



OPEN SOCIETY GEORGIA FOUNDATION
ფონდი ღია საზოგადოებას სპარტოველი

WHAT SHOULD EU DO TO FOSTER ACCOUNTABILITY AND DEMOCRATIC OVERSIGHT OF LAW ENFORCEMENT AGENCIES IN GEORGIA

TBILISI, DECEMBER 2017

OPEN SOCIETY GEORGIA FOUNDATION

**This policy brief covers period
of January-November, 2017**

AUTHOR:

*** Ana Natsvlishvili**

on behalf of the Georgian Young Lawyers Association (GYLA)

Peer review by: Dr. Tobias Schumacher

This policy brief is prepared within the framework of the Open Society Georgia Foundation's in-house project Monitoring Implementation of the EU-Georgia Association Agreement by Coalition of Civil Society Organizations. The views, opinions and statements expressed by the author and those providing comments are theirs only and do not necessarily reflect the position of the Foundation. Therefore, the Open Society Georgia Foundation is not responsible for the content of the material.

*** Ana Natsvlishvili is the chair of the Georgian Young Lawyers Association. She has eight years of experience in the field of democratic reforms and human rights in Georgia and abroad. She has worked as a South Caucasus regional project coordinator for a number of EU funded projects and has served as an expert for international governmental as well as non-governmental organisations, e.g., COE, OSCE, Human Rights House Network, etc. Ms Natsvlishvili is an author of a number of publications and research projects. She holds a BA in Law from Tbilisi State University (2002-2006, Georgia), an LLM in Human Rights from Central European University (2006- 2007, Hungary) and LLM in International Human Rights and Humanitarian Law (2011-2012, UK)**

INTRODUCTION

Georgia has a long history of impunity of law-enforcement officials' for serious human rights violations, including torture. As widely believed, it was the leak of secretly recorded videos depicting widespread torture in Georgian prisons that played a decisive role in the opposition's victory in the parliamentary elections in 2012.

Considering this background, it was not a surprise that the new government was strongly recommended to set up an independent mechanism for fighting torture and similar crimes.¹ The EU-Georgia Association Agreement, concluded in June 2014, in conjunction with the accompanying Association Agenda 2014-2016, further stresses the need for Georgia to increase the accountability and democratic oversight of law enforcement agencies. The document underlines the importance of providing "professional, effective mechanism for credible response" to complaints against the police and prosecutors; for this purpose, the Association Agenda suggested to "consider establishing a full-fledged independent and effective complaint mechanism to investigate such cases."² The National Strategy and Action Plan for Human Rights, an official document adopted by the government in 2014, further commits the state to the obligation to consider creating such a mechanism.³ Last but not least, national and international human rights organizations, as well as the Ombudsman, are also strongly advocating for the creation of such a mechanism.⁴

Despite this, to date, investigating the cases of police abuse (including torture) remains in the hands of the prosecutor's office – the body that was also responsible for such investigations before 2012 and dramatically failed to perform its tasks. Due to this past, as well as the more recent cases of police abuses that have not been effectively and timely investigated,⁵ the body enjoys very low trust by the Georgian public. The practice shows that while gravity and scale of ill-treatment cases today are clearly different (particularly as far as the penitentiary system is concerned) and not as severe as they were before 2012, the efficiency of the state's response to such cases in terms of independent, speedy and effective investigations is still missing - as in the past. Impunity for ill-treatment is still a serious challenge.

Moreover, despite the recent institutional reforms carried out, the prosecutor's office is still considered to be politicized.⁶

1 See the report prepared by the EU Special Adviser on Constitutional and Legal Reform and Human Rights, Thomas Hammerberg. He was invited by the government of Georgia with the support of the EU to give recommendations to the new government after the 2012 parliamentary elections; among other recommendations, he advised Georgia to set up an independent investigative mechanism. The full report with the recommendations is available at http://gov.ge/files/38298_38298_595238_georgia_in_transition-hammarberg1.pdf

2 See EU-Georgia Association Agenda, 2014 (Political Dialogue and Reform Section)

3 The first time Georgia received similar recommendation was already in 2005 by the UN Special Rapporteur on Torture. It is notable that 10 years later the next UN Special Rapporteur voiced the same recommendation

4 See e.g., Address by the Coalition for Transparent and Independent Judiciary to the Council of Europe's Committee of Ministers, 2017, available at http://www.coalition.ge/files/letter_to_the_committee_of_ministers.eng.pdf

5 See further Crimes Allegedly Committed by Law Enforcement Officers and the State's Response to them: Analysis of Cases by the Georgian Young Lawyers' Association (GYLA), 2016, available at <https://gyla.ge>

6 See e.g., Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), para 10, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)039-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)039-e); see further policy brief - Reform of the Prosecutor's Office in Georgia – what is at stake? 2016, by Ana Natsvlshvili, available at <http://www.osgf.ge/files/2015/Publication/EU-Georgia%20Association%20report6.pdf>

WHAT SHOULD EU DO TO FOSTER ACCOUNTABILITY AND DEMOCRATIC OVERSIGHT OF LAW ENFORCEMENT AGENCIES IN GEORGIA

Considering the above mentioned facts, the question arises: is Georgia safe from sliding back to widespread and systemic torture or other malpractices if no significant legislative and institutional guarantees have been put in place after the period when torture was a widespread problem? Can Georgia achieve the goals defined by the Association Agenda and consolidate its democracy without establishing a fully independent, transparent and efficient law-enforcement system, including an independent investigative mechanism?

This policy memo demonstrates the scope of the problem, its effects on the rule of law and democracy in Georgia, and the importance of the EU in putting stronger emphasis on Georgia's commitment to set up an independent investigative mechanism.

WHY KEEPING THE STATUS QUO IS UNACCEPTABLE?

At present, no effective accountability mechanism for law enforcement officials exists in Georgia. The general prosecutor's office systematically fails to conduct effective and independent investigations into allegations of law enforcement officials committing crimes; judicial control as well as parliamentary oversight of law-enforcement bodies are weak or even absent.

Since 2014 the Ombudsman of Georgia and NGOs have requested investigation into the facts of ill-treatment on 91 occasions. Out of these cases, only two persons have been charged and no person has been held criminally liable as of now.⁷

These and other available statistics demonstrate that the law-enforcement system is struggling to investigate abuses potentially committed by its own representatives. And demonstrate the urgency of addressing the issue of law enforcement officials' impunity with a long-term solution.

The Ombudsman and human rights watchdogs further talk about a pattern of systemic problems that undermine the effectiveness of investigation for torture cases. First, is inherent conflicts of interest and hierarchical connections between the prosecutor's office and the police officers present in such cases, public trust towards such investigations is derailed from the outset. Second, the improper qualification of the crime: instead of qualifying it as torture (or other forms of ill-treatment), such cases are mostly qualified as abuse of authority. In addition to differences in sanctions between these two crimes, such a practice also makes official statistical data about torture cases inaccurate and, therefore, misleading. Third, the role of judges in addressing potential torture cases is very limited. Judges do not have a right or a duty to order a conduct of effective investigations when s/he has a reasonable suspicion that a person, appearing before him/her has been subjected to torture; neither does (s)he have the right to take measures to protect the person or require access to materials relevant to the case. Fourth, victims of torture are not acknowledged as such during an investigation process. Denial of the victim's status deprives him/her of the basic right to have access to case materials and hence assess the progress of the investigation. Fifth a dangerous tendency

⁷ Brief analysis of the existing situation on torture and ill-treatment in the recent years in Georgia, by Besarion Bokhashvili, 2017 available at http://www.osgf.ge/files/2017/Cameba%20cixeebshi/Final_ENG.pdf

has been observed that while investigations into allegations of ill-treatment are either terminated or protracted without leading to any effective results, those who raise their voice about such facts themselves face criminal charges and some are even sentenced for allegedly making false accusations.

HOW MUCH AN UNACCOUNTABLE LAW ENFORCEMENT SYSTEM COST TO DEMOCRACY?

Impunity for torture has deleterious consequences for democracy and the rule of law. First, it is often an indication of 'loyalty links' between law enforcement agents and political elites. The ruling elite agrees to ignore the abuses by law enforcement officials and in return requires paybacks, when needed. Such paybacks become particularly useful during election campaigns and public discontent with government policies, etc. As a result, the ruling elite turns a blind eye on police abuses and in return starts to use the law enforcement system for political purposes; law enforcement officials gain more powers in practice than granted to them by law. Such de facto powers do not only allow them to benefit from impunity, but can, at times, even influence important law-making and decision-making processes – particularly when their partisan interests may be at stake by new initiatives. This further inhibits much needed reforms in the law enforcement system to make it more transparent, accountable and law-obedient, in general. Second, impunity for torture has a slippery-slope effect: once the law enforcement bodies understand that something as severe as torture and other forms of ill-treatment are encouraged, or at least condoned by the state, other less severe forms of misconduct are even more likely to be excused. As the practice of many countries demonstrates, impunity for torture has spill-over effect and deteriorates respect for and protection of other fundamental rights as well. Third, considering that most often ill-treatment is used to force the person to confess to a crime, impunity for torture further corrupts the justice system as well, since it allows the use of illegally obtained evidence in the justice-making process.

INDEPENDENT INVESTIGATIVE MECHANISM: THE MANDATE

The Independent Investigative Mechanism would not be unique to Georgia. Similar institutions, with varying mandates, exist both in consolidated and relatively young democracies (e.g. Canada, Israel, Australia, South Africa).

Based on international practices and local context analysis, NGOs have elaborated a particular model of the Independent Investigative Mechanism for Georgia, which has all necessary institutional and functional guarantees of independence. The draft is positively evaluated by international experts as well.

According to the draft bill, the independent investigative mechanism shall be an independent agency accountable to the parliament. Its head (commissioner) shall be elected for a fixed term. A detailed description of the selection procedures is prescribed in the draft; participation of the parliamentary minority is ensured in the selection process. It will be possible to discharge the head of the independent

WHAT SHOULD EU DO TO FOSTER ACCOUNTABILITY AND DEMOCRATIC OVERSIGHT OF LAW ENFORCEMENT AGENCIES IN GEORGIA

investigative mechanism only pursuant to prescribed legal grounds. Dismissal from office is subject to judicial review in the constitutional court.

The mechanism will have exclusive jurisdiction to investigate cases of torture and death and complementary jurisdiction in other cases of grave crimes where conflict of interests arises if other investigative bodies take up the case. The function of the independent investigative mechanism in all cases will be investigation, indictment and criminal prosecution.

CHALLENGES TO THE CREATION OF AN INDEPENDENT INVESTIGATIVE MECHANISM

Opponents of the independent investigative mechanism often claim that there is no need to set up such a mechanism since it duplicates the functions of the prosecutor's office. This opinion deliberately ignores two important points:

- 1) the fact that the prosecutor's office continuously fails to perform its respective duties with due diligence;
- 2) even if, eventually, the prosecutor's office was to establish itself as politically neutral and independent, two concerns must be born in mind: first, justice delayed is justice denied: considering the size of the body and the deeply rooted problems in there, turning the prosecutor's office into a politically neutral, independent and efficient body will take years. Second, according to the current institutional setting, which will not change even if the prosecutor's office emerges as an independent body, there is an inherent conflict of interest and hierarchical connections between the prosecutor's office and the police. These close connections between the two institutions jeopardizes integrity and trust towards the investigations carried out by one over the representatives of the other. The scope of the mechanism's exact mandate is also a subject of contestation. Opponents argue that it should not have the power to prosecute, but only to investigate. Such a solution would significantly weaken the mechanism and the fight against torture in general.

An additional argument put forward against the creation of such a mechanism is the potentially high cost that Georgia, a lower middle income country, would find it difficult to afford. While this might be an issue, the lack of resources is not a legitimate excuse for the state to turn a blind eye to the violation of important and fundamental rights such as the right to life, freedom from torture and ill-treatment and the right to a fair trial. Besides, there is no talk about a big-size institution, but rather an independent and effective one; in case there is a genuine political will to set up a functional, truly independent mechanism, that goal may well be achieved within a reasonable budget affordable for a country like Georgia.

Finally, the question is who will hold accountable the representatives of the mechanism if they commit a crime. While this is an important question, international experience could be a helpful guide here.

All in all, while there is significant opposition to the creation of such a body, no viable alternative has been proposed so far by the government as to how to fulfill the obligation under the EU-Georgia Association Agenda to strengthen police accountability and democratic oversight over the law-enforcement bodies

RECOMMENDATIONS

- Georgia must conduct a speedy, transparent and effective reform to establish an independent mechanism for the investigation of crimes committed by law enforcements;
- EU can serve as the most efficient generator of political will inside the government of Georgia to set up an independent investigative mechanism. Therefore, the EU should pay stronger attention to this issue and attach strict conditionality to its fulfillment.