the only shortcomings, for alternative channels for the communication by others of concerns as to the possibility of ill-treatment occurring even in the absence of a complaint from a prisoner were also rendered ineffective by this climate of fear of reprisal operating in prisons.

15. Prison healthcare personnel ought to enjoy access to effective channels of communication for the voicing of concerns concerning possible ill-treatment to management and to prison inspection services. However, this source was significantly

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in at least 6 prisons and this was now being considered by the Anti-Corruption Agency of the Ministry of Internal Affairs. In one prison visited for the purposes of the research (the main pre-trial detention facility for the Tbilisi area) we were told that surveillance equipment had been discovered only one month before our visit.

36. In one of the prisons visited in February 2013, the forms were readily available but prisoners would still require to request a pen or pencil, although it was stated that such access was now automatically granted; but in the other prison, there was no sign whatsoever of these forms, although the box in which the complaints letters were to be placed was obvious. Cf CPT/Inf (2010) 27, para 119: 'The new Code of Imprisonment introduces a complaints procedure according to which inmates can use the assistance of lawyers when lodging complaints. Locked complaints boxes should be installed in each establishment, to be opened every day by a social worker in the presence of the establishment's Director or his representative. Complaints addressed to the Director should in principle be responded to within 5 days, and those addressed to the Penitentiary Department, within 10 days (in special cases, an extension of up to 1 month is envisaged). Complaints concerning torture, inhuman or degrading treatment should be brought to the attention of the Director or the national preventive mechanism within 24 hours and should be considered immediately. Decisions resulting from a complaint can be appealed before the court pursuant to the administrative procedure. The management must provide inmates with the necessary materials to file a complaint (paper, envelopes, pens, etc.). Further, it is inadmissible to punish prisoners for having filed a complaint.'

37. We were told in one prison visited that inmates were normally only allowed three telephone calls a month to their families. There was no indication that there was any regulation or practice allowing a prisoner to contact any outside body competent to receive complaints by telephone, and in any case in one of the prisons visited the telephone available to inmates to make calls was within a matter of metres from the desk of the prison officer monitoring the ground floor of that wing of the institution. Even at the time of the report, there was no obvious ready access to the 'hotline' introduced by the MCLA's inspection unit in either prison visited.

compromised. First, it appears that prisoners who sought access to medical services could be punished for doing so when it was subsequently deemed that the request was unnecessary. Secondly, there were clear indications that healthcare professionals working in prisons appear to have been placed under intolerable and entirely inappropriate pressure to turn a blind eye to any ill-treatment witnessed by them. We heard compelling evidence that even the most restrained criticism (eg, to cease to inflict ill-treatment when medical staff were present) could and did lead to constructive dismissal.[38] In other words, the climate of fear that sustained a climate of impunity also afflicted medical staff.

16. Only one external domestic monitoring body examined and reported upon conditions within prisons through its authority to enter prisons to report upon possible ill-treatment. But the climate of fear that existed within prisons had also effectively neutered such arrangements. Monitoring by the Public Defender's Office, the designated National Preventive Mechanism (NPM),[39] was rendered essentially ineffective as its members recognised that prisoners considered it both of high risk to complain as surveillance of conversations was likely to be taking place, and also in any event pointless as no action would result.

17. Even upon release, the unwillingness of former prisoners to make complaints continued. If this reluctance was understandable during incarceration, it was not as obviously so following conditional release. We sought to consider whether probation services had been well placed to receive complaints from recently-released individuals. But in Georgia, 'probation' is not 'probation' as commonly understood, for following release from prison, this inevitably only requires the attendance of the individual at a designated office to record physical attendance (for example, by providing an electronically-scanned fingerprint). There appears to be virtually no meaningful contact between a probation officer and the individual.

18. Complaints made to legal representatives suffered from similar concerns as to probable monitoring of conversations and lack of trust in the prosecutor's ability to treat complaints with any degree of seriousness. The provision of free legal assistance by the MCLA[40] may involve a visit by a member of the legal assistance team to a prison to visit a prisoner within one or two days after the receipt of a

38. We are satisfied that there is sufficient indication that healthcare staff would have been certainly aware of ill-treatment in certain institutions. One discussant also suggested that, on occasion, medical healthcare staff were passively involved in ill-treatment insofar as it was expected that they would intervene were the ill-treatment to become excessive. We did not attempt to verify this as it was outside the scope of the remit for this report.
39. Ie, in terms of the UN Optional Protocol to the Convention against Torture.
40. Here, a further factor arose, for the system of legal aid to those facing criminal charges but unable to afford legal representation is provided by the Ministry of Corrections and Legal Assistance, the ministry that is also responsible for the prison service. But it is not clear that any potential clash of interests had any impact, for this was largely obfuscated by the unwillingness of prisoners to lodge complaints.

letter requesting assistance. If an allegation of ill-treatment is made during such a consultation, the matter is referred to the prosecutor's office for action. Only since September 2012 has the legal assistance service received significant numbers of communications requesting assistance in respect of allegations of ill-treatment from prisoners who have not yet been released.[41] Other shortcomings were noted, for in respect of complaints of ill-treatment involving allegations of criminal wrongdoing transferred to the public prosecutor, legal representation from the MCLA extends only to the transfer of the case to the prosecutor: thereafter, the lack of standing of an alleged victim in domestic criminal law apparently limits any further potential for assistance.

19. There was also an absence of alternative mechanisms and devices for raising concerns as to the infliction of ill-treatment in prisons. There appears to have been no culture in prisons whereby the voicing of concerns by prison staff was regarded as appropriate.

20. What was surprising in the past was also the lack of departmental mechanisms for monitoring prisons. The Ministry of Corrections and Legal Assistance had at this time no effective mechanism for identifying and reporting upon any indications that prisoners may have been subjected to ill-treatment. In particular, the General Inspectorate Unit did not enter prisons as its role was apparently restricted to issues of staff discipline, and in consequence, the Unit's contribution to addressing ill-treatment was severely hampered.[42] The lack of any internal (ie, Ministry) investigative service was not remedied by a regular programme of visits to prisons by prosecutors, for while prosecutors apparently enjoyed such authority, in practice they did not employ this power: prosecutors admitted that monitoring only took place when a complaint was received or otherwise on an irregular basis.[43]

21. Statistical analysis of data involving complaints made by prisoners can play a vital part in identifying prisons (and prison wings and prison officers) against whom complaints are brought and may thus alert management of the possibility of significant issues calling for urgent attention. Data relating to allied complaints such as the refusal to facilitate the transmission of a complaint or the making of a threat of sanction for doing so may also assist. But the system for the compilation

41. It was explained that the legal aid service has no authority to act upon complaints from former prisoners.
42. It was reported that the low level of complaints (some 75 in the 9 months before mid-October 2012) to the Unit had resulted in only 2 reprimands.
43. Cf Comments by the Government of Georgia to the conclusions and recommendations of the Committee against Torture (CAT/C/GEO/CO/3), Doc CAT/C/GEO/CO/3/Add.1, 5 December 2007, para 44: 'The monitoring is carried out in response to the protocols received on daily basis from [the] Penitentiary Department. The mentioned protocols contain, *inter alia,* the information about the persons that have been placed in the prisons or pre-trial detention institutions or hospitals of these institutions with the physical injuries and the circumstances surrounding the injuries. In response to this information, the staff members of the HRPU [Human Rights Protection Unit] enter the institution to find out if the physical injuries are the result of torture or inhuman or degrading treatment or punishment….'

of such data did not appear strong. While the ability of prisoners to make complaints before September 2012 was significantly compromised, there has been a high number of complaints made since that date in respect of earlier ill-treatment. There was some variation in the accounts given to us of the statistics of complaints received, a matter not so much one of criticism but more of observation that it will be crucial to ensure that in future there is accurate data-recording to permit the monitoring of statistical data and the outcomes of investigations.

22. Civil proceedings may help draw public attention to the existence of practices of ill-treatment. While such a remedy in the absence of an effective investigation leading to prosecution will not meet a State's international obligations under the European Convention on Human Rights, this nonetheless may help a victim feel he may still achieve some level of justice. But the legal assistance service of the MCLA is still precluded from helping an individual alleging ill-treatment while in prison to bring a civil action against the authorities. In any event, while it is apparently not impossible to bring a civil case, such an action – as with actions against police officers who have resorted to unwarranted ill-treatment – appears almost unheard of, and the right to compensation for ill-treatment still appears largely theoretical[44] (although not impossible).[45]

b. investigations: sufficiency of evidence

23. This aspect of the evaluation exercise is not without difficulty on account of the lack of sufficiently significant examples of successful investigations and prosecutions of prison staff for ill-treatment. However, some speculation is possible, suggesting that the handling of complaints by the prosecution service still requires some attention.[46] Some prosecutors and former prosecutors admitted that they

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44. In Georgia in the absence of an actual determination that a 'criminal act' has occurred, there are considerable doubts as to the competency of such a claim for it appears that a determination that a 'crime' has been committed is required to allow a victim of ill-treatment must obtain the status of formal 'victim' in domestic law (as with a decision to charge an official with a crime involving torture or ill-treatment will give rise to such a right to seek compensation. But civil proceedings may be initiated against the State in any instance where a state official is charged with an offence under art 144[1-3] of the Criminal Code (ie, torture, threat of torture, and inhuman or degrading treatment) at any stage of the criminal proceedings). This right is not subject to prescription.
45. In respect of the 2009 report into police ill-treatment, it was reported that there had been two cases involving ill-treatment in which civil awards had been made (of some €4500, ie 10k Lari): it is now understood that the cause of death in both cases was inadequate medical treatment. ' It is believed that other civil awards have been made since this date.
46. Guidelines (in the form of recommendations) to prosecutors prepared by the Analytical Department of the Ministry of Justice and adopted in May 2009 by means of an Order of the Minister of Justice clearly recognise the need for greater transparency in the investigation and decision-making process. These guidelines have still not been published. Prosecutors and investigators must start an investigation as soon as they receive information concerning the possibility of torture or ill-treatment. Criminal Procedure Code, arts 100 and 101(1). All investigations are now to be completed within a reasonable time, a 'reasonable time' now specified as being within two months (unless a short prolongation is necessary to bring the investigation to a conclusion). Each investigation is to be

had been aware of the situation in prisons, but had felt constrained to ignore these problems to prevent the complaints system from being overwhelmed: it was, as one interlocutor put it to us, a 'fortress not to be touched'. The single most obvious flaw seems to have been that investigations inevitably would be discontinued on the basis of an absence of sufficient evidence, but the very system itself discouraged the collation of evidence.

24. First, there was a real risk that individuals who had alleged ill-treatment would withdraw these allegations. As one prosecutor put it, evidence could 'perish' en route to the prosecutor's office. The threat of intimidation remained, and could lead to the retraction of statements by prisoners. It was also reported to us that this affected the extent to which other prisoners who were witnesses to ill-treatment were interviewed. Witnesses were thus also reluctant to provide testimony. In short, the existing system seemed to turn upon the willingness of individual prisoners to make and thereafter not to withdraw a complaint, for the withdrawal of a complaint seems to have led to a situation where this led to the *de facto* ending of the investigation, as admitted by prosecutors (current and former). Too much hinged upon the readiness of the individual prisoner to retract evidence or to refuse to authorise the transmission of the medical report to forensic services; too little weight was placed upon the positive obligation to take decisive action, even in the absence of a formal complaint from a prisoner. Nor did it appear that there were sufficient procedures in place to protect those prisoners who had sought to use the complaints system and who thereby placed themselves in a position of considerable vulnerability, for example by securing their removal to another prison.

25. Secondly, there were significant flaws in the recording of indications of ill-treatment in prisons. Prison healthcare services should be well-placed to play an important part in the prevention and identification of possible ill-treatment. The provision of medical care and treatment to an inmate will also allow the identification and recording of bruising and injuries sustained, including the recording of any contemporaneous explanation proffered by the inmate as to the cause of the injuries, and such records can be a vital source of information to inspection, investigation and monitoring bodies. However, there was significant indication that the process of recording of injuries by healthcare professionals in prisons appears to have been unsatisfactory insofar as it failed to provide a firm basis for adequate follow-up in relevant cases. The members of the forensic services institute met during discussions voiced serious reservations as to the adequacy of the recording by prison medical staff (in particular, on the ground that non-technical rather than medically-specific terminology was used, and descriptions tended towards the general rather than the specific) making it difficult to provide expert opinion when

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'effective and result-oriented', and carried out impartially and objectively. In particular, victims and witnesses are to be summoned for interrogation.

requested on the ground that ill-treatment may have occurred. Further, recording procedures appeared haphazard.[47] It seems that medical staff were expected simply to record the explanation of injuries professed by the prisoner even where that explanation was improbable or (from the witnessed ill-treatment in light of the proximity of medical services to prisoners' cells) simply incorrect as fact without providing further elaboration. Such flaws are likely to be even more noticeable where (as is the case outside the main prisons) there is no permanent prison healthcare service, and reliance is placed upon visiting staff who are not expert in matters of prison health or are aware of the importance of accurate recording of possible ill-treatment.

26. Thirdly, this unsatisfactory initial recording by prison healthcare staff of injuries which may have been occasioned by deliberately-inflicted ill-treatment was not remedied by the intervention of members of the State forensic service unit, the National Bureau of Forensic Expertise, through the intervention of prompt and adequate investigation of injuries. It was clear that this service is failing to fulfil its potential to act as an effective source for the delivery of expertise that should be of real value to investigators and to courts. The intervention of forensic expertise should provide the opportunity for impartial and independent examination of individuals who allege ill-treatment and the giving of an opinion as to the consistency of findings with allegations. But it was of some surprise and of much concern that the members of the Bureau in Tbilisi who took part in discussions saw their role and responsibilities in the effective investigation of ill-treatment in particularly narrow terms. Certainly, the prosecutor will refer cases to the service,[48] but the utility of a reference by a prosecutor is in reality minimal, and it is difficult to resist the conclusion that such a reference both on the part of the prosecutor and on the part of the service appeared more a case of going through the motions of appearing to take action rather than constituting a deliberate attempt to obtain evidence

47. From discussions, the practice appears for handwritten (and not always legible) recording of injuries in two separate documents – both in a general ledger and also in each prisoner's health record. Prison management in one institution seemed entirely uncertain as to the policy concerning the safeguarding and retention of data.
48. See CPT/Inf (2010) 27, para 24: 'On 31 October 2008 the Parliament of Georgia adopted a law which entered into force on 1 January 2009 and created the National Bureau of Forensic Expertise as an independent legal entity entitled to carry out remunerated activities. Further, Georgian legislation [Code of Criminal Procedure, art 38(9)] stipulates that the alleged victim of ill-treatment or his lawyer has the right to request a medical examination from a forensic doctor with a view to receiving a conclusion/certificate. The examination is performed upon the person's initiative and at his own expense. In this respect, the person does not need prior authorisation from the Prosecutor's Office or a judge. In addition to the National Bureau of Forensic Expertise, there are several private forensic bureaus. The CPT welcomes this development.' The forensic service reported it produced a total of some 20,000 reports per annum, of which some 300 requests per annum were made by prosecutors. It was also reported that requests from legal advisers are competent but rare in practice (some 5-10 per annum). It was not entirely clear whether the Forensic Service in Tbilisi is the only competent provider of forensic services in Georgia. Despite the assurances given to the CPT, above, some uncertainty surrounded the existence of alternative private services that could be used by individuals or their legal representatives directly.

of real value. To start with, in some 90% of cases where a referral by a prosecutor is made the prisoners themselves are not even seen let alone examined. This means that the intervention of forensic services in the vast majority of cases is largely based upon the written documentation provided by prison healthcare services, and as discussed above, this documentation is likely to be inadequate. A clear impression was gained that members of the forensic services found this situation frustrating – they were openly critical of the lack of training or competence on the part of medical healthcare staff in recording in appropriate terms the nature of injuries noted on prisoners. But of greater concern was the equally clear impression that the forensic service does not consider it appropriate to provide any informed opinion as to the possible causes of recorded injuries, even in the few cases in which prisoners are examined. Indeed, a certain element of hostility to the suggestion that such should form part of the responsibilities of the service was evident. This minimalist attitude was justified, we were told, by legislative provisions which precluded the reporting of informed opinion, but whether or not this indeed is precluded by regulations,[49] there was an obvious lack of professional interest in determining the possible cause of injury,[50] an impression supported by the surprise that members of the forensic services reported when the full extent of the ill-treatment in prisons became apparent.[51] Certainly, while it appears that prosecutors would discuss the conclusions of referred cases with those responsible for drawing up the reports, this appears to be done informally.[52] That prisoners are examined by a forensic specialist in less than 10% of cases in which a referral is made means that in the vast majority of cases the intervention of forensic expertise is based upon inadequate initial recording carried out in prisons. Those members of the forensic service who were involved in discussions claimed to 'be aware' of the Istanbul Protocol, but if this is so, it is not clear why in particular the importance of language signalling the level of consistency with allegations as to the cause of injuries was neither understood nor accepted. Prosecutors and

49. This seems unlikely. Cf 2009 Prosecutorial Guidelines recognise the need for greater transparency in the investigation and decision-making process. The guidelines also provide that qualified medical doctors should carry out the investigation in the absence of any law-enforcement official. The final report should 'reflect' any explanation of inflicted injuries given by the victim; in the absence of any explanation, the victim should be summoned for questioning by the prosecutor with a copy of the testimony available to the doctor before he carries out his investigation. The victim should also have the possibility to conduct an independent forensic expertise and have the report attached to the case file.
50. As one interlocutor from the Bureau put it in, not all of the 300 referrals involving injuries sustained by prisoners involved prisoners accidentally 'falling from their beds', but providing informed opinion on the cause of injuries was 'not our business'.
51. In discussions, members of the forensic service bureau indicated they had not been aware of concerns raised by monitoring groups such as the CPT as to the possibility of ill-treatment in prisons. The dissemination of CPT reports seems restricted.
52. Cf UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2004 ('Istanbul Protocol'), para 84: 'The report should be confidential and communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report. The report should be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. …'

courts are thus unable to obtain expert opinion as to the extent to which lesions are likely to have been caused by the trauma described. Whether the injuries are 'not consistent with', 'consistent with', highly consistent with', 'typical of' or 'diagnostic of' the reported cause is of considerable importance in the effective investigation of ill-treatment.[53] The whole system of referral to forensic services appears fundamentally flawed.

27. Fourthly, there is still a lack of effective participation in the investigation by the person making the allegation of ill-treatment. In Georgia, a victim of ill-treatment will only be involved in the proceedings when officially recognised as a 'victim' of a crime committed against them in accordance with domestic law. In other words, an individual who lacks such a status has no standing in the procedures and cannot thus challenge a refusal to instigate an investigation or its termination before the courts.[54] While 2009 Guidelines to prosecutors now specifically require the interrogation of witnesses and also the alleged victim, this is still far removed from active involvement or participation in the investigation. There are simply insufficient safeguards against a merely superficial disposal by a prosecutor who may too readily conclude that it has not been established that ill-treatment occurred. The individual concerned cannot challenge the rebuttals made or other evidence produced by state officials. While European standards certainly do not require an adversarial process, they do require a level of involvement by the complainer to help ensure the testing of allegations through responses to assertions.[55] Some assurances were given that this is seen as a significant defect in domestic arrangements, and that there are suggestions that the Criminal Procedure Code will be amended to try to address this major defect.[56]

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53. Istanbul Protocol, para 83 (b): reports to include: '*The background*. A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment was alleged to have occurred and all complaints of physical and psychological symptoms; (c) A physical and psychological examination. A record of all physical and psychological findings upon clinical examination including appropriate diagnostic tests and, where possible, colour photographs of all injuries; (d) An opinion. An interpretation as to the probable relationship of physical and psychological findings to possible torture or ill-treatment. …'
54. See the related case of *Gharibashvili v Georgia* (29 July 2008) (the applicant had never been interviewed into allegations of ill-treatment during preliminary enquiries, proceedings that had been terminated by the courts sitting in *camera* without holding oral hearings).
55. Cf *Gharibashvili v Georgia*, above, at para 74: 'The Court further deplores that the termination of the above investigation was upheld by the domestic courts sitting in camera, without holding oral hearings. Nor could it be inferred from the case file that a transparent and adversarial procedure in writing took place instead.... The Court observes in this connection that a public and adversarial judicial review, even if the court in question is not competent to pursue an independent investigation or make any findings of fact, has the benefit of providing a forum guaranteeing the due process of law in contentious proceedings involving an ill-treatment case, to which the applicant and the prosecution authority are both parties....'
56. It was also suggested that reform could also be prompted by the Proposed EU Directive establishing minimum standards on the rights, support and protection of victims of crime, COM(2011) 275 final (18.5.2011).

28. Judges may be called upon to take the initiative to ensure that some investigation occurs into the possibility of ill-treatment when indications that physical or psychological force may have been applied. This is likely to occur during the course of a trial where an accused lodges a complaint of ill-treatment during pre-trial detention,[57] and should also extend to the requirement to take action even in the absence of a specific complaint by an individual (for example, where an individual appears in court with bruising). But discussions with members of the judiciary and those responsible for judicial training suggested that there were still issues to be addressed in convincing judges that they have an active role in such cases, in particular by instructing a full investigation of any indications that a prisoner had been subjected to ill-treatment. It was suggested to us that attitudinal change towards a wider acceptance as the judge as protector of the rights of the individual was slowly taking place, but that judges were still too committed to a system that valued form and attention to the letter rather than the spirit of the law. Although one judge assured us that a trial judge would take action whenever a prisoner appeared with visible bruising (by asking questions, entering he facts into the protocol, and directing the prosecutor to take action), this comment was not particularly convincing in light of the lack of examples of such occurring in practice. It also appeared that judges themselves differed in their understanding whether any such action was mandatory or merely discretionary, and if merely the latter, whether there was a specific need for additional legislative provisions to direct judges to take action themselves (or rather whether this could be achieved simply through appropriate judicial training).

3. DEVELOPING A COMPREHENSIVE SYSTEM FOR THE EFFECTIVE HANDLING OF ALLEGATIONS OR INDICATIONS OF ILL-TREATMENT – COMMENT AND RECOMMENDATIONS

29. As outlined above, any domestic framework should meet key criteria:
    - effectiveness (independence and impartiality; adequacy; promptness; sufficient victim involvement; and openness via public scrutiny);
    - sufficiently coordinated across agencies;
    - subject to checks (in cases of discontinuation or termination of proceedings or refusal to prosecute, the obligation extends to consideration of the judicial review of the legality of such decisions, or the possibility of triggering judicial proceedings by means of lodging a criminal complaint where this is provided for by domestic legislation); and
    - be motivated by a determination to root out ill-treatment.

57. Criminal Procedure Code, art. 197c - complaints of ill-treatment or procedural irregularities. Judges were clear that in their opinion ill-treatment had been motivated by internal security concerns alone: they rejected suggestions that others had made that the ill-treatment could also have become a tool to try to encourage plea-bargaining by encouraging accused persons to negotiate an early release from the prison system by pleading guilty and accepting a substantial monetary penalty.

a. *independence and impartiality; adequacy; promptness; sufficient victim involvement; and openness via public scrutiny*

30. These five criteria constitute the essential requirements for compatibility with the 'procedural aspect' of Article 3 of the European Convention on Human Rights. There is no standard model: each legal system must ensure the criteria are satisfied in each individual case where the obligation to examine arises. Discussion above has highlighted the primary concerns affecting the system of investigation as it operated in Georgia. At the heart of domestic arrangements in Georgia is the prosecutor. The system of prosecution in Georgia is stated to be mandatory – that is, a prosecutor must initiate an investigation where the evidence supports such. But in Georgia, the prosecutor enjoyed considerable discretion in determining the extent to which responsibilities would be discharged. The entire focus of the system for making complaints, investigating complaints, assessing the strength of evidence, and determining whether to bring a prosecution and upon what legal grounds lay in the hands of one office. This model has the potential to meet European expectations in principle, but the near-untrammelled authority to determine the course of the investigation involves insufficient checks and balances. In particular, accountability is significantly limited – it is difficult in realty to challenge a decision to discontinue investigations. From our discussions, it is hard to avoid the conclusion that there was a perception that prosecutors did not actively engage with the task of investigating ill-treatment allegations in prisons with the requisite open-mindedness and rigour required to meet European expectations.

31. The first need is to ensure that arrangements command public confidence in the <u>independence and impartiality</u> of the system charged with carrying-out an effective investigation into allegations of ill-treatment. Serious consideration should be given to the introduction of an independent investigatory agency; or alternatively, at least to the introduction of an independent agency able to supervise the handling of individual cases by the prosecutor. If it is decided that no independent element is required, there must be at the very least a separate investigation unit within the Office of Prosecutor specifically charged with the handling of cases involving ill-treatment by state officials. This unit must have operational independence, be provided with clear guidance as to the manner in which they are expected to supervise such investigations, be fully supported in resources and its members encouraged through appropriate incentives to believe that service in such a unit is professionally rewarding. Such a unit should be dedicated to the operational conduct of an investigation into possible ill-treatment by public officials, or exercise close and effective supervision of the investigation by other investigatory bodies.

32. There was some discussion as to the most appropriate agencies to involve in assisting the prosecutor in the operational conduct of investigations when this was deemed necessary. Some suggestions were made that investigators from the

Ministry of Internal Affairs would now be specifically instructed by the prosecutor in certain cases involving allegations of possible ill-treatment in prisons. This would certainly enhance the independence of the investigations. However, certain internal units of the MCLA may also have important responsibilities at an earlier stage in helping identify indicators of possible ill-treatment and securing evidence at an early stage, matters considered further, below.[58]

33. As far as the promptness and adequacy of investigations is concerned, the expectation is that all reasonable steps will be taken to secure relevant evidence and to attempt to locate and to properly interview witnesses and to obtain and assess real evidence. At the very least, the authorities 'must always make a serious attempt to find out what happened', for example, by taking 'all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence' and the like.[59] Since evidence is a perishable commodity, action must be taken promptly. Prompt action is also of importance in helping address any suggestion of impunity for the infliction of ill-treatment; and prompt action will also help maintain trust in the integrity of the complaints system on the part of prisoners and the public in general. But there seemed to be deficiencies in the arrangements to secure promptly evidence that can be of real use in any subsequent investigation. Perfunctory investigation appears to be the norm in respect of the most objective available evidence, that is, the medical evidence of injuries. First, as discussed above, the recording and specialised assessment of indicators of possible ill-treatment in the forms of trauma injuries was severely compromised both at initial recording stage in prisons by healthcare staff and subsequently when considered by forensic services. There was widespread agreement that the training of prison medical staff required urgent attention to help ensure that injuries are adequately recorded so as to provide an accurate and comprehensive record of injuries and of any explanation proffered. Secondly, the problem of poor standards of initial recording of injuries that could be attributable to ill-treatment is thereafter compounded by an unsatisfactory level of intervention by forensic services. There can be significant delay between the time of infliction of injuries and the intervention of forensic services. No attempt seems to be made to follow the requirements of the Istanbul Protocol in providing informed opinion on the compatibility or otherwise of the traumas with any explanation recorded. The results of forensic expertise intervention are not communicated to the prisoner. The outcome is a situation that is of minimal assistance to the prosecutor (or to the judge) in assessing the relevance of medical recording of injury.

58 At paras 38-43.

59. *Khadisov and Tsechoyev v Russia* (5 February 2009, para. 114. See eg *Barabanshchikov v Russia* (8 January 2009), para 44. 'The Court observes, and the Government did not argue to the contrary, that domestic authorities did not take any action against the applicant's alleged attackers, that they were never subject to any form of investigation and were not even questioned about the alleged attack.'

34. There is potential for such a situation to be improved. First, the MCLA's investigation unit, a multi-disciplined team with medical expertise, could well be involved in the early recording of trauma, particularly if the intention is that there should be a rapid response to complaints or indications of ill-treatment. Secondly, training of both healthcare professionals working in prisons and of the forensic service team should lead to reporting that is consistent with the Istanbul Protocol. As the Istanbul Protocol makes clear, specific care may be needed in questioning techniques where the vulnerability of alleged victims of ill-treatment is an issue in light of their physical or psychological state of health.[60] Thirdly, significant changes in the working practices, enhanced responsibilities in providing informed opinions based upon expertise, and attitudinal change will be required of members of the forensic service in Georgia. If it is deemed necessary (for we heard suggestions that Georgian law criminalises the giving of false testimony), legislative amendment should clarify that 'false testimony' does not apply (as it does not elsewhere in Europe) to the testimony of expert witnesses who are called upon to give informed opinion based upon recognised professional competency as long as such testimony is given in good faith.

35. <u>Adequate participation by the alleged</u> victim in the process of investigation of allegations or indications of ill-treatment proceedings is also a concern. The Criminal Procedure Code appears to be seen by prosecutors as an insurmountable barrier in permitting the confrontation of a perpetrator by an alleged victim as the alleged victim does not qualify as a 'victim' in domestic law unless and until a formal investigation is opened following the initial investigation. Recent reforms to the Criminal Procedural Code apparently do not change this situation which confers a narrow and formal label of 'victim' only at too late a stage of investigatory proceedings to be of practical use. This unduly restricts the ability of the prosecutor to test conflicting accounts, although it appears that in principle prosecutors may re-examine an alleged victim if discrepancies subsequently arise in oral testimony.[61] Domestic law and practice should facilitate rather than hinder investigation. There is an urgent need for reform of procedure to allow an enhanced involvement of the alleged victim in the investigative stages of proceedings.

36. <u>Prompt investigation</u> is closely allied to the requirement of adequacy of the investigation. Witnesses forget or are relocated to other institutions or released; outward signs of trauma injuries fade. Since 2009, Guidelines have apparently provided that prosecutors and investigators must start an investigation as soon

60. Istanbul Protocol, paras 120-160.
61. Cf information received from the Ministry of Internal Affairs, November 2009: 'With regard to a cross-examination, the present Criminal Procedure Code of Georgia does not stipulate the mentioned legal institute. However, the new Criminal Procedure Code, which has been already adopted at the autumn session by the Parliament, prescribes the cross-examination institute in line with the other new novelties of the criminal law.' The examination of witnesses (both direct and by cross- examination) can only thus take place during court proceedings.

as they receive information concerning the possibility of torture or ill-treatment, and that investigations are now to be completed within a reasonable time, a 'reasonable time' being specified as within two months (unless a short prolongation is necessary to bring the investigation to a conclusion). The Guidelines are still confidential. The public interest in making these public outweighs any purported interests of justice or of administrative convenience in retaining confidentiality: at the very least, publication would help ensure accountability for failings. Publication should take place without further delay.

37. There is also an expectation that there should be a sufficient element of public scrutiny of the investigation or its results, to secure accountability in practice as well as in theory. The research did not specifically address this issue in respect of individual cases in light of the sensitivity surrounding these pending cases.

b. sufficient coordination across agencies

38. Since September 2012, a number of new initiatives have been introduced in Georgia. In particular, new monitoring initiatives are apparent, particularly in the MCLA which has established a number of internal monitoring mechanisms. These developments are welcome insofar as they will give ministers and senior officials early notification of indications of ill-treatment and thus allow rapid intervention. More particularly, these mechanisms will be able to transmit indications of possible ill-treatment to the prosecutor for investigation, and also help secure evidence which may be of importance in a subsequent investigation. At the same time, these developments bring with them the needs for additional arrangements for coordination and communication and for support to ensure their continuing effectiveness.

39. First, the General Inspectorate Unit of the MCLA has been significantly reformed. As noted above, the Unit's functions were previously restricted and its powers precluded entry to prisons; the Unit has been extensively restructured and allocated new staffing resources. The Unit's primary focus is upon disciplinary procedures for wrongdoing by staff. Disciplinary proceedings help to combat impunity by providing an additional and important form of redress against ill-treatment. European expectations are that disciplinary culpability should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence. Crucially, this means that they may take place in parallel to criminal proceedings, and if it is established that the actions complained of are criminal in nature, the matter should be referred to the competent prosecutorial authorities. There is strong encouragement for the creation of 'a fully-fledged independent investigation body' for disciplinary matters, with powers to direct that disciplinary proceedings be instigated.[62]

62. 14th General Report, CPT/Inf (2004) 28, paras 37-38.

40. The Unit is charged with the task of carrying out enquiries into complaints and can refer a case once investigations are completed to the Minister for the application of sanctions. However, if there is an indication that a case appears to indicate a criminal offence has occurred, the matter is referred directly to the prosecutor.[63] The Unit appears likely to make an effective contribution to the promptness and effectiveness of any investigation through its proactive role in inspecting (it visits prisons on a daily basis) and its reactive role in handling complaints, including the initial stages of a complaint that may require to be referred to the prosecutor. While these reforms were introduced only a matter of months before the research for the report, there is every indication that this unit has the potential to play an important part in the effective investigation of ill-treatment. Early results from a significant increase in workload seem promising.[64] However, the Unit faces considerable challenges in the immediate aftermath of the events in autumn 2012. The significant increase in complaints suggests it has now gained a not insignificant level of trust, but to sustain that trust in the long term, it is not only necessary that there are adequate resources to allow it to discharge its responsibilities, but also that the results of investigations are tangible, either in terms of the imposition of disciplinary measures upon staff in individual cases, or in respect of the transfer of the case and the results of any preliminary inquiries to the prosecutor for further action.

41. The Unit is itself part of the MCLA and therefore is not independent. This was readily identified in discussions. But the determination of its current leadership to discharge the role allocated to it was evident. The key will be to ensure the Unit retains this sense of mission in the years to come, and this may be largely dependent upon the sense of purpose shown by political leadership. The current political leadership in Georgia is strongly in support of addressing abuses in the prison system, and this may be the ideal time to develop some form of guarantee to help protect the independence and integrity of the system of disciplinary investigation in the future, particularly as its key role in helping secure evidence at the initial stages in an investigation could be of real use to a prosecutor in any case subsequently transferred for assessment of possible criminal wrongdoing.

42. Secondly, the Monitoring Unit of the Prison Service of the Department of Corrections and Legal Assistance is a newly-established unit that has 11 members who serve on a full-time basis. Each has a legal or medical background, and additionally, additional external expertise is available. Its task is essentially preventive, and to this end it carries out daily visits to prisons, reporting directly to the Ministry on any

63. The current head is a former prosecutor and investigator. The Unit now has a staff of some 24, 10 of whom are involved in internal inspection division and 7 in the human rights protection division (with the remaining staff in a finance division)

64. In the 3 month period before the visit, it was reported that some 440 complaints had been received, almost all of which apparently relate to the period before September 2012. Of this number, 88 cases were transmitted to the prosecutor. There have been 10 voluntary resignations, 29 dismissals, 5 reprimands, and 13 instances of other sanctions imposed by way of disciplinary measures.

matters calling for identification. However, it may also refer concerns (either in the form of complaints made to it, or in respect of indications of ill-treatment). It is too early to proffer an assessment of the extent to which the unit is likely to make an effective contribution to the prevention and investigation of ill-treatment. Certainly, its visibility within prisons was reported to have gained the trust of prisoners, and there was an obvious determination that the unit should be effective.

43. Much in future may be dependent upon the extent to which information and concerns can be shared between other bodies, particularly the inspection unit of the MCLA. But the relationship between the monitoring unit and the inspection unit of the MCLA was still to be fully worked out. It was accepted that there was some overlap in functions. The explanation that the two units had distinct focuses – in one case, the treatment of detainees (including conditions of detention) and in the other, the observance of human rights – was not entirely convincing, and the risk remains that in time this 'overlap' is productive of conflict or confusion. Nor was it entirely clear whether the monitoring unit should be more concerned with general issues or policy matters or whether it was expected to focus upon individual cases. Assuming its mandate and the relationship with the general inspectorate can be clarified, the Monitoring Unit certainly has the potential to contribute to the prevention of ill-treatment by acting as an early warning system for the MCLA. However, there is a need already identified by the MCLA to ensure that monitoring unit members are provided with adequate training. This may be a fruitful area for cooperation with bodies such as the Council of Europe.

c. checks and accountability

44. The making of complaints by prisoners calls for attention. It must be remembered that prisoners are in a vulnerable situation should they seek to make a complaint. Steps are urgently needed to ensure that prisoners can readily communicate concerns as to ill-treatment, and without fear of official reprisal through the imposition of sanction except where it can clearly be shown that the complaint has been made in bad faith. Writing implements should be readily available and not made dependent upon specific request.[65] Complaints envelopes should be readily available at multiple points in prisons, and not be dependent upon specific request. The existence of the MCLA 'hotline' (ie, telephone facility) should be published throughout the prison, and be available to prisoners on the basis of confidential communication. The making of a threat or imposition of a sanction for communicating with monitoring bodies should be a specific disciplinary offence.

45. It is also vital that other mechanisms for the identification of possible ill-treatment

65. In one prison, we were told that writing implements were made available upon request of social workers, apparently on the basis that writing implements posed a risk to the safety of prisoners and staff. But so-called 'prison pens' are now readily available.

are protected. Medical staff should be required to raise concerns with management, and not be discouraged through the fear of dismissal for challenging ill-treatment. Judges must be certain as to what steps they should take if confronted by indications of possible ill-treatment. In particular, a system for the protection of 'whistle-blowers' working in the prison service must be introduced. It was put to us that any system of complaints should also protect prison officials against malicious or unfounded allegations made by prison officials, but the creation of a climate within institutions which will in future reduce the likelihood of ill-treatment requires that prisoners and staff (and others) who seek to report concerns that ill-treatment may have been inflicted requires that 'whistleblowing' (by staff) and the reporting of concerns or complaints (by others) is protected unless motivated by bad faith. Such a system must make it mandatory to report credible allegations of ill-treatment, protect those making the allegations when made in good faith, and involve clear lines of reporting. Prosecutors must understand their obligations to investigate indications of ill-treatment even in the absence of an express complaint. Internal disciplinary and monitoring bodies and judges must understand their proper responsibilities if there are other indicia (such as visible injuries or a person's general appearance or demeanour) that ill-treatment might have occurred.

46. The focus of the system in Georgia remains firmly upon the prosecutor. The assertion that the public prosecutor has no discretion but to prosecute whenever the evidence is sufficient to warrant a prosecution ignores the central weakness in domestic arrangements: that the investigative stages during which the prosecutor seeks to determine whether such evidence exists is not accompanied by sufficient rigour, sense of purpose, or accountability. Herein lies the greatest weakness in domestic arrangements; here is where the need for controls and enhanced accountability are at their greatest. During discussions, it was asserted that the decision of a prosecutor to discontinue investigations or proceedings was challengeable in the domestic courts. It was not difficult to conclude that such a remedy is likely to be ineffective in practice, for an alleged victim must show that the prosecutor had failed to take into account relevant and sufficient evidence in the particular case, but the reason for the lack of such evidence is likely to be significant defects in the investigation that are largely attributable to prosecutorial shortcomings in the first place. A request for review of a prosecutor's determination to discontinue proceedings is unlikely to be of practical utility, and the focus upon controls and accountability needs to be at a much earlier stage. Such controls and accountability can be achieved to some extent by the adoption and implementation of prosecutorial guidelines, providing that such guidelines are able to establish norms that provide a basis for monitoring performance and thus enhancing accountability. The 2009 Guidelines purport to lay down a strict timetable for investigations and direct prosecutors to investigate allegations thoroughly. It has already been proposed these guidelines are published without further delay. The Guidelines have no internal mechanism provided for supervising compliance

with the guidelines, particularly with the exhortation not to discontinue an investigation without full examination of the facts. The process is essentially investigative, but still has insufficient safeguards against a merely superficial disposal by a prosecutor who may still too readily conclude that it has not been established that ill-treatment occurred or that it has been impossible to identify the perpetrators concerned. There is thus a need to introduce a system permitting an alleged victim to challenge the exercise of the discretionary authority of a prosecutor in respect of the initial and subsequent investigatory stages in respect of the perceived failure to adhere to such guidelines. This end may be achieved, for example, by means of the introduction of a request for internal review or judicial review of a decision to discontinue proceedings.

d. motivation to root out ill-treatment

47. The importance of delivering a clear message of 'zero tolerance' of ill-treatment is vital. This also includes the principle that the sanctions imposed for ill-treatment are considered as adequate insofar as the mark the seriousness of the ill-treatment involved. Two issues suggest the possible need for legislative reform. First, it was suggested to us that the finality of previous determinations that complaints were ill-founded may prove a difficulty since the criminal procedural code apparently precludes the re-examination of complaints previously considered to be ill-founded. Individuals who have previously had complaints dismissed after investigation and who have been recognised as having 'victim' status will only have the right to legal assistance in cases where their appeal rights (that is, the right to seek to challenge a prosecutorial decision to close the case) have not expired. If this is so, then legislative reform is desirable. Secondly, it was not entirely clear the extent to which investigators and prosecutors in Georgia may proceed upon 'similar fact' evidence (that is, evidence from a number of unconnected individuals concerning one alleged perpetrator but similar in nature in each instance so as to determine that there has been a course of conduct entered into by an individual, each instance corroborating each other). The strong suspicion was – in light of the responses to the question when asked – that this is a concept unknown to prosecutors and investigators.[66] If this is so, this is a weakness in the effective combating of impunity. It is a mistake to treat each complaint as entirely independent from any other complaint, and the fact that a number of unrelated complaints are lodged against the one officer should be seen as of some weight. This, though, in turn presupposes a system in place which allows investigators to log the material elements across a range of complaints to try to ascertain whether any pattern is discernible; it also presupposes that cases that were initially closed on the basis of an absence of evidence could in certain cases be reopened.

66. Cf 14th General Report, CPT/Inf (2004) 28, para 33: 'The investigation must also be conducted in a comprehensive manner. The CPT has come across cases when, in spite of numerous alleged incidents and facts related to possible ill-treatment, the scope of the investigation was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded.'

e. other relevant issues

48. Certain other issues call for brief comment. The recruitment and selection of prison staff calls for urgent attention. There were frequent references in discussions to the turnover of prison officers which seems to be relatively high (with many choosing to leave the service after a comparatively short time in post). Two reasons for this were suggested to us. First, there were suggestions that the appointment criteria for prison officials were not sufficiently adequate to identify those who would make unsatisfactory appointments. Secondly, promotion prospects appear highly restricted. Prison managers are recruited by a process of direct entry, and while there appear to be no specific requirements for appointment, often have a background in policing. While some prison officials may well be appointed to managerial posts, this is very much the exception, and several interlocutors suggested there was a real need to open up management posts to prison officers to ensure that those with experience as officers have a real possibility to seek promotion and thereby obtain further motivation in their choice of career.

49. There is also an urgent need to develop and expand training for prison staff. Georgia possesses an impressively-resourced training centre offering both basic and specialised training courses and which has the potential to help skill those who work in prisons and to help effect appropriate attitudinal change, and there is now evidence of new approaches (such as the identification of specific additional training needs, albeit that this identification appears to be determined by managers rather than through eg regular staff appraisal schemes). The work of a prison officer carries with it an inherent element of stress, and it is highly probable that the situation described above whereby ill-treatment became an established part of official culture reflected the basic sense of lack of control and security in a prison regime subjected to an explosion in prison population. The absolute lack of training for managerial post-holders in the past cannot but have contributed to this situation. It now appears that prison managers are required to undertake only three days' basic training, but even this is in any way sufficient to help equip those charged with the leadership of prisons. There is an urgent need to develop and expand management training. Basic training for prison officers now involves some 18 days of attendance at the penitentiary and probation training centre. There was insufficient opportunity to explore the content of the curriculum, but it did appear that successful completion of training was not a prerequisite for appointment insofar as training followed upon appointment; and while since 2010 there is now a period of probation (allowing any concerns eg as to attitudinal shortcomings to be addressed), we were told that the probationary period is more artificial than real, for there is virtually no instance in which probationers are dismissed. Discussion above also suggests that training should be extended to prison healthcare services in respect of the recording and reporting of indications of possible ill-treatment.[67]

67. See paras 25-26 above.

50. Discussions in this area also highlighted the lack of adequate personal support for prison staff. While a mentoring system appears to have been recently introduced, this is still at a rudimentary level of development. More critically, some interlocutors stressed the need to provide not only prisoners but prison staff with adequate psychological and psychiatric services.

51. Special attention is required in respect of prison healthcare staff. That medical staff have a critical role to play in the prevention and investigation of ill-treatment is clear.[68] Medical staff are likely to become involved at an early stage after the infliction of possible ill-treatment, and in providing medical assistance and in the full and accurate recording of injuries sustained may be of considerable importance in the subsequent investigation of allegations or indications. We were impressed by the obvious determination to address shortcomings already identified and to ensure that healthcare services for prisoners are rapidly improved, and some steps have already been taken.[69] However, the active intervention of medical staff more generally (and without compromising professional confidentiality) is possible. One domestic monitoring body remarked that medical personnel were seen by prisoners as 'part of the system'. Steps are urgently needed to ensure that the autonomy and professionalism of the prison health service are strengthened. Prison doctors and nurses must be seen primarily as medical staff whose first responsibility is to the prisoners as their patients. Doctors in particular require greater autonomy and protection for professional judgment. Steps are required to enhance their professional standing and to align their standing as closely as possible with the mainstream of health-care provision in the community at large. Steps should be taken to ensure that all medical staff possess specialist knowledge enabling them to deal with the particular forms of prison pathology, and consideration should be given to the introduction of a recognised professional speciality, both for doctors and for nurses, on the basis of postgraduate training and regular in-service training. Any attempt by prison staff to interfere with this right of access, or to seek to breach the confidentiality of the consultation, should lead to disciplinary sanctions. Transfers of prisoners for treatment to hospitals (whether within the prison system or not) should be determined by qualified medical personnel, not by bodies responsible for security or administration. The system for the compilation, confidentiality and long-term storage of prison medical files for each

68. Certain instances of the abuse of healthcare services reported, but these issues fall outside the scope of this report. For example, it was reported that delay of medical care could be used by way of punishment; prisoners could be punished for requesting medical services when it was considered unnecessary; and that the use of psychotropic drugs in prisons since Sept 2012 had tripled suggesting the use of drugs to pacify prisoners was likely to have led to degree of dependency upon drugs.
69. In particular, there has been some budgetary increase (but whether this is a meaningful increase in real terms in light of inflation is not clear); new arrangements for the compassionate release of prisoners suffering terminal illnesses have been introduced (and further reforms are envisaged in this area); a new 'midterm strategy' for prison healthcare reform has recently been prepared; and steps are being taken to address the issues identified by the European Court of Human Rights in cases involving prisoners suffering from Hepatitis C.

prisoner requires urgent attention. The recording of traumas must be enhanced: any signs of violence observed should be fully recorded, together with any relevant statements by the prisoner and the doctor's conclusions, and this information should be made available to the prisoner upon request. Medical secrecy should be observed in prisons in the same way as in the community, and the retention of patients' files should be the doctor's responsibility. A system for the secure and confidential retention of health records for a specific period following a prisoner's release should be introduced. Prison health care services should compile periodic statistics concerning injuries observed and forward these to the prison management, relevant Ministers, and internal and external domestic monitoring bodies (in particular, to the investigation, etc units of the MCLA and to the Ombudsman).

52. The place of social workers in the prison service also deserves comment. It was not possible in the time available to examine their potential role, but it was clear that attempts are being made to enhance their responsibilities in helping establish an appropriate atmosphere in prisons. There is real possibility for social workers to have a part – albeit a minor part – in helping act as a conduit for complaints and concerns that may arise.[70]

53. It is a truism that prisons are essentially 'closed' places; but the Georgian prison system appears to have been closed to outside visits to an inappropriately high degree. Thus as noted, even the MCLA's inspection unit was apparently unable to inspect prisons; and even when entry was gained, visiting bodies such as the domestic NPM (the Ombudsman) and at an international level, the CPT were aware of an atmosphere in which contact with prisoners was subject to the fear of intimidation. In the aftermath of the public concern prompted by the screening of the videos and following a change of Government, it seems that prisons are now much more open insofar as outsiders are more able to visit.[71] It is important that this impetus is maintained: intimidation is less likely the greater the opportunity prisoners have of seeing (and being seen) by outsiders. In many European countries, groups of professionals working in the criminal justice system visit prisons as part of higher education or training. In the longer term, there is a need to try to open up prisons to a wider range of outside visitors with a relevant interest in penal policy so as to try to foster genuine awareness of current penal practice.

54. Other forms of opening-up the closed world of prisons are possible. The shortcomings in the prison system of Georgia are all the more striking when compared with the situation in places of detention run by the police. While it cannot be said that ill-treatment has entirely disappeared in the police service, there has been a significant reduction in the numbers of allegations of ill-treatment. A recent inno-

70. Currently, for example, social workers are entrusted with the handling of letters completed by prisoners.
71. As noted also, a number of internal bodies now actively monitor prisons including the inspection unit of the DCLA. We were told that prisons are now regularly visited by ministers.

vation in detention institutions run by the Ministry of Internal Affairs (the MIA) may be worthy of further emulation by the Department of Corrections and Legal Assistance. Temporary detention isolators (ie pre-trial detention centres) run by the MIA are now, it was explained, extensively monitored by officials in the MIA's headquarters who have the opportunity to access CCTV images being transmitted in real time on computers. CCTV cameras may only, of course, merely relocate any ill-treatment to areas within an institution where cameras are not located; but the installation of cameras in key locations in prisons may help further to minimise the risk that officers will use ill-treatment. The practice of the MIA should be spread to all prisons (rather than as it appeared only certain institutions), and officials in the MCLA headquarters should be able to access actual real-time video of the situation in prison wings. Moreover, prisons should retain video recordings made for a sufficient period to allow the internal monitoring unit or the investigator to access relevant recordings when necessary (and this suggests a retention policy of weeks rather than of days).

55. We also sought to examine the extent to which a prisoner could be transferred to another institution where there is an allegation of ill-treatment involving a prison officer or officers in one institution where there is a reasonable risk that the impugned ill-treatment may re-occur.[72] While it appears possible for a prisoner's legal representative to ask for a transfer, apparently no statistical data had been kept of the making or success of such requests. The practicalities of arranging such a transfer are not entirely straightforward (for example, if the prisoner is a minor, there may not be any alternative places in juvenile detention centres; and relocation in any event may involve significant disruption for family members when seeking to visit a prisoner). In a situation where ill-treatment is rife in the prison system, logistical challenges would in any event be severe. However, in particular cases in future where there are well-founded indicators of ill-treatment involving a particular prisoner, it is appropriate that steps can be taken rapidly to protect the individual by relocating him while an investigation takes place. In certain exceptional cases, it may also be appropriate to consider relocating a prisoner temporarily from the control of the MCLA to the MIA by placing him in a temporary detention isolator for a short period of time. Such a transfer out of the control of the MCLA is not currently possible and may appear contrary to principle, but may be justified in exceptional cases.

56. One final point concerns the code of ethics for prison staff. In one prison visited, the code was quickly located on-line; in the other prison, not one of the five manag-

72. A compelling account of the issue was provided by a representative of an international organisation who had met detainees alleging ill-treatment. They had been escorted by one of the officers allegedly involved in the ill-treatment and who warned the detainees of reprisals were they to complain of beatings. The official thereafter had demanded a meeting with the director of the institution and the immediate suspension of the officer responsible, but the official was not aware whether such action had been successful in preventing any reprisals.

ers was aware of the code. There was a strong suggestion gained that the crucial issue for prison officials was not so much whether certain behaviour was ethical as whether it was or was not proscribed by ministerial order (ie, whether the behaviour would constitute a disciplinary offence). This is not entirely satisfactory. If it is simply the case that whatever is permissible other than that which is prohibited, there is little opportunity for the development of the sense of professional standards or of attitudinal change except that which is dependent upon monitoring.

4. THE SYSTEM FOR HANDLING COMPLAINTS OF POSSIBLE ILL-TREATMENT BY POLICE OFFICERS – FOLLOW-UP MEETING

57. The 2009 report into the investigation of ill-treatment in places of detention under the authority of the Ministry of Internal Affairs (‘the MIA’) had included a number of recommendations. These recommendations sought not only to increase the effectiveness of existing procedures, but also to help prevent the risk of ill-treatment arising in the first place. These recommendations can be summarised under four general headings: better procedures for the handling of complaints involving allegations of ill-treatment; developing systems that would produce a more useful evidentiary basis for investigations; improving statistical record-keeping; and attitudinal change to reinforce the ‘zero tolerance’ of ill-treatment.

58. While the main focus of the 2013 visit was to consider the investigation of complaints involving prisoners, it was clear that certain of the recommendations made in the earlier report in respect of police systems are also of relevance to the investigation of complaints against prison officials. These included the following:

    - Publication of Prosecutorial Guidelines to help ensure accountability and to enhance public confidence in the system of handling of complaints.
    - Addressing the lack of involvement of the individual lodging a complaint after initial interview to ensure that at the very least, an individual has the opportunity to comment fully upon the responses of the officers concerned
    - Expecting that prosecutors should not need to be constantly pressed to take action, that investigations do not last for lengthy periods of time, and that any proceedings are initiated under article 144^{1-3} of the Criminal Code where ill-treatment is suspected, (rather than under provisions alleging abuse of authority).
    - Giving serious consideration to the introduction of an independent investigatory agency, or at least to the introduction of an independent agency able to supervise the handling of individual cases by the prosecutor.
    - Ensuring the right to compensation for ill-treatment is a real right, rather than largely theoretical (eg by permitting civil compensation for ill-treatment even where it is impossible to identify the individual police officers involved).
    - Where it appears that ill-treatment may well have occurred, requiring judges as a matter of routine to question persons who have been detained by the police as to their treatment and to order an independent medical examination even in the absence of a formal complaint

59. Other recommendations made in respect of the police also have some corresponding similarity with some of the discussion above. In particular, these recommendations made previously included:
    - Reducing the time taken to obtain a medical examination by forensic services.
    - Ensuring greater coordination between internal monitoring bodies and the prosecutor, and ensuring the referral of a case back from the prosecutor to the MIA for consideration as to whether disciplinary action is appropriate whenever it is properly considered that there is insufficient evidence to bring a prosecution.
    - Improving arrangements for recording and monitoring complaints, and regular publication of the number of complaints and their disposal.

60. The degree of overlap in the two sets of recommendations is not surprising. Discussions in February 2013 also suggested that many of these issues are being considered or are being currently addressed in deliberations.

61. In February 2013, there was also an (admittedly brief) opportunity to discuss with senior officials from the MIA the progress that had been achieved to date in respect of recommendations for which the Ministry itself was primarily responsible. We were also accorded the chance to visit two Temporary Detention Isolators to consider how procedures worked in practice.[73] Some amount of progress is now certainly evident. It was encouraging to note that significant action had been taken in respect of the recommendations to address problems identified in the collation of records, etc that subsequently could be of use as evidence (and thus minimising the risk that a prosecutor would discontinue an investigation on the basis of insufficiency of evidence). More attention was being placed upon accurate recording, according suspects procedural rights from the outset of detention, and proactively reacting to visual signs suggesting possible ill-treatment. In particular, considerable steps had been taken to improve monitoring arrangements, including the installation of video cameras in all isolators (with remote monitoring taking place in MIA headquarters), the strengthening of the General Inspection Unit of the MIA, unified systems of inspection, and ensuring readier access to complaints-raising mechanisms for detainees (including publication of a website address). We were also advised of a more proactive approach to the safeguarding of detainees' health (including the provision of psychological services). Crucially, there now again appears to be better coordination between internal inspection services and the prosecutor's office. All of this is suggests that real progress is being made within the confines of the responsibilities of the Ministry.

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73. The programme of renovation of the infrastructure of temporary detention isolators was obvious in the two facilities visited. The opportunity to hold discussions with detainees was declined, but we discussed procedures with the staff of both institutions.

SUMMARY OF RECOMMENDATIONS: ARRANGEMENTS IN RESPECT OF PRISONS

Complaints from prisoners

1. The making of a threat or imposition of a sanction for communicating with monitoring bodies should be a specific disciplinary offence.

2. Persons lodging complaints of ill-treatment or reporting other indications of ill-treatment should not run the risk of prosecution for doing so unless the complaint or report is patently absurd or made in bad faith. Prisoners must be able to communicate concerns as to ill-treatment without fear of official reprisal; if necessary in exceptional cases, prisoners should be able to request transfer to another institution.

3. Writing implements for sending written complaints should be readily available: sealed complaints envelopes should be readily available at multiple points in prisons, and not be dependent upon specific request, and access to the MCLA 'hotline' (ie, telephone facility) should be available to prisoners on the basis of confidential communication.

4. Prosecutors must understand their obligations to investigate indications of ill-treatment even in the absence of an express complaint, and act upon this.

5. Judges must have clarified - and thus understand - their proper responsibilities to instruct decisive action if there are other indicia (such as visible injuries or a person's general appearance or demeanour) suggesting that ill-treatment might have occurred.

6. In the longer term, groups of professionals working in the criminal justice system should be encouraged to visit prisons as part of their higher education or training so as to try to foster genuine awareness of current penal practice.

7. A comprehensive system for the collation of data on complaints, etc of ill-treatment in prisons is necessary to give early indication of possible abuses and to monitor the subsequent investigation and outcome of complaints or reports.

The system for the investigation of allegations, etc of ill-treatment

8. Serious consideration should be given to the introduction of an independent investigatory agency to investigate all complaints, etc of ill-treatment; or alternatively, at least to the introduction of an independent agency able to supervise the handling of individual cases by the prosecutor.

9. If it is decided that no independent element is required, there must be at the very least a separate investigation unit within the Office of Prosecutor specifically

charged with the handling of cases involving ill-treatment by state officials. This unit must have operational independence, be provided with clear guidance as to the manner in which they are expected to supervise such investigations, be fully supported in resources, and its members encouraged through appropriate incentives to believe that service in such a unit is professionally rewarding.

10. Clear guidelines or directions should be promulgated instructing in unambiguous terms the procedures and timescales for the investigation of complaints or allegations of ill-treatment. These guidelines should be published in order to enhance transparency and to help signal to prison staff the clear determination to root our ill-treatment through the effective investigation and punishment of ill-treatment. If the Prosecutorial Guidelines of 2009 are considered adequate, publication should take place without further delay to help ensure accountability of prosecutors.

11. An alleged victim must be able to challenge the conduct of initial and subsequent investigatory stages in respect of the perceived failure to adhere to Prosecutorial Guidelines, for example by means of the introduction of a request for internal review or judicial review of a decision to discontinue proceedings, if necessary with the right to legal assistance.

12. Investigators and prosecutors must be able to proceed upon 'similar fact' evidence (that is, evidence from a number of unconnected individuals concerning one alleged perpetrator but similar in nature in each instance so as to determine that there has been a course of conduct entered into by an individual, each instance corroborating each other) in cases of ill-treatment.

13. Guarantee to help protect the independence and integrity of the system of disciplinary investigation carried out by the General Inspectorate Unit of the MCLA are necessary.

14. Members of the Monitoring Unit of the Prison Service should be provided with adequate training and support.

15. The working relationships between the Monitoring Unit of the Prison Service and the General Inspection Unit should be clarified.

16. Central access to access actual real-time video of the situation in prison wings should be introduced with retention of video recordings for a sufficient period to allow the internal monitoring unit or the investigator to access relevant recordings when necessary.

Prison staff

17. An atmosphere must be created in which the right thing to do is to report ill-treat-

ment by colleagues; there must be a clear understanding that culpability for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to act to prevent or report it. This implies the existence of a clear reporting line as well as the adoption of whistle-blower protective measures. A system for the protection of 'whistleblowers' working in the prison service must be introduced together with the mandatory reporting of credible allegations of ill-treatment: those making the allegations in good faith must be protected, and clear lines of reporting concerns must be established.

18. Urgent attention is required in respect of the recruitment and selection, training and support of prison staff, particularly in respect of appointment and promotion criteria for prison officials. This training must also focus upon the sense of professional standards or of attitudinal change, for example by stressing the code of ethics for prison staff.

Prison medical staff

19. Steps are required to enhance the professional standing of medical personnel working in the prison system – whether full-time or as visiting medical staff called upon to attend prisons on a regular basis. Medical staff should possess specialist knowledge enabling them to deal with the particular forms of prison pathology, and consideration should be given to the introduction of a recognised professional speciality, both for doctors and for nurses, on the basis of postgraduate training and regular in-service training.

20. Measures to enhance professional independence are also required. In particular, medical staff in prisons must be protected against reprisals for drawing attention to general indications of possible ill-treatment inflicted upon prisoners. A system for the rapid transmission of general concerns noted by medical staff which protects patient confidentiality and the staff themselves from sanctions for 'whistle-blowing' is required.

21. Prisoners must be able to approach the health care service on a confidential basis without prison officers being able to screen requests for access and free from the threat of reprisal for doing so. Any attempt by prison staff to interfere with this right of access, or to seek to breach the confidentiality of the consultation, should lead to disciplinary sanctions. Transfers of prisoners for treatment to hospitals (whether within the prison system or not) should be determined by qualified medical personnel, not by bodies responsible for security or administration.

22. The system for the compilation, confidentiality and long-term storage of prison medical files for each prisoner requires urgent attention. The recording of traumas must be enhanced: any signs of violence observed should be fully recorded, to-

gether with any relevant statements by the prisoner and the doctor's conclusions, and this information should be made available to the prisoner upon request. Medical secrecy should be observed in prisons in the same way as in the community, and the retention of patients' files should be the doctor's responsibility. A system for the secure and confidential retention of health records for a specific period following a prisoner's release should be introduced.

23. Prison health care services should compile periodic statistics concerning injuries observed and forward these to the prison management, relevant Ministers, and internal and external domestic monitoring bodies (in particular, to the investigation, etc units of the MCLA and to the Ombudsman).

Forensic services

24. Urgent training is required along with a requirement that reports involving possible ill-treatment are fully consistent with the Istanbul Protocol. If necessary, legislative amendment should clarify that 'false testimony' does not apply to the testimony of expert witnesses who are called upon to give informed opinion based upon recognised professional competency as long as such testimony is given in good faith.

CONCLUSION

This report has attempted to identify the causes of failures in the system for investigating ill-treatment and also remedial strategies that could assist in future. While implementing these recommendations (and monitoring their success) can appear initially as posing significant challenges to a State, in the case of Georgia the clear progress made in relation to places of detention run by the police should suggest that realisation of European standards is evidently possible with goodwill. The project sought to examine the legal framework and actual operation of regulatory arrangements for investigating complaints of ill-treatment involving police officers. The report has highlighted aspects of legal, administrative and policy that call for attention. Preventing and combating torture and ill-treatment requires effective organisational structures and procedures, and inter-institutional cooperation. The readiness and commitment on the part of Ministers, officials, NGOs, and legal representatives that this should occur suggests that the issues highlighted in the report will be addressed.