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PREVENTION OF AND RESPONSE TO INCIDENTS OF ILL-TREATMENT

GCRT The Georgian Center for Psychosocial and Medical Rehabilitation of Torture Victims

GYLA

Georgian Young Lawyers' Association

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Georgian Young Lawyers' Association

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Introduction

Since February 2018, the Georgian Young Lawyers' Association (GYLA), together with the Georgian Centre for Psychosocial and Medical Rehabilitation of Torture Victims (GCRT), has been implementing the project **'Combating Torture and Ill-Treatment in Georgia, Armenia and Ukraine'**. In the framework of the project, the GYLA provides legal aid to indiviuals who became victims of torture and other cruel, inhuman or degrading treatment at the hands of law enforcement officers at the time of detention, in penal institutions, and/or in temporary detention isolators, as well as during the Russia-Georgia War of August 2008 or in later post-conflict situations.

Torture and other cruel, inhuman or degrading treatment or punishment as systemic practice has not been observed in Georgia in recent years, although the investigation of cases that involve possible commission of crimes by law enforcement officers remains an important challenge.

In 2016, the GYLA, on the basis of 21 cases litigated by the organization in the period from 2013 till July 2016, released a report analyzing the effectiveness of the State's response to possible crimes by law enforcement officers and of the identification and punishment of those responsible.[1] The analysis of the cases demonstrated the deficiencies in legislation and practice which hinder the prevention of and proper response to incidents of ill-treatment.

The present report analyzes cases of ill-treatment which were identified by the GYLA in the years 2017-2018. The report also analyzes the deficiencies in legislation and practice which substantially hinder the prevention of and proper response to incidents of ill-treatment.

Methodology

The present report analyzes amendments that were made to the legislation in 2017-2018 with the aim of preventing ill-treatment, as well as deficiencies that still remain at the legislative level despite the amendments. The report also deals with deficiencies identified as a result of

[1] The GYLA's report is accessible at: https://bit.ly/2sGQxUR;

studying cases of criminal and administrative offenses related to possible torture and ill-treatment by employees of penal institutions and law enforcement officers.

The deliberation contained in the report is based on information received from the following sources:

- **Public information** – We have requested information from the Ministry of Internal Affairs about the number of individuals detained on the basis of the Code of Administrative Offenses, about the places they were held in, and about the number of administrative offense reports drawn up;
- **Letters of prisoners held in penal institutions** – The report analyzes 310 letters that prisoners held in penal institutions across Georgia sent to the GYLA during 2018;
- **Materials of criminal cases** – The report contains an analysis of 12 criminal cases under consideration in Tbilisi, Gori and Batumi, in which the GYLA got involved in the years 2017-2018. These cases reveal criminal acts allegedly committed by law enforcement officers and employees of penal institutions. Seven of these incidents took place in 2017, while 5 of them occurred in 2018. In 11 of the said cases concern criminal acts allegedly committed by law enforcement officers employed in the system of the Ministry of Internal Affairs, while 1 case involves employees of a penal institution.

  It should be noted that the GYLA's lawyers are involved in the said cases with the aim of defending the victims' interests, although they have not been granted access to the materials of all the cases. Accordingly, the cases were analyzed on the basis of the case materials available to the lawyers at the time of preparation of the report and the information about the factual circumstances of the cases that we received from the lawyers;
- **Materials of administrative cases** – For the purposes of the report, we have studied 4 cases of administrative offenses which are being litigated by the GYLA;
- **Analysis of legislation and relevant international standards** – In the framework of the report, we have analyzed the legislative

amendments that were made in 2017-2018 in connection with prevention of ill-treatment and ensuring effective investigation of similar cases, as well as the deficiencies that still remain at the legislative level despite the amendments.

Main findings and recommendations

The years 2017-2018 saw positive amendments to the legislation which aimed to prevent incidents of ill-treatment, although these amendments are not sufficient. Individual legislative acts are in need of fundamental revision and substantive change. Ineffectiveness of investigations conducted by the prosecution organs into incidents of torture and ill-treatment still remains an important challenge.

- As a rule, relevant agencies launch investigations in response to victims' applications about alleged battery or other violence on the part of law enforcement officers, although in some cases the investigations are launched with a delay;
- In the majority of cases, victims of crimes allegedly committed by law enforcement officers were denied the status of a victim during the investigation;
- As a rule, the prosecutor's decrees on denying the status of a victim are not properly substantiated and are not reinforced by relevant factual circumstances and arguments;
- The mechanism of appealing a prosecutor's refusal to grant a victim's status in connection with less grave and grave crimes has not been effective. There was not a single case when a superior prosecutor reversed a subordinate prosecutor's denial of a victim's status. In addition, the victims' ability to copy the materials of the case is still limited; the law does not allow victims to file an appeal in a court against a superior prosecutor's decision regarding a subordinate prosecutor's decree on the termination of the investigation and/or criminal prosecution, except when the case involves a particularly grave crime or a crime within the jurisdiction of the State Inspector's Service;
- We have observed different approaches in Tbilisi and other cities of Georgia in terms of informing victims of crimes allegedly com-

mitted by law enforcement officers about the progress of investigation;

- In the vast majority of cases analyzed, the investigation has failed to arrive at any concrete final results, despite the fact that at least six months has passed since the opening of the investigation;
- In several cases, individuals who stated that they had been subjected to battery or other types of excess of powers by law enforcement officers were themselves subjected to administrative liability, while in one case, an individual was subjected to criminal liability;
- When examining cases of administrative offenses that involve resistance to law enforcement officers, the courts mainly fail to properly investigate the facts and deliver judgments only on the basis of information provided by police officers.

Recommendations:

The Parliament of Georgia should:

- ensure that the State Inspector's Service will start functioning in a timely manner, as well as study the reasons which prevented the Law of Georgia on the State Inspector's Service from taking effect on January 1, 2019, and caused a postponement for six months;
- make amendments to the Code of Criminal Procedure which will clearly define the victim's right to receive/copy materials of a criminal case, as well as entitle victims of crimes of all categories to appeal a superior prosecutor's decision regarding the termination of an investigation and/or criminal prosecution in a court;
- carry out a fundamental reform of the Code of Administrative Offenses, which will make it possible to adopt legislation on administrative offenses that will be in compliance with international standards;
- define the role of a judge in the prevention of torture and ill-treatment in the Code of Administrative Offenses, as it was done in the Code of Criminal Procedure;

- make amendments to the legislation which will oblige police officers to make uninterrupted video footage of their response to offenses and/or during detention with a camera.

The Ministry of Internal Affairs should:

- place detainees in a temporary detention isolator in a timely manner and to eliminate the practice of holding detainees in a police vehicle or police station.

The Prosecutor's Office of Georgia should:

- conduct investigations into crimes allegedly committed by law enforcement officers and to carry out procedural supervision on the investigations promptly and effectively;
- ensure that victims of alleged crimes are granted the status of a victim, in order to increase the degree of their involvement in the investigation of the case and their information level.

1. AMENDMENTS TO THE LEGISLATION AND EXISTING CHALLENGES

1.1. Independent investigative mechanism

The creation of an independent investigative mechanism that would investigate crimes committed by law enforcement officers was on the agenda for many years.[2] The necessity of creating an independent investigative mechanism is also emphasized in the EU-Georgia Association Agreement and its accompanying Association Agenda for 2014-2016, which were concluded in June 2014. The creation of an independent investigative mechanism is actively supported by human rights NGOs.[3]

On July 21, 2018, the Parliament of Georgia passed the Law on the State Inspector's Service, creating the State Inspector's Service to take the place of the Office of the Personal Data Protection Inspector. Together with other issues, the law granted the State Inspector's Service the powers to investigate cases of ill-treatment.[4] The Parliament set 1 January 2019 as the effective date of the law.

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[2] a. Thomas Hammarberg, Georgia in Transition, 2013, p. 26. Accessible at: http://eeas.europa.eu/archives/delegations/georgia/documents/human_rights_2012/20130920_report_en.pdf;
b. Special Report of the Public Defender of Georgia: The Practice of Investigation of Possible Crimes Committed by Law Enforcement Officers, Legislative Regulations and International Standards of Effective Investigation, 2014;

[3] See, for example, the Letter of the Coalition for an Independent and Transparent Judiciary to the Committee of Ministers of the Council of Europe of 2017. Accessible at: http://www.coalition.ge/files/letter_to_the_committee_of_ministers.eng.pdf;

[4] According to Part 1 of Article 19 of the Law of Georgia on the State Inspector's Service, the investigative jurisdiction of the State Inspector's Service extends to:
a) crimes punishable by Articles 144^1–144^3, Subparagraphs B and C of Part 3 of Article 332, Subparagraphs B and C of Part 3 of Article 333, Article 335, and/or Part 2 of Article 378 of the Criminal Code of Georgia, if the crime was committed by a law enforcement officer, as well as by a public official or a person equal in status to a public official; b) other crimes committed by a law enforcement officer, as well as by a public official or a person equal in status to a public official, which have caused a person's death and during the commission of which this person was held in a temporary detention isolator or a penal institution and/or in any other place where a law enforcement officer, a public official, or a person equal in status to a public official prohibited him/her from leaving the place against his/her will, or if the said person was under the State's effective control in any other manner;

The creation of the State Inspector's Service in response to the challenge that has existed for years is a step forward, although the mandate and competence of the newly established institution of the State Inspector are limited, which brings its effectiveness and independence under question. A certain category of crimes has been left outside the scope of the newly created mechanism. The Prosecutor's Office retains the exclusive powers of criminal prosecution. The State Inspector's Service is limited to the investigative competence alone, whereas, according to the applicable law, because of the procuratorial supervision, the investigation is practically conducted by the Prosecutor's Office.[5] Despite the limited mandate and powers of the State Inspector, it was vitally important to put this institution into operation within the determined time frame – from 1 January 2019. For this reason, the Georgian Parliament's making the amendments to the Law of Georgia on the State Inspector's Service in an accelerated manner – several days before the State Inspector's Service was to start functioning – should be given a particularly negative assessment. As a result of the amendments to the law, instead of 1 January 2019, the law will enter into force six months later. The explanatory note justifies the amendments by the argument that the postponement of the effective date 'will enable the relevant agencies to take the required legal and organizational-technical measures to fully activate the functions provided for by the law from 1 July 1 2019 and to properly fulfill the international commitments undertaken by Georgia'.[6] This explanation cannot be considered sufficient to justify the postponement of the reform, and it's important that the Parliament of Georgia study the reasons why the necessary measures could not be taken in 2018 in order to make it possible to activate the relevant articles of the law within the determined time frame (by 1 January 2019).

[5] See a) Comments of the Coalition for an Independent and Transparent Judiciary regarding the draft Law on the State Inspector's Service – http://coalition.ge/index.php?article_id=185&clang=0;

b) Joint submissions of the GYLA and the European Human Rights Advocacy Centre (EHRAC) to the Council of Ministers about the so-called Tsintsabadze group of cases – https://gyla.ge/en/post/saia-m-e-ts-cincabadzis-jgufis-saqmeebze-evropis-sabtchos-ministrta-komitetshi-komunikacia-tsaradgina#sthash.6bWDZYyI.dpbs;

[6] The explanatory note to the Amendments to the Law of Georgia on the State Inspector's Service – https://bit.ly/2SkaSZw;

1.2. Increasing the role of judges in the prevention of ill-treatment

Judges have a particular role in providing proper response when a person bears the marks of ill-treatment and the judge – as an objective observer – has or is supposed to have a doubt that the person was subjected to ill-treatment.[7]

Until July 21, 2018, the Georgian legislation didn't allow judges to apply to the relevant bodies with a request to launch an investigation into incidents of ill-treatment. According to amendments to the Code of Criminal Procedure (which took effect from July 1, 2019), a judge is entitled to apply to an investigative body, at any stage of the criminal proceedings, if he/she has a doubt that the defendant/convict is a victim of torture or degrading and/or inhuman treatment. A judge is also entitled to do so when the defendant/convict himself/herself tells him/her about such treatment. In addition, if the life or health of a defendant/convict held in a penal institution is in danger, and/or a judge has a doubt that a defendant/convict has been or might be subjected to torture or degrading and/or inhuman treatment, the judge is entitled to issue a ruling directing the Director General of the Special Penitentiary Service – a sub-agency institution within the system of the Ministry of Justice of Georgia – to take special measures necessary for ensuring the safety of such defendant/convict.[8]

The foregoing is the most important amendment to the Code of Criminal Procedure in terms of prevention of and response to ill-treatment since the amendment of June 24, 2014, which increased the judge's responsibility for making sure before approving a plea bargain that the plea bargain with the defendant 'has been entered into without torture, inhuman or degrading treatment or other violence, threat, deception or any unlawful promise.'[9]

In spite of the positive changes, it remains a problem that such a regulation is only included in the Code of Criminal Procedure. The changes haven't touched the Code of Administrative Offenses on the basis of

[7] CPT/Inf/E (2002) 1, p. 14, Paragraph 45;

[8] The Code of Criminal Procedure, Article 191[1];

[9] The Code of Criminal Procedure, Article 212;

which judges consider the cases of individuals charged with administrative offenses. The majority of the cases analyzed in the report involve incidents of contact with the police which started in the context of an administrative offense. In the event that a person bearing the marks of ill-treatment is brought before the court in a case of administrative offense, the legislation does not clearly establish the administrative judge's powers to apply to the investigative body with a request to provide response. Granted, the Code of Administrative Offenses states that 'The legislation of Georgia on administrative offenses consists of this Code of Administrative Offenses and other legislative acts of Georgia,'[10] but this provision does not sufficiently ensure that the judge examining a case of administrative offense will use the powers envisaged by the Code of Criminal Procedure. For this reason, it's important to ensure that the Code of Administrative Offenses also clearly determines the judge's role in the prevention of torture and ill-treatment, as it has been done by the amendments to the Code of Criminal Procedure.

1.3. **The status and rights of a victim**

Solving a crime committed against a person, effective investigation, correct qualification of the crime, identification of the perpetrator beyond doubt, and subjecting him/her to statutory liability are in the interests of the victim. The victim is one of the main reasons for launching criminal law procedures, and he/she objectively has the highest interest in the results of the legal proceedings.

Victims must be recognized as such at the very starting stage of the legal proceedings, so that they are informed of the ongoing investigation and can get actively involved in it. And if, during the legal proceedings, it is established that the grounds for recognizing a person as a victim no longer exist, the law allows the prosecutor to revoke the decree on recognition as a victim, which is to be notified to the victim in writing.

The European Court of Human Rights (ECHR) has indicated, in a number of cases, the necessity of proper protection of the victims' rights and interests and of their involvement in the process of investigation. Involvement implies provision of existing information both about the

[10] The Code of Administrative Offenses, Article 2;

results and progress of investigation. Victims of a crime are entitled to have access to information on their role in the legal proceedings and about the scope, time frames, and progress of the criminal case, especially when the case concerns a grave crime. In particular, they have the right to be informed about criminal prosecution or about refusal to launch such prosecution, as well as to be informed about an appeal or refusal to grant an appeal and to have access to the case materials.[11] In its deliberation on Article 13 of the Convention, the ECHR emphasizes the significance of the right to effective remedy, stating that the said right implies not only the possibility of receiving compensation but also the right to effective investigation capable of leading to the identification and punishment of those responsible.[12]

In spite of individual positive amendments to the legislation, the Code of Criminal Procedure of Georgia contains significant deficiencies in terms of effective protection of victims' rights:

- **The right to appeal a decree on refusal to recognize as a victim**

According to the amendments to the Code of Criminal Procedure, [13] whose effective date was set at 1 January 2019, a superior prosecutor's decision on refusal to recognize a person as a victim is final and may not be appealed, except for cases when the case concerns a particularly grave crime or a crime which, according to law, **is subject to the jurisdiction of the State Inspector's Service**. Therefore**,** according to the amendments to the Code of Criminal Procedure, if a superior prosecutor fails to grant such an appeal, the person concerned has the right to appeal the superior prosecutor's decision in a district (city) court according to the place of investigation.[14] According to the Law on the

[11] Recommendation No. R (85) 11 of the Council of Ministers of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted on June 28, 1985;

[12] *Kaya v. Turkey* (Application No. 158/1996/777/978, 1998, Paragraph 107;

[13] The Law of Georgia on Amendments to the Code of Criminal Procedure of Georgia, adopted on July 21, 2018, promulgated on August 9, 2018;

[14] The Code of Criminal Procedure, Article 56 (5);

State Inspector's Service,[15] the State Inspector's jurisdiction extends to crimes punishable under Articles 144^1–144^3, Subparagraphs B and C of Part 3 of Article 332, Subparagraphs B and C of Part 3 of Article 333, Article 335, and/or Part 2 of Article 378 of the Criminal Code of Georgia, if the crime was committed by a law enforcement officer, as well as by a public official or a person equal in status to a public official.

The amendments to the Code of Criminal Procedure partially resolved the problem related to appealing the refusal of recognition as a victim, although the State Inspector's jurisdiction does not extend to the articles (Part 1 of Article 332 and 333 of the Criminal Code) under which the investigations are typically launched in cases of torture and ill-treatment.

It became possible to eliminate the said deficiency as a result of strategic litigation in the Constitutional Court. On December 14, 2014, the Constitutional Court of Georgia announced its judgment in the case of *Citizens of Georgia – Khvicha Kirmizashvili, Gia Patsuria and Gvantsa Gagniashvili and Nikani LLC v. Parliament of Georgia*. In the said case, the applicants disputed the norm of the Code of Criminal Procedure which made it impossible to file an appeal in a court against a superior prosecutor's refusal to recognize a person as a victim in cases concerning less grave and grave crimes. The Constitutional Court found the said restriction unconstitutional in relation to the right to a fair trial recognized by Paragraph 1 of Article 42 of the Constitution of Georgia (the wording that was in force when the judgment was delivered) and to the right to equality safeguarded by Article 14 of the Constitution.

In the judgment, the Constitutional Court stressed that the law grants considerable rights to victims of a crime, by which they acquire certain procedural safeguards during the criminal proceedings and an opportunity to be informed of the progress of the proceedings as well as to be equipped with instruments to exercise control on the prosecution. Accordingly, such individuals have a high interest in appealing the decision **adopted** by a prosecutor regarding the victim's status in a court. The Court also noted that a general reference to a court's overloading alone – without confirming the court's overloading and interruption

[15] The Law on the State Inspector's Service, Article 19 (1(a));

of legal proceedings by tangible evidence – cannot justify the blanket restriction provided for by the disputed norms which does not take account of the degree of harm inflicted on the victim and of the importance of his/her enjoyment of the rights granted by law.

- **The right to appeal a superior prosecutor's decree on the termination of investigation and/or criminal prosecution**

The issue of filing an appeal in a court against a superior prosecutor's decision on the termination of criminal prosecution and investigation remains problematic. The applicable legislation allows the victim to appeal a prosecutor's decree on the termination of investigation and/or criminal prosecution to a superior prosecutor on a single occasion. The superior prosecutor's decision is final and may not be appealed, except for cases when the case concerns **a particularly grave crime or a crime** which, according to law, is subject to the jurisdiction of the State Inspector's Service. In this case, if the superior prosecutor does not grant such an appeal, the victim has the right to appeal the prosecutor's decision to a district (city) court, according to the place of investigation. The court is to make a ruling within 15 days, with or without an oral hearing. The decision made by the court may not be appealed.[16]

It is important that the victim have the right to appeal a superior prosecutor's decision on refusal to launch criminal prosecution in a court and to verify the lawfulness of such a decision. The lack of such a safeguard at the legislative level leaves an important tool in the hands of the Prosecutor's Office to use its power arbitrarily, as there is no legal mechanism that will make it possible to verify the lawfulness of its decisions by means of a court.

- **The right to receive copies of materials of the case**

One more deficiency that hinders the full exercise of the victim's rights is related to receiving the materials of a criminal case. In accordance with Subparagraph H of Paragraph 1 of Article 57 of the Code of Crim-

[16] The Code of Criminal Procedure, Article 106, Paragraph 1^1;

inal Procedure, the victim has the right to be informed of the progress of investigation and to review the materials of the criminal case, unless this contradicts the interests of the investigation. This article allows the victim to review the materials of the case (to read them and make notes), although this right does not include the possibility of copying the case materials.

It is important that the legislation establish the victim's right to receive materials of the criminal case if this does not contradict the interests of the investigation.[17]

1.4. The legislation on administrative offenses

1.4.1. The scale of application of the legislation on administrative offenses

In 5 of the 12 criminal cases analyzed in the present report, the victims were placed under administrative detention, while in 4 cases law enforcement officers drew up administrative offense reports on the basis of Article 166 (disorderly conduct) and/or Article 173 (non-compliance with a lawful demand of a law enforcement officer) of the Code of Administrative Offenses, which was followed by legal proceedings in courts. Therefore, the way in which the legislation on administrative offenses regulates the process of detention or examination of cases is closely connected with the prevention of torture and ill-treatment.

The police come in direct contact with many citizens on a daily basis using the legislation on administrative offenses. With the aim of obtaining accurate statistics on administrative detentions, the GYLA applied to the Ministry of Internal Affairs of Georgia, although we were unable to obtain accurate information. As explained by the Ministry of Internal Affairs, the agency does not keep statistics on the number of individuals placed under administrative detention. The Ministry of Internal Affairs only provided us with information on the number of individuals transferred to temporary detention isolators as administrative detainees. According to the information provided by the agency, in 2017, 5,656 individuals were transferred to temporary detention

[17] Judgment of the Constitutional Court of Georgia of 30 September 2016 in the case of *Citizen of Georgia Khatuna Shubitidze v. Parliament of Georgia*, Chapter 2, Paragraph 52;

isolators as administrative detainees, while in 2018 (until 14 December) this figure amounted to 4,956. We can say that the number of administrative detentions exceeds the number of individuals who were transferred to isolators. We can argue this on the basis of the practice of the police,[18] whereby administrative detainees are not transferred to isolators and the police keeps them in patrol police vehicles, police buildings, or near the buildings – in the yard.

The said practice allows for ample opportunities of arbitrariness on the part of law enforcement officers and hinders the conduct of medical examination of detainees. According to the applicable legislation, in the event of placing an individual in an isolator, the detainee is to be given an initial medical examination before he/she is placed in an isolator cell; at the time of the initial medical examination, the medical worker is to interview the individual about the condition of his/her health and document the data on his/her health, as well as conduct a visual examination with the aim of fully documenting the injuries on his/her body. If the medical worker deems that the individual's medical condition does not make it possible to place him/her in an isolator, the individual is to be transferred to a relevant medical institution.[19]

1.4.2. **The lack of procedural safeguards**

The current Code of Administrative Offenses imposes liability for a number of infractions that are criminal in their nature. For this reason, it is important that the rights safeguarded under the right to a fair trial be extended to administrative offenses. The current reality is quite far from ensuring these safeguards. The Code of Administrative Offenses imposes heavy penalties for the commission of some offenses, including administrative imprisonment which, by its nature, requires the application of procedural safeguards related to criminal offenses. However, the current Code does not contain sufficient procedural safeguards. For example, the Code does not envisage the requirements of the pre-

[18] Joint report of the GYLA and the EMC – May 12 – A Large-Scale Police Operation in Tbilisi's Night Clubs. Accessible at: https://bit.ly/2Qhr80h;

[19] Order No. 423 of 2 August 2016 of the Minister of Internal Affairs of Georgia on the Approval of the Typical Statutes and Internal Regulations of Temporary Detention Isolators of the Ministry of Internal Affairs of Georgia;

sumption of innocence; it does not make judges obliged to be guided by the standard beyond reasonable doubt. The tight time frames for examination of cases and application of sanctions don't ensure effective representation (according to the current practice, examination of a case typically lasts for 10-15 minutes). The application of the Code of Administrative Offenses in the current form causes the violation of fundamental human rights and Georgia's international commitments.

Fundamental deficiencies characteristic of the examination of cases of administrative offenses and legal proceedings have also been noted by the Public Defender: 'The Code does not regulate comprehensively the procedure of conducting examination of administrative violations; does not provide a person adequately with the elements making up the right to a fair trial; and does not determine the procedure of gathering, examining, and assessing evidence. The nonexistence of the standard of proof required for holding a person responsible creates significant problems in practice. Besides, the nonexistence of the duty to refer to evidence substantiating the circumstances established during examination of the case, along with other factors, causes the lack of reasoning of court decisions; the majority of court decisions lack reasoning and are rendered in a formulaic template; all pieces of evidence are gathered by one body/official and there is only formal unity of evidence. Due to the nonexistence of a procedure of distribution of the burden of proof and standards of proof, the formal legality of the administrative offense report is verified without referring to accepted or rejected evidence.'[20]

An important problem is posed by the regulation on the use of shoulder-held cameras by the police when they respond to administrative offenses. The legislation does not clearly establish police officers' obligation to make an uninterrupted video recording when they respond to offenses; instead, it only establishes that police officers are entitled to make a video recording. This regulation considerably decreases the possibility of obtaining neutral evidence.[21]

[20] *Annual report of the Public Defender of Georgia: The Situation of Human Rights and Freedoms in Georgia*, 2017, pp. 74-75;

[21] The Law of Georgia on Police, Article 27; Order No. 1310 of 15 December 2005 of the Minister of Internal Affairs of Georgia on the Approval of the Instruction on the Procedures of Patrolling by the Patrol Police Service of the Ministry of Internal Affairs of Georgia, Article 14, Paragraph 1, Subparagraph E;

1.4.3. **The mechanism of administrative detention**

The Code of Administrative Offenses provides for administrative detention as a preventive measure that can be applied when concrete statutory grounds are present.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) attaches particular importance to three rights of persons detained by the police:

- the right of the person concerned to have the fact of his/her detention notified to a third party of his/her choice (family member, friend, consulate);
- the right to access to a lawyer;
- The right to request a medical examination by a doctor of his/her choice (in addition to any medical examination carried out by a doctor called by the police authorities).

In the CPT's opinion, these are fundamental safeguards against ill-treatment of detained persons which should apply from the outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.).[22]

According to the Code of Administrative Offenses of Georgia, in the event of an administrative detention, the detaining officer is obliged to inform the detainee upon placing him/her under detention, in a form that he/she understands:

- of the administrative offense committed by him/her and the basis of the detention;
- of his/her right to a defense counsel;
- of his/her right, if desired, to request that the fact of his/her detention and his/her location be made known to a relative named by him/her, also to the administration of his/her place of work or study.[23]

[22] Standards of the CPT – https://rm.coe.int/16806cea2f;

[23] The Code of Administrative Offenses of Georgia, Article 245;

Despite the fact that the Code of Administrative Offenses establishes the obligation to inform the detainee of his/her rights upon detention, the Code does not determine a time frame within which the detainee should be given the opportunity to exercise this right. This creates a risk that the detainee may be restricted in exercising the said right from the moment of detention and that he/she may only be given the opportunity to have the fact of his/her detention notified after several hours.

The Code of Administrative Offenses sets the maximum period of 12 hours for administrative detention, although if a person was detained during non-working hours, he/she may be placed in a temporary detention isolator for a period of up to 48 hours.[24] Therefore, the law establishes different periods of detention depending on whether an individual is detained during working or non-working hours, which unjustifiably restricts the rights of persons detained during non-working hours.[25]

It is also an important deficiency that judges examining cases of administrative offenses do not verify the lawfulness of detention. Cases of administrative offenses are examined within tight time frames, while the lawfulness of detention may be verified independently of the case of administrative offense, in separate proceedings. The said process might continue for several years, which renders the decision on the lawfulness of detention ineffective for the person found guilty of an offense, because after the completion of the process the person may no longer be considered as an individual subjected to an administrative penalty. Detainees are not informed of the right and time frames of appealing the detention. The form of the administrative detention report, which was approved by an order of the Minister of Internal Affairs of Georgia, does not contain a box explaining the right to appeal the detention.

In addition, as a rule, the police do not indicate the concrete grounds for detention in the detention report, which makes it difficult to verify the lawfulness of the actions of the police. In some cases, maximum pe-

[24] The Code of Administrative Offenses of Georgia, Article 247;

[25] Joint submission of the GYLA and the EHRAC to the Committee of Ministers of the Council of Europe, Paragraph 4.3.1. – https://bit.ly/2AiCszy;

riods of detention are used without any reasoning. The police also use detention in cases when the law does not provide for detention at all.[26]

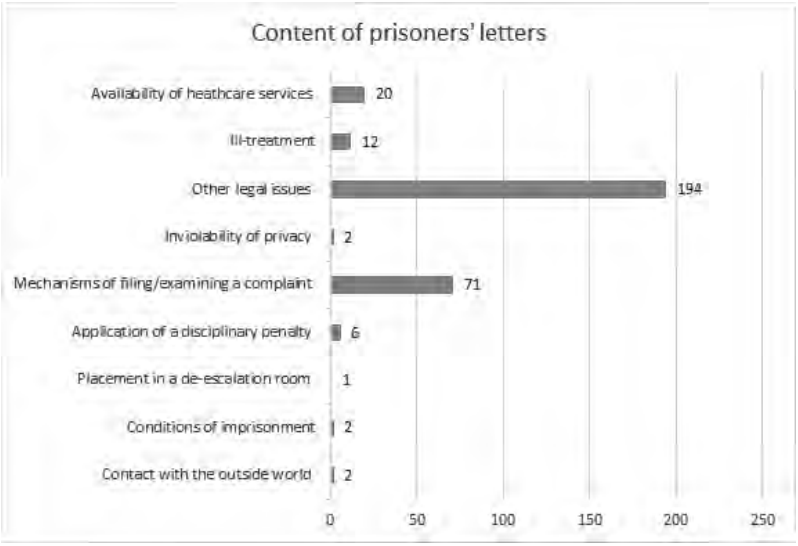
2. ANALYSIS OF CORRESPONDENCE RECEIVED FROM PENAL INSTITUTIONS

Individuals held in institutions of deprivation of liberty are under a high risk of ill-treatment. To a large degree, combating these risks is based on preventive approaches. It should be noted that the only means for monitoring penal institutions in Georgia is the National Preventive Mechanism of the Public Defender. Therefore, the GYLA was devoid of the opportunity to monitor the situation of prisoners in penal institutions during 2018 by visiting the institutions.

During 2018, the GYLA received 310 letters from prisoners in various penal institutions (this figure also includes multiple letters from the same prisoners). Twelve of these prisoners wrote about ill-treatment they had been subjected to, including 2 prisoners who talked about incidents that had taken place before 2012. Only one of the letters concerned ill-treatment by employees of a penal institution that had taken place in 2018. The Prosecutor's Office has launched an investigation into this case. The remaining nine letters concern incidents of ill-treatment on the part of police officers, some of which are under investigation.

The vast majority of letters sent from prisons concerned receiving of advice and/or provision with a lawyer in connection with various legal issues.

[26] Protest Considered as an Offense, GYLA, 2017 – https://bit.ly/2tyIvwQ;



3. DEFICIENCIES IN THE PROCESS OF INVESTIGATION OF CRIMES ALLEGEDLY COMMITTED BY LAW ENFORCEMENT OFFICERS

3.1. Introduction

Effective investigation of cases of ill-treatment is a positive obligation of the State. According to the case-law of the European Court of Human Rights, in order for an investigation to meet the standard of effectiveness, investigative bodies must take 'all reasonable steps' to obtain all possible evidence related to the crime and identify and punish those responsible. The effectiveness of an investigation is assessed on the basis of the following circumstances:

- whether or not the investigation is carried out within reasonable time frames, thoroughly, fully, and objectively;
- whether or not the investigation is carried out independently and impartially;
- whether or not the victim is properly involved in the process of investigation.

Deficiencies in the process of investigation diminish the investigative agencies' ability to establish the factual circumstances of the case and to punish those responsible, which contradicts the principle of effective investigation established by the ECHR.

This section discusses the deficiencies that were revealed as a result of the analysis of the criminal cases studied during the preparation of the report.

3.2. Determining the jurisdiction and delayed initiation of investigation

In 4 of the 12 criminal cases analyzed in the report, the investigations into crimes allegedly committed by law enforcement officers were launched on the basis of applications of GYLA's lawyers, while in 8 cases the GYLA got involved after the investigation had been launched.

According to the procedure of determining the investigative jurisdiction, the special jurisdiction of an investigator of the Prosecutor's Office includes cases involving crimes committed by the President of Georgia, a member of the Parliament of Georgia, a member of the Government of Georgia, a judge of Georgia, the Public Defender, the Auditor General, a member of the Board of the National Bank, a special and plenipotentiary ambassador and envoy of Georgia, **an employee of the Prosecutor's Office, a police officer**, an employee of the State Security Service of Georgia, and an officer with a highest military or special rank who is currently serving in a public office or an individual equal in status.

In 2 cases launched on the basis of the GYLA's applications, the Prosecutor's Office, in violation of the procedure of determining investigative jurisdiction, initially forwarded the applications to the district prosecutor's offices in whose areas of responsibility the alleged crimes had taken place. It should be noted that the applications unequivocally pointed to criminal acts allegedly committed by police officers. Accordingly, the applications should have been forwarded for further response to the Investigation Unit of the Chief Prosecutor's Office rather than to the district prosecutor's offices, which conduct investigations through the respective divisions of the Police Department of the Ministry of Internal Affairs.

Granted, the investigations, including those launched on the basis of the applications filed by the GYLA's lawyers, were finally conducted in conformity with the procedure of determining jurisdiction, although the resolution of the procedural issue delayed the process of launching the investigations.

3.3. Qualification

In the 12 criminal cases analyzed in the report, investigations are underway under various articles of the Criminal Code: 1 case each is being investigated under Articles 126, 116, 150, 144^3, and 144^1, 6 cases – under Article 333, and 1 case – under both Article 333 and Article 341.

It should be noted that when investigations are launched in connection with incidents of alleged physical violence by law enforcement officers, the cases are mainly assigned the qualification provided for by Article 333 of the Criminal Code – exceeding official powers. The said article is quite general and, in a number of cases, fails to properly describe the composition of the alleged crime. As a rule, incidents of alleged violence take place at the time of detention, arrest, and interrogation or when the victim is under effective control of the State. Violence carried out in such a situation by those representatives of the State who are obliged to protect citizens exerts a particularly distressing influence on the victims and arouses a feeling of defenselessness in them.

According to the case-law of the ECHR, physical violence against a citizen on the part of law enforcement officers is regarded as a violation of Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment and punishment. **In a situation where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which is not made strictly necessary by the person's conduct diminishes human dignity and constitutes an infringement of the right set forth in Article 3 of the Convention.**[27] For this reason, any conduct by law enforcement officers vis-à-vis an individual which undermines human dignity amounts to a violation of Article 3 of the Convention. This applies in particular to their

[27] Case of *Bouyid v. Belgium*, Application No. 23380/09, Judgment of September 28, 2015;

use of physical force against an individual where it is not made strictly necessary by his or her conduct, whatever the impact on the individual concerned. **In any case, the Court emphasizes that a slap inflicted by a law enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual's dignity.** The Court notes that it could well suffice that the victim was humiliated in his own eyes for there to be degrading treatment within the meaning of Article 3 of the Convention. Police officers' conduct that is unlawful and constitutes a breach of professional ethics **may arouse a feeling of arbitrary treatment, injustice, and powerlessness in the victim.**[28]

Considering the foregoing, when law enforcement officers have committed acts of violence against persons under the State's effective control, it's important to conduct the investigation under a special norm relating to torture/ill-treatment rather than under the general articles relating to official misconduct.

3.4. Other deficiencies identified during the investigations

In the cases in which the GYLA's lawyers had the opportunity to familiarize themselves with the materials of the case (7 cases), we have identified various types of significant deficiencies, in particular:

- In 2 cases, there were problems related to the conduct of identification, which is an investigative action. Identification is an important investigative action directed at revealing the likely perpetrator and the failure to conduct it considerably decreases the prospects of solving a crime;
- In 1 case, an important witness changed the initial testimony he had given to investigative bodies in suspicious circumstances. In spite of several applications of the GYLA's lawyer regarding the changing of testimony by the witness, the Prosecutor's Office didn't open an investigation and didn't enquire what had caused the witness to change the initial testimony, including whether

[28] Case of *Bouyid v. Belgium*, Application No. 23380/09, Judgment of September 28, 2015; case of *Rabitsch v. Austria*, Application No. 18896/91, Judgment of December 4, 1995;

police officers had subjected him to coercion, threats, or intimidation. In addition, the mutual contradiction of the provided information raised a doubt that the witness had provided false information during the interview. In spite of this, the Prosecutor's Office also failed to investigate this aspect of the case.

- In general, there is a problem related to making full video recordings of the interaction between law enforcement officers and citizens and, by so doing, creating important evidence on incidents of alleged violence. In the majority of cases, the police didn't film the processes of placing individuals under administrative and criminal detention, searches, or other types of contact with citizens, or filmed them incompletely, and the videos don't show the moments of alleged violence. Making police officers obliged to make full and uninterrupted video recordings of their interactions with citizens would play an important role in the prevention of ill-treatment and exceeding of powers by law enforcement officers. It is also important to ensure that police stations are equipped with respective equipment, so that the period when citizens are interrogated or stay in police stations is filmed on video tape.

3.5. Problems related to granting the status of a victim and receiving information about the progress of investigation

To assess the effectiveness and objectivity of investigation, it is important to ensure that the person who has suffered damage as a result of the crime under investigation is properly involved in the process of investigation. For the purposes of effective investigation, the interested person should be properly informed of the progress of investigation, including about the initiation and results of the investigation. According to the case-law of the ECHR, an investigation should be 'accessible to the victim's family'[29] Similarly to the national legislation, the ECHR takes into consideration the confidential nature of investigation and establishes that, considering the interests of the investigation, it may not

[29] For example, see *Khaindrava and Dzamashvili v. Georgia*, Application No. 18183/05, Judgment of June 8, 2010, Paragraph 60;

be advisable to answer all questions that are asked about the criminal case, although, unlike the Georgian legislation on criminal procedure, the ECHR clearly takes into account that the 'victim' should possess sufficient information that will enable him/her to draw conclusions about the progress of the investigation.

The analysis of the cases studied shows that granting the status of a victim and receiving information about the progress of investigation remain significant problems. In only 2 of the 12 criminal cases studied was the victim of an allegedly committed crime recognized as such.

It should be noted that in one of the 12 cases, the individual concerned was recognized as a victim by a court rather than by the prosecutor's office investigating the case. In particular, the prosecutor supervising the case refused to grant the lawyer's application to recognize the individual as a victim, and the superior prosecutor also refused to grant an appeal regarding the person's recognition as a victim. As this case was being investigated with the qualification of torture committed under aggravating circumstances, which is a particularly grave crime, the lawyer litigating the case filed a complaint in the court of first instance. The court agreed with the position of the GYLA's lawyer and directed the respective prosecutor to grant the status of a victim to the individual affected by the crime allegedly committed by law enforcement officers.

In all the cases in which the prosecutor adopted a decree on refusal to recognize the individuals concerned as victims, the decrees have a formulaic content and do not contain reasoning regarding the motives for refusal. They only contain a general reference to the article under which the case is being investigated and to the standard of recognition of a person as a victim. The decrees on refusal also say that investigative actions are being carried out and no grounds have been identified for recognizing a concrete person as a victim. The decrees do not indicate what investigative actions have been carried out and why the foregoing is not sufficient for recognizing the person as a victim.

It should be noted that the mechanism of appealing a decree of a prosecutor supervising the case to a superior prosecutor is weak and does not constitute an instrument of real supervision. We can argue this based on the fact that there have been no precedents of a superior

prosecutor granting an appeal regarding recognition as a victim (or regarding any other issue) and revoking the decision of a subordinate prosecutor.

It is also noteworthy that there are different approaches to informing victims of crimes allegedly committed by law enforcement officers. In particular, in spite of the Prosecutor's Office's refusal to recognize the persons as victims in a part of the cases, in some instances the victims are informed of the investigative actions and their results. Conversely, in other cases, such an approach is not applied and the victims are completely devoid of the opportunity to be informed about the progress of investigation. In some cases, the victims also face problems related to receiving the results of the forensic medical examinations conducted on them or their copies. Granted, informing victims who don't have the corresponding status of the progress of investigation should be assessed positively, although the foregoing cannot replace the victim's status, because without this status, the victims cannot enjoy the right which the applicable Code of Criminal Procedure grants them.

3.6. The problem of protraction of investigations

The Code of Criminal Procedure of Georgia does not determine a concrete time frame for investigating criminal cases, although it says that the investigation should be conducted within a reasonable period.[30] What is meant under 'reasonable period' should be determined individually, on the basis of the circumstances of the case – whether the investigation of the criminal case was conducted effectively, whether the case was given priority, and whether the investigation was interrupted due to inaction of investigative bodies.

The analysis of the cases dealt with in the report demonstrates that although investigations are launched in response to applications of victims of alleged battery or other violence by law enforcement officers, as a rule, the said investigations fail to arrive at concrete results despite the passage of a reasonable period. Granted, a reasonable period is not defined by law, but we should interpret this term as a period of time required for carrying out investigative actions comprehensively.

[30] The Code of Criminal Procedure, Article 103;

Despite the fact that at least six months has passed since the opening of investigations into the cases discussed in the report, the vast majority of them have yet to arrive at a concrete final decision. More specifically, the final decision has been made only in 2 of the 12 cases. In one case the investigation has been terminated and another case the police officers were charged.

We should also mention one of the cases in which the investigation was terminated but was later renewed by means of a court. In particular, the body investigating the case first revoked the victims' status of the person concerned and later terminated the investigation. The lawyer litigating the case appealed the revocation of the victim's status and the termination of the investigation to a superior prosecutor – who didn't grant the appeal – and later, as the case concerned a particularly grave crime, filed a complaint in the court. The court agreed with the lawyer's arguments and deemed that the revocation of the victim's status and termination of the investigation had taken place without any reasoning and without studying and establishing important factual circumstances. It should be noted that, despite the fact that the investigation has been renewed and there are enough grounds for holding concrete persons responsible, the relevant final decision has yet to be delivered. At the same time, the revocation of the decree on recognition as a victim, the initial termination of the investigation, and its protraction after renewal raise serious questions regarding the State's interest in solving this case.

As for the remaining 9 cases, despite the fact that the investigation of these cases has been underway for at least six months, no concrete results have been achieved, those responsible have yet to be revealed, and the cases have not ended with another result either. According to the information at the disposal of the lawyers, in a part of these cases, no new investigative actions are being taken any more and the cases have in fact been terminated.

3.7. Imposition of administrative liability on victims of crimes allegedly committed by law enforcement officers

Persons who stated that they had been subjected to battery or other types of ill-treatment by law enforcement officers were, in a number of cases, had been detained by the police under Article 166 and/or Article 173 of the Code of Administrative Offenses, which concern disorderly conduct and resistance to the police, respectively.

In 5 of the 12 criminal cases studied, the alleged victims were placed under administrative detention, while in 4 instances the cases of administrative offenses were examined by administrative panels of courts. In 2 of the 4 cases, the cases of administrative offenses were terminated, and in 2 cases the individuals concerned were found guilty and were subjected to a penalty in the form of a fine.

As for the lawfulness of detentions, in 2 cases the GYLA's lawyers applied to the Ministry of Internal Affairs with a request to assess whether the detentions had been carried out in compliance with law and whether there had been pre-conditions for detention. It should be noted that the courts do not exercise effective control on the lawfulness of administrative detentions, because detention is not assessed as an independent legal act, despite the fact that the Code of Administrative Offenses provides for independent examination of such acts. In particular, the courts do not examine whether there were any concrete grounds for detention, why it was necessary to apply detention as a measure of last resort, and why the goal could not have been achieved by using other means that causes less restriction of human rights. In one of the aforementioned 2 cases, the complaint filed in connection with detention was enclosed with the criminal case files, while in another case the letter sent in response to the complaint didn't contain relevant deliberation on the pre-conditions of detention and on the necessity of its application.

In the cases in which individuals were found guilty of an administrative offense and subjected to penalties, the court mainly relied on evidence obtained from one source, in particular, police officers. The court decisions treated the administrative offense report, the report of administrative detention, police officers' reports, and their testimonies as sep-

arate pieces of evidence, whereas all these pieces of evidence had been provided by the same party – the police. It is also noteworthy that even these pieces of evidence contained contradictions, to which the court failed to give an adequate assessment. The decisions of both city courts and courts of appeals lack well-reasoned arguments on why the court agreed with the position of one party – in particular, the police – and rejected the explanations of individuals brought before the court. The court explained that 'The court should not attach less importance to the explanation of law enforcement officers than to that of the individual to be held responsible.' In parallel, the judge failed to explain why the explanation of a law enforcement officer should be given priority and considered as more credible.