# PROHIBITION OF TORTURE

## Application of International Standards Guaranteed by Articles 3 and 6 of the European Convention of Human Rights in National Legal Practice

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# Prohibition of Torture:
# Application of International Standards Guaranteed by Articles 3 and 6 of the European Convention of Human Rights in National Legal Practice

The Supreme Court of Georgia

The Human Rights Centre

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## Introduction

In a democratic state huge attention is paid to prohibition of torture, as a solid guarantee of protection of fundamental human rights. Prohibition of torture is provided by numerous international acts, including article 3 of the European Convention of human Rights.

In recent years, among the number of significant legal problems that Georgia is facing, are the challenges, related to examination of the facts of torture and ill-treatment, and identification and punishment those responsible for perpetrating the abovementioned acts. It is true, that systemic violations against human rights in penitentiary institutions have been significantly eradicated over the past years, however, it is noteworthy, that torture and other cruel, inhuman and degrading treatment continue to be a topical issue in the Georgian society. Also, it remains problematic to qualify appropriately certain acts as torture, which is also stressed in the Public Defender's reports[1]. The existence of the abovementioned problem is corroborated by the low number of cases examined under the relevant provisions of the Criminal Code of Georgia[2].

This report is divided into two parts. The first part provides the overview of the prohibition of torture under international law and aims to review the UN and the Council of Europe standards on prohibition of torture, including exact defining and differentiation of other forms of torture and ill-treatment. Moreover, the first part of the research overviews the scope of Article 3 and the importance of the minimal threshold of severity, as well as the positive and negative obligations imposed on the Member States under this article. In addition, the important task of the present report is to exhaustively demonstrate all those actions, which are closely related to torture and ill-treatment on the basis of the European Court's case-law. Consequently, the report provides the analysis of the case law of the European Court of Human Rights related to detention conditions, lack of adequate medical care in detention facilities, threat of torture, extradition and other lesser-known grounds for the breach of Article 3. The research places special focus on the case-law of the European Court of Human Rights and especially the cases filed against Georgia in relation to torture.

The second part of the research focuses on the national courts' practice in cases of torture in view of the international standards. It aims to analyze judgments delivered by the national courts in the cases of torture and other forms of ill-treatment, as well as the application of the international standards in this field. The particular significance is given to the level of the substantiation of judgments. On the other hand, national courts' practice analysis reveals challenges in terms of providing sufficiently reasoned judgments and also indicates several aspects which are of paramount importance when addressing the cases of torture. Most importantly, this research, based on the international standards, aims to provide guidelines through recommendations that would help the judges to resolve the cases of torture.

1 e.g. Report of the Public Defender of Georgia of 2017 on the Status of Protection of Human Rights and Freedoms in Georgia, page 28.mag.

2 During 2017-2018 (as of 8 months) in given regard were considered only 13 cases.

## Methodology

It should be stated from the outset that present research is focused on the criminal regulation of treatment prohibited by Article 3. As you know, the scope of Article 3 of the European Convention on Human Rights is much broader and includes such issues, as healthcare in penitentiary institutions, protection of children and women from violence, obligation of investigation and etc. Consequently, it should be emphasized that the main focus of the research was to examine the national court practice and substantiation of judgments in relation to the norms prohibiting torture and ill-treatment under the Criminal Code. The research focuses on the application of international standards by the national courts.

Therefore, within the framework of present research were examined judgments concerning the ill-treatment delivered by the first instance courts of different regions in regard to ill-treatment in the period of 2017-2018. For the purpose of in-depth review, research materials were gathered through sending official letters to the first instance courts, requesting to provide judgments delivered by them in the period of 2017-2018 on the basis of article 144 1(torture), 1442 (threat of torture) and 1443 (inhuman or degrading treatment). It is important to state that the present research was conducted on the basis of examination of judgments rendered by the first instance courts during the last two years. More specifically, within the framework of this research were analyzed: 7 cases of ill-treatment delivered by Tbilisi City Court Criminal Collegium, 1 case considered by Bolnisi District Court, 2 cases considered by Rustavi City Court and 1 case considered by Poti City Court.

The cases related to torture and other forms of ill-treatment considered by the national courts were analyzed through application of comparative-legal analysis, descriptive and synthesis methods. In the course of the research personal data protection was ensured through striking out of the names and surnames by the courts.

With the purpose of thorough research of the national judicial practice's compliance with the international standards, the research includes analysis of the following topics: level of substantiation of judgments in cases of torture and other forms of ill-treatment; examination of evidence by the courts in adherence with the standard of beyond reasonable doubt; assessment of "minimum level of severity"; application of plea bargain in cases concerning torture and other forms of ill-treatment; substantiation of imposed sentence; the role of the judges in cases of torture and other cruel, inhuman or degrading treatment of punishment.

In the research particular attention was drawn to application of the relevant international documents and the case-law of the European Court of Human Rights at the national level. In the different chapters of the research special importance is attached to the application of the judgments of the European Court of Human Rights in the reasoning of domestic courts. Furthermore, for better illustration of state of affairs the document contains excerpts from relevant judgments and examples of application of European standards in the course of substantiation of judgments are analyzed.

The report includes key findings identified as a result of analysis of national courts' practice. Furthermore, based on internationally acknowledged human rights standards, the research provides appropriate recommendations, in order to support judges to deliver reasoned judgments, including in the cases of torture.

## Key findings:

The study revealed that in the majority of cases torture mostly was connected to the ill-treatment inflicted by an official or person holding equivalent position, knowingly against two or more persons, by a group of persons, against a person detained or otherwise deprived of freedom. In such cases ill-treatment was committed by more than one person and through abusing their official position. Other cases of torture were related to the severe physical pain inflicted by the husband on the wife and/or her alleged lover for suspected adultery;

- In the majority of cases intensity of the acts or inflicted suffering was causing physical pain. The study revealed that the cases concerning psychological or moral anguish were not that numerous;
- Analysis of the court judgments have shown that majority of victims of torture were detainees, who are extremely vulnerable to abuse given that they are entirely in the power of authorities;
- The study findings indicate that key challenge associated with cases of torture is lack of specification of the alternative element of the norm disposition, which is particularly related to the act in question (i.e. whether an act constitutes inhuman or degrading treatment);
- Taking into consideration that present research is the first attempt to analyze the substantiation of the national courts' judgments' in cases of torture, it is hard to prepare comparative analysis and reach conclusions. Nevertheless, it is obvious that judges show strong commitment to apply case-law of the European Court of Human Rights in their rulings; Moreover, Georgian judges reason their legal argumentation by referring to the International and European Standards;
- In general, the judgments reveal constructive interaction between the domestic law and the practice of the European Court. In most cases, national courts cite from the international covenants or the international practice and state that their rulings are based on the national and international acts;
- In view of the research results, as a rule, in majority of cases national courts relevantly use the case-law of the ECtHR, however providing appropriate analysis regarding the interaction of the cited standards and the factual background of the case still remains challenging. It is of particular importance to adopt the judgments on the basis of factual circumstances of the case and systematic methods of analysis.

Part I

## 1. Prohibition of Torture in the International Law

Prohibition of torture and inhuman or degrading treatment or punishment is a fundamental principle of the international law (jus cogens), universally acknowledged by the international community of states as an absolute right from which no derogation is permitted. This general principle of international law is binding for all states, notwithstanding the fact, whether a particular state is a signatory of this instrument.[3]

The prohibition of torture is enshrined in many human rights instruments, namely, Article 5 of the Universal Declaration of Human Rights, adopted in 1948 and Article 3 of the European Convention on Human Rights, adopted in Rome on 4 November of 1950, as well as in many international and regional treaties on human rights. Article 3 of the European Convention on Human Rights states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 3 is one of the shortest provisions of the Convention. However, the size of the article does not affect its depth and significance. Since as the European Court of Human Rights has repeatedly stated, "Article 3 represents one of the most fundamental values of a democratic society." The Rome Statute of the 1998 of the International Criminal Court is also indicating the importance of given provision as its states that "torture, when committed as part of a widespread or systematic attack directed against any civilian population, is a crime against humanity."[4]

The vast majority of States have ratified treaties that contain provisions relating to prohibition of torture and other forms of ill-treatment. Numerous international acts were elaborated for the purpose of combating torture. These are:

- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984, Convention Against Torture);
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987);
- Inter-American Convention to Prevent and Punish Torture (1985).

Consequently, international standards are established to ensure protection against torture and no state can use as defence the constitution or national laws to justify the breach of the international law.

### 1.1Definition of Torture

Torture, as a legal term, has a distinct legal meaning. It should be emphasized that the legal definition of torture is different from the understanding of the term as used in media or public conversations, where the main focus is on the intensity of inflicted pain. Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Georgia on September 22 of 1994) provides internationally recognized legal definition of torture:

3 C. Fouley, Combatting torture, UK, page 32.

4 The Rome Statute of the 1998 of the International Criminal Court, article 7, paragraph 1, sub-paragraph "f".

''… the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[5]

Accordingly, three cumulative elements of definition of torture can be identified:

- Inflicting of severe pain or suffering
- Direct or indirect involvement of a public official
- Specific purpose

It is also important to note that many international mechanisms of prevention of torture emphasize importance of gender-sensitive interpretation of torture and indicate the need of paying of particular attention to questions such as cases of raping of convicted women, violence against pregnant women and breaching of reproductive rights[6]. Under the phrase "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" are also implied acts, committed by private individuals against women, children and specific groups of people, if such acts have caused severe pain or suffering and the state failed to take appropriate actions to protect them.[7]

## 1.2.Imperative Norm

Some of the human rights may be restricted in case of specific circumstances (for example, for the protection of public order), if the restriction is prescribed by the law, pursues one or more of the legitimate aims set out in international law an is ''necessary in a democratic society" to achieve the aim or aims concerned. These circumstances are specifically defined in exhaustive manner in whole range of Human Rights Covenants or Conventions. However, as the European Court of Human Rights (hereinafter referred to as the European Court, or Strasbourg Court) held in the case of Tyrer v. the United Kingdom[8]

> "Prohibition contained in Article 3 (art. 3) of the Convention is absolute: no provision is made for exceptions, and Article 15 (2) provides for no derogations as well".

Consequently, it can be stated unequivocally, that torture is absolutely prohibited, and can in no case be justified. In its judgment in the case of Selmouni v. France [GC][9], the Court reasoned:

"Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the

5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, Art. 1.
6 Preventing Torture: An Operational Guide for National Human Rights Institutions, May 2010, p. 12.
7 Preventing Torture: An Operational Guide for National Human Rights Institutions, May 2010; p. 13.
8 Tyrer v. the United Kingdom, April 25 of 1978, Series A, #26.
9 Selmouni v. France [GC], July 28 of 1999, #25803/94, ECHR 1999-V.

Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation".[10]

Relevant international agreements unanimously exclude the possibility of exemption from norms restricting torture and inhuman treatment. As noted above, the customary international law, which concerns all states, including those states, which have not ratified human rights treaties, consider the prohibition of torture as an imperative norm - jus cogens. This means that there is no exception allowed from the prohibition in any circumstances, including state of war or state of emergency, the threat of war or internal political destabilization.[11] The necessity of defense or other circumstances cannot be taken into account in cases of torture, regardless of whatever dire consequences might occur potentially in potential future.[12]

Thus, prohibition of torture is an imperative norm of International Law. Important international treaties emphasize that the right of a person not to be subjected to torture or cruel, inhuman or degrading treatment or punishment is an absolute right.[13]

## 1.3. The Scope of Application of Article 3 of the European Convention on Human Rights and the Standard of Proof

This chapter shall examine the scope of application of Article 3 of the Convention, in particular, what criteria does the European Court of Human Rights follow, when examining whether the impugned treatment falls within the scope of Article 3. In addition, in the second subsection will be provided brief overview of the standard of proof in cases of torture, submitted for consideration to the European Court of Human Rights.

### 1.3.1. The Scope of Application of Article 3 and the Minimum Threshold of Severity

It would be wrong to claim, that implementation of Article 3 of the European Convention on Human Rights and Freedoms (hereinafter European Convention) is based only on the need to eliminate torture. Undoubtedly, cases of torture cases represent the most grave and cruel forms of breaches of Article 3, but protection guaranteed under Article 3 is aimed against abasement of human dignity and infringements of physical inviolability. It should be noted, that not all forms of ill-treatment fall within the scope of Article 3 of the Convention. In the well-known case Ireland v. the United Kingdom[14] the Court noted, that ill-treatment must attain a minimum level of severity, if it is to fall within the scope of Article 3. However, it has also been recognized that, it may be difficult to establish a dividing line between on the one hand, ill-treatment and, on the other hand, the violation of Article 3 of the Convention[15]. In the case of Selcuk and Asker v. Turkey [16] the Court found that the assessment of this minimum level of severity is relative: it depends on all circumstances of the case, more specifically, the severity or intensity of inflicted suffering, which can be assessed on the basis of following factors:

10 Ibid, $ 95.
11 Ireland v. the United Kingdom, January 18 of 1978, Series A #25.
12 Preventing Torture: An Operational Guide for National Human Rights Institutions, May 2010, p. 16.
13 The UN Committee against Torture, general comment №2, $ 5.
14 See footnote #9.
15 McCallum v. the United Kingdom, August 30 of 1990, $$ 27, 33; Series A - #183.
16 Selcuk and Asker v. Turkey, April 21 of 1998, § 76, report 1998-II.

- duration of the treatment
- its physical and/or mental effects
- the sex, age and state of health of the victim

Elements of the above referred criteria, which are connected to the individuals, especially to their sex, are used for evaluation of intensity of specific actions, and are not applied in general manner, as the actions that on the ground of objective characteristics, inflict to the person pain of sufficient severity, will be considered as torture, regardless of the fact, whether a person is female or male, or of weak or strong constitution. The Court provided this explanation in the case of Selmouni v. France [GC], where it observed, that "besides the violent nature of the above acts, … they would be heinous and humiliating for anyone, irrespective of their condition.[17]

The Strasbourg system also recognized that what is considered to be unacceptable ill-treatment can also vary in different places. In one of the cases the Court observed:

"It is clear from the testimony of individual witnesses, that certain ill-treatment, committed by the police as well as the military authorities towards a detainee is tolerated by most prisoners, and sometimes is perceived as a normal occurrence. This emphasizes the fact that certain threshold, below which prisoners and the public can accept physical violence, and consider it as not cruel or beyond the acceptable limit, may differ in different societies, or even in different parts of society".[18]

It is noteworthy, that different societies and individuals within the society may have different opinion about the notion of ill-treatment. Specific treatment, for example, targeted against women and children on the ground of religious and cultural dogmas may be considered by some groups as more cruel, than the same treatment inflicted on other groups. The degree of psychological consequences, caused to an individual as a result of such ill-treatment, always depends on the culture of a person.

### 1.3.2. The Standard of Proof in Cases of Torture, Submitted to the European Court of Human Rights

The European Court of Human Rights establishes the standard of "beyond the reasonable doubt" in relation to evidence submitted with regard to breach of Article 3. Such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation[19]. In the event of failure of the government to advance any convincing explanations, the court may come to conclusions, which shall not be in favor of defendant government.[20]

17 Selmouni v. France [GC], July 28 of 1999, #25803/94, $103, ECHR 1999-V.

18 Denmark, Norvey, Sweden, Netherlands v. Greece (The Greek Case), #3321/67, #3322/67, #3323/67, #3344/67, page 501, 1969.

19 Salman v. Turkey [GC], №21986/93, § 100, ECHR-2000-VII).

20 Orhan v. Turkey, №25656/94, § 274, June 18 of 2002.

There are aspects of the burden of proof, that the national authorities should adhere to during investigation to ensure that their actions are in line with the requirements of Article 3. For example, as noted above, the Court has explained in a number of cases that

"When a person is taken into police custody completely healthy, but he/she has injuries upon release, the burden of proof lies on the authorities, and they are obligated to provide convincing explanation regarding the origin of injuries. In case of failure to do so, the issue of violation of Article 3 of the Convention shall be raised."[21]

Where allegations are made under Article 3 of the Convention, however, the Court must apply a particularly thorough scrutiny.[22] Although, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them.

## 2. Differences between Actions Prohibited by Article 3

In the process of considering Article 3, it is necessary, first of all, to evaluate correlation between torture and other forms of ill-treatment, which are prohibited by this article, and clearly determine their boundaries.

### 2.1. Torture

The Greek Case and Ireland v. the United Kingdom are the two leading cases wherein the European Commission and the Court developed distinct definitions for the three prohibited acts. The first case is heralded as a landmark judgment and involved the conduct of Greek Security forces following the military coup in 1967. In the present case the European Commission held that the defining characteristic of torture was not necessarily the nature and severity of the act committed but rather the purpose for which the act was perpetrated:

"... all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. Torture… has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment".[23]

The European Court reiterated this definition in several further cases and the "purposive element" became a particularly important element of torture. However, in one of the most important inter-state cases, mentioned above - Ireland v. the United Kingdom- the European Court held that an action can be qualified as torture on the basis of "intensity and severity of suffering"[24]. This case concerned the treatment of persons suspected in membership of the "Irish Republican Army" by UK troops. The case was brought by the irish Government against the United Kingdom, alleging that the methods of interrogation using the ''five techniques" constituted a breach of Article 3. These methods, known as "five techniques", were:

- wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high

21 Tomasi v. France, August 27 of 1992, §§108-111, series A, №241-A.
22 Matko v. Slovenia, № 43393/98, § 100, November 2 of 2006.
23 Denmark, Norvey, Sweden, Netherlands v. Greece (The Greek Case), N3321/67, N3322/67, N3323/67, N3344/67, p. 186, 1969.
24 Ireland v. the United Kingdom, January 18 of 1978, #5310/71, §167; Series A, #25.

above the head against the wall for several hours"…;

- hooding: putting a black or navy coloured bag over the detainees' heads and keeping it there all the time except during interrogation;
- subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

The Court held, that since five techniques were applied in combination, with premeditation and for hours at a stretch, they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3). The techniques were also degrading since they were such as to arouse in their victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.

Consequently, this ruling created a precedent for drawing a distinction between torture, inhuman and degrading treatment or punishment, based primarily upon a progression of severity rather than purpose.

The Court deemed it necessary to make distinction between "torture" and "inhuman or degrading treatment", as the notion of torture is associated with "special stigma"[25]. Accordingly, for the purpose of differentiation between these notions, the Strasbourg Court based its reasoning not on the purpose of the actions, but on the degree of their intensity and severity and established that in order to qualify specific actions as torture such actions should have caused "strong and severe suffering"[26]. Accordingly, the distinction between these abuses is largely based upon a threshold of severity. In the course of determining the abovementioned degrees of intensity the court relied on the factors, necessary for assessment of minimum thresholds, referred to in the previous chapter, such as duration of the treatment, its physical and/or mental effects, the sex, age and state of health of the victim, and manner and method of its execution.

Moreover, the Strasbourg Court found that since the Convention distinguishes between "torture" and "inhuman or degrading treatment", consequently, it aimed to underline, that the first of these terms is of special category, which implied only such intentional inhuman treatment, which causes a very serious and intense suffering. It is noteworthy, that this logic is the foundation of the first article of Resolution 3452 (XXX) adopted by the United Nations General Assembly on December 9 of 1975, which declares:

"Torture constitutes am aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".[27]

However, it should be noted that 21 years later after adopting the judgment in the high-profile inter-state

25 Ibid.
26 Long D, Guide to Jurisprudence on Torture and Ill-treatment, Geneva, 2002, p. 14.
27 UN Resolution 3452(XXX): Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975; Art. 1.2.

case - Ireland v. The United Kingdom, the European Court of Human Rights offered an important and substantially different interpretation in another landmark case - Selmouni v. France [GC], which was related to ill-treatment of a detainee by police officers, both in physical and sexual terms. The Strasbourg Court emphasized that:

"The Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[28]

The Court has stated that the distinction between torture and other types of ill-treatment is to be made on the basis of "a difference in the intensity of the suffering inflicted". The degree of severity or intensity of the suffering inflicted can be gauged by reference to the factors mentioned above: duration, physical and mental effects, the sex, age and state of health of the victim, the manner and method of its execution.[29]

## 2.2. Inhuman and Degrading Treatment

For the purposes of this document, this chapter will jointly discuss the differences between torture and inhuman and degrading treatment. More specifically, the European Court of Human Rights provides its reasoning in regard to the difference between those kinds of ill-treatment in its judgment on the case Pretty v. the United Kingdom, where it states, that:

"Treatment is considered as inhuman treatment, when it is committed intentionally, exceeds the minimum level of severity, and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading".[30]

In terms of difference between these two notions it can be concluded, that the definition of inhuman treatment is very similar to the notion of "torture", and is characterized by many aspects of torture, but in lighter form, while according to the case law of the European Court degrading treatment has always been considered as related to "serious insult". The most comprehensive definition of this notion is provided in the judgment of the European Court on the case East African Asians v. the United Kingdom, according to which:[31]

"The general purpose of this concept is to prevent interferences in human dignity, which are of a particularly serious character, and are prohibited by Article 3. It follows, that an action that debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, can only be regarded as degrading treatment after it reaches specific level of severity".[32]

The European Court provides comprehensive explanations in regard to given issue in its judgment on the case Kudla v. Poland [GC][33], according to which:

28 Selmouni v. France [GC], July 28 of 1999, #25803/94, $ 101, ECHR 1999-V.
29 The prohibition of torture – A guide to the implementation of Article 3 of the European Convention on Human Rights, Aisling Reidy, Human rights handbooks, No.6, pg.12, © Council of Europe, 2002.
30 Pretty v. the United Kingdom, #2346/02, § 52, ECHR 2002-III.
31 East African Asians v. the United Kingdom, #4403/70, December 14 of 1973.
32 ibid, $189.
33 Kudla v. Poland [GC], #30210/96, October 26 of 2000, ECHR 2000-XI.

"Although … the treatment should be capable of humiliating and debasing a person, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment".[34]

As to the intention, in case of inhuman treatment we find in many definitions such terms, as "intentionally", "knowingly", "deliberately" and etc., which is logical, since it is difficult to imagine committing actions prohibited by Article 3, without any obvious interest. However, in the notion of degrading treatment the aspect of purpose is not clearly stated, and this leaves unanswered the following issue - does there need to be intention to humiliate or debase a person for the finding of violation of article 3 of the Convention?[35]

The issues of a lack of intent was considered in Peers v. Greece[36], which concerned an allegation of a violation of Article 3 due to the inappropriate and poor conditions of detention for the applicant. The applicant was a convicted drug user, who was kept in a psychiatric hospital within a prison for a period of time and then transferred to the prison's segregation unit. It was alleged that the conditions of detention were poor and unsuitable for a person in need of psychiatric care. In its decision the Court, noting there was no evidence of any ''positive intention of humiliating or debasing the applicant", nevertheless upheld that this could not rule out the possibility of the finding of a violation. Accordingly, the Court considered that the authorities' omission to improve unacceptable conditions denoted ''a lack of respect for the applicant" and there had been a violation of Article 3[37].

Consequently, it can be unequivocally stated, that absence of direct intent in assessing the fact of violation of Article 3 is of particular importance, although it is not a decisive factor upon which the judgment is based.

### 2.2.1. Discrimination as Degrading Treatment

Within the meaning of Article 3 of the Convention, the discriminatory treatment as such can in principle amount to degrading treatment, where it attains a level of severity such as to constitute an affront to human dignity. The first time the European Court was called upon to review this issue was in the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom[38], where the Commission held that ''policies of a purely racist nature" constituted ''racial discrimination". Against the background of factual circumstances of the case, the Court did not agree with the Commission; However, the Strasbourg Court has acknowledged the principle, according to which such discrimination could be considered as degrading treatment. This approach was confirmed by the Court in other cases.

The Strasbourg Court also considered this issue in the case Identoba and Others v. Georgia[39], where the applicants argued, that on 17 May 2012, during a peaceful march to celebrate International Day against Homophobia, the domestic authorities had failed to protect them from homophobic violence and to launch effective investigation, which included establishing of discriminatory intent of the attackers.

In this connection the Court reiterated, that discrimination as such can amount to degrading treatment within the meaning of Article 3 of the Convention, if such treatment reaches required level of severity. Discriminatory remarks and insults must in any event be considered as an aggravating factor when con-

34 ibid, §92.
35 Long D, Guide to Jurisprudence on Torture and Ill-treatment, Geneva, 2002, p. 18.
36 Peers v. Greece, #28524/95, ECHR 2001-II.
37 ibid, $74.
38 Abdulaziz, Cabales and Balkandali v. the United Kingdom, May 28 of 1985, Series A, №94.
39 Identoba and Others v. Georgia, №73235/12, May 12 of 2015.

sidering the alleged fact of physical violence under Article 3 of the Convention.[40] When investigating violent incidents, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives, which the Court concedes is a difficult task. The respondent State's obligation to investigate possible discriminatory overtones for a violent act is an obligation to use best endeavors, and it is not absolute obligation. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence, induced by a racism, religious intolerance or gender-based discrimination.[41] The Strasbourg Court stated, that:

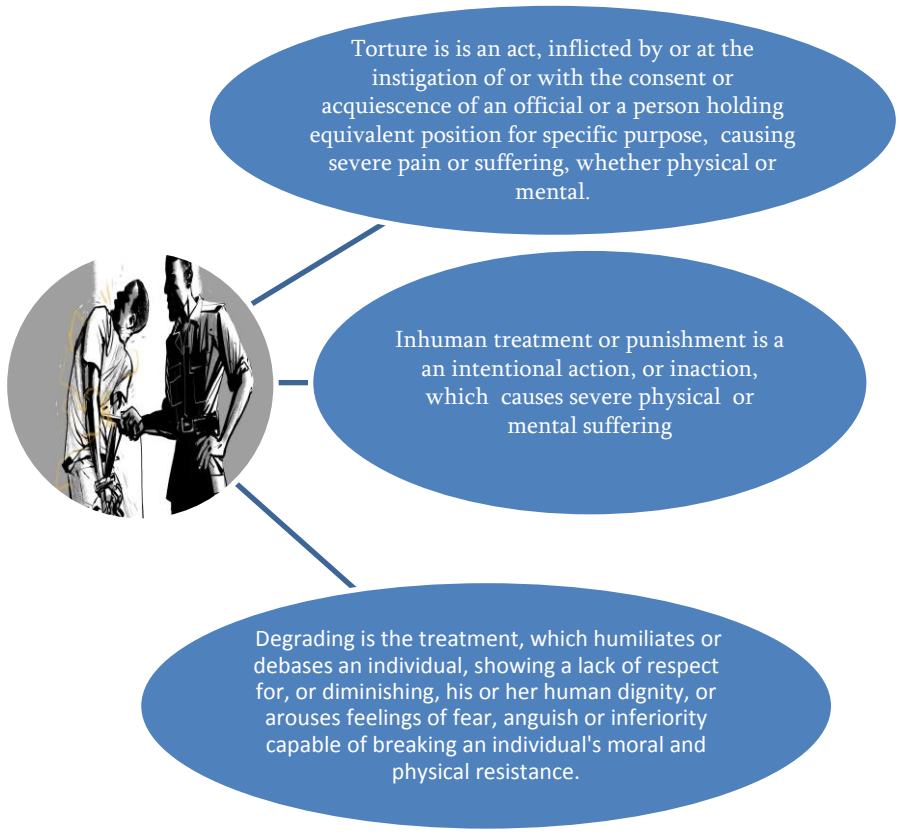
"Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention".[42]

Taking into account all the evidence, the Court found violation of Article 3 in conjunction with Article 14 of the Convention. The applicants were surrounded by an angry mob that outnumbered them and was uttering death threats and randomly resorting to physical assaults, demonstrating the reality of the threats, and that a clearly distinguishable homophobic bias played the role of an aggravating factor, this in itself was sufficient to excite intense fear and anxiety. The aim of that verbal – and sporadically physical – abuse was evidently to frighten the applicants so that they would desist from their public expression of support for the LGBT community.

40 Moldovan and Others v. Romania (no. 2), nos. 41138/98 and N64320/01, §111, July 5 of 2005.
41 Nachova and Others v. Bulgaria [GC], nos.43577/98 and 43579/98, §160, ECHR 2005-VII.
42 Identoba and Others v. Georgia, №73235/12, §67, May 12 of 2015.

## 2.3. Conclusions

In the light of the foregoing, as a conclusion the definition of treatments prohibited by article 3 may be summarized as following:




## 3. Negative and Positive Obligations Imposed by Article 3 of the Convention

Article 3 of the Convention imposes on Member States positive as well as negative obligations. Each of them will be discussed below.

### 3.1. Negative Obligations

**Negative obligations**

The negative obligation imposes on the states the duty of refraining from actions prohibited by this article. The state shall be responsible for all actions of law-enforcement authorities, shall it be police, security forces or officials working in these bodies. They shall be held liable, notwithstanding the fact, whether they were acting upon orders, or their own will. States cannot avoid liability for actions contrary to the requirements of Article 3 by claiming, that they were not aware of such actions.

As stated in Chapter 3, on the case Ireland v. the United Kingdom the Strasbourg Court found violation of Article 3 due to the use of so called "five techniques" in the course of interrogation, and observed the following:

"… It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected".[43]

In spite of the obligations imposed by Article 3, the issue of liability of the state may not arise when individual acts of lack of discipline occur. However, in this case too, the State must take appropriate measures to prevent such actions. The State shall take decisive steps to punish the offenders and shall carry out relevant measures for the purpose of preventing committing of such actions.[44]

## 3.2. Positive Obligations

Positive Obligations

Positive obligations, stipulated by Article 3 of the Convention can be divided into two categories:

- The State should undertake measures to ensure protection of persons not only from the ill-treatment inflicted by the state authorities, but by private individuals as well;
- The State has procedural obligation to investigate alleged incidents of ill-treatment.

### 3.2.1. Protection of Persons from Ill-treatment

Article 1 of the Convention in conjunction with Article 3 imposes positive obligation on the states, requiring that the authorities conduct an effective official investigation into the alleged ill-treatment, even if such treatment has been inflicted by private individuals. This obligation should include effective protection of, inter alia, an identified individual or individuals from the criminal acts of a third party, as well as reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known[45].

In the case A v. United Kingdom[46] the Strasbourg Court observed the following:

"Article 3, in conjunction with Article 1 of the Convention, obliges the State to take measures to ensure that private persons within its jurisdiction do not become victims of torture, inhuman or degrading treatment, including such acts, committed by private individuals".[47]

In the present case, the child was severely beaten by the stepfather, who was subsequently brought to justice for the assault; However, the law of the United Kingdom allowed the parent to justify such conduct on the grounds of the argument of "parental disciplinary punishment". The child and his father challenged this legislation before the European Court of Human Rights, pointing out, that there is deficiency in the legal system, which protects individuals from punishment in cases of committing of prohibited actions. The Court upheld the victim's opinion, and noted that States are required to carry out specific measures in order to prevent individual persons from being subjected to ill-treatment or punishment within their jurisdiction. The Court observed: "Children and other vulnerable persons are entitled to have ac-

43 Ireland v. the United Kingdom, January 18 of 1978, $ 159, Series A, #25.
44 The European Court of Human Rights and your Fundamental Rights, "Article 42 of the Constitution", Chapter 3 – Prohibition of Torture (Article 3 of the Convention), 2005.
45 T.M. and C.M. v. the Republic of Moldova), №26608/11, § 38, January 28 of 2014.
46 A v. United Kingdom, January 23 of 1998, § 22, report 1998-VI.
47 Ibid, § 2.

cess to effective protection and the state is obligated to offer such protection in deterring manner, in order to ensure serious guarantees of inviolability".[48] Moreover, the Court has repeatedly emphasized, that the state is responsible for any person in custody, since the latter is in the hands of public officials and is in vulnerable position, and the obligation of the state is to protect such person"[49].

Furthermore, the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals. If the private school shall apply a form of punishment, which shall reach the level of severity specified by article 3, the responsibility of the state shall arise, as the state is automatically responsible to secure the right to education.[50] In its judgment on the case Costello-Roberts v. United Kingdom[51] the Court found, that the high contracting parties have the positive obligation to set up such legal system, which shall ensure adequate protection of physical and psychological development of children.

### 3.2.2. Investigation of Cases of Alleged Ill-treatment

In the case Assenov and Others v. Bulgaria[52] the Court held the following:

" …in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation."[53]

Article 3 of the Convention obliges the authorities to effectively investigate the facts of alleged physical violence, even if physical violence is carried out by private individuals.[54] For the investigation to be regarded as "effective", it should be capable of leading to the identification and punishment of those responsible.[55] This is not an obligation of result, but one of means. In this connection, the Court has often assessed whether the authorities reacted promptly to the incidents reported at the relevant time.

#### 3.2.2.1. Judgments against Georgia Adopted by the European Court in regard to Investigation of Cases of Alleged Ill-Treatment

The violation of the procedural aspect of Article 3 of the Convention was topical in many complaints filed against Georgia. This group of six judgments concernes the lack of effective investigations into allegations of violation of ill-treatment. The first judgment on this group of cases where the Court found a violation of Article 3 on account of inadequate investigation carried out in terms of excessive use of force by the police in the course of the applicant's arrest was the case of Gharibashvili v. Georgia[56]. In these cases of Gharibashvili group the Court concluded that the official investigations conducted at the material time lacked the requisite independence and impartiality due to institutional connection and even hierarchical subordination, between those implicated and the investigators in charge of the cases. Below some of the cases are discussed in more detail.

48 Ibid.
49 Berktay v. Turkey, №22493/93, § 167, March 1 of 2001.
50 Costello-Roberts v. United Kingdom, March 25 of 1993, § 27, Series A, №247-C.
51 Costello-Roberts v. United Kingdom, March 25 of 1993, Series A, №247-C.
52 Assenov and Others v. Bulgaria, October 28 of 1998, report 1998-VIII.
53 ibid., §102.
54 M.C. v. Bulgaria, №39272/98, ECHR 2003-XII.
55 Stoica v. Romania, №42722/02, §67, March 4 of 2008.
56 Gharibashvili v. Georgia, №11830/03, July 29 of 2008.

In the case Danelia v. Georgia[57] the applicant complained, that he had been tortured while in police custody. However, the authorities concerned did not permit conducting of independent forensic examination for the purpose of establishing the truth, which ultimately prevented proper investigation of the fact of torture.

The Strasbourg Court once again reiterated, that when an applicant claims, that the police officers or other state authorities committed actions, contrary to Article 3 of the Convention, then given provision, in conjunction with Article 1 of the Convention, obligates Member States to ensure protection of the rights and freedoms set forth in Chapter I of the Convention for all persons under its jurisdiction, which requires conducting of effective investigation of such incidents. According to the Court:

"The investigation should be capable of leading to the identification and punishment of those responsible. 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".[58]

In conclusion, in view of the absence of any investigative act, the Court concluded that there hab been a violation of Article 3 of the Convention under its procedural limb.

The Strasbourg Court found violation of the positive obligations imposed by Article 3 in regard to another complaint filed against Georgia. In particular, in the judgment on the case of Aliev v. Georgia[59] the Strasbourg Court found, that the competent authorities, who were fully informed about the use of force against the applicant in the cell No. 88 on October 3 of 2002, should have conducted investigation before the applicant filed his complaint. The Court did not uphold the Government's argument that the applicant had to file a complaint for launching of investigation. The Court noted that:

"Thus, the authorities have an obligation to take action as soon as an official complaint has been lodged. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness and reasonable expedition is implicit in this context."[60]

Thus, the Strasbourg Court found violation of Article 3 of the Convention and held, that the national authorities had not investigated the issue of proportionality of the use of force against the applicant.

In its judgment on the case Dvalishvili v. Georgia[61] the Court found a substantive violation of Article 3 of the European Convention and established that the police subjected the applicant to ill-treatment for the purpose of obtaining of confession. In given case the applicant was also complaining the violation of procedural aspect of Article 3. Despite the fact, that the relevant authorities did carry out an inquiry into the applicant's allegations of ill-treatment and that a number of relevant investigative measures were indeed promptly taken, such as the questioning of various witnesses. The Court was not convinced, however, that the inquiry was sufficiently thorough and effective. The Court also noted the somewhat inconsistent approach to the assessment of evidence by the domestic authorities in the present case. The Court found it inconceivable that the domestic authorities, rather than verifying the applicant's allegations of ill-treatment, relied on the very same confession, which, as he claimed, had been extracted from him under physical duress. Also, the prosecution and judicial authorities accepted the credibility of the police of-

57 Danelia v. Georgia, №68622/01, October 17 of 2006.
58 Ibid, §44.
59 Aliev v. Georgia, №522/04, ECHR 2009.
60 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia, №№71156/01, § 97, May 3 of 2007.
61 Dvalishvili v. Georgia, № 19634/07, December 18 of 2012.

ficers' testimonies without giving any convincing reasons for doing so, despite the fact that those officers' statements might have been subjective and aimed at evading criminal liability for the purported ill-treatment of the applicant. The credibility of the police officers' statements should also have been questioned. Having regard to its findings under Article 3, the Court found violation of procedural aspect of Article 3.

The judgment on the case of Mikiashvili v. Georgia concerned the positive obligation of conducting of effective investigation[62]. The Court observed, that a number of crucial steps were delayed which made it difficult, if at all possible, for the prosecution authorities to thoroughly investigate the alleged incident. The most serious omission of the investigation in that regard was the delayed medical examination of the applicant. Furthermore, the Court noted, that the criminal proceedings into the alleged abuse of authority by police officers during the applicant's arrest were instituted with a delay of almost two months. This is inconsistent with the obligation to carry out a prompt investigation, as there is a risk that evidence of ill-treatment disappears as time goes by and injuries heal.[63]

On February 21 of 2019 the European Court of Human Rights reached decision on the case Gablishvili v. Georgia[64], which concerned the alleged ill-treatment of prisoners and the national authorities' failure to conduct an effective investigation in that regard. According to the facts of the case, on March 30 of 2009 the applicants were arrested when they were attempting to flee from the penitentiary facility. They were attacked by prison officers who severely beat them with wooden sticks and iron pipes. After the arrest the applicants were placed in a punishment cell, where their beating continued. During interrogation the applicants blamed all of their injuries on a fall from a prison wall, nevertheless in court proceedings they withdrew their initial statements and testified that they had been ill-treated during their arrest.

On 10 November 2009 all the applicants complained to the Chief Prosecutor of Georgia and requested the initiation of criminal investigation into the fact of ill-treatment. In the course of investigation, the prison governor and four prison officers who had been involved in the incident were interviewed. all of them denied that the applicants had been beaten. The prosecutor decided to discontinue the proceedings for lack of evidence of a crime. He fully accepted the prison officers' version of the events, concluding that the applicants could have been injured when they had jumped down from the wall.

In the instant case the Strasbourg Court found breach of substantive and procedural limbs of Article 3 of the Convention. Furthermore, as the Court has emphasized on many previous occasions, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The Court concluded that the authorities failed to conduct an independent, thorough and effective investigation into the circumstances surrounding the incident of 30 March 2009.

The Court noted, that all the investigative measures were conducted by the Investigation Department of the Ministry of Penitentiary, the very same Ministry which was, at the material time, in charge of the prison system, which gave rise legitimate doubts as to the independence of investigation conducted. Nor did the forensic medical examination of the applicants' injuries comply with the requisite standards of independence, as it was conducted in the presence of the investigator who was later implicated by the applicants in the misconduct. According to the Strasbourg Court, the effectiveness of investigation was doubtful due to the fact, that the prosecutor's decision to terminate the criminal investigation was only based on the testimony given by the prison officers involved in the incident. The prosecutor accepted the credibility of the prison officers' statements without giving any convincing reasons for doing so, despite

62 Mikiashvili v. Georgia, №18996/06, October 9 of 2012.
63 Paduret v. Moldova, №33134/03, §64, January 5 of 2010.
64 Gablishvili v. Georgia, №7088/11, February 21 of 2019.

the fact that those statements might have been subjective and aimed at evading criminal liability for the purported ill-treatment of the applicants. The credibility of the prison officers' statements should have been questioned, as the investigation was supposed to establish whether they were liable to face criminal charges. Furthermore, the questioning of the arresting officers was superficial. Having examined the substance of their statements, the Court noted that all of them made formulaic statements to the effect that they had not participated in any ill-treatment and the physical force they had used to arrest the applicants had been necessary. Furthermore, it is unclear whether the authorities questioned some potentially important witnesses. Those include, for example, the prison guard who, according to the applicants, was allegedly ordered by the prison governor to shoot the applicants following their arrest, the investigator who allegedly took the applicants' initial statements under duress, the Prison Warden, who allegedly visited the applicants soon after the incident and promised them leniency in return for silence. The Government has not submitted a copy of any statements given by them as part of the investigation file.

Having regard to the above considerations, the Court concluded that the authorities failed to conduct an independent, thorough and effective investigation.

Consequently, according to the case-law of the European Court, it is incumbent on the State to properly investigate the injuries caused to a person in the course of arrest or during detention, failing which gives rise to an issue under Article 3 of the Convention.[65]

65 Mikiashvili v. Georgia, №18996/06, §69, October 9 of 2012.

## 4. Conditions of Detention

In assessing the compatibility of conditions of detention under Article 3 of the Convention, the Strasbourg Court shall take into account the following cumulative circumstances:

- Overcrowding of the cell;
- Inadequate sanitary conditions;
- Heating means;
- Access to daylight;
- Sleeping conditions;
- Personal space (square meters of the cell);
- Ability to use toilet without presence of another inmates;
- Proper food;
- Ventilation;
- Contact with the outside world;
- The duration of time, when the applicant had to be in the contested conditions;
- Specific complaints made by the applicant.

Due to the fact that the obligation to provide adequate medical assistance in closed institutions is reviewed separately within the research, the abovementioned section will only examine conditions of detention.

Another group of cases to be considered by the Strasbourg Court under Article 3 are complaints related to detention conditions. In given cases the Court observes, that the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity.[66] Conditions of detention indicate both to the general environment, in which the prisoners reside, as well as the prison regime and the specific conditions. In assessing whether the environment or conditions of detention of the prisoner are in conformity with the requirements of the Convention, due regard shall be given to the age and gender of a prisoner, the risks that he may be facing, as well as the fact whether he is in pre-trial detention or not.[67]

The manner and method of the execution of the measure shall not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and, given the practical demands of imprisonment, his health and well-being shall be adequately secured. When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant.[68] Irrespective of the reasons for the overcrowding, the Court considers that it is incumbent on the respondent Government to organize its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties.[69]

It follows from the above, that Article 3 of the Convention imposes two types of obligations on the States in this regard, i.e. positive and negative.

- ***Positive obligations*** imply ensuring prisoner's health and well-being.

66 Kalashnikov v. Russia, № 47095/99, § 95, ECHR 2001-XI.
67 Implementation of Article 3 of the European Convention: The Roadmap: [author: Aisling Reid, translation: Lasha Chelidze at al. Tbilisi, the Council of Europe, 2005] page 117.
68 Dobrev v. Bulgaria, №55389/00, August 10 of 2006.
69 Benediktov v. Russia, № 106/02, § 37, May 10 of 2007.

- ***Negative obligations*** require, that the prisoner shall not be subjected to ill-treatment prohibited by Article 3 due to the conditions of detention.

The Court has consistently stressed that according to Article 3 of the Convention, the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.[70]

In the Greek case the Commission found, that the conditions of detention, when prisoners lived in overcrowded cell and did not have proper facilities for heating, sanitation, beds, food, healthcare facilities, and connection with the outside world, were humiliating.

In one of the cases the prisoner at least during 2 months had to spend almost 24 hours of each day confined to his bed in a cell with no ventilation and no window, and sometimes there was unendurable heat. He had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The Court considered, that the prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considered that the conditions of the applicant's detention in the segregation unit of the Delta wing of Koridallos Prison amounted to degrading treatment within the meaning of Article 3 of the Convention.[71]

Solitary confinement or separation has often served as basis for complaints regarding inhuman or degrading conditions, but neither the Court nor the European Committee for the Prevention of Torture (CPT) have considered solitary confinement per se contrary to the requirements of Article 3. Nevertheless, the severity of this measure used in specific cases, as well as duration of solitary confinement and its purpose, also, its effects on the applicant may cause violation of Article 3. Accordingly, the lawfulness of solitary confinement must be established in each particular case. The lawfulness of such measure is doubted, if such confinement causes physical pain and psychological suffering to the detainee, and this measure is applied for the purpose of obtaining of confession. The Strasbourg Court considered it as mitigating circumstance, that the applicant had access to television and newspapers, had language lessons, was able to meet his lawyer and some members of his family.[72]

## 4.1. Complaints Filed against Georgia regarding Conditions of Detention

Conditions of detention were appealed in numerous complaints filed against Georgia. In the judgment on the case Aliev v. Georgia[73], the European Court of Human Rights ruled that due to the conditions of detention of the applicant Article 3 of the Convention was breached and stated that:

"Evidence at its disposal allows it to consider beyond the reasonable doubt that the applicant was indeed held in conditions, contested in his application. In particular, he suffered from having no bed, lack of air and antisanitary conditions for 1 year and 4 months, despite the fact, that he suffered from heart problems and asthma. The Court considers that such conditions of detention undoubtedly inflicted on the applicant suffering of such extent, which exceeds the level of suffering inherent to detention".[74]

70 Valasinas v. Lithuania, №44558/98, § 102, ECHR 2001-VIII.
71 Peers v. Greece, #28524/95, ECHR 2001-II.
72 Ramirez Sanchez v. France, N59450/00, & 134, January 27 of 2005.
73 Aliev v. Georgia, №522/04, ECHR 2009.
74 ibid, § 83.

In the judgment on the case Gorgiladze v. Georgia,[75] the applicant, relied on Article 3 of the Convention, was complaining about the fact that during 19 months he was detained in Tbilisi N5 prison, and placed in a dirty cell, along with 35 other inmates, while it was designated for 24 inmates, due to which they were forced to sleep in turns. The cell was so damp that even healthy prisoners were getting ill. In addition, the applicant claimed that the food supplied by the prison administration was extremely meager. The Court once again reiterated, that:

„ ... apart from securing the health of inmates, given the practical demands of imprisonment, their well-being shall be adequately secured... ‘’[76]/

Taking into consideration factual circumstances of the case, the Court found violation of Article 3 of the Convention in the present case. The evidence available to the Court provided sufficient grounds to consider beyond the reasonable doubt, that the applicant's conditions of detention had undoubtedly inflicted on him the suffering beyond the level, inherent to detention.

The Court established violation of article 3 on the grounds of conditions of detention in regard to another case against Georgia - Ramishvili and Kokhreidze v. Georgia.[77] In the instant case the Court stressed, that provision of personal space as provided by Article 3 also implies, that the detained person has the right to minimal personal space in his daily life. As the first applicant was obliged to share a 120 cm bed with a stranger and could not even relieve himself in “the toilet” without being observed by the latter, the conditions obviously did not allow any elementary privacy. The problem of small space of the cell was further aggravated by the fact, that the applicant had no opportunity to take walks in the fresh air. Also, applicant refused to consume the food on account of the unhygienic conditions in the cell. As regards the nutrition problem, the Court further noted that the Government was apparently content to acknowledge that the first applicant had been able to rely on his relatives' food parcels in the punishment cell. However, the Court concluded, that “the permission to consume one's own food cannot be a substitute for appropriate catering arrangements, because it remains the State's obligation to ensure the well-being of persons deprived of their liberty”.[78]

In given regard is also noteworthy the judgment of the Strasbourg Court of September 21 of 2017 on the case Kuparadze v. Georgia[79], where an underage applicant complained about the conditions of her related detention. Although, differently from previous cases, the Court found no violation of Article 3.

The Court observed that the applicant contested several aspects relating to the conditions of her detention. She submitted before the Court that she had been entirely deprived of any possibility of exercising her right to daily walks. However, it transpires from the case file that she expressly admitted to the contrary during the judicial proceedings at the domestic level. Similarly, the claim concerning a malfunctioning washbasin causing humidity in the cell appears to have been a one-off, temporary problem. Furthermore, the applicant's complaint regarding the insufficiency of personal space in a cell measuring approximately 12-15 square meters and shared by a maximum of three juveniles, including the applicant, which thus entitled her to at least 4 square meters of personal space, does not raise an issue under Article 3 of the Convention. In assessing the overall conditions of the applicant's detention, the Court took note of the fact that, the juvenile offenders' section offered an opportunity to freely consult the psychologist present on the premises, to shower freely and to continue her education.

75 Gorgiladze v. Georgia, №4313/04, October 20 of 2009.
76 ibid, § 41.
77 Ramishvili and Kokhreidze v. Georgia, №1704/06, January 27 of 2009.
78 Ramishvili and Kokhreidze v. Georgia, №1704/06, § 87, January 27 of 2009.
79 Kuparadze v. Georgia, №30743/09, September 21 of 2017.

The Court further observed, that the applicant's complaint about the overcrowding in prison and her having to share a cell in the section for juvenile offenders with adult inmates is not supported by any evidence and is furthermore at odds with the applicant's own account that she was placed alone in that cell for five months and the Public Defender's description of the conditions in the cell. Observing that the applicant has not substantiated her complaint in this regard, the Court stated, that it cannot establish the existence of the alleged conditions beyond reasonable doubt. Lastly, when complaining of a dysfunctional ventilation system, the applicant did not provide any details as to the severity of the problem or its duration. The Court noted, that in order to determine precisely the severity of the situation in each particular case, it expects an applicant to provide specific examples as to the time periods complained of and the duration of such conditions. In the absence of such information, even assuming that the ventilation system was dysfunctional, while regrettable, this fact alone does not amount to a violation of Article 3.

The European Court assessed eight conditions of detention of the applicant, namely:

- Right to walk;
- The level of air humidity;
- The number of square meters of the cell;
- The fact of detention with adults;
- Ventilation;
- Access to light;
- Possibility to consult with a psychologist

And, taking into consideration the above mentioned factors, found no violation of Article 3 of the Convention.

## 4.2. Standard Minimum Rules for the Treatment of Prisoners and Reports of UN and the Council of Europe Bodies regarding Georgia

According to the standards established by international instruments, i.e. the Standard Minimum Rules of Treatment of Prisoners, all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

As stated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter – the Committee for Prevention of Torture (CPT)) the minimum living space allocated for the prisoners should be 4 square meters per prisoner. In 2001 the Committee recommended the Government of Georgia to assign at least 4 square meters per prisoner.[80] It is noteworthy, that the lack of personal space provided for prisoners may be considered as an acute problem and cause violation of Article 3 of the Convention. For example, in a number of cases, the Strasbourg Court found the violation of the provision only on the grounds of the fact that inmates were afforded less than 3 sq. m of personal space.[81] In all plcases where prisoners are required to live or work the windows should be

80 See CPT report of June 30 of 2005, prepared on the basis of experts visits to Georgia on November 18-28 of 2003 and May 7-14 of 2004.

81 Lind v. Russia, #25664/05, § 59, December 6 of 2007; Andrey Frolov v. Russia, #205/02, §§ 47-49, March 29 of 2007;

large enough to enable the prisoners to read or work by natural light. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner. Also, adequate bathing and shower installations shall be provided so that every prisoner may be enabled to have a bath or shower. All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times. If a prisoner is allowed to wear his own clothes, the penitentiary establishment upon receiving of an inmate should ensure, that clothes are clean and suitable for use. Each prisoner should have a separate bed. The prison administration should ensure that every prisoner is provided at the usual hours with food of nutritional value adequate for health and strength. Every prisoner shall have at least one hour of suitable exercise in the open air if the weather permits. To this end space, installations and equipment should be provided.[82]

In given regard is noteworthy the role of the above-mentioned Committee for Prevention of Torture (CPT), which carries out periodic visits in penitentiary facilities of member states (usually every 4 years, however, additional ad hoc visits are carried out if necessary). The delegation of the Committee last visited Georgia on September 10-21 of 2018, and published the report on May 10 of 2019. In the report the Committee has positively pointed out, that the delegation has not received any information about ill-treatment of prisoners by the staff in temporary detention isolators and penitentiary facilities. According to the report, there was the atmosphere of sound communication between inmates and the prison staff, which was free from tension. The report also positively assesses the efforts directed towards elimination of various types of hepatitis and tuberculosis in prisons. In the conclusions of the Committee material conditions of penitentiary facilites in general are assessed positively. However, the Committee indicated problems existing in the penitentiary establishments, including violence between prisoners, existence of hierarchy among prisoners, lack of psychiatric treatment of inmates and etc., at the same time noting improvements in the prison regime and activities. The report also provides specific recommendations. The Committee for the Prevention of Torture left in force recommendation, according to which Georgian authorities shall ensure the following in temporary detention isolators and other penitentiary establishments:

- $4m^2$ space per prisoner in shared cells, and as a minimum $6m^2$ in individual cell;
- Elaboration programmes of activities to enable the prisoners to spend a reasonable part of the day (8 hours or more) outside their cells, engaged in purposeful activities of a varied nature (work, education, sport, etc).

The Committee also called upon the Georgian authorities to instruct the management and staff of all penitentiary establishments, so that they use all appropriate means at their disposal to prevent and combat inter-prisoner violence and intimidation. Upon recommendation of the Committee, an end must be put to the practice of delegating authority to informal prisoner leaders and using them to maintain order and security among the inmate population; also, all informal prisoner leaders and their close circle must be deprived of privileges which other prisoners do not enjoy, including as regards material conditions.

Apart from activities of the Council of Europe's Committee for the Prevention of Torture (CPT) in given sphere, it is also noteworthy to stress the importance of the UN Special Rapporteur's - Juan E. Mendesz's visit to Georgia, which was organized under the auspices of UN during March 12-19 of 2015. During the visit, the UN Human Rights expert from Argentine visited in total 11 institutions, including psychiatric institutions and temporary detention isolators. At the end of the mission, the Special Rapporteur stressed the effectiveness of the reforms carried out in the sphere of treatment of prisoners after the Parliamen-

Kantyrev v. Russia, #37213/02, §§50-51, June 21 of 2007.

82 "Article 42 of the Constitution", Conditions of Imprisonment, and National Guarantees of Protection of Health of Convicted Persons and International Standards of Care for Prisoners, Tbilisi, page 14.

tary Elections of 2012, as well as positive achievements of these reforms. According to Mr. Mendez's assessment "in terms of general policy towards prisoners, Georgian authorities have managed not only to implement fundamental reforms, but also to attain radical changes in the mentality of the entire staff." However, the Human Rights Expert pointed out that "there is still a lot to improve and systematic measures need to be implemented in given direction".

## 5. Provision of Adequate Medical Care to Convicted Persons

One of the widespread violations of Article 3 of the Convention is failure to provide adequate medical care for detainees. In general, the European Court of Human Rights to a certain extent, defines the international standard in terms of effective medical care. More specifically, the State's obligation to provide proper medical care to sick prisoners includes three different obligations, namely:

- Make sure, that the health condition of a person allows his detention;
- Provide adequate (and timely) medical treatment;[83];
- Ensure, that conditions of detention are appropriate for health of a person.[84]

Thus, inadequate medical treatment and in general, keeping of a sick person in inadequate conditions of detention represents violation of Article 3 of the Convention[85].

According to the Court's assessment, medical assistance available in prison hospitals may not always be of the same standard as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance and the authorities must also ensure that the diagnoses and care are prompt and accurate[86] and that where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation.[87] The responsibility of the state for provision of treatment to detained persons is also confirmed by the fact, that sharp deterioration of state of health in the detention facility raises certain doubts as to the adequacy of medical treatment available there.[88]

In its judgment on the case Mouisel v. France the Strasbourg Court explained, that ''in terms of treatment of a person with serious illness or of an elderly person, specific physical or psychological condition of such person should be taken into account".[89] This case concerns treatment of a person suffering from leukemia during systematic transportation to the hospital, and in a hospital itself, where during chemotherapy sessions the applicant was attached to the bed with on one arm with handcuffs, and the legs were tied with a chain. The Court found violation of Article 3 as a result of assessment of the circumstances of the case. Referring to this decision, one of the authoritative French editions - La Revue Trimestrielle des Droits de l'Homme (RTDH - Human Rights Review) noted that keeping seriously ill persons in a detention facility should be considered as inhuman treatment.[90]

83 Oshurko v. Ukraine, #33109/05, $82, September 8 of 2011.
84 Ukhan v. Ukraine, #30628/02, $74, 83; December 18 of 2008; and Poghosyan v. Georgia, #9870/07, $46, February 24 of 2009.
85 Ilhan v. Turkey [GC] # 22277/93, § 87, ECHR 2000-VII.
86 Hummatov v. Azerbaijan, #9852/03 and 13413/04, §115, November 29 of 2007.
87 Pitalev v. Russia, #34393/03, $ 54; July 30 of 2009; Vasilyev v. Russia, # 28370/05, $ 58; January 10 of 2012.
88 Khudobin v. Russia, #59696/00, $ 84, ECHR 2006-XII).
89 Mouisel v. France, #67263/01, $45, November 14 of 2002.
90 Le maintien en detention des maladies graves constitue un traitement inhumain et degradant – 1007, RTDH 2003.

However, it is noteworthy that, keeping in prison seriously ill person, or person with limited life expectancy, does not in itself amount to degrading treatment (e.g. case of AIDS - Gelfmann v. France[91]). As to such conditions, when the wheelchair-bound applicant had to rely largely on his weak legs to move in order to visit the medical unit, see his lawyer, undergo clinical testing, attend a court hearing etc, the Court could not overlook that the detention authorities were indifferent to the prisoner's accessibility needs and found violation of Article 3 by the State.[92] If the State refuses to provide medical services to a detained person, that are available to the general public, and puts the health and life of the prisoner at risk, this is deemed as a violation of Article 3 (refusal to provide dentistry service, which has resulted in loss of all teeth of the inmate)[93]. In general, the standard of healthcare should be compatible with the human dignity of the detainee, but at the same time it should take into account the practical requirements of detention.[94]

In one of the landmark judgments on the case Testa v. Croatia the European Court found the violation of article 3 not only on the ground that the inmate, who was sick with C hepatitis was kept in conditions of poor hygiene, but also because of the fact, that despite regular consultations, the applicant was not adequately informed regarding the disease and had no access to proper medical care.[95] The situation was practically analogous in the case Jeladze v. Georgia,[96] where to the detainee with C hepatitis was not conducted HCV screening. As a result, the applicant remained without diagnostic treatment for more than 15 months. Furthermore, he was not provided with relevant information about the disease and thus, the applicant was deprived of the possibility to control the disease. The Court found the Government's reaction to the applicant's diagnosis delayed and inadequate, and ruled that violation of Article 3 of the Convention occurred in given case. This problem is also considered in several other Georgian cases, which are provided below.

## 5.1. Applications Filed against Georgia regarding Failure to Provide Effective Medical Care in Penitentiary Facilities

The fact, that majority of complaints, filed to the European Court of Human Rights against Georgia in regard to violation of Article 3 of the Convention are related to failure to provide adequate medical services in the penitentiary establishments (11 violations out of 20), indicates the special topicality of this issue. In the period between 2009-2013 the European Court of Human Rights adopted 5 judgments relating to the structural problem of improper treatment of C hepatitis and tuberculosis in the penitentiary system. These cases are:

- Ghavtadze v. Georgia, #23204/07, March 3 of 2009;
- Poghosyan v. Georgia, #9870/07, February 24 of 2009;
- Irakli Mindadze v. Georgia, #17012/09, March 11 of 2003;
- Jeladze v. Georgia,N#1871/08, ECHR 2012;
- Ildani v. Georgia, #65391/09, June 26 of 2007.

91 Gelfmann v. France, #25875/03, $54; December 14 of 2004.
92 Arutyunyan v. Russia, #48977/09, $77; January 10 of 2012.
93 V.D. v. Romania, #7078/02, $ 92; February 16 of 2010.
94 Aleksanyan v. Russia, #46468/06, $ 140; January 22 of 2008.
95 Testa v. Croatia, #20877/04, $51; July 12 of 2007.
96 Jeladze v. Georgia, #1871/08, ECHR 2012.

In the aforementioned cases, the Strasbourg Court found that the Government failed to fulfill the positive obligation imposed by Article 3 of the Convention, namely to provide adequate medical care in prison. In particular, in the case Poghosyan v. Georgia the court observed, that

"There is no doubt of the need of carrying out urgent general measures at the national level with respect to the enforcement of this judgment. Consequently, legislative and administrative measures should be implemented within the shortest possible time to prevent transmission of C hepatitis infection in Georgian penitentiary establishments, and effective system of timely and efficient diagnosis and treatment of the disease should be set up".[97]

It is of significant importance that the Committee of Ministers of the Council of Europe by the Resolution adopted on 12 November 2014 (CM/Res DH (2014)209) decided to close the examination of the execution of final judgments of the European Court of Human Rights on the above referred 5 cases. Consequently, the cases against Georgia related to the structural problem of treatment of tuberculosis and C hepatitis in the penitentiary system were declared as executed. In this Resolution, the Committee of Ministers positively evaluated the reforms carried out in 2013-2014 in the healthcare sphere of penitentiary system.

The violations, identified by the Court in the sphere of provisions of medical assistance to persons deprived of liberty, included the following key aspects:

- Inadequate treatment of tuberculosis and/or hepatitis C;
- Inadequate medical facilities and lack of medical staff;
- Ineffectiveness of complaint procedures in penitentiary establishments.

Especially noteworthy is the judgment of the Strasbourg Court on Jeladze case, where the Court listed the general principles, which need to be observed under the Article 3. The Court observes that "Article 3 obligates the states to ensure, that physical well-being of the detained persons is adequately secured"[98]. At the same time it should be stressed, that this cannot be construed as laying down a general obligation on the State to release detainees on health grounds. Rather, the compatibility of a detainee's state of health with his or her continued detention, even if he or she is seriously ill, is contingent on the State's ability to provide relevant treatment of the requisite quality in prison".[99]

In regard to another case against Georgia - Ghavtadze v. Georgia[100], the Strasbourg Court found incompatible with the Article 3 of the Convention the fact, that the applicant was transferred to the prison hospital only after a serious complication of his health condition, and he was returned to prison before his recovery, where effective treatment was not provided to him. The Court also held, that "the mere fact that the applicant was seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate".[101]

As the European Court of Human Rights observed in one of the landmark cases Khudobin v. Russia "the authorities should maintain records of the applicant's state of health and the treatment he underwent

97 Poghosyan v. Georgia, #9870/07, $70, February 24 of 2009.
98 Kudla v. Poland [GC]), #30210/96; § 94, October 26 of 2000, ECHR 2000-XI.
99 Goginashvili v. Georgia, #47729/08, §§69-70, October 4 of 2011; Makharadze and Sikharulidze v. Georgia, #35254/07, §§71 73, November 22 of 2011.
100 Ghavtadze v. Georgia, #23204/07, March 3 of 2009.
101 HHummatov v. Azerbaijan, #9852/03 and 13413/04, § 116, November 29 of 2007.

while in detention".[102] It is noteworthy, that the state failed to fulfill this obligation in the case Ildani v. Georgia, where the Government failed to submit any medical evidence concerning the applicant's medical condition during the initial period of his detention, or the treatment administered to him during that time. The Court concluded that neither the letter of the prison Governor nor the undated one-page extract from a medical file can serve as a sufficient proof in this case. The Court, hence, considered that until February 2010 the applicant was left without appropriate medical care in violation of Article 3 of the Convention.[103] Although, it is noteworthy, that immediately after in the beginning of February the applicant was diagnosed with focal pulmonary TB, he was placed on the DOTS (Directly Observed Treatment, Short-Course) programme, recommended by the World Health Organisation. Subsequently, G. Ildani was transferred to the medical unit of Rustavi no. 1 Prison only after the first-phase, 8 month long, of the anti-tuberculosis treatment had yielded positive results. As to the issue, whether given Prison was adequately equipped to provide the applicant with the second-phase anti-TB treatment, the Court, taking into consideration the circumstances of the case, noted that the applicant continued to receive second-phase anti-TB drugs in line with the DOTS standards and was under permanent medical supervision since his transfer to Rustavi no.1 Prison, with periodic medical check-ups conducted in the prison hospital. On the basis of complete medical records, submitted by the Government, the Court found no violation of Article 3 of the Convention on account of the medical treatment provided to the applicant following his diagnosis[104].

As already mentioned, the State is obliged to ensure, depending on the medical necessity, regular surveillance over the prisoner's condition, and this obligation implies availability of proper therapeutic strategies and diagnostics. The relevant bodies should also assure themselves, that necessary conditions are created for provision of full treatment.[105] The Court considers, that it must be guided by the due diligence test in assessing adequacy of the treatment, "since the State's obligation to cure a seriously ill detainee is one of means, not of result."[106]

One of the complaints against Georgia, namely the case Mirzashvili v. Georgia was related to assessment of given aspects. It is evident from the material available in the case file, that according to the recommendation of chemotherapy specialist of the medical facility of the penitentiary system, the applicant should have undergone quarterly medical examinations. That recommendation was not complied with, as the applicant was kept in Rustavi Prison no. 2 for the next four months. It thus appears that despite the seriousness of the applicant's medical condition and the doctor's recommendation that he needed regular chemotherapy, the applicant was left without the urgently required treatment. To sum up, the Court considered, that given the seriousness of his condition, in particular the diagnosis of recurrent tumor eight months after his arrest, and the risks and suffering attached to it, the state failed to fulfill its obligation of ensuring medical care and supervision to a seriously ill prisoner, and the applicant did not receive adequate medical assistance at the relevant period of time (till March 28).[107]

Although, it should be also noted, that similarly to the above-mentioned case of Ildani, in the instant case too, in accordance with Rule 39 of the Rules of Court, the Government immediately transferred the applicant to the prison hospital, and provided him with adequate medical examinations and treatment. Mirzashvili was offered chemotherapy treatment twice, but both times he refused to undergo treatment. It is noteworthy, that this medical facility was opened in 2008 and according to the Committee for Prevention of Torture (CPT) it was adequately equipped to provide treatment to seriously ill prisoners, and patients

102 Khudobin v. Russia, #59696/00, §83, ECHR 2006-XII.
103 Ildani v. Georgia, #65391/09, $$39-40, April 3 of 2013.
104 ibid, $$ 41-43, 45-46.
105 Holomiov v. Moldova, #.30649/05, § 117, November 7 of 2006.
106 Goginashvili v. Georgia, #47729/08, § 71, October 4 of 2011.
107 Mirzashvili v. Georgia, #26657/07, $$ 68-70, September 7 of 2017.

were constantly under the supervision of oncologist and chemotherapy specialist. Accordingly, the Court did not consider that the Government was negligent with respect to the applicant or his serious medical condition during that phase of his treatment, and in view of the above, the Court found no violation of Article 3 of the Convention on account of the medical care provided to the applicant after 28 March 2008.

## 6. Extradition and Expulsion

Shamayev and Others v. Georgia and Russia[108] is one of the cases against Georgia, where the Strasbourg Court considered the issue of violation of Article 3 of the Convention in the context of extradition.

It is noteworthy, that this case is also interesting from the standpoint, that the Court on the basis of request of the applicants, applied Rule 39 (interim measure), and indicated to Georgia, that it would be in the interests of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants until the Court had had an opportunity to examine the application. It should be noted, that the Court satisfies the request on application of interim measure only in strictly defined circumstances, namely, when the applicant provides sufficient proof, that there is a real risk of violation of the Convention. Despite the application of Rule 39 by the Strasbourg Court, the Government of Georgia extradited 5 applicants and stated, that due to technical problems with communication it did not receive in timely manner the notification regarding interim measure, adopted by the European Court. The Court extended the interim measure in respect of the eight applicants detained in Tbilisi and started examining the application.

According to the factual circumstances of the case, on August 4 of 2002 Georgian Border guards detained the applicants near the Guirevi checkpoint, where they were crossing the border. Some of them were injured and were taken to the hospital for provision of medical assistance. The applicants were charged with importing weapons in breach of the customs regulations, illegally carrying, handling and transporting weapons and crossing the border illegally. On 6 August 2002, the Vake-Saburtalo Court of First Instance, in Tbilisi, ordered that they be placed in pre-trial detention for three months. On August 6 of 2002 Russian authorities applied to the Government of Georgia with request of extradition of the applicants. According to the Russian authorities, they were terrorists operating in Chechnya. Georgian Procurator-General indicated that, due to the fact, that the names provided by Russian authorities did not coincide with the names of the applicants, it required additional documentation for their identification before their extradition could be agreed. As a result of the assessment of given documentation and other evidence, 5 applicants were identified. In view of the seriousness of the charges brought against them in Russia, the Georgian Deputy Procurator-General signed the extradition orders on 2 October 2002. As stated above, despite application of interim measure by the Strasbourg Court, on October 4 of 2002 the 5 Chechen applicants were extradited to Russia. The applicants, who were not extradited to Russia, remained in detention in Georgia. They were claiming, that in case of their extradition to Russia, where capital punishment was not abolished, they would face a real risk of being subjected to treatment contrary to Articles 2 and 3 of the Convention.

In consequence, the Court, on the grounds of documentation available to it, concluded in regard to 5 applicants, that in the light of all the material placed before it, the facts of the case did not support "beyond any reasonable doubt" the assertion that, at the time when the Georgian authorities took the decision, there were real or well-founded grounds to believe that extradition would expose the applicants to a real and personal risk of inhuman or degrading treatment, within the meaning of Article 3 of the Convention. There has accordingly been no violation of that provision by Georgia.

108 Shamayev and Others v. Georgia and Russia, №36378/02, ECHR 2005-III.

Finally, the Court drew attention to a new and extremely alarming phenomenon: individuals of Chechen origin who have lodged an application with the Court are being subjected to persecution and murder. According to the reports of the Human Rights defender organization, the period of 2003-2004 was marked with a sudden rise in the number of cases of persecution, which is confirmed by the increase of applications lodged to the Court in given regard. The persecution occurred in the form of threats, harassment, imprisonment, forced disappearance and murder. Taking into consideration all the above mentioned, the Court considered, that extradition of one of the applicants to Russia would have caused the breach of Article 3 of the Convention; According to the Court, the assessments made in favor of the applicant's extradition 2 years ago were no longer sufficient to exclude the risk of his ill-treatment. Therefore, his extradition to Russia would violate Article 3 of the Convention.

In cases related to expulsion and extradition, attention is paid to the State's obligation to protect individuals from human rights violations. According to the case-law of the European Court of Human Rights, in cases of expulsion or extradition of a person to those countries, where he may be subjected to treatment prohibited by Article 3 of the Convention, the liability shall be imposed on the state, which enforced extradition.[109] The Court for the first time established this principle on the case Soering v. the United Kingdom[110], in which the United States were requiring from the UK extradition of the applicant, who faced charges of murder in the Commonwealth of Virginia. In his application he stated his belief that, there was a serious likelihood that he would be sentenced to death if extradited to the United States of America. He maintained that in the circumstances and, in particular, having regard to the "death row phenomenon", he would thereby be subjected to inhuman and degrading treatment and punishment. The "death row phenomenon", cumulatively constituted such conditions of detention (prison of strict regime, where a prisoner can be kept for lengthy period of time, taking into consideration delays in the appeal and review procedures following a death sentence), during which time he would be subject to increasing tension and psychological trauma. The applicant's age at the material time of committing of the offence (he was under 18) and the subsequent spiritual condition was taken into account by the Court when determining that these conditions were tantamount to inhuman and degrading treatment. The Court further stated that if the United Kingdom would extradite the applicant in such conditions, violation of Article 3 would have taken place. Namely, the Court observed the following:

"In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[111]

Whole set of cases, following the Soering case, reaffirmed the principle, according to which the responsibility of the Contracting State, which extradited a fugitive may arise, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. As to determination of the risk of ill-treatment, the Strasbourg Court observed:

109 Implementation of Article 3 of the European Convention: The Roadmap: [author: Aisling Reid, translation: Lasha Chelidze at al. Tbilisi, the Council of Europe, 2005] page 89.

110 Soering v. the United Kingdom, July 7 of 1989, Series A, №161.

111 ibid, § 91.

"In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances"[112]

As to the standard of proof, the applicant in the event of extradition should face the "real threat" of ill-treatment, so that the extradition is considered as contrary to the requirements of Article 3. In the judgment on the case Vilvarajah and Others v the United Kingdom[113] the Court stated, that a "mere possibility" of ill-treatment, however, is not in itself sufficient to reach the level of "real threat".[114] Although, in the case Saadi v. Italy the Court observed, that the required level is lower, that the standard "more likely than not".[115] According to the Strasbourg Court, the same standard of proof applies in regard to all applicants, notwithstanding the circumstances. More specifically, in the Saadi case the Court observed, that the same test of "real threat" is used in regard to those applicants as well, who represent the risk to national security, which means, that such applicant is not required to meet the higher standard of threat, than other applicants.[116]

In a number of decisions, the Court deliberated on the applicant's statements concerning serious damage sustained in the past, and concluded, that significant weight should be assigned to this circumstance in case of existence of such circumstances.[117] However, in the case Chahal v. the United Kingdom[118] the Court declared:

,, ... Since he [the applicant] has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.[119]"

Therefore, it is important to conduct meticulous inquiry into the complaint of a person under which the extradition to the third state would subject him to the risk of treatment contrary to the requirements of Article 3. Use of automatic or mechanical provisions, such as a limited period of time for submitting of an application for request of asylum, contradicts those values declared in Article 3 of the Convention.[120]

The European Court of Human Rights recognized in several cases related to extradition, that the risk may be arising from non-state actors as well. In its judgment on the case H.L.R. v. France[121] the Court observed the following:

"Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."

The Strasbourg Court once again examined this issue in its judgment on the case Salah Sheekh v. theNeth-

112 Saadi v. Italy [GC], № 37201/06, § 130, ECHR 2008.
113 Vilvarajah and Others v the United Kingdom, October 30 of 1990, Series A №215.
114 ibid, § 111.
115 Saadi v. Italy [GC], № 37201/06, § 140, ECHR 2008.
116 ibid.
117 Ismailov v. Russia, №20110/13, § 77, §§86-89, April 17 of 2014; M.E. v. France, №50094/10, §§ 51-52, June 6 of 2013; F.G. v. Sweden [GC], №43611/11, § 131-143, ECHR 2016.
118 Chahal v. the United Kingdom, November 15 of 1996, report 1996-V.
119 ibid, § 86.
120 Implementation of Article 3 of the European Convention: The Roadmap: [author: Aisling Reid, translation: Lasha Chelidze at al. Tbilisi, the Council of Europe, 2005] page, 90.
121 H.L.R. v. France, April 29 of 1997, § 40, report 1997-III.

erlands[122], where it stated the following:

"…the existence of the obligation not to expel is not dependent on whether the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials. What is relevant in this context is whether the applicant was able to obtain protection against and seek redress for the acts perpetrated against him. The Court considers that this was not the case."[123]

The Council of Europe's Committee for Prevention of Torture (CPT) recommends, that a decision involving the removal of a person from a State's territory should be appealable before another body of an independent nature prior to its implementation.[124]

## 6.1. Expulsion of a Foreign National with Serious Health Condition in the Light of Article 3 of the Convention

According to the well-established practice of the European Court of Human Rights, the decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.[125] As an exceptional circumstances are considered such cases, when extradition of a person may cause serious and irreparable damage.

One of the first cases, where the Court examined this issue was the case D. v. the United Kingdom[126]. In given case the applicant was national of St Kitts and he was serving his sentence in due to drug-related offence. Upon his release, the UK authorities requested his deportation to St Kitts. By that material time the applicant had AIDS. In the period of consideration of the case by the Court the applicant's "CD4" cell count has been below 10 and the applicant had suffered severe and irreparable damage to his immune system; the applicant's prognosis was very poor and it was evident, that he was approaching his death. According to the evidence available before the Court, the medical facilities in St Kitts did not have the capacity to provide the medical treatment that he would require. He had neither house, nor relatives who would be able to care for him in St Kitts. The court observed the following:

"In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3.

... The Court also notes in this respect that the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.

122 Salah Sheekh v. the Netherlands, №1948/04, January 11 of 2007.
123 Ibid, § 147.
124 Committee for Prevention of Torture (CPT), 7th report, paragraph 34.
125 N. v. the United Kingdom [GC], № 26565/05, § 42, ECHR 2008.
126 D. v. the United Kingdom, May 2 of 1997, report 1997-III.

Against this background the Court emphasizes that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.

However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3".[127]

Consequently, in given case the Court established the principles, according to which aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance. The fact, that circumstances of the applicant, including substantial reduction of the remaining lifespan shall if he is extradited from the state, is not in itself a sufficient ground to find violation of Article 3. Extradition of an alien who has serious physical or mental illness to the state, where the facilities for the treatment of illness are inferior to those available in the Contracting State may raise an issue under Article 3, but in a very exceptional circumstances and given the compelling humanitarian considerations at stake. The exceptional circumstances in the case of D were the fact that the applicant was critically ill, close to death and had no prospect of medical care and family support in his home country, who was willing, or could care for him or provide the applicant with basic food, shelter and social assistance.

In the case N. v. the United Kingdom, which was examined by the Grand Chamber, the applicant, relying on Article 3 of the Convention, was complaining on the grounds of unavailability of proper treatment of her health condition in the country of her origin, and was requesting granting of an asylum. Differently from the previous case the Court found, that the applicant's case was not critical exception and enforcement of the decision of her expulsion to Uganda is not likely to cause violation of article 3, as she was not critically ill. The Court found, that rapidity of deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and Aids worldwide. Although, the Grand Chamber did not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in D.'s case and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

In one of the landmark cases of 2016, where the applicant was Georgian national, the Strasbourg Court substantially modified its case law in regard to expulsion of seriously ill migrants. The judgment on the case Paposhvili v. Belgium [Grand Chamber][128] was related to the deportation of a seriously ill alien. The applicant was residing on the territory of Belgium, suffered from hepatitis C, tuberculosis and leukemia. The Government of Belgium arrived to decision of his deporting to Georgia. The applicant was alleging that his removal to Georgia would expose him to risks to his life and physical well-being, as he would not have access to treatment that he was receiving in Belgium. Despite the fact that the applicant died in the period, when the Grand Chamber was examining his case, the Court did not strike out his application from the list of pending cases, considering, that "special circumstances related to respect for human rights" required continuation of examination of the complaint.

127 D. v. the United Kingdom, May 2 of 1997, §§ 53-54, report 1997-III.
128 Paposhvili v. Belgium [GC], № 41738/10, ECHR 2016.

The Grand Chamber of the Strasbourg Court established in regard to given case, that "if the Belgian authorities failed to assess the risk risks to his health condition in the light of the information available to them in regard to medical situation and the shortcomings of the Georgian health-care system", this would give rise to a breach of Article 3 of the Convention. The Grand Chamber quashed the Chamber judgment, which followed the standard established in N's case, according to which, in spite of the fact that the applicant had been diagnosed with an incurable disease, the applicant's condition was not considered critical since he was stable due to provided treatment and could travel. Consequently, according to the Chamber judgment, this was not exceptional case, differently from the case of D. v. the United Kingdom.

Paposhvili case is of particular importance, as it sets guiding principles as to when the humanitarian aims outweigh other interests, when the issue of the expulsion of seriously ill persons will be considered. In particular, as noted earlier, apart from the risk of the imminent death as in the case of D, in the case of N was stated, that "other exceptional cases" in the context could give rise to the breach of Article 3 of the Convention. In this case, the Strasbourg Court explained how the "other exceptional cases" should be understood. Namely, the court considered as an exceptional case the following:

"The Court considers that the "other very exceptional cases" …should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy."[129]

In the present case, the Court has emphasized that the State should consider the following:

a) Is the treatment in the receiving State "sufficient and appropriate to cure the applicant's disease in order to exclude the risk of treatment contrary to the requirements of Article 3; and

(b) Whether the treatment in receiving state shall be actually accessible to the applicant (in given regard following factors are relevant: expenses, availability of family members and relatives, as well as social connections and the distance to the point of treatment).

If there is a "serious suspicion" that the expulsion will have a negative impact on him, the state, executing expulsion must obtain "individual and sufficient guarantees" from the receiving State before the expulsion of the person, that relevant treatment shall be accessible to the applicant.

Consequently, in the Paposhvili case, in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to home country, would not have run a real and concrete risk of treatment contrary to Articl 3. In view of this finding, the Strasbourg Court held that if the applicant had been returned to Georgia without these factors being assessed, there would have been a violation of Article 3. It is also noteworthy that after the case of D this was the first case, where the European Court found violation of Article 3 of the Convention due to expulsion of a seriously ill applicant.[130]

129 ibid, § 181.

130 European Court of Human Rights- Annual Report 2016, France, 2017, pg. 53.

## 6.2. Detention of Children who are Nationals of Foreign States deemed as Torture or Inhuman and Degrading Treatment or Punishment

On the background of events unfolding in the world, detention of illegal migrant children and their separation from their families became a topical issue. The European Court also examined this issue in the light of Article 3 of the Convention, namely, in its judgment on the case Mubilanzila Mayeka and Kaniki Mitunga v. Belgium[131]. In the instant case, the applicants were two Congolese nationals, Ms Mubilanzila Mayeka and her daughter Miss Tabitha. The application was related to the detention of Tabitha for two months and her deportation to the country of origin.

The factual circumstances of the case were the following: the first applicant had arrived in Canada in September 2000, where she was granted refugee status in July 2001 and obtained indefinite leave to remain in March 2003. After being granted refugee status, the first applicant asked her brother, a Dutch national living in the Netherlands, to collect Tabitha, then five years old, from the Democratic Republic of Congo, and to look after her until she was able to take her to Canada. In August 2002 K. arrived at Brussels National Airport, where Tabitha was detained, as she did not have the necessary travel and immigration papers. Her uncle, who was accompanying her, returned to the Netherlands, while Belgian authorities appointed a lawyer for her. In September of 2002 the Immigration Services did not satisfy her request for asylum. In October 2002 the Brussels Court of First Instance held that Tabitha's detention was incompatible with the Convention on the Rights of the Child and ordered her immediate release. On the same day the UNHCR's representative in Brussels requested the Aliens Office permission for Tabitha to remain in Belgium, while her application for a Canadian visa was being processed. The Commissioner drew the Office's attention to the fact that her mother was already granted a refugee status. Despite this, on the following day Tabitha was deported to Democratic Republic of Congo, where she was accompanied by a social worker. She travelled with three Congolese adults who were also being deported. There were no members of her family waiting for her when she arrived. On the same day the first applicant rang Transit Centre, where Tabitha was detained, and asked to speak to her daughter. She was informed that she was no longer staying at the Centre and was deported. In the end of October 2002 following the intervention of the Belgian and Canadian Prime Ministers, Tabitha joined her mother in Canada.

The applicants argued before the European Court of Human Rights, that Tabitha's detention and deportation, among others, was violation of Article 3 of the Convention. The Court stated that:

„55. The second applicant's position was characterized by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention. [...]

58. The Court considers that the measures taken by the Belgian authorities – informing the first applicant of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the second applicant and liaising with the Canadian authorities and the Belgian embassy in Kinshasa – were far from sufficient to fulfill the Belgian State's obligation to provide care for the second appli-

131 Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, № 13178/03, ECHR 2006-XI.

cant. The State had, moreover, had an array of means at its disposal. The Court is in no doubt that the second applicant's detention in the conditions described above caused her considerable distress. Nor could the authorities who ordered her detention have failed to be aware of the serious psychological effects it would have on her. In the Court's view, the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment."[132]

The Strasbourg Court arrived to the same conclusion in regard to deportation of the second applicant. The European Court held, that by Tabitha's deportation the Belgian authorities violated the positive obligation imposed on them to carry out relevant measures and preventive actions. The respondent State did not provide proper care to Tabitha and did not take into consideration the real situation in which she would have found herself upon return to the country of origin. Thus, in the present case, the European Court of Human Rights found a violation of Article 3 of the Convention.

## 7.Other Grounds for Violation of Article 3 of the Convention

Apart from the cases of detention, Article 3 of the Convention can be applied with regard to many other cases, where the treatment towards victims have been deliberately cruel, inflicting severe physical or psychological suffering on them. As the grounds for violation of Article 3 of the Convention may also serve the threat of torture, life imprisonment and damage to property. Each of these acts shall be considered separately in the following chapters.

### 7.1 Threat of Torture

International and national law contains a number of norms that prohibit use of psychological or physical coercion towards detained and convicted persons for the purpose of extorting of evidence, information or confession against their will. Such treatment is considered as degrading treatment. The case Campbell and Cosans v. UK[133] examined by the European Court of Human Rights, concerned the threat of use of corporal punishment towards school children. Despite the fact, that such treatment did not occur, the Strasbourg Court observed the following:

„ … provided it is sufficiently real and immediate, a mere threat of such treatment, which is prohibited by Article 3 may itself be in conflict with that provision.Thus, to threaten an individual with torture might in some circumstances constitute at least "inhuman treatment".[134]

The Strasbourg Court examined this issue in the case Gäfgen v. Germany [GC][135]. The central element of the case was the fact, that police threatened the applicant with considerable physical pain, who was detained for kidnapping of an 11 year old boy (the applicant had strangled the boy and hid his corpse, which was not known to the police at that material time). For the purpose of saving the missing boy's life the police officers threatened the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. As a result of abovementioned the applicant told the police where he was hiding the corpse. In so far as the duration of the impugned conduct is concerned, the Court noted that the interrogation under threat of ill-treatment lasted for approximately ten minutes. The Court therefore considered that the real and immediate threats of deliberate and imminent ill-treatment to which the applicant was subjected during his interrogation must be regarded as having

132 Ibid, §§ 55; 58.
133 Campbell and Cosans v. UK, №7511/76, February 25 of 1982.
134 Ibid, § 26.
135 Gäfgen v. Germany [GC], №22978/05, ECHR 2010.

caused him considerable fear, anguish and mental suffering, although there was no evidence of any long-term adverse psychological consequences suffered or sustained as a result. The Court further observed that the threat was not a spontaneous act but was premeditated and calculated in a deliberate and intentional manner and the purpose of such treatment was to extract information.[136]

"Having regard to the relevant factors for characterizing the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3. It reiterates that according to its own case-law, which also refers to the definition of torture in Article 1 of the United Nations Convention against Torture, and according to the views taken by other international human rights monitoring bodies, […] a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture."[137]

Despite the fact, that police were motivated by the desire to save the life of the boy, the Court reiterated the absolute nature of Article 3:

"The prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognizes that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue."[138]

Thus, according to the Strasbourg Court's case-law, the threat of torture or ill-treatment, which is sufficiently real and immediate, however noble cause it has, represents the violation of this provision.

## 7.2. Life Imprisonment

The Council of Europe's Committee for Prevention of Torture has repeatedly stated in its reports that "it is inhuman to impose as punishment life sentence without any real hope of release".[139]

According to the case-law of the European Court, the State should provide possibility of rehabilitation and release to every prisoner, including persons, who are condemned to life imprisonment. This follows from the system of the European Convention on the Protection of Human Rights and Fundamental Free-

136 F. Lichi, How to apply to the European Court of Human Rights, Tbilisi, 2013, page 259.
137 Gäfgen v. Germany [GC], №22978/05, § 108, ECHR 2010.
138 Gäfgen v. Germany [GC], №22978/05, § 107, ECHR 2010.
139 Reporst prepared on the basis of visits to Hungary (2007) and Switzerland (2011).

doms, one of the essential principles of which is respect for human dignity. In its landmark judgment on the case Vinter and Others v. the United Kingdom [GC][140] the Court observed that life sentence is contrary to the requirements of Article 3 of the Convention, if national legislation does not provide for the possibility of review of life sentences after a set period, for the purpose of establishment of the need of continuation of application of the life sentence.

In the case of Vinter the Court held that in order to ensure, that life sentence is compatible with Article 3 of the Convention, there should be:

- The prospect of release
- The possibility of review of the sentence.

"The Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds."[141]

It is enough for the purposes of Article 3 that a life sentence is de jure and de facto reducible. In determining whether a life sentence in a given case can be regarded as irreducible, the Court should ascertain whether a prisoner can be said to have any prospect of release. An analysis of the Court's case-law on the subject indicates that if national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy requirements of the Article 3[142]. In this respect, the Court emphasized that the issue of violation of Article 3 does not arise if a person, serving the life sentence is allowed by the national law, that his case is reviewed on the subject of possible early release, but received refusal due to the fact, that he is still viewed as representing a threat to the public. As the States have a duty under the Convention to take measures for the protection of the public from violent crime, it does not prohibits States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention or recall to detention following release where necessary for the protection of the public.[143]

Ensuing from the humanitarian principles and the obligation of respect of dignity of a person (as provided by article 3), any punishment, including life sentence, would serve the purpose of rehabilitation of a person deprived of liberty. Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. The Court stresses, that a life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.[144] The Strasbourg Court noted in the case of Vinter, that

"While punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence. In the Council of Europe's legal instruments, this is most clearly expressed in Rule 6 of the European Prison

140 Vinter and Others v. the United Kingdom [GC], nos. 66069/09 and 2 others, ECHR 2013.
141 Vinter and Others v. the United Kingdom [GC], nos. 66069/09 and 2 others, &119, ECHR 2013.
142 Kafkaris v, Cyprus [GC], №21906/04, & 98, ECHR 2008.
143 T. v. the United Kingdom [GC], №24724/94, § 97, December 16 of 1999.
144 Vinter and Others v. the United Kingdom [GC], nos. 66069/09 and 2 others, &122, ECHR 2013.

Rules, which provides that all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty, and Rule 102.1, which provides that the prison regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life"[145]

However, the Court also emphasized that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter.

## 7.3. Violation of Article 3 of the Convention on the Grounds of Damage to Property

Selcuk and Asker v. Turkey[146] was one of the first cases, which concerned violation of Article 3 on the grounds of destroying of the applicant's house. The applicants, referring to the circumstances of the destruction of their homes and their eviction from their village, maintained that there had been a breach of Article 3 of the Convention. The Court noted, that at that material time the applicants were aged respectively 54 and 60 at the time and had lived in the village of İslamköy all their lives. Their homes and most of their property were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr. and Mrs. Asker; Mrs. Selcuk's protests were ignored, and no assistance was provided to them afterwards. The European Court took into consideration the manner in which the applicants' homes were destroyed and their personal circumstances, and that they must have been caused suffering of sufficient severity for the acts of the security forces, and held that the acts of security forces should be categorized as inhuman treatment within the meaning of Article 3.

In its judgment on the case Bilgin v. Turkey[147] the Court deliberated on the issue of violation of Article 3 on the grounds of the damage to the property caused by Turkish Security Forces. The Strasbourg Court, having determined that the Security Service was responsible for the damage to the applicant's property, had to decide whether the breach of Article 3 of the Convention had taken place. The Court took into account the fact that destruction of the house and property deprived the applicant of the sources of livelihood and a place to reside. The Court observed:

"However, even assuming that the acts in question were carried out without any intention of punishing the applicant, but instead as a discouragement to others or to prevent his home from being used by terrorists, this would not provide a justification for the ill-treatment."[148]

Having regard to the circumstances in which the applicant's home and possessions were destroyed and his personal circumstances, the Court considered that this must have caused the applicant suffering of sufficient severity for the acts of the security forces to be categorized as inhuman treatment.

145 ibid, § 115.
146 Selcuk and Asker v. Turkey, April 24 of 1998, report 1998-II.
147 Bilgin v. Turkey, №23819/94, November 16 of 2000.
148 ibid, § 102.

The Court confirmed this approach in its judgment on the case Dulas v. Turkey[149], where it found the violation of Article 3 on account of causing damage to the property. The factual circumstances of the case were similar to those, in the case of Bilgin. The Court took into consideration the applicant's personal circumstances. In particular, the fact, that applicant was around 70 years old at the time of the incident; He was deprived of shelter and forced to leave the village where he has spent all his life. Consequently, the Court found violation of Article 3 of the Convention.[150]

Thus, in assessing the breach of Article 3 of the Convention on the grounds of causing damage to the property, the European Court of Human Rights draws attention to the applicants' personal circumstances and the impact of such actions on their lives.

149 Dulas v. Turkey, №25801/94, January 30 of 2001.

150 Long D, Guide to Jurisprudence on Torture and Ill-treatment, Geneva, 2002, pg. 35.

Part II

## 8. The Quality of Substantiation of National Court Decisions Concerning Cases of Torture and Ill-treatment

It is noteworthy, that one of the most reliable measures of independence of judges and, in general, the quality of justice is the quality of substantiation of decisions, since the adequate substantiation of court's judgments is the key requirement; at the same time, this is important component of the right to fair trial, enshrined in Article 6 of the European Convention on Human Rights. The primary protection of human rights is ensured at the domestic level. The national courts should follow and reflect European standards in their judgments.

Due to the above referred reason, during last several years numerous measures have been taken in Georgia for the purpose of increasing the quality of court judgments[151]. However, large number of cases communicated to the European Court of Human Rights concerning this issue[152] indicates, that the insufficient reasoning of judgments still remains a concern in Georgia. Proper substantiation of court judgments is also a significant challenge in cases of torture, especially, in the light of the provisions connected to the prohibition of torture and other forms of ill-treatment, provided by the European Convention on Human Rights, and their formulation in the national law. It is noteworthy that the particular gravity of these offenses entails, that substantiation of judgments is even more important, as if the judgment is not properly substantiated, it undermines the public confidence in the judicial system. In this chapter we shall examine the judgments of the national courts concerning torture and ill-treatment, in particular, whether the international standards are applied, and whether the guarantees provided by Article 6 of the Convention are safeguarded. On the other hand, such analysis shall help to identify the shortcomings in qualification of offences and reasoning of judgments, as well as help to focus on important aspects of torture, which shall facilitate improvement of the quality of judgments reached in regard to such cases.

### 8.1. Substantiation of Decisions in Compliance with the European Convention

According to the well-established case-law of the European Court of Human Rights effective administration of justice implies, that judicial decisions should properly reflect those reasons, on the grounds of which the decision was reached. Article 6 of the Convention establishes the right of a person to a substantiated court decision. However, this obligation cannot be understood as requiring a detailed answer to every argument, that a party provided to defend its position[153]. It is important, that where a party's submission is decisive for the outcome of the proceedings, a specific and express reply be provided[154]. Thus, the national courts must clearly indicate the grounds, on the basis of which they reached the decision, to enable the parties to make effective use of the right to appeal.

It is noteworthy, that the obligation on courts to give reasons for their decisions does not mean replying to every argument raised by the defence. The extent of this duty may vary according to the nature of

151 Training conducted with the support of the Council of Europe project on the topic of "The form of verdict, its justification and stylistic aspects of the text"
http://www.hsoj.ge/geo/media_center/news/2015-05-19-ganachenis-dasabuteba
http://www.hsoj.ge/geo/media_center/news/768-2016-12-02-sisxlis-samartlis-saqmeze-ganachenis

152 e.g. see Lobzhanidze v. Georgia, N21447/11, Peradze and others v. Georgia, N5631/16, Tcholadze v. Georgia, N35852/11, etc.

153 Van de Hurk v. the Netherlands, April 19 of 1994, § 61, Series A no. 288.

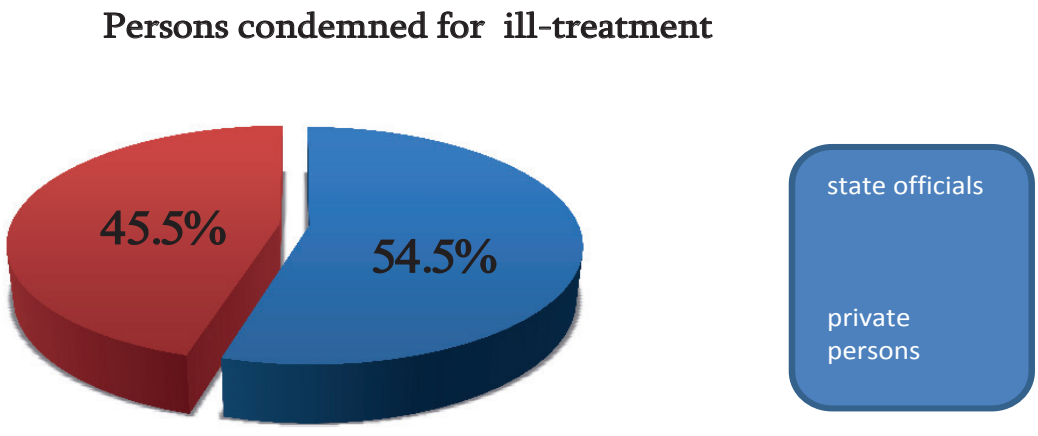
154 Boldea v. Romania, №71156/01, § 30, February 15 of 2007.

the decision, and can only be determined in the light of the circumstances of the case[155]. In order to respect the principle of fair trial, the reasoning should demonstrate the parties that their case has truly been heard. It is also a means of maintaining confidence in the courts. Apart from this, given principle implies, that the judges should reach decisions on the basis of objective arguments and safeguard the rights of the defence. According to the Opinion no.11 (2008) of the Consultative Council of European Judges (CCJE) on the quality of judicial decisions, the reasons must be consistent, clear, unambiguous and not contradictory. They must allow the reader to follow the chain of reasoning which led the judge to the decision.[156] Also, given principle enables society to understand the functioning of the judicial system.

## 8.2 Analysis of National Court Practice

As stated in the beginning of the research, for the purpose of examining the national courts' practice in the cases of torture and other forms of ill-treatment, relevant information was collected through sending official letter to the first instance courts, requesting to provide judgments, reached by them in the period of 2017-2018 on the basis of article 144 1(torture), 1442 (threat of torture) and 1443 (inhuman or degrading treatment). In total, within the framework of the research were examined 11 cases.

The examination of cases revealed, that in the majority of the judgments the person committing ill-treatment was a civil servant or a person equal to it, while the rest of the cases concerned mainly violent acts committed on the ground of jealousy by a spouse.

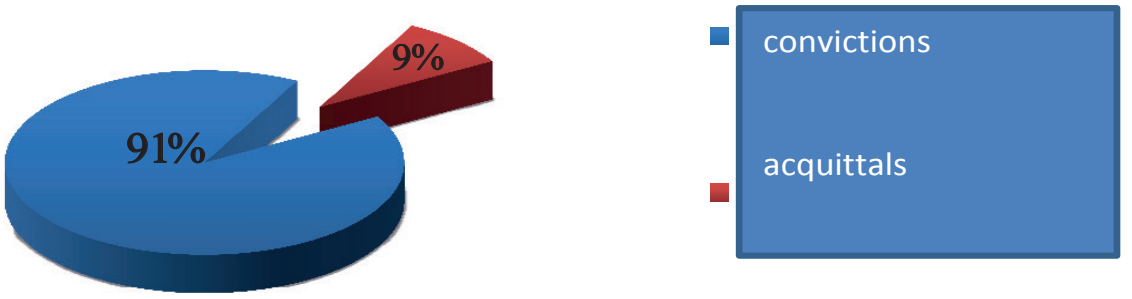



The above diagram illustrates the percentage of offenders, who committed ill-treatment, identified as a result of examination of cases. It is noteworthy that according to UN Convention and the practice of the European Court of Human Rights, the perpetrator of torture is the representative of the state authorities, while according to the Criminal Code of Georgia torture can be committed by a private person as well. Below will be discussed whether provision of the national law, according to which torture may be committed by a private person, is compatible with the international standards.

In addition, it was interesting to establish the ratio of inculpating and acquittal judgments in percentage. The diagram below shows a percentage of convictions and acquittals.

155 Ruis Torija v. Spain, December 9 of 1994, § 29, Series A no. 303-A.
156 Opinion no.11 (2008) of the Consultative Council of European Judges (CCJE) on the quality of judicial decisions

**Judgments reached on the cases concernign ill-treatment**




The statistical indicator shows that in 91% of the cases, examined within the framework of the research, the defendants have been found guilty, which means that in 10 cases out of 11, the courts of first instance reviewed in the period of 2017-2018, they have reached convicting judgments.

As a result of detailed analysis of these cases were identified such judgments, which were distinguished for high quality of reasoning, but at the same time, number of shortcomings were identified as well in several specific directions. Below shall be provided detailed overview in respect to relevant topics.

### 8.2.1 Drawbacks of National Legislation

Before analyzing judgments reached in regard to cases of ill-treatment in the light of international standards, it is expedient to focus on the definition of the notion of torture, as stipulated by national legislation.

Paragraph 1 of Article 1441 of the Criminal Code of Georgia provides the following:

"Torture, i.e. exposing a person, his/her close relative or the person who is dependent on him/her materially or otherwise to such conditions or treating him/her in a manner that causes severe physical pain or psychological or moral anguish, and which aims to obtain information, evidence or confession, threaten or coerce, or punish the person for the act, he/she or third person has committed or has allegedly committed "

In the first paragraph of this article the perpetrator of the act of torture is a private person. It should be noted, that the wording of the provision prohibiting torture in the Criminal Code significantly differs from the definition of torture, stipulated by paragraph 1 of Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in December 9 of 1975, which states the following:

"The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person… when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.".

Thus, according to the United Nations Convention, the perpetrator of the offence can only be a public official or other person acting in his official capacity. Given part of the definition of torture clearly identifies the key element - direct or indirect participation of a representative of a state authority. Consequently, according to this classical definition, torture is a delict, which envisages availability of a special subject. Although the European Convention on Human Rights does not textually contain such definition, taking into consideration the practice of the European Court of Human Rights, it may be assumed, that the Strasbourg Court actually incorporates this interpretation.[157] As an example of this can serve the above referred case Selmouni v. France, where the European court when determining whether a particular form of ill-treatment should be qualified as torture, or inhuman or degrading treatment, made reference to the UN Convention and examined one by one presence in this case of elements, stipulated by Article 1 of the Convention. [158]

It should be noted, that the relevant provision of the national legislation of Georgia interprets the perpetrator of the offence in a broader manner, and considers it as aggravating circumstance, when such acts are committed by a public official, who according to the UN Convention is the subject of the offence. Such formulation of the definition of torture in the national law is not a serious breach, but undoubtedly, such difference of the definition from the definition stipulated by the UN Convention, which Georgia ratified in September 22 of 1994, cannot be considered as a positive fact.

Accordingly, the fact that significant number of cases, examined within the framework of the research, concern ill-treatment committed not by a public official, but a private person, who caused intense physical/psychological pain or suffering to a spouse or alleged lover on the grounds of jealousy, can be explained by current formulation of the definition of torture in the national law. Such cases shall not be considered as torture within the meaning of the Convention.

Another important aspect is the provision prohibiting inhuman and degrading treatment, i.e. Article 1443 of the Criminal Code. Unlike the international legal instruments adopted by the United Nations and the Council of Europe, Georgian legislation contains the definition of inhuman and degrading treatment. The problem is arising from the fact that the title of the article indicates "inhuman or degrading treatment", while the provision itself states the following:

"Degrading or coercing a person, or exposing a person to inhuman, degrading and humiliating conditions as a result of which he/she suffers severe physical and psychological pain".

This norm does not explicitly differentiate these two forms of ill-treatment that are prohibited by Article 3 of the European Convention on Human Rights, and the title of the provision is also of alternative character. As a result, such formulation of the article poses problems in distinguishing from each other inhuman and degrading treatment, which is clearly evident from the judgments, reached by the national courts.

There is no doubt, that this circumstance cannot be considered as a legislative achievement at the national level, since inhuman and degrading treatment is distinctly different from each other. Also, it is noteworthy, that difference between these two notions is provided not only by the degree of severity of actions. In regard to given issue of particular importance is the definition contained in the "Guidebook on torture and ill-treatment" published under the aegis of the Association for the Prevention of Torture, according to which inhuman treatment is lighter form of ill-treatment, as to the degrading treatment, according to the case-law of the European Court, it has always been, and still is closely associated with "serious humil-

157 See concurring opinion of Judge Zupančič on the case Jalloh v. Germany, № 54810/00, July 28 of 1999.
158 Selmouni v. France [GC], July 28 of 1999, #25803/94, §§ 96-100, ECHR 1999-V.

iation"[159] and such aspects of the offence, as human dignity and honor[160]. These concepts are most clearly stated in the judgment of the Court on the case Pretty v. the United Kingdom:

"As "ill-treatment" is considered a deliberate treatment, that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading".[161]

### 8.2.2. Differentiation of Forms of Ill-treatment

As stated above, the wording of article 144 of the Criminal Code can pose certain challenges. In given regard it is relevant to mention the case[162] considered by Tbilisi City Court in 2018, which was related to ill-treatment of detainees by the inspectors of one of the regional temporary detention isolators. According to the case materials, the above mentioned officials systematically and mercilessly beat the detainees. The ill-treatment towards them also included such actions, as verbal insults and coercion of the detainees and making them clean the dusty floors of cells and corridors with their clothes and then put on these clothes. In addition, for months, the prisoners were kept in unhealthy hygienic conditions, namely, they were not allowed to wash, and had no access to the items, mainly food, that was brought to them.

Although the court refers to such landmark cases, reviewed by the European Court of Human Rights, as Kudla v. Poland[163] and Nekrasov v. Russia[164], it also emphasizes the absolute nature of Article 3 of the European Convention on Human Rights, however, it is noteworthy, that from the standpoint of legal assessment, the judgment reached in regard to the present case lacks analysis as to specifically which form of treatment prohibited by the national law are we dealing with in given case. In addition, the judgment lacks the reasoning on what basis it was considered that the inhuman and degrading treatment occurred. According to the national court,

"In the given case the unity of evidence adduced to the case materials confirms beyond the reasonable doubt, that the defendants committed inhuman and degrading treatment".

It is noteworthy, that only a reference to the fact that the persons committed offence stipulated by the relevant article, cannot be considered as sufficient for the legal assessment to be in compliance with the established international legal standards. To this end it is necessary to differentiate between the forms of prohibited ill-treatment and properly assess the actions committed by the offenders, which unfortunately we do not see in this judgment.

As an excellent illustration of proper use of the international standards and adequate reasoning by the national courts may serve the judgment of Rustavi City Court[165], concerning the case of severe beating of the victim on the ground of infidelity, as well as such sadistic treatment, as cutting of the ear.

Namely, referring by the relevant case-law of the Strasbourg Court, the court drew distinction between

159 Denmark, Norvey, Sweden, Nitherlands v. Greece (The Greek Case), #3321/67, #3322/67, #3323/67, #3344/67, page 186, 1969.
160 D. Long, Guide to Jurisprudence on Torture and Ill-treatment, Geneva, 2002, p. 17-18.
161 Pretty v. the United Kingdom, #2346/02, § 52, ECHR 2002-III.
162 Judgement of Tbilisi City Court of March 29 of 2018, case №1/4939-1
163 Kudla v. Poland [GC], #30210/96, October 26 of 2000, ECHR 2000-XI
164 Nekrasov v. Russia, #8049/07, May 17 of 2016.
165 Rustavi City Court Judgement of March 13 of 2017, case #1-553-16

the actions prohibited by the Article 3, namely inhuman and degrading treatment and stated the following:

"Treatment has been held by the European Court to be "inhuman" because it was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (Labita v. Italy, application N26772/95, paragraph 120 of the Judgment of Grand Chamber of the European Court of Human Rights of April 6 of 2000). The European Court held, that treatment is considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and breaking their physical or moral resistance (Jalloh v. Germany, application N54810/00, paragraph 68 of the Judgment of the Grand Chamber of the European Court of Human Rights, 2006).

"Inhuman treatment rather causes mental suffering, than a physical one, while the treatment is considered "degrading" when it is such as to arouse in its victim feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance".

It should be noted, that in the present case, the court, on the basis of appropriate assessment of evidence, found that in given instance the immediate relative created such conditions, or applied to such treatment, which by its nature, intensity or duration, led to severe physical pain or mental or moral suffering, the aim of which was to punish a person for her actions, or alleged actions, and as a result, the court found violation of paragraph 2 of article 1441 of the Criminal Code.

### 8.2.3. Assessment of Evidence in Compliance with the Standard of Beyond Reasonable Doubt

As stated above, in the course of adoption of a judgment it is of utmost importance, that the assessment of evidence presented in the case, should satisfy the requirement of the standard of beyond the reasonable doubt. In cases of torture and ill-treatment, the European Court has reiterated this approach. Namely in the case Jalloh v. Germany the European Court stresses, that "to assess the evidence, the Court adopts the standard of proof "beyond reasonable doubt", but adds that such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".[166]

It is noteworthy, that the European Court of Human Rights uses the standard of beyond reasonable doubt to determine the responsibility of the state towards the applicants, which is the obligation of the Court due to the role assigned to it. In particular, it determines the issue of responsibility of States in accordance with the international law, and its function is not to determine individual criminal liability. Consequently, the national courts should not interpret the standard of beyond the reasonable doubt, applied by the Strasbourg as the standard of proof, necessary for establishing of criminal liability of a person. Given issue is highlighted in the research, prepared within the framework of the joint project of the European Union and the Council of Europe - "Application of to the European Convention on the Human Rights and harmonization of national legislation and judicial practice in Georgia in line with European Standards" [167], underlining that "it is fundamentally wrong to assign to the European Court of Human Rights the function, that it establishes, what standard of proof should be used at the national level to establish culpability of a person. This should be determined by the domestic legislation and interpreted by the national courts, and not the international court, which assesses the fairness of the process on the whole.

166 *Ireland v. The United Kingdom,* application #5310/71, Judgment of January 18 of 1978, paragraph 161.

167 Nana Mchedlidze, "The Standard of use of the European Convention on Human Rights by National Courts", Tbilisi, 207. Page 108.

Nevertheless, in one of the cases, examined for the purposes of the research, it was explicitly clear, that this problem is still relevant. In particular, in one of the cases, the court said, that:

„According to the European Court of Human Rights, the verdict should be based on the free assessment of the evidence in the case, the conclusions derived from the factual circumstances, and the arguments submitted by the parties. Proof can be derived from the unity of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact, which in the opinion of the court is not so in regard to this case. [168]''

Which, as already mentioned, does not arise from the practice of the European Court of Human Rights and the functions assigned to the Court.

Paragraph 13 of Article 3 of the Criminal Procedure Code of Georgia defines the standard of beyond the reasonable doubt, application of which is necessary when arriving to the verdict of guilty. This standard is explained indepthly in one of the cases requested within the framework of the research, according to which

''The standard of "beyond reasonable doubt" is the combination of the evidence required by the Court for arriving to a convicting judgment, which would convince an objective person in the culpability of the defendant. The standard of beyond the reasonable doubt is the most important and highest level of standard of proof, i.e. the unity of evidence necessary for arriving to a convicting judgment, which would convince an objective person in the culpability of the defendant. In given case, the main emphasis is on the quality of doubt, and not the assumption. At the same time, the focus is not on the judge, but an objective person, who is an objective, impartial, neutral observer. This standard of proof means that as a result of the evidence examined in the court, an objective observer (in this case, a judge) should have no grounds for reasonable suspicion in the truthfulness of the accusation and culpability of the accused".

The present case,[169] considered by Tbilisi City Court in 2018, concerned the victim, whose spouse on the basis of jealousy, and allegedly because of her sexual intercourse with another person, and for the purpose of obtaining confession, was regularly assaulting the victim physically and insulting her verbally. Additionally, the defendant inflicted strong physical pain to the victim by extinguishing a cigarette in two places on her leg and biting her in the various parts of the body. Due to the abovementioned acts the victim suffered severe physical pain, and mental and moral suffering. The offender restricted the victim's freedom by locking her in the house for 5 days, until she escaped through climbing to the neighbor's balcony.

It is noteworthy, that at the court hearing the victim, as well as her family members and relatives, gave radically different testimony from the testimony, that she gave at the investigation stage. She explained sustained injuries and concussion by the fact, that she fell on the iron shutter when climbing to the neighbor's balcony, and stated, that the reason, that she gave different testimony to the investigation was jealousy and the motive of vengeance on the ground of "feminine principles", which was ascribed to her severe depression.

It should be assessed positively, that the court has taken into consideration and systemically analyzed inconsistency of the victims and witnesses testimonies given at the stage of investigation and at the trial. In particular, the court observed, that the testimony given by the victim and witnesses at the stage of investigation in full compliance of the law were consistent and corresponding, while the testimonies submitted before the first instance court were contradictory and unreliable. The court assessed each proof from

168 Judgment of Tbilisi City Court of May 31 of 2017, case #1/2760-15.
169 Judgment of Tbilisi City Court of April 23 of 2018, case #1/4301-17.

the standpoint of an objective observer, and considered as most reliable testimonies of two close friends of the victim, who differently from her family and other relatives, had no grounds to fear the accused, or any personal interest in preserving the family, and were free from societal stereotypes. According to the arguments contained in the legal assessment of the judgment, the court stated the following:

"The court does not accept victim's testimony in the part, that N. Ts. has never committed acts of violence towards her, and never restricted her movement, as the court considers this testimony not persuasive, due to the reason, that materials of the case confirm beyond reasonable doubt that N.Ts. has committed above referred acts. Also, the court found, that testimony of the victim, where she states, that she burnt her legs while cooking food, and the bites where caused by her children, was not convincing.

Neither did the Court find convincing, that L. G. was trying to climb to the balcony of N.U. because her door locked, as materials of the case confirm that N. Ts. was a wealthy person, who had several private businesses, and repairing of a broken door would present no great difficulty to him, so that his spouse and the mother of his children did not have to climb out from the apartment on the 8th floor in attempt to get to the neighbor's balcony, thus endangering her life. Also, it was possible to call to the relevant service, which would have assisted in opening the door.

Also, it is noteworthy, that according to the explanations of the father of the victim N.G. he did not know which testimony he signed at the investigation stage, while he confirmed correctness of the protocol of interrogation by his signature. Also, a witness N.P. made different statement at the trial, stating that the victim had no injuries when she came to her, and that L.G. and N.Ts. have an exemplary marriage.

L.G. and other witnesses made at the trial not only different statements from those, that they made at the stage of investigation, but these statements also contradicted each other. According to the court's assessment, these statements are contradictory and unreliable, and they do not pass the so called "credibility test". ''

The court stated clearly in its reasoning, that

"The submission of evidence (information) to the court by the party (s) does not automatically turn this information into credible evidence, as after submission, the evidence must undergo several tests, i.e. the evidence must be assessed in relation to its relevance, admissibility and trustworthiness (Article 82 (1) of the Criminal Procedure Code of Georgia)… It is also worth mentioning, that each of these tests (relevance, admissibility, trustworthiness) is of its importance, and some evidence may meet two tests, but because it may not overcome the third tests (trustworthiness), it shall not be upheld.

Finally, the court took into account the victim's friends - T. E's and E. U's statements, who confirmed that they knew from L.G. that N.Ts. was insulting her physically, but she was not applying to the police, as she was afraid that N. Ts. would kill her".

On the basis of this reasoning, the court expressed its position and arrived to the following conclusion:

"Due to all the above-mentioned circumstances, the court considers, that L.G. is still under the fear and does not testify against her spouse, and the fact, that all other witnesses have changed their testimonies, is linked with this circumstance, all of which serves the purpose of attaining dismissing criminal charges from the accused ...

Thus, the Court having assessed each piece of evidence in the criminal case from the standpoint of its relevance, admissibility and trustworthiness, and taking into consideration the totality of the evidence examined in regard to this case, and assessing these evidence from the standpoint of sufficiency for in-

ditement, concludes, that the evidence examined at the trial (including undisputed evidence ) proves beyond reasonable doubt N. Ts. had committed offences, stipulated by article 111 and paragraph 1 of article 1441 of the Criminal Code of Georgia (exposing a person, his/her close relative to such conditions or treating him/her in a manner that causes severe physical pain or psychological or moral anguish, and which aims to obtain information, evidence or confession, threaten or coerce, or punish the person for the act he/she has committed) and Article 143, paragraph 2, sub-paragraph "c" and paragraph 3, sub-paragraph "e" (unlawful restriction of liberty by one family member, committed against another family member for the purpose of facilitating other offenses, through use of violence threatening person's life and health, and the threat of use of such violence)".

This judgment is exemplary in terms of proper assessing of the factual and legal circumstances of the case. The court clearly saw the real picture and fulfilled its obligation to effectively administer justice. This case also makes it clear, that for the proper substantiation of the judgment is not the panacea to refer to the practice and judgments of the European Court of Human Rights. Quite frequently judges refer to the practice of the Strasbourg Court without any necessity, thus trying to increase the quality substantiation of the decision. However, it is noteworthy that referring to the judgments of the Strasbourg Court without necessity not only does not raise the quality of justification, but also overloads the text of the decision. Thus, the national courts are encouraged to refer to the case-law of the European Court of Human Rights only if necessary, and when it helps in resolving the legal issue and correctly assessing facts or legal circumstances.

### 8.2.4. Assessment of the Minimum Threshold of Severity and Absolute Nature of Article 3 of the Convention

It is well known that the European Court of Human Rights assigns special importance to the minimum level of severity of the treatment to differentiate the actions prohibited by Article 3. It should also be noted, that this threshold is definitive in determining whether or not the ill-treatment is falling within the scope of Article 3 of the Convention. This issue is duly considered in accordance with international standards in one of the cases examined by Rustavi City Court[170], which concerned group torture of a person on the ground of betrayal, brutal beating and perverted raping. In the reasoning part the court explains:

"To fall within the scope of actions prohibited by Article 3 of the Convention, ill-treatment should reach the minimum level of severity. This assessment is relative and depends on all circumstances of the case, such as duration of the treatment, its physical and/or mental effects, and in some cases, the sex, age and state of health of the victim (Ireland v. The United Kingdom, application #5310/71, judgment of January 18 of 1978, paragraph 162; Nekrasov v. Russia, application #8049/07, ECHR judgment of May 17 of 2016, paragraph 91). ''

The criteria for measuring of the minimum level of severity, established by the European Court of Human Rights case-law was appropriately applied in other cases as well, examined within the framework of the research, namely, cases reviewed by Tbilisi City Court, as well as other Regional/City courts. Such practice should be assessed positively, as the above mentioned factors are of crucial importance for correct qualification of offences.

The above referred judgment is also noteworthy for the fact, that in the reasoning part the court provides detailed analysis of differences between the definitions of inhuman and degrading treatment:

170 Judgment of May 17 of 2018 of Rustavi City Court, case #1-645-17

"In order to determine whether the treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has established previously, the purpose was, that through this distinction the Convention assigned special features to deliberately caused inhuman treatment, and this distinction is that such treatment should have caused intense and severe suffering (Ireland v. The United Kingdom, application #5310/71, judgment of January 18 of 1978, paragraph 167). UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, which entered into force on June 26 of 1987, establishes similar distinctions in Articles 1 and 16: Namely, Article 1.1 provides definition of "torture" for the purposes of this Convention: the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed".

In the instant case the court clearly stressed the absolute character of prohibition of torture, and this is illustrated by references to relevant provisions of international Conventions. In this connection, in one of the judgments[171] of Tbilisi City Court is provided the following:

"According to Article 3 of the European Convention on Human Rights no one shall be subjected to torture or to inhuman or degrading treatment or punishment. This prohibition is of absolute character, and it cannot be restricted by any specific circumstances.

According to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, no one shall be subjected to torture or to inhuman or degrading treatment or punishment in no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. "

In the above-mentioned case, the Rustavi City Court[172] in line with the Strasbourg Court's case-law and in the context of absolute nature of prohibition of torture, stresses the fact that "even fight against such a grave crime as terrorism, cannot be envoked to justify restriction of Article 3".

In conclusion, it should be stated, that national courts when considering cases concerning torture emphasize the absolute nature of prohibition of torture, and in their reasoning indicate the relevant case-law of the European Court of Human Rights. Furthermore, examination of the research material has revealed, that the national courts apply the principle established by Article 3 of the European Convention on Human Rights, according to which for the treatment to fall within the scope of Article 3 of the Convention, it should achieve the minimum level of severity. Also, the domestic courts correctly refer to the case-law of the Strasbourg Court, where the Court defines the factors, according to which the minimum threshold of severity should be assessed. The national courts have been advised to examine in detail the factual circumstances of each case and apply the above referred factors for establishing the minimum threshold of severity when establishing whether the treatment falls within the scope of Article 3 of the Convention.

171 Tbilisi City Court Judgment of April 23 of 2018, case #1/4301-17.
172 Rustavi City Court Judgment of May 17 of 2018, case #1-645-17.

### 8.2.5 Reference to Positive and Negative Obligations of the State Ensuing from Article 3 of the Convention

As already mentioned, Article 3 of the European Convention on Human Rights imposes on Member States negative as well as positive obligations in relation to torture and other ill-treatment. With the purpose of preventing acts prohibited by the Article 3, it is essential that the States implement abovementioned obligations. Consequently, the domestic courts are called upon to review the positive and negative obligations of the States under Article 3 of the Convention in the legal reasoning of the judgment.

It is noteworthy that in several cases examined within the framework of the research, the courts emphasized the above-mentioned obligations of the state. For example, Rustavi City Court focuses its attention in the above referred judgment[173] not only on the negative, but also positive obligations of the state, arising from Article 3 of the Convention, and states the following:

"The importance of prohibition of torture is also indicated by the fact, that the state which takes responsibility and considers a specific act as punishable has the positive obligation to ensure that no one within its jurisdiction is subjected to torture and inhuman treatment."

However, it is worth noting, that in terms of the proper interpretation of given obligation, Tbilisi City Court's judgment[174] of 2018 year does not contain exact definition of this obligation. The case concerned ill-treatment of prisoners committed by the employees of a penitentiary institution, namely they applied such forms of inhuman and degrading treatment, as tying hooded prisoners to window bars for days, spitting on the head, burning out cigarette butts on their hands and etc. In the reasoning of the judgment the court stated the following:

"The fact that all of the victims were persons deprived of liberty, and placed in the state institution under the Penitentiary Department, in itself gives rise to a positive obligation of the state to protect such persons from torture, inhuman or degrading treatment, which in this particular case the state failed to provide. Consequently, this gives rise to a negative obligation of the state to impose criminal liability on those who committed this offence".

It is noteworthy that, as discussed above when overviewing the international standards[175], the negative obligations imposed on States by the Article 3 implies, that the State should refrain from committing actions prohibited by the provision. Positive obligations, in their turn, are divided into material and procedural obligations. According to the material positive obligations, the State must protect persons from torture, degrading or inhuman treatment, while according to positive procedural obligations, the State must conduct an effective investigation for the purpose of punishing the perpetrators.

Therefore, it follows, that in the second sentence of the above passage the court interpreted the substance of the negative obligations incorrectly. The obligation, that the court interpreted as a negative obligation of the state, in particular, to conduct a thorough and effective investigation for the purpose of identification and punishment of offenders, as noted above, is the positive procedural obligation of the State. When the court was deliberating about the fact, that the victims in given case were persons deprived of liberty, placed in a penal institution, the court should have stressed not the positive, but negative obligation of the state, as the negative obligation of the state implies responsibility of the state for all actions of such law-enforcement authorities, as police, security forces and officials, employed in such bodies. The body

173 Rustavi City Court Judgment of May 17 of 2018, case #1-645-17.
174 Tbilisi City Court Judgment of February 6 of 2018, case #1/3385-17.
175 See Chapter 3, page 22.

referred to in the present case was a penitentiary establishment. In addition, it should be stressed, that according to the practice of the European Court of Human Rights, the States will be held liable notwithstanding the fact, whether the subordinate authorities and persons acted in accordance with their own will, or upon orders. States shall not avoid liability for actions contrary to Article 3 of the Convention by claiming, that they were not aware of such actions.

Thus, although the national court correctly indicated what is the essence of the State's positive obligation, i.e. to protect persons from torture, degrading or inhuman treatment, the judgment does not explicitly explain that the obligation implies protection of persons from ill-treatment perpetrated by the third parties, more specifically, in the context of a prison, from the risks posed by other prisoners, and not the actions committed by the representatives of the state agency.

In the present case, the court emphasized the role of the penitentiary establishment and its employees in respect of execution of positive obligation of the state, and the responsibility imposed upon them in given regard. The judgment reads as follows:

"The state representatives, especially the staff of the penitentiary system, who are obliged to comply with the Constitution, and protect fundamental freedoms safeguarded by the Convention on Protection of Human Rights and Fundamental Freedoms, carry higher responsibility than ordinary perpetrators, as in this case at stake is not only the issue of liability of each individual offender, but also the obligation of the state to eliminate the sense of impunity that criminals may have only due to the fact, that they hold a certain office; this obligation also implies, that they should thus contribute to and maintain trust and respect of the society towards the country's law enforcement system".

Thus, in view of the fact, that obligations imposed on the member states by the Article 3 of the Convention differ significantly in many respects, it is important to formulate them properly and in compliance with international standards in cases of torture and other ill-treatment.

### 8.2.6. Taking into Consideration Specific Character of the Offences and their Elements

ne of the most important factors in cases concerning torture and ill-treatment and formulation of judgments in compliance with the international standards, is to properly take into consideration specificity of the offence. Since in the process of assessment of actions prohibited by Article 3 of the European Convention on Human Rights along with legal aspects great emphasis is made on the moral and societal norms, therefore, it is logical that in this cases special importance may be assigned to such specific circumstances, as the victim's subjective perceptions, relations between him/her and the accused, their personal characteristics and so forth.

One of the above-mentioned aspects, related to the specificity of the offence is highlighted in the reasoning part of the judgment[176] of Tbilisi City Court, concerning the disciplinary measures taken by the military officials towards their subordinates on the grounds, that the privates left the military unit without permission. In this case, the conscripts, who left the post without permission, were taken to the basement of the barracks for the purpose of their intimidation and punishment, where they were physically and verbally insulted, beaten with hands and feet, and were made to kneel down, after which one of the defendants took out from the holster his service firearm and threatened the servicemen with death. The beating of the conscripts, their mental and moral suffering lasted about 30 minutes. After the above-mentioned treatment the defendants forced the soldiers to stand on guard for 24 hours in full equipment,

176 Tbilisi City Court Judgment of May 31 of 2017, case #1/2760-15.

which was weighing about 25 kilograms.

"The court will also pay attention to the subjective perception of the victims, as in the testimony given to the court none of them confirm the feeling of strong physical pain or moral suffering as a result of actions of their leadership.

The victim A.T, questioned as a witness on the case, reported to the court that he had not received injuries as a result of beating and has not felt strong pain. Consequently, neither he, nor other victims had to take any medication or needed to consult a doctor.

Z.N, who was assigned the status of a victim, in the course of interrogation as a witness before the court, did not confirm, that he received any injuries, or needed assistance of a physician or psychiatrist. He said that he was hit near the temple, but there was no sign of swelling, because his hair was covering his temple. He also confirmed that he did not need assistance of a doctor, psychologist or psychiatrist. He also stated, that the victims had the opportunity of using toilet.

G.G., who was assigned the status of a victim, in the course of interrogation as a witness before the court, stated, that he did not feel strong pain as a result of beating and did not need assistance of a physician, psychologist or psychiatrist. He also stated, that the victims had no traces of beating."

Although in the present case the court assessed the evidence in compliance with the standard of "beyond the reasonable doubt", it concluded, that "there is no evidential proof of any criminal action and no sufficient totality of evidence." However, it is noteworthy, that in the substantiation part of the judgment it is not sufficiently clear, how the court took into consideration such factors determining specificity of the offence, as the context in which it was committed, as well as the hierarchical relationship between the accused and the victim, which may have been decisive for qualification of the offence. Also, it should be stressed, that according to the victims' statements, which are corroborated by other witnesses, the captain ordered them to collect 10 boxes of cigarettes on that day. The victims were able to collect only 8 boxes, and the captain asked them to get the remaining 2 boxes, otherwise they would be punished. According to the victims, they left the post in order to obtain cigarettes.

As has been several times stated above, that according to the case-law of the European Court of Human Rights, ill-treatment should reach the minimum level of severity to fall within the scope of Article 3 of the Convention. The minimum level of severity is a relative notion, and it depends on the duration of treatment, its physical and mental impact, as well as, in some cases on the sex, age and health of a victim. Additional factors may also include the purpose of treatment, as well as the motive and intent of such treatment, the context, such as the atmosphere of heightened tension and emotions (see Selmouni's case, paragraph 104).

Although as a result of assessment of the evidence the cumulative existence of components of torture have not been identified, on the basis of undisputed factual circumstances of the case it was possible to conduct a more detailed analysis of whether or not the military officials have committed other criminal offences prohibited by the law, for example, degrading treatment, having regard to the hierarchical interrelation and taking the victims to the basement for the purpose of their punishment (slapping in the face, pointing a gun to the forehead and etc), it is quite logical, that there is a legitimate interest towards proper assessment of this issue.

The court concluded, that the fact of beating of victims was not confirmed by sufficient evidence. The court also found, that putting the victims instead of a five day shift on a three day shift and making them carry all the equipment did not constitute torture, as a three day shift, as a disciplinary measure was pro-

vided by the normative act[177], and as for their assignment, the court noted that the victims were using the toilet and ate in the dining room, i.e. the shift was not uninterrupted, and consequently, the treatment could not be considered as torture. The court, based on established factual circumstances, could have deliberated on the fact, whether the treatment committed towards the victims was indicating to the lower position of the conscripts in comparison with the defendants, which may have caused the feeling of inferiority in them; In addition, as a result of the abovementioned acts the victims may have felt fear and humiliation, especially given, that the victims left the military unit for the purpose of getting sufficient number of cigarette packages, demanded by the captain. Also, the court should have paid attention to the difficulties, associated with carrying of 25 kilograms of equipment over a long period of time. The national court pointed to the relevant normative regulations indicating, that in carrying out the most important function of defending the country, the strict measures envisaged by the law for preventing violations of military discipline could not be considered as torture committed against soldiers.

Nevertheless, while discussing such issues, the standard set by the European Court of Human Rights should be taken into account, according to which the measure, which was applied against the applicant should not reach the minimum level of severity. Therefore, it would have been expedient, if the court considered the necessity of used method, i.e. how reasonable it was to bring the soldiers to the basement, where they were made to kneel and the firearm was pointed at them while they were in this position. At the same time, the court should have stressed the fact that, that unlike being on duty, such treatment could not have been applied as a disciplinary measure. Thus, it would have been expedient, if the court deliberated, whether degrading or inhuman treatment had taken place, and if it would find, that such treatment had not taken place, the court should have explained why the disputed actions did not reach the minimum level of severity required by the Article 3 of the Convention.

Although the charges brought by prosecution did not include the actions prohibited by Article 1443, if we take into account, that these elements were clearly identified in the course of the case, the court should have deliberated more indepthly on these issues, thus making the role of the judge more prominent. The court's decision on changing of qualification of the defendant's actions on its own initiative is of great importance for the purpose of ensuring on the one hand, that a person is not charged in committing a graver offence, than he actually did, and on the other hand, not exclude fully culpability of a person. This is particularly important in cases of ill-treatment, since the neglect of degrading and inhuman treatment and the acquittal of the defendant in the allegation of torture is incompatible with Article 3 of the Convention; In addition, this approach would mean overlooking of the specific nature of actions, that violate fundamental human rights.

### 8.2.7. Use of Plea bargain in Cases concerning Torture and Other Forms of Ill-treatment

The most striking expression of the reduced role of the judge in the criminal proceedings is the institute of plea-bargain, introduced in the national criminal procedural law. The Coalition for Independent and Transparent Judiciary in the study prepared by the Working Group on Criminal Justice, titled "The Use of Plea Bargaining in Georgia", provides an assessment of one of the members of the Georgian Bar Association in relation to the role of a judge in reaching a plea bargain agreement. He notes, that when the plea bargain is signed, the judge actually has the role of a notary[178]. This circumstance is particularly important in cases concerning torture and other forms of ill-treatment. It is noteworthy, that by the 2010 edition of the Criminal Procedure Code of Georgia the plea bargaining agreement was not permitted to be

177 Article 36 of the Ordinance of the President of Georgia on Approval of the Military Disciplinary Regulations of the Armed Forces of Georgia, dated by June 10 of 2006.

178 The Coalition for Independent and Transparent Judiciary, "The Use of Plea Bargaining in Georgia", page 13.

reached in the event of offences, stipulated by Articles 1441-1443 of the Criminal Code of Georgia, but according to subsequent amendments, Article 218 paragraph 8 of the Criminal Procedure Code of Georgia, it is forbidden to fully exempt the accused person from criminal liability on the grounds of a plea bargain only in the following cases:

"The accused/convicted persons may not be fully released from a sentence for criminal offences provided for by Articles 1441–1443 of the Criminal Code of Georgia".

It can be said, that the agreement envisaged in this article is a plea bargain by its nature, with the difference, that for striking of such agreement, certain preconditions need to be satisfied (different from the plea agreement) and only the Chief Prosecutor has the authority of signing it. If ordinarily, in the event of a plea bargain it is necessary to admit the guilt, in given case the accused/convicted person should not necessarily admit the guilt, but to cooperate with the investigation; given article also stipulates for some other preconditions as well, namely, that as a result of such cooperation, the identity of an official, who committed the offense or the person, who committed a particularly serious offense should be revealed.[179]

The purpose of the abovementioned provision is to encourage people who are in close cooperation with the investigation, who greatly assisted the investigation in cases concerning such grave and sensitive offences, as torture or other ill-treatment, which is in the spotlight of the society. However, taking into consideration the national legislation, in particular paragraph 3 of Article 216 of the Criminal Procedure Code of Georgia, according to which

"The court is authorized to enter changes in the plea bargain only upon agreement of the parties to the case".

Undoubtedly, the abovementioned provision grants a fairly broad discretion to the author of a plea bargain - the Prosecutor's Office, which is potentially authorized to minimize penalty to a person accused of torture by means of avoiding consideration of merits of the case by the court.

It should be noted, that we come across this problematic issue in practice as well. As an illustration, we can cite Tbilisi City Court judgment[180] on one of the cases concerning the use of such forms of ill-treatment by controllers of one of the prisons under the Penitentiary Department towards the prisoners, as placing them without any grounds into a solitary confinement cell in a naked condition, where there was only one wooden plank bed without a mattress, a blanket and bedcover; The convicts also did not have hygienic means, such as toilet paper, towel and so on; Because of the absence of glass in the window, the rain was freely getting into the cell. In the evenings due to cold, it was unbearable to stay naked in the solitary confinement cell, and it was almost impossible to sleep at night. According to the case materials, plea bargains were concluded with the defendants in the present case. The court satisfied the motions of the prosecution in compliance with the requirements of Chapter XXI of the Criminal Code. As a result, for the offence, which was punishable with custodial sentence for the term from 5 to 10 years, on the basis of a plea bargain, concluded by the prosecutor, the accused were sentenced to imprisonment for the term of four years and eight months. On December 28 of 2012 in accordance with Article 16 of the Amnesty Act, the sentence was reduced by one-fourth and term of imprisonment was defined as three years and six-month; out of which, in accordance with the Article 50 of the Criminal Code of Georgia, part of the term, namely one year and six months was to be served in a penitentiary institution, while the remaining term - imprisonment for two years, on the grounds of articles 63-64 of the Criminal Code was considered as conditional sentence, and probation period was defined as 2 years. This kind of sentence does not promote to high perception of fairness of justice in the society.

179 Comments to the Criminal Procedure Code of Georgia, Tbilisi, 2015, page 650.
180 Tbilisi City Court judgment of May 25 of 2018, case #1/836-18.

All of this points to limited capabilities of the courts to impose a proportionate sentence on the accused, corresponding to the gravity of the committed action. In the above-mentioned study concerning the use of plea bargaining in Georgia, is reflected the position of a representative of Tbilisi Court of Appeal, who supports expanding judicial discretion, and emphasizes that "it is important to expand the role of a judge in the part of determining of the sentence in the course of approval of a plea bargain."[181] The above issue is much more important, when it comes to such grave offences, as ill-treatment by a public servant, especially in the context of the use of solitary confinement cells, as placement of convicted persons in such cells should be lawful, necessary and proportionate. Such removal for indefinite term and in inadequate conditions is contrary to the requirements of the European Convention on Human Rights. The violation of Article 3 of the Convention shall also be established in those cases, when the risk posed by a prisoner is insufficient to justify the imposed measure, or when the reason of placement in the solitary confinement cell is not properly substantiated.[182]

### 8.2.8. Substantiation of Imposed Penalty

It is noteworthy that in order to properly assess the quality of a judgment, proper substantiation of imposed sentence by the court within the limit of discretion granted to it is of fundamental importance, as substantiation by the court is the main issue assessed by the public, which impacts formation of its perception about justice. The European Court of Human Rights emphasizes the importance of substantiation of a judgment and the principle of individualization of penalties. In the case Ajdaric v. Croatia[183], the European Court of Human Rights held violation of Article 6 of the Convention on account of insufficient reasoning in criminal conviction, as the principle of individualization of penalties was infringed and the accused was sentenced to imprisonment for up to 40 years.[184]

The majority of cases studied within the scope of the research, are not distinguished by a diligent analysis in the aspect of reasoning of a judgment, and in majority of cases, in the judgment is indicated a uniform sentence, which states, that the imposed sentence is a proportionate consequence of deliberation in process of the legal assessment. However, it should be mentioned, that in several judgments analyzed within the survey, we come across proper substantiation of imposed sentences in compliance with relevant international standards. In given regard especially important is the judgment[185] of Tbilisi City Court reached on the case, concerning the use such forms of treatment by the accused towards the alleged lover of the spouse, as tying hands and legs with a rope and merciless beating with an iron bar, hoe handle, as well as beating with hands and feet, and nailing of a lower limb. The purpose of the accused was to obtain a confession from the victim that he had a sexual intercourse with his wife. The court stated the following in regard to the imposed penalty:

"The use of lenient sentences from the standpoint of sufficiency of the penalty is unreasonable. In such situations more attention should be paid to creation of such perceptions in the society, that a person and his physical inviolability is of predominant value, and that each person has the right to respect for his or her physical integrity and free movement. The use of a lenient sentence is absolutely unjustifiable, especially when the quality of physical injuries inflicted by the accused to the victims meets the standard of torture, which is a serious public threat. In this case, a strict penalty should facilitate restoration of social justice for a victim, as well as in the public consciousness.

181 The Coalition for Independent and Transparent Judiciary, "The Use of Plea Bargaining in Georgia", page 13.
182 X v. Turkey, October 9 of 2012, §§ 31-35.
183 Ajdaric v. Croatia, #20883/09, December 13 of 2011.
184 I. Kelenjeridze, the Importance of the Principle of Individualization of Sentences in the Process of Imposition of a Penalty, German-Georgian Criminal Law Journal, page 24.
185 Tbilisi City Court judgment of January 24 of 2018, case #1/3853-16.

The sentence that fully reflects the seriousness of the action ... gives a legal answer, and the desire of personal or public revenge is replaced by the achievement of restoration of justice".

From the standpoint of adequate reasoning is of interest the judgment of Tbilisi City Court in one of the above-mentioned cases[186] concerning torture committed by a family member towards another family member, namely the spouse, according to which:

"In the course of imposition of a penalty the court takes into account the mitigating and aggravating circumstances related to the offender, namely, the motive and purpose of the offence, the unlawful will expressed through the action, the nature and scope of violation of duties, the form and means of committing of offence, the unlawful consequences, the criminal record, personal and economic conditions, behavior after committing offence, especially, the desire to compensate damages caused to the victim and to reconcile with him/her".

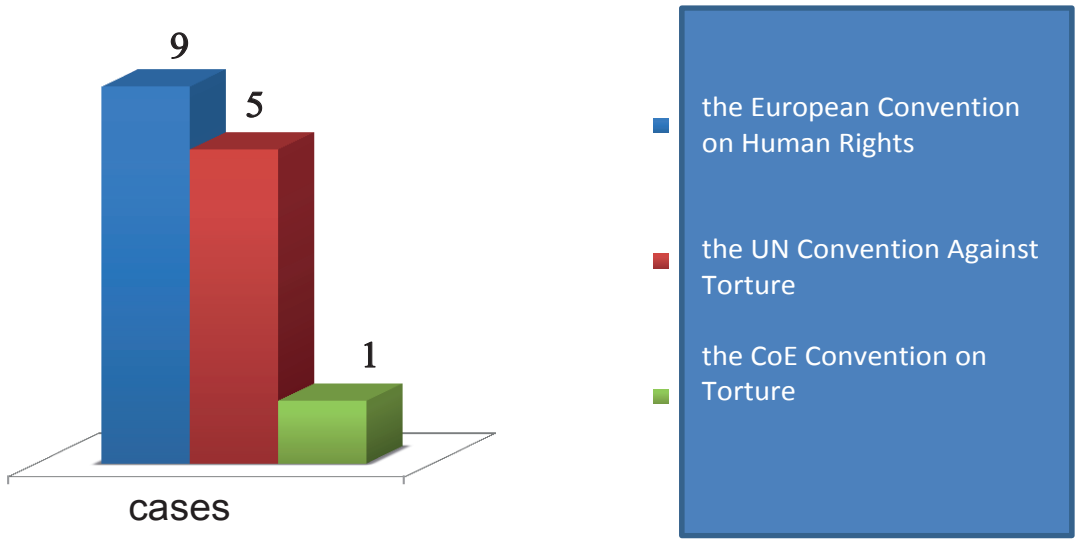
Thus, for the development of sentencing practices it is important to take into consideration all those circumstances, that the Criminal Code specifies in terms of imposition of a penalty, namely, the offender's personality, his past record, the severity of the committed offence, the aggravating and mitigating circumstances, and it is important, that the adopted sentence is strictly individualized and well-substantiated in the eyes of the reasonable observer. The society must assure itself, that the last resort measure applied by the state, i.e. the imprisonment, which is imposed as a penalty on the grounds of convicting judgment, should be fully in line with the factual circumstances of the case, the personality of the convicted person, is strictly personalized and ensures attaining the goals of the punishment, which is prevention of crime and social reintegration of a convict.

### 8.2.9. The Practice of Application of International Acts and the Case-law of the European Court of Human Rights

The increasing importance of the European Court of Human Rights has influenced application of the Convention and the case-law of the Court by the national courts. The study has shown, that judges express their readiness to follow the standards of the European Court when adopting their decisions. They are trying to substantiate their legal arguments referring to the international and European standards. For example, in the majority of cases examined within the framework of the research the national courts when assessing torture, indicate the practice of the European Court, according to which the treatment should reach the minimum level of severity. As a rule, the judgments reflect constructive interaction between the domestic legal system and the case-law of the European Court. The courts are quoting from relevant international practice and/or international acts, by which they corroborate their conclusions and state, that their judgments are based on the national and international acts.

186 Tbilisi City Court judgment of January April 23 of 2018, case #1/4301-17.

**Application of international standards by the national courts on cases concerning ill-treatment in the period of 2017-2018**




The diagram illustrates that in cases concerning torture the courts most frequently refer to the European Convention on Human Rights and the Strasbourg Court practice, after which comes the UN Convention and finally the Council of Europe's Convention for Prevention of Torture.

In the cases, analyzed in the course of the research the least frequently applied international instrument was the Council of Europe Convention on Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which was referred to only in one case. This may be due to the fact, that this Convention establishes a non-judicial mechanism aimed at protecting persons deprived of their liberty from torture or degrading treatment or punishment. In particular, on the basis of the above referred Convention was established the European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the mandate of which is to monitor treatment towards persons deprived of their liberty through conducting visits to relevant facilities. Consequently, this convention addresses the functioning of the abovementioned mechanism: the system of visits, procedures, etc. Hence, the domestic courts when examining cases of ill-treatment often rely on the United Nations Convention and the European Convention on Human Rights.

In addition, it is noteworthy, that in most of the examined judgments the courts refer to the following judgments of the Strasbourg Court adopted in regard to alleged violations of Article 3 of the European Convention: Kudla v. Poland[187], Nekrasov v. Russia[188]; Selmouni v. France[189], Ireland v. the United Kingdom[190].

It should be noted that in various judgments we come across identical overview of the practice of the European Court of Human Rights and international acts. For example:

"According to the well-established practice of the European Court of Human Rights, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and

187 Kudla v. Poland [GC], #30210/96, October 26 of 2000, ECHR 2000-XI.
188 Nekrasov v. Russia, #8049/07, May 17 of 2016.
189 Selmouni v. France [GC], July 28 of 1999, #25803/94, ECHR 1999-V.
190 Ireland v. the United Kingdom, January 18 of 1978, Series A, #25.

the victim's behavior (Kudla v. Poland, application no. 30210/96, judgment of the ECtHR Grand Chamber of October 26 of 2000, paragraph 90; Nekrasov v. Russia, application no. 8049/07, ECtHR judgment of May 17 of 2016, paragraph 90).

The abovementioned overview was included in the judgments of Tbilisi and Rustavi city courts. In addition, the use of comparatively obsolete material was observed. As a rule, the courts when referring to the case law of the European Court of Human Rights indicate the name of the case in the original language, but they do not specify the case number, the date of adoption of the judgment and the relevant paragraph, which makes it difficult to find the case and verify the source. At the same time, there were cases, when provided quotation was not from the indicated case of the European Court of Human Rights. For example, the Bolnisi District Court judgment reads:

"The prohibition of torture is of absolute nature, which means, that it is inadmissible to justify such actions for any reason, whichever big and important goal the perpetrator had when committing such acts (see the judgment of the European Court of Human Rights of August 27 1992, on the case Tomasi v. France)".

Although the judgment of the European Court of Human Rights cited by Bolnisi District Court refers to the issue of violation of Article 3 of the Convention, the text quoted in the court decision does not have a similar formulation. In addition, during the analysis of cases it was identified, that the courts in the cases concerning torture were referring to the practice of the European Court of Human Rights related not only to violations of Article 3, but also provided citations from the judgments of the European Court's from the cases relating to the evidence and reasoning of judgments. It is also noteworthy, that in the majority of cases the courts were relevantly indicating to the judgments of the European Court, although, they were not applying the indicated standard to the cases under their consideration. Such citation from the judgments of the European Court of Human Rights is of formal character, and therefore does not conform to a high standard of properly substantiated judgments.

Taking into account the results of the research, it is important that the domestic courts adapt the definitions of the European Court to the factual circumstances of the case and come to the relevant conclusions as a result of systematic analysis. It is no less important to quote Strasbourg Court's practices relevantly and correctly. The Human Rights Center of the Supreme Court of Georgia is ready to verify any source, provide precize translation and search for relevant case-law. Furthermore, the rules on citation of the judgments of the European Court of Human Rights have been elaborated, and implementation of these rules by common courts will be a step forward. In addition, the new practice of the European Court of Human Rights is available in Georgian, reflecting of which in the judgments of common courts shall contribute to improvement of the quality of substantiation of court decisions and promote to increase of public trust towards the judiciary.

## 9. The Role of Judges in the Process of Fighting against Torture

Although judicial systems are different in different parts of the world, the prohibition of torture is universal. Independent and impartial judiciary plays a crucial role in the effective enforcement of absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The main obligation of judges is to ensure proper execution of justice, which also implies following of international standards. The judges should constantly be on guard not to overlook the facts of ill-treatment towards defendants and witnesses. In the following chapters will be provided detailed overview of those international standards, that judges should be guided by in the fight against torture. Also, there shall be provided the review of the role of a judge as stipulated by the national legislation.

## 9.1. International Standards of Effective Implementation of the Role of a Judge

A judge has a fundamental role in the process of combating torture and ill-treatment, as on the basis of a reasonable doubt, and through effective exercising of judicial authority and undertaking proper measures, a judge can carry out a number of preventive measures and activate protection mechanisms.

One of the vital ways to keep human rights safe by preserving the prevailing role of the judiciary. Numerous international organizations promote the role of judiciary in the fight against torture as well as the protection of human rights and fundamental freedoms. Especially noteworthy in given regard is the International Commission of Jurists (ICJ)[191], which defines international standards specifically in this direction.

In October 2017, under the auspices of the International Commission of Jurists, a seminar on the implementation of effective safeguards to prevent torture and other cruel, inhuman or degrading treatment during police custody and pre-trial detention was conducted, where fundamental aspects of the role of judges were identified.

The Commission explained that judges are obliged to:

- **Examine each charge indepthly;**
- **Pose appropriate questions when there are signs of ill-treatment, even if detained person does not blame anyone specifically in the above-mentioned;**
- **Require physical appearance of detained persons before the court. Express readiness to raise the issue of criminal liability of authorities for failure to obey the court, when the latter do not act in accordance with the court's requirements.**

The standards of the European Committee for Prevention of Torture (CPT) contain similar provisions. In one of the conclusions of the Committee, we read:

"If the prisoner states that he/she has been ill-treated in a penitentiary establishment, the judge is obliged to immediately issue an order to conduct forensic examination and implement all measures to ensure thorough investigation of such allegations. The same measures should be implemented even if the defendant does not express such complaint, but traces of violence are clearly visible."[192]

The judges should also ensure the following:

- **Make sure that the state authorities respect the right of prisoners to have access to the outside world (including attorneys, family, friends, physicians and others) both, as a protective mechanism, as well as to ensure that detainees are not subject to isolation, which based on its cumulative impacts, may be equal to ill-treatment or even the torture;**
- **Ensure adequate criminal liability of the perpetrators of ill-treatment;**
- **Make sure that the statements presented before them were provided voluntarily, without any coercion;**

191 The Commission was set up in Geneva in 1952 and comprises of 60 highly reputable jurists worldwide, including high-ranking acting judges, lawyers and representatives of academic circles, who adequately reflect a wide range of jurisdictions and legal traditions. At present, this organization has a direct cooperation with different developed countries of Europe and more than 70 countries worldwide.

192 The UN CPT General Conclusions N12, paragraph 45, 2002.

- **Ensure constitutionality of relevant legislative norms and practices and apply international law in practice in cases concerning torture and ill-treatment.**

In terms of interpretation of national legislation by judges, the UN Standard Minimum Rules for the Treatment of Prisoners or "Mandela Rules"[193] and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[194] should be considered as important guidelines, nevertheless of the fact that they are not legally binding international standards. One of the most important documents in this regard is the European Prison Rules[195], adopted by the Committee of Ministers of the Council of Europe in 2006, which although are of recommendatory character, but contain guiding principles for the member states on such issues, as hygiene, food, clothing, living conditions and generally, treatment of persons deprived of liberty.

## 9.2. The Role of Judges as Stipulated by National Legislation

It should be noted that the current version of the criminal procedural legislation of Georgia is characterized by the lowest degree of inquisitorial character of the court, and therefore it somewhat reduces the role of a judge. In recent years important steps have been taken to prevent torture and other forms of ill-treatment at a legislative level. It is worth to note that as a result of changes made in the procedural legislation, judge's authority has expanded, and in cases of a plea bargain it is responsibility of a judge to ensure that the plea bargain "is reached without application of torture, inhuman or degrading treatment or other forms of violence, intimidation, and deceit ..."[196].

Over the years another important problem was the legislative provisions, that did not allow the judge to take relevant actions without submission of a motion, if as a result of first appearance of the defendant, or at the next stages of the proceedings, he had a reasonable doubt to believe, that the accused/convict was subjected to torture or other ill-treatment.

It is noteworthy, that the case-law of the European Court of Human Rights concerning Article 3 of the Convention, as well as Article 14[197] of the International Covenant on Civil and Political Rights and related regulations clearly impose on national judiciary ipso facto obligation to duly respond without any motion, if a person concerned shows traces of ill-treatment and the judge, as an impartial observer had, or should have had, a reasonable doubt, that the person was subjected to ill-treatment.[198] In this regard amendments in the procedural legislation entered in 2018 must be assessed as a positive development[199]. Namely, according to the above referred amendments, a judge can apply to the relevant investigative body in case of reasonable suspicion of ill-treatment of a person. This provision is reflected in the Criminal Procedure Code with the following wording:

"If at any stage of the criminal proceedings a judge suspects, that torture, inhuman and/or degrading treatment has been committed against the accused/convicted person, or if accused/convicted person

193 UN Standard Minimum Rules for the Treatment of Prisoners or "Mandela Rules", 2015. https://www.ohchr.org/Documents/ProfessionalInterest/NelsonMandelaRules.pdf (last accessed: 14.12.2018).

194 UN Body of Principles for the protection of all persons under any form of detention or imprisonment, 1988. https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx (last accessed: 14.12.2018).

195 European Prison Rules, Council of Europe, 2006. https://www.apt.ch/content/files/region/visits/EuropeanPrisonRules.pdf (last accessed: 14.12.2018).

196 Criminal Procedure Code of Georgia, Article 212 (amendments entered on 24/07/2014).

197 International Covenant on Civil and Political Rights, http://www.supremecourt.ge/files/upload-file/pdf/aqtebi2.pdf.

198 Brief analysis of the state of affairs in Georgia concerning torture and other forms of ill-treatment, Foundation Open Society Georgia, page 9, 2017.

199 https://matsne.gov.ge/ka/document/view/4276661?publication=0#DOCUMENT:1.

himself notifies the court regarding such treatment, the judge shall apply to the relevant investigative body to respond to such allegations".[200]

It should be noted, that this provision, which is effective from January 1 2019, clearly defines authority of a judge to order taking special measures to a public servant with relevant competencies, for the purpose of securing safety of a particular person deprived of liberty. In accordance with paragraph 2 of this article,

"If the life or health of a defendant/convict, who is placed in a penitentiary establishment is at risk, and/or if a judge suspects that accused/convicted person can be subjected to torture, degrading and/or inhuman treatment, a judge is authorized to adopt a ruling, ordering the Director General of the Special Penitentiary Department under the system of the Ministry of Justice of Georgia to take special measures necessary to ensure security of such defendant/convicted person".

In order to increase efficiency of the abovementioned provision in practice, it is expedient to establish the mechanism of control over implementation of obligations imposed by a judicial ruling. Defining specific procedures related to control over implementation of such duties would presumably express more clearly the judge's direct powers in prevention of such sensitive offenses as torture, inhuman and degrading treatment.

Ultimately, this provision is a definitely a positive novelty in terms of enhancing the role of a judge in criminal proceedings, which from the standpoint of effectiveness of combating torture and ill-treatment, will undoubtedly promote to approximation of national legislation with international standards.

## Conclusions

Independent and impartial judiciary plays a crucial role in effective enforcement of absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Therefore, proper application of international standards in the national judicial decisions is of great importance, as on the one hand, it improves the quality of judicial reasoning and, on the other hand, increases the public trust towards the judiciary.

Analysis of cases reviewed by the courts has revealed, that cases concerning torture were mainly related to ill-treatment committed by an official or a person holding equivalent position, knowingly against a person detained or otherwise deprived of freedom. In such cases ill-treatment was committed by more than one person and through abusing their official position. Other cases of torture were related to severe physical pain inflicted by the husband to the wife and/or her alleged lover for suspected adultery. In the majority of cases intensity of the acts or inflicted suffering was causing physical pain. The study revealed that the cases concerning psychological or moral anguish were in minority.

Analysis of the court judgments have shown that the victims of the torture mostly were detainees, who are extremely vulnerable to abuse given that they are entirely in the power of authorities.

The results of the research have shown that in almost all their judgments the judges refer to the international standards and the case-law of the European Court of Human Rights. It is clear, that judges express their readiness to follow the standards of the European Court when adopting their decisions. In the majority of cases, analyzed within the framework of the research, the judgments reflect constructive interaction between the domestic legal system and the case-law of the European Court. In most cases, the courts cite relevant international covenants and/or international practice, by which they corroborate their con-

200 Criminal Procedure Code of Georgia, Article 1911.

clusions. In view of the research results, national courts, as a rule, relevantly use the case-law of the European Court of Human Rights, however providing appropriate analysis regarding the interaction of the cited standards and the factual background of the case still remains challenging. It is of particular importance to base the judgments on the systematic methods of analysis.

As a result of analysis of cases concerning torture were identified judgment, which are distinguished by a high degree of justification, although on the background of positive developments, we can state, that the biggest challenge remains proper identification by courts of alternative elements of composition of the offence, stipulated by relevant article (e.g. .: action should be qualified as inhuman or degrading treatment).

To facilitate effective implementation of justice in cases concerning torture, below we present relevant recommendations, which are based on international standards and various international guiding documents.

## Recommendations

In the end of the research we considered it expedient to formulate several guiding recommendations, that will assist judges in substantiation of different judgments, and particularly those, related to cases of torture and other ill-treatment.

- It is recommended, that the judgment should clearly specify as to which alternative element of the composition of the offense is the case related to (for example, in case of ill-treatment, it is necessary to clearly specify, whether it is inhuman or degrading treatment);
- A judgment not only should indicate the abovementioned element, but should also refer to the particular evidence, which confirms the existence of that element;
- A judgment should demonstrate that judge ensured the fairness of proceeding, applied a standard of proof and properly distributed the burden of proof between the parties;
- A judgment should not be similar to a protocol of a meeting or any template document. The listing of facts of the case, presented as evidence before the court, and making subsequent conclusion is not sufficient, and such facts need to be analyzed systematically;
- comparison and contrast of the evidence in favor of defense and evidence presented by the prosecution; the assessment of their credibility and reliability should be carried out. The courts should specify the reason for taking into account the evidence of the one party and rejecting the other; Moreover, it should be done with regard to each piece of evidence;
- The reasoning of the judgment should include proper assessment of the relevant evidence submitted by the defence, as well as the prosecution, and they should be compared and contrasted for assessment of their credibility and authenticity. It is desirable, that the court specifically states why it deemed evidence submitted by one party as conclusive evidence, and why it did not support the evidence submitted by the opponent party; It should be noted, that this should be done in relation to each evidence;
- When examining evidence and reaching legal conclusions, particular attention should be paid to the fact that the findings summarized in the judgment are comprehensive, thorough and convincing to the objective observer. As a result, it should be taken into consideration whether conclusions meet to which court arrived meet the standard of beyond reasonable doubt;

- It is recommended for the courts to take into account the specific nature of the crime (especially in the cases of torture and other cruel, inhuman or degrading treatment or punishment), as quite often such cases are related to the personal characteristics of the victim and the defendant, as well as the features of the committed acts. These factors play an important role not only on classification of the case, but subsequently also on the determination of the degree of guilt and gravity of the sentence;
- In the process of examining cases related to torture, it is expedient, that courts are guided by the relevant international acts and adequately apply the latest practice of the European Court of Human Rights to factual circumstances of the case.

This research is divided into two key parts. First part concerns prohibition of torture under the international law and aims to discuss relevant standards in this regard established by the Council of Europe and the United Nations. This includes precise definition of torture and other types of inhuman or degrading treatment and their proper distinction. Moreover, the first part of the research overviews the scope of Article 3 and the meaning of required "minimum level of severity" in this context, as well as the positive and negative obligations imposed on the Member States under this article. In the research, special emphasis is placed on the case-law of the European Court of Human Rights and the cases regarding ill-treatment rendered against Georgia.

The second part of the research focuses on the national courts' practice in the cases of torture in view of the international standards. It aims to analyze judgments delivered by the national courts in the cases of torture and other forms of ill-treatment, as well as the application of the international standards in this field. The particular significance is given to the level of the substantiation of judgments. On the other hand, national courts' practice analysis reveals challenges in terms of providing sufficiently reasoned judgments and also indicates several aspects which are of paramount importance when addressing the cases of torture. Most importantly, this research, based on the international standards, aims to provide guidelines through recommendations that would help the judges resolve the cases of torture.

EN

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