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Communication from an NHRI (Public Defender's Office of Georgia) (23/10/2020) in the TSINTSABADZE group of cases v. Georgia (Application No. 35403/06)

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

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Réunion : 1390^e réunion (1-3 décembre 2020) (DH)

Communication d'une INDH (Public Defender's Office of Georgia) (23/10/2020) relative au groupe d'affaires TSINTSABADZE c. Géorgie (requête n° 35403/06) **[anglais uniquement]**

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



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23/10/2020

Committee of Ministers DGI-Directorate
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By mail

Rule 9 (2) submission to the Committee of Ministers of the Council of Europe in respect of the general measures required to adopt in the course of the execution of the *Tsintsabadze group of cases*.

Dear Madam/Sir,

The Public Defender of Georgia would like to submit communication pursuant to Rule 9.2 of the Rules of Committee of Ministers for the supervision of the execution of judgment.

The present communication addresses complications to implement the Court's judgment in ***Tsintsabadze group of cases*** and mainly refers to the Action plan of 12/10/2020 of the Government of Georgia and provides information on inadequacies in the execution of general measures by the Georgian Government and also includes recommendations as regards the further steps needed to ensure the full and effective execution of the Court's judgments.

Please, find enclosed communication of the Public Defender of Georgia to this cover letter.

Annex - Communication of the Public Defender of Georgia in ***Tsintsabadze group of cases*** made under Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the terms of Friendly Settlements; 10 pages.

Yours Faithfully

Nino Lomjaria

Public Defender of Georgia





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Communication of the Public Defender of Georgia

Tsintsabadze group v. Georgia (Application No. 35403/06)

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

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Introduction

1. The Public Defender of Georgia has an honor to submit the communication to the Committee of Ministers on the execution of judgments in the Tsintsabadze group v. Georgia (Application No. 35403/06), pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of Judgments and of the terms of Friendly Settlements.
2. This submission refers, but not limited, to the Action plan (12/10/2020) of the Government of Georgia and provides information on the implementation of general measures by the Government of Georgia in the course of the execution of the present judgements.

Challenges with Combatting torture and ill-treatment

3. The Public Defender welcomes implemented legislative changes in the process of combating torture in recent years. Also, positively notes that combating torture is one of the most important tasks indicated in the national strategy for the protection of human rights as well as in the government's action plans.
4. However, it should be noted that fight against ill-treatment is considerably impeded by the impunity of law enforcement officers for such crimes. The effectiveness of investigation is a systemic problem, as a result of which not a single law enforcement officer has been held responsible in criminal cases instituted based on the Public Defender's 107 proposals submitted to the prosecutor's office in 2012-2019. Out of these, only in two cases a person was given a victim's status. Recognizing a person as a victim is a rare practice and non-uniform,¹ while under the Georgian legislation, only a victim has the right to be informed about the progress of the criminal investigation and to study case-files.
5. In its decision (1362nd meeting, 3-5 December 2019) in *Tsintsabadze group v. Georgia* the Committee invited the authorities to provide information on disciplinary measures taken against the state agents under investigation for, or convicted of having engaged in, acts of torture and other forms of ill-treatment. To further illustrate this problematic issue, as it is noted in the Special Report of the Public Defender of Georgia,² which provides analysis of 38 criminal cases, criminal prosecution was not commenced in any of the cases against any person, no dismissal of the alleged perpetrators from their jobs was carried out under Article 159 of the Criminal Procedure Code of Georgia and no suspension of the office has occurred under Article 55(2)(g) under the Law of Georgia on Public Service.
6. The cases examined by the Public Defender's Office (hereinafter PDO) demonstrate that investigations initiated by investigative authorities are usually protracted without

¹ Annual Parliamentary report of the Public Defender of Georgia – 2019.p.94. Available at: < <https://bit.ly/2H4VvUj> > [accessed 21.10.2020].

² The Special Report of the Public Defender of Georgia on the Effectiveness of Investigation of Criminal Cases of Il-Treatment, 2019, available at: < <https://bit.ly/2W3K4BJ> > [accessed 21.10.2020].

an outcome for years, investigation often starts late and investigative actions are conducted in unreasonably long intervals, correct classification of ill-treatment-related crimes still remains as problematic.³ The Public Defender hopes that the problem of effectively investigating cases of ill-treatment will be overcome through the active efforts of the State Inspector's Service which became operational on 1st November 2019. However, it should be noted that, all cases that were under the examination of the Prosecutors' Office of Georgia before November 1st, 2019, still need special attention for further ensuring proper and effective investigation.

7. In the annual reports, the Public Defender's Office has been continuously pointing out those factors that give rise to risks of ill-treatment by law enforcement officers in Georgia. Unfortunately, systemic recommendations that are issued by the PDO over years and that are crucial in terms of preventing torture and other ill-treatment remain mostly unfulfilled. Notably, citizens in police custody and prisoners in penitentiary institutions are still not provided with sufficient procedural or institutional safeguards against ill-treatment; police officers of territorial agencies are not provided with body cameras with improved specifications; the obligation of police officers to record communication with citizens is still not mandatory by legislation; recommendation about conducting audio and/or video recording of interrogations/questionings in police stations is unfulfilled, existing regulations of documenting injuries found on prisoners and reporting them to independent investigative authorities is deficient, etc.

Situation in penitentiary establishments

8. PDO identified following issues among the trends in penitentiary establishments: scope of the criminal underworld in penitentiary establishments; the practice of placing prisoners in de-escalation rooms and solitary confinement cells for a long time; obstructing prisoners' right to appeal; etc.
9. Personnel related problems still pose obstacles in terms of the fight against ill-treatment such as the lack of penitentiary establishments' personnel, heavy work schedules and lack of adequate qualifications.
10. It should be noted that, under the statute of a penitentiary establishment, whenever a doctor comes across a suspicious injury, he/she is obliged to follow the procedure established by Order no. 131.⁴ Under this order, the ground for documenting an injury is a suspicion that a medical professional might have about alleged torture or other ill-treatment of a prisoner. However, PDO notes that there is a risk that a medical professional will fail to identify fully and comprehensively an incident of alleged ill-treatment as there are no statutory criteria for medical professionals to use in selecting suspicious injuries when documenting them.
11. Inspection of penitentiary establishments revealed problems in the practice of medical professionals employed by the establishments in identifying and documenting incidents of alleged ill-treatment. In semi-open prison facilities, upon finding suspicious injuries on a prisoner's body, doctors do not document them in accordance with the procedure determined by Order no. 131. In closed-type prison facilities, injuries are

³ *Ibid.*

⁴ Order no. 131 of the Minister of Corrections and Probation of Georgia of 26 October 2016 (hereinafter Order no. 131).

documented only in those cases where, at the time of admission into an establishment, an accused person reports ill-treatment by police officers.

12. The Public Defender of Georgia maintains that the faulty practice of identifying and documenting incidents of alleged violence, among other factors,⁵ is preconditioned by the inadequate qualifications of doctors, absence of confidential environment for doctor-prisoner meetings, the obligation to obtain informed consent from a prisoner and other normative shortcomings.
13. Under the current regulation, in particular, according to Article 6.1 of Order no. 131 a doctor still reports a suspicious case of torture or other ill-treatment to the General Inspection of the Ministry of Justice – an agency institutionally linked with the Special Penitentiary Service and not to the independent investigative body - State Inspector's Service, which undermines the effective investigation of alleged incidents of ill-treatment.

i. Informal rule in penitentiary establishments

14. Recently, Public Defender has been particularly concerned about the informal rule existing in penitentiary establishments and its influence on the protection of prisoners' rights. PDO has been pointing out that the informal rule existing in the penitentiary establishments creates serious threats of ill-treatment of prisoners.
15. The informal rule often leads to interprisoner violence and bullying. With the influence of the criminal underworld, prisoners are divided informally. As a result, a certain segment of prisoners that enjoy privileges rules with repressive methods, which often lead to interprisoner violence and are manifested in taking punitive measures against those prisoners that disobey the informal rule.
16. According to some prisoners, there are convicted persons who have close relations with the administration, enjoy certain influence over other prisoners and, if need be, the administration uses them to "sort out problems" with other prisoners (complaints filed during a hunger strike, expression of dissatisfaction in another form or conflict situations, etc.). Members of the criminal underworld move freely within the establishment, control prisoners, collect the so-called kitty,⁶ enter cells and physically assault disobedient prisoners.⁷ Whoever disobeys their orders is marginalized and taken to another block.
17. Moreover, the so-called prison "watchers" control the sums deposited on prisoners' cards through prisoners employed in household services. For this purpose, they have

⁵ For instance, the influence of the informal rule in penitentiary establishments (under the informal rule, a victim of violence cannot reveal a sustained injury, moreover, its reasons and lack of trust of victims of violence in investigative authorities.

⁶ A combination of material items and donations accumulated in the hands of informal leaders and also managed by them.

⁷ It is noteworthy that the case Tsintsabadze v. Georgia (application no. 35403/06) concerns the death of the applicant's son on 30 September 2005 at Khoni prison #9 where he was found hanged in the storeroom. The applicant alleged that her son, who had problems with the prison 'watchers' (influential prisoners, either unlawfully favoured or tacitly tolerated by the prison administration), was killed and that his murder was made to look like a suicide.

- special books with prisoners' name and surname, the time of verification of the card and the amount of the sum deposited on the card at the time.⁸
18. In the establishments visited in the course of the monitoring by PDO,⁹ especially in semi-open prison facilities, the order is mostly maintained by informal leaders. The misleading sense of order existing in the establishments is based on violent methods and is rather fragile in reality. It may subject prisoners' life and security to greatest threats in the long run or even from a short-term perspective.
 19. It is also noteworthy that, over the years, along with the strengthening of the influence of the informal rule, the number of applications lodged from semi-open prison facilities to the Public Defender is reduced.
 20. Public Defender notes that it is important to ensure that the measures aimed at overcoming the criminal underworld are taken with due respect for prisoners' rights and their security; violent measures and reprisals should be excluded.
 21. It is noteworthy that the Public Defender's findings regarding the informal rules in penitentiary establishments are similar to and in line with the findings reflected in the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) report.¹⁰

III-Treatment by Police Officers

22. Unlike the penitentiary system, notable positive changes have been implemented in the system of the Ministry of Internal Affairs, as a result of which doctor personally reports a suspicious case of torture or other ill-treatment to the State Inspector of Georgia.
23. In 2019, the Special Preventive Group of National Preventive Mechanism (mandate of Public Defender of Georgia) identified 449 suspicious cases, where Special Preventive Group had reasonable grounds to suspect that an arrested person was subjected to possible ill-treatment given the circumstances of the arrest, place, number and nature of injuries sustained. Out of the 449 cases examined by the Special Preventive Group 98 cases (21.8%) were not notified to the prosecutor's office/the State Inspector. Among them, there are cases where injuries were inflicted in the facial area and near eye-sockets. For comparison, out of 508 cases examined in 2018, notifications were not sent in 110 cases (21.6%).
24. PDO welcomes the fact that police agencies are equipped with an internal and external CCTV system. It should be underlined that according to the information supplied by the Ministry of Internal Affairs, the CCTV cameras installed in police buildings cover only the entrances and common areas. It is also noteworthy that police agencies have various infrastructure and a citizen or an arrested person might happen to be in any part of the building. However, not all the areas where an arrested person or a citizen might be kept are covered by the surveillance system.

⁸ For details about this issue, see the Report of the National Preventive Mechanism on Monitoring Visits to Penitentiary Establishments nos. 2, 8, 14 and 15; p.16, available at: < <https://bit.ly/2TALjFE> > [accessed 21.10.2020].

⁹ Penitentiary establishments nos. 2, 8, 14 and 15.

¹⁰ The Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 September 2018, (CPT/Inf (2019) 16), < <http://bit.ly/38p44kK> > [accessed 21.10.2020]. .

25. It is also noteworthy that working rooms of a Chief of Police or a Deputy Chief of Police are actively used for interviewing an arrested person or a person being in a police building in a capacity of other status. However, none out of the 30 police divisions visited by the representatives of PDO is equipped with an audio-video surveillance system, which poses a risk for ill-treatment. The Public Defender of Georgia believes that any area in police agencies where an arrested person or a citizen might be kept should be fully covered by a CCTV system, except those cases where this can interfere with a person's right to respect for private life or confidentiality of a meeting with a lawyer or a doctor.¹¹
26. Apart from the above-mentioned, like in the previous years, the practice of using body cameras by police officers remains problematic. Under the legislation in force, there is no statutory obligation to make audio and video recording of patrol officers' communications with citizens and making audio and video recording in such cases depends on a patrolling police officer's discretion. It should be noted that, apart from patrol officers, officers of the Central Criminal Police Department and territorial agencies also have communication with citizens as a part of their official duties. However, they do not have the duty to record their communication with citizens (this falls within the discretion of an officer). Besides, there are no provisions governing the procedure and terms of storing recordings in this latter case either.

Measures regarding the Article 6 violation in the *Mindadze and Nemsistveridze* case

27. The Public Defender's Office welcomes the amendment to Article 191¹ of the Criminal Procedure Code of Georgia that came into force on 1 July 2019. Under the amendment, at any stage of criminal proceedings, a judge applies to a competent investigative authority in case of suspicion concerning torture, inhuman or degrading ill-treatment an accused/convicted person could be subjected to or when an accused/convicted person him/herself states about it before the court.
28. However, according to lawyers specialized in criminal law,¹² there are cases where a judge does not examine incidents of alleged ill-treatment by police officers. Some accused persons interviewed by the Special Preventive Group stated that they had visible multiple injuries (including in the facial area) and a judge had failed to pay attention to this issue.
29. It is noteworthy that according to the information supplied by the Supreme Court of Georgia, in 2019, judges of district (city) courts of Georgia applied to investigative authorities based on Article 191¹ of the Criminal Procedure Code of Georgia in 25 cases (this included the stages of examination of merits as well as the first appearance of an accused person before the court).
30. It should be underscored that unfortunately, the Administrative Offences Code of Georgia has not been amended to the effect of allowing a judge to apply to a competent investigative authority at any stage of administrative proceedings where he/she

¹¹ Annual Parliamentary report of the Public Defender of Georgia – 2019.p.71. Available at: < <https://bit.ly/2H4VvUj> > [accessed 21.10.2020].

¹² According to 45.2% of interviewed lawyers, a judge did not adequately examine the incident of an alleged ill-treatment by police officers. For instance, according to two lawyers from Adjara, even in those cases where alleged use of violence against a person is evident, the court does not refer the case for instituting investigation into ill-treatment.

suspects that a person under administrative responsibility could have been subjected to ill-treatment.

Reform of the Office of the Prosecutor General of Georgia

31. In its recent decision (1383rd meeting, 29 September – 1 October 2020) in the *Merabishvili case* (CM/Del/Dec(2020)1383/H46-6) the Committee strongly encouraged the authorities of Georgia to continue reforms aimed at further enhancing the independence, effectiveness and accountability of the prosecution service, including considering whether further legislative changes are required.
32. The absence of the effective mechanism of accountability and separation of the powers between the Prosecutor General and the Prosecutors' Council are particularly noteworthy.
33. Under Article 65.2 of the Constitution of Georgia, the prosecutor's office shall be led by the Prosecutor General. In parallel, at the constitutional level, there is the Prosecutors' Council which comprises of 15 members.¹³ In accordance with the constitution, the Prosecutors' Council shall be established to ensure the independence, transparency and efficiency of the prosecutor's office.¹⁴ The Organic Law on Prosecutor's Office was adopted on 30 November 2018. The interrelation between the Prosecutor General and the Prosecutors' Council is determined so that the Prosecutor General is the central figure in the Prosecutor's Office of Georgia and his/her authority is balanced by the powers of the Prosecutors' Council.
34. According to the assessment given by the Venice commission, this is an ambitious goal (to ensure the independence, transparency and efficiency of the prosecutor's office) which will be difficult to achieve with the powers granted to the Prosecutorial Council.¹⁵
35. It should be noted that the Prosecutors' Council is not unfortunately involved in the organisation of the structure and system of the prosecutor's office, which implies jurisdiction, or separation of competences among structural units.¹⁶ It neither approves the guidelines stemming from the Criminal Law Policy¹⁷ nor participates in the adoption of the normative acts governing systemic issues of the prosecutor's office.¹⁸ All the issues mentioned above fall within the competence of the Prosecutor General of Georgia.
36. The Prosecutors' Council is responsible for the efficiency of the prosecutor's office. However, its work will not be efficient in those conditions where it has no leverage over the Prosecutor General. After the Prosecutors' Council submits the candidate for the position of the Prosecutor General to the parliament, the council is unable to carry out any supervision over the activities of the Prosecutor General. In reality, the Prosecutor General in terms of assessment of his/her activity does not have any link with the Prosecutors' Council. The deliberation or working groups that are necessary for the

¹³ Eight members are elected among prosecutors, 2 members by the High Council of Justice and 5 by the parliament.

¹⁴ The Constitution of Georgia, Article 65.3.

¹⁵ Opinion of the Venice Commission of 17 December 2018, CDL-AD (2018)029, para. 31.

¹⁶ The Organic Law on Prosecutor's Office, Article 7.

¹⁷ *Ibid.*, Article 15.2

¹⁸ Opinion of the Venice Commission of 17 December 2018, CDL-AD (2018)029, para. 34.

efficient functioning of the prosecutor's office do not fall within the competence of the Prosecutor's Council either.¹⁹

37. In its Opinion the Venice Commission deems it necessary that additional controlling power should be attributed to the Prosecutorial Council, notably on the basis of the report of the Prosecutor General.²⁰
38. The Public Defender shares the opinion expressed by the Venice Commission concerning the goal of ensuring the transparency of the prosecutor's office that there is not a provision that expressly sets out or can be interpreted to allow the fulfilment of the task provided in the new constitution.²¹
39. The presence of 8 prosecutors forming the majority of the council is also faulty. According to the opinion of the Venice Commission, this proportion achieves professional representation and expertise, but does not sufficiently enhance public credibility of independence.
40. The vertical nature of authority within the prosecutor's office and the professional subordination are also noteworthy. Thus, the majority representation of prosecutors in the council undermines the independence of the prosecution service.
41. The Venice Commission also points out the fact that the majority representation of the council by prosecutors is not balanced out by the participation of civil society.²²
42. In the light of the above, in the 2018 and 2019 Parliamentary Reports the Public Defender addressed the parliament to start the reform of the Office of the Prosecutor General of Georgia, to involve the Prosecutorial Council in the process of determination of jurisdiction and separation of competences among structural units; approving guidelines and adopting normative acts stemming from criminal law policy that regulate systemic aspects of the prosecutor's office. Unfortunately, the Parliament of Georgia failed to fulfil the Public Defender's proposal.
43. The necessity of further reforming the Office of the Prosecutor General is important, since they were entrusted with the function of investigating ill treatment cases for several years. Many of cases are still pending and investigation is formally ongoing.

Recommendations of the Public Defender of Georgia to the Government of Georgia:

44. In order to effectively execute Tsintsabadze Group cases, it is important for the Georgian Government to take additional general measures, namely:
 - To the end of overcoming the criminal underworld and its informal rule in penitentiary establishments in line with CPT and Public Defender's recommendations and ensure elaboration of strategy in this regard;
 - Amend Order no. 131 of the Minister of Corrections and Probation of Georgia of 26 October 2016 to the effect of determining the duty of a doctor employed in a penitentiary establishment to report to the independent investigative agency – the State Inspector's Service of Georgia – alleged incidents of ill-treatment;
 - Amend Order no. 131 of the Minister of Corrections and Probation of Georgia of 26 October 2016 to the effect of determining medical professionals' duty to describe, photograph and report injuries to independent investigative authorities, irrespective of

¹⁹ *Idem*.

²⁰ Opinion of the Venice Commission of 17 December 2018, CDL-AD (2018)029, para. 34.

²¹ *Ibid.*, para. 36

²² *Ibid.*, para. 33.

the prisoner's informed consent, whenever he/she suspects that the prisoner could have been subjected to torture or other inhuman treatment;

- Install CCTV systems in police stations so as to cover the areas where an arrested person or a person willing to give a statement has to stay;
- Determine by secondary legislation the duty of patrol officers to record their communication with citizens;
- Ensure in a pilot mode, in several police stations recording with technical means (audio and video recording) of the process of interrogation/questioning of an arrested person or a person with other status
- To amend the Code of Administrative Offences Code of Georgia to the effect of determining that, whenever a judge suspects that a person under administrative responsibility could have been subjected to torture, inhuman or degrading treatment or that person him/herself states about it before the court, a judge applies to the competent investigative authorities.