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Communication of the Public Defender of Georgia
Merabishvili v. Georgia (Application No. 72508/13)
Made under Rule 9(2) of the Rules of the Committee of Ministers
for the Supervision of the Execution of Judgments
and of the terms of Friendly Settlements

Introduction

1. Pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the terms of Friendly Settlements, the Public Defender of Georgia hereby submits to the Committee of Ministers (hereinafter the CM) the communication on the execution of the judgment in the case of Merabishvili v. Georgia (Application No. 72508/13).

2. This submission refers to the decision of the CM adopted at the 1459th meeting in March 2023 and provides information on the matters mentioned in the decision. The present communication also comments on/replies to the Action Plans dated 20.12.2022 and 15.04.2024 submitted by the Government of Georgia¹ and assesses the implementation of general measures by the Government in the course of the execution of the judgement in the Merabishvili case.

The timeframe for storing and keeping video recordings in penitentiary establishments

¹ Action Plan (15/04/2024- Communication from Georgia concerning the case of Merabishvili v. Georgia (Application No. 72508/13), available at: <https://tinyurl.com/4xvb73fs> [last accessed 24.04.24]; Action Plan (20/12/2022) - Communication from Georgia concerning the case of Merabishvili v. Georgia, (Application No. 72508/13), available at: <https://tinyurl.com/bdhhmnz5> [last accessed 24.04.24].

3. The Public Defender's Office (hereinafter the PDO) would like to recall that the time limit for storing and keeping surveillance videos in penitentiary establishments was initially set at 24 hours.² This timeframe was extended to 5 days at first.³ However, the PDO deemed this insufficient and advocated for increasing the period for retaining video recordings to one month in light of the difficulties the short timeframe created for prisoners in making complaints and for the PDO in verifying violations alleged.⁴ The time limit was indeed extended to 30 days and this change was welcomed by both the PDO and the CM.⁵ Unfortunately, this positive development was reversed. In particular, the Order issued by the Minister of Justice of Georgia in October 2023 reduced the aforementioned 30-day time limit to 10 days,⁶ thereby worsening protection of prisoners from and prevention of ill-treatment and other human rights violations.

4. The need to increase financial and human resources was named by the Special Penitentiary Service as the reason for the aforementioned decrease.⁷ However, the Special Penitentiary Service has not provided the PDO with any argumentation as to which objective circumstances caused the increase of financial and human resources that led to a threefold reduction in the period for storing surveillance videos in penitentiary establishments.⁸

5. Retention of video recordings constitutes an important mechanism of preventing human rights breaches in closed facilities and provides means to obtain neutral evidence to investigate

² The 2023 Activity Report of the Criminal Law Justice Department of the Public Defender's Office of Georgia, page 41, available at: <https://tinyurl.com/3pea6yzj> [last accessed 11.04.2024]; The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2023, page 72, available at: <https://tinyurl.com/y6h68zys> [last accessed 04.04.2024]; Communication of the Office of the Public Defender of Georgia on Merabishvili v. Georgia (application no. 72508/13) made under Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the terms of Friendly Settlements, November 22, 2018, page 6, available at: <https://tinyurl.com/4yazu9tr> [last accessed 13.03.2024].

³ Ibid.

⁴ Communication of the Office of the Public Defender of Georgia on Merabishvili v. Georgia (application no. 72508/13) made under Rule 9(2) of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the terms of Friendly Settlements, November 22, 2018, pages 4-7.

⁵ Communication from an NHRI (Public Defender's Office of Georgia) (27/07/2021) in the case of Merabishvili v. Georgia (Application No. 72508/13), paragraph 41, available at: <https://tinyurl.com/4ww59a3t> [last accessed 13.03.2024]; Decision adopted at the 1348th meeting, 4-6 June 2019 (DH), CM/Del/Dec(2019)1348/H46-8, paragraph 5, available at: <https://tinyurl.com/2zptzdbh> [last accessed 24.04.2024]; The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2023, page 72.

⁶ N941 Order issued by the Minister of Justice of Georgia on 20 October 2023 and amending the N35 Order dated 19 May 2015 and issued by the Minister of Corrections and Probation of Georgia on "determination of the rule of conducting control and surveillance by visual and/or electronic means, keeping, deleting and destroying recordings"; The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2023, page 72; The 2023 Activity Report of the Criminal Law Justice Department of the Public Defender's Office of Georgia, page 40.

⁷ № 333280/01 letter of the Special Penitentiary Service, dated 30 November 2023; The 2023 Activity Report of the Criminal Law Justice Department of the Public Defender's Office of Georgia, page 41.

⁸ № 363765/01 letter of the Special Penitentiary Service, dated 28 December 2023; The 2023 Activity Report of the Criminal Law Justice Department of the Public Defender's Office of Georgia, page 41.

crimes or other offences and punish perpetrators. Thus, the decrease of the time limit of keeping video recordings can hinder detection of and inquiries into infringements of rights of the accused and the convicts.

6. It should be noted that the timeframe for retaining video recordings remains 120 hours in N3 and N11 penitentiary establishments and one of the buildings⁹ of the N8 establishment until video surveillance systems are upgraded/updated there.¹⁰ Despite the PDO's request, the Special Penitentiary Service has not presented/provided an order stipulating that the time limit is to remain 120 hours before upgrading/updating video surveillance systems in the aforementioned penitentiary facilities.¹¹ Such a regulation could not be found on the website www.matsne.gov.ge (the official gazette of Georgia). The PDO finds that the Special Penitentiary Service should allocate enough resources to ensure that video recordings in the aforementioned facilities are retained in the same way as in other penitentiary establishments where the time limit should be extended to 30 days again.

The outstanding/pending reform of the Prosecutor's Office

7. In its last decision, the CM “noted with interest the adoption of the draft constitutional amendments concerning the rules governing the appointment of the Prosecutor General in the first reading and called upon the authorities to accomplish the reform in a timely manner and in line with the Venice Commission's recommendations”.¹² The CM also recalled its previous indication on “the revision of the composition and powers of the Prosecutorial Council and provision of specific guarantees for the individual independence of prosecutors, as recommended by the Venice Commission”.¹³

8. Unfortunately, the comprehensive reform of the Prosecutor's Office has not been carried out in accordance with the recommendations of the PDO and the Venice Commission.¹⁴ Crucial challenges, such as appointment and excessive internal powers of the Prosecutor

⁹ The part/building of the N8 penitentiary establishment that is located on the Abuseridze-Tbeli Street N11 in Tbilisi.

¹⁰ N23854/01 letter of the Electronic Surveillance Division of the Penitentiary Department of the Special Penitentiary Service, dated 30 January 2023; N5201/01 letter of the Electronic Surveillance Division of the Special Penitentiary Service, dated 9 January 2024; The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2023, pages 72-73; The 2023 Activity Report of the Criminal Law Justice Department of the Public Defender's Office of Georgia, page 42.

¹¹ The 2023 Activity Report of the Criminal Law Justice Department of the Public Defender's Office of Georgia, page 42.

¹² Decision adopted at the 1459th meeting, 7-9 March 2023, CM/Del/Dec(2023)1459/H46-9, paragraph 4, available at: <https://tinyurl.com/mrxwhxy7> [last accessed 13.03.2024].

¹³ Ibid, paragraph 5.

¹⁴ The European Commission, Georgia 2023 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy, pages 10, 20, 22, available at: <https://tinyurl.com/ycnhyavf> [last accessed 13.03.2024].

General, composition and functions of the Prosecutorial Council and insufficient independence of individual prosecutors, have remained unresolved.¹⁵

9. The government's Action Plan dated 20/12/2022 mentions the adoption of the draft Constitutional law regarding the appointment of the Prosecutor General in the first reading.¹⁶ However, the amendment has not been adopted and, unfortunately, the appointment rule has remained the same, requiring the simple majority of the Parliament to elect the Prosecutor General.¹⁷ In this connection, the European Commission's report on Georgia reads that "the appointment process for the Prosecutor-General needs to be improved to ensure it is transparent and based on criteria of integrity, independence, impartiality, and competence. In particular, draft constitutional amendments remain to be adopted to introduce a qualified majority vote in Parliament".¹⁸

10. Another outstanding issue pertains to the functions and composition of the Prosecutorial Council. Despite the reform described in the Action Plan dated 20/12/2022,¹⁹ the PDO would like to reiterate its concerns and comments from its previous rule 9 communications. In particular, the powers of the Prosecutorial Council are limited and insufficient to balance the authority of the Prosecutor General. The Prosecutorial Council is still not involved in determination of jurisdiction and separation of competencies among structural units of the Prosecutor's Office.²⁰ Although this body can prepare and present recommendations on the guiding principles of the criminal law policy,²¹ it is up to the Prosecutor General to determine and approve these principles.²² Similarly, career management, including decision-making on disciplinary issues, lies largely within the Prosecutor General's authority²³ while the

¹⁵ Ibid, pages 20-23; Communication from an NHRI (Public Defender's Office of Georgia) (27/07/2021) in the case of Merabishvili v. Georgia (Application No. 72508/13), paragraphs 7-9, available at: <https://tinyurl.com/4ww59a3t> [last accessed 13.03.2024]; Communication from an NHRI (Public Defender's Office of Georgia) (01/02/2021) in the case of Merabishvili v. Georgia (Application No. 72508/13), paragraphs 1-19, available at: <https://tinyurl.com/5cwa8c92> [last accessed 13.03.2024]; Communication from an NHRI (Public defender of Georgia) (20/01/2022) in the case of Merabishvili v. Georgia (Application No. 72508/13), paragraphs 6-12, available at: <https://tinyurl.com/mpsm92wk> [last accessed 13.03.2024].

¹⁶ Action Plan (20/12/2022) - Communication from Georgia concerning the case of Merabishvili v. Georgia (Application No. 72508/13), paragraph 18, available at: <https://tinyurl.com/bdhhmnz5> [last accessed 13.03.2024].

¹⁷ Paragraph 2 of article 65 of the Constitution of Georgia.

¹⁸ The European Commission, Georgia 2023 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy, page 22.

¹⁹ Action Plan (20/12/2022) - Communication from Georgia concerning the case of Merabishvili v. Georgia (Application No. 72508/13), paragraph 21.

²⁰ Article 7 of the Organic Law of Georgia on the Prosecutor's Office.

²¹ Ibid, subparagraph "f" of paragraph 13 of article 19.

²² Ibid, subparagraph "h" of paragraph 2 of article 15.

²³ Ibid, subparagraphs "a", "r", „s", "t", "t1" of paragraph 2 of article 15; The European Commission, Georgia 2023 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy, page 24.

Prosecutorial Council has a rather limited role in disciplinary matters and career management.²⁴ Apart from its weak powers, the composition of this body is also problematic as already emphasized by the PDO and the Venice Commission.²⁵ In this regard, the European Commission's report states that "...Venice Commission opinions concerning the prosecution service remain to be addressed. This includes revising the composition of the Prosecutorial Council to ensure a better balance between prosecutor and non-prosecutor members, strengthening the internal independence of prosecutors by shifting certain powers concerning prosecutors' career from the Prosecutor General to the Prosecutorial Council. To address these points, a comprehensive set of legislative amendments taking into account existing recommendations should be prepared and adopted in consultation with the EU, the Venice Commission and relevant stakeholders".²⁶

11. As for the independence of individual prosecutors, the European Commission's report reads that the Law on the Prosecutor's Service "does not mention the obligation of the superior prosecutor (including the Prosecutor General) to provide instructions in written form; nor does it mention the right or duty of the subordinated prosecutor to draw attention to the (alleged) illegality of an instruction received. Mechanisms for reviewing the legality of instructions by an independent body are missing. Furthermore, the Criminal Procedure Code empowers prosecutors in management positions to remove subordinate prosecutors from an investigation and to assign their responsibilities to other prosecutors without any justification. The current legislative framework concerning internal independence of prosecutors must be revised to align with European standards, taking into account recommendations of the OECD, and the Venice Commission".²⁷

The Special Investigation Service

12. In its last decision, the CM "noted with satisfaction the recent legislative changes enabling the Special Investigation Service to investigate any future case in which the European Court

²⁴ Subparagraphs "b" and "c" of paragraph 13 and paragraph 17 of article 19 of the Organic Law of Georgia on the Prosecutor's Office; The European Commission, Georgia 2023 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy, page 21-22.

²⁵ Communication from an NHRI (Public Defender's Office of Georgia) (01/02/2021) in the case of Merabishvili v. Georgia (Application No. 72508/13), paragraphs 10-14; Opinion of the Venice Commission, CDL-AD(2018)029, 17 December 2018, paragraph 33, available at: <https://tinyurl.com/4nhxaepm> [last accessed 13.03.2024]; Paragraph 2 of article 19 and paragraph 9 of article 20 of the Organic Law of Georgia on the Prosecutor's Office.

²⁶ The European Commission, Georgia 2023 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy, page 22.

²⁷ The European Commission, Georgia 2023 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement policy, page 23.

finds a violation of Article 18 of the Convention”.²⁸ The Action Plan dated 20/12/2022 also refers to this change as well as to the amendment extending the SIS jurisdiction to “to all crimes provided for in the CCG that relate to violation of the Convention or any of its protocols established by a final judgment of the Court”.²⁹ While these legislative changes are welcomed, the PDO would like to refer to the remaining flaws of the legal framework applicable to the Special Investigation Service (SIS) that were described in the PDO’s last 2 communications on execution of the cases of the Tsintsabadze group.³⁰ In addition, it should be mentioned that a draft law extending the SIS mandate to certain crimes committed by prosecutors was recently initiated and adopted in the first reading in the Parliament.³¹ The PDO hopes that the bill will be supported by the legislature and that other shortcomings in the SIS jurisdiction will be resolved as well.

13. The Action Plan dated 20/12/2022 states that the amendment extending the SIS mandate to crimes related to the ECHR violations “will give the State opportunity to fulfil its positive obligations more successfully and subject the investigation of violent crimes committed by State representatives to an independent investigative mechanism”.³² Therefore, the PDO finds it relevant to inform the CM about investigations conducted by the SIS. In particular, the PDO examined 55 criminal cases (46 terminated and 9 ongoing) investigated by the SIS.³³ The examination reveals that investigations usually satisfy the effectiveness standards. Nevertheless, the following shortcomings in investigations should be singled out: considerable delays in interviewing public officials who are alleged perpetrators or witnesses, failure to check/inquire into the reasons for non-existence of recordings of video surveillance at police facilities, failure to timely document inspections of obtained video recordings and mistakes in classifying ill-treatment.³⁴

²⁸ Decision adopted at the 1459th meeting, 7-9 March 2023, CM/Del/Dec(2023)1459/H46-9, paragraph 6.

²⁹ Action Plan (20/12/2022) - Communication from Georgia concerning the case of Merabishvili v. Georgia (Application No. 72508/13), paragraphs 33-34.

³⁰ Communication from an NHRI (Public Defender of Georgia) (30/01/2024) concerning the TSINTSABADZE group of cases v. Georgia (Application No. 35403/06), paragraph 3, available at: <https://tinyurl.com/2x3zpusa> [last accessed 13.03.2024]; Communication from an NHRI (Public Defender of Georgia) (25/04/2023) in the case of TSINTSABADZE v. Georgia (Application No. 35403/06), paragraphs 5-6, available at: <https://tinyurl.com/5vujm73r> [last accessed 13.03.2024]; The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2023, page 75.

³¹ Public Defender’s Statement regarding Initiative to Expand Investigative Jurisdiction of Special Investigation Service, available at: <https://tinyurl.com/xmz388fh> [last accessed 13.03.2024]; The draft law is available at: <https://parliament.ge/legislation/28044> [last accessed 13.03.2024].

³² Action Plan (20/12/2022) - Communication from Georgia concerning the case of Merabishvili v. Georgia (Application No. 72508/13), paragraph 35.

³³ The Report of the Public Defender of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia 2023, pages 76-77.

³⁴ Ibid, page 77; The 2023 Activity Report of the Criminal Law Justice Department of the Public Defender’s Office of Georgia, pages 55-63; For further information and assessments regarding the issue of incorrect classification of ill-treatment, please refer to the PDO’s last 2 communications on the execution of cases of the Tsintsabadze group as well as Special Report of the

Recommendations

14. In order to effectively execute the judgment in the Merabishvili case, the PDO calls on the Government of Georgia to:

- Adopt legislative amendments to include crimes committed by the Prosecutor General, the Minister of Internal Affairs and the Head of State Security Service within the mandate of the Special Investigation Service.
- Adopt legislative changes to extend the mandate of Special Investigation Service to cover certain crimes committed by prosecutors (crimes under articles 108, 109, 111, 113-118, 120-124, 126, 126¹, 137-139, 143-144, 150-151¹ under the Criminal Code).
- Adopt legislative amendments to include in the remit/jurisdiction of the Special Investigation Service only those crimes which correspond to its main mandate (remove crimes under articles 153-159 and 162-163, 164⁴ from its remit/jurisdiction).
- Change the law to provide/introduce:
 - review by the Prosecutor's Office of the SIS request regarding transfer of cases within a shortened timeframe and a prosecutor's obligation to substantiate her/his decision (on the request);
 - decrease of length of the timeframe for review of a substantiated proposal by the SIS to carry out an investigative/procedural action and a prosecutor's obligation to substantiate her/his decision (on the proposal);
 - additional guarantees to ensure gathering, protecting and storing evidence in a timely manner and without hinderance and the obligation to justify refusal in case of incompliance with the SIS request.
- Reform the Prosecutor's Office of Georgia in accordance with the recommendations of the relevant stakeholders, including the PDO, the European Commission, the CM and the Venice Commission.
- Increase the time limit of keeping and storing/archiving video surveillance recordings to at least 30 days in penitentiary establishments.

Public Defender of Georgia, Practical Analysis of Qualification of Ill-treatment under General and Special Provisions, available at: <https://tinyurl.com/5ydwfwsj> [last accessed 04.04.2024].