



Coalition

for and Independent and
Transparent Judiciary

**Committee of Ministers
Department of Execution of Judgments of the
European Court of Human Rights**

**Communication of the Coalition for an Independent
and Transparent Judiciary**

Gharibashvili Group Cases

Gharibashvili v. Georgia (Application no. 11830103)

Mikiashvili v. Georgia (application no. 18996106)

Dvalishvili v. Georgia (Application no. 19634107)

Khaindrava and Dzamashvili v. Georgia (application no. 18183105)

Tsintsabadze v. Georgia (application no. 35403106)

Enukidze and Girgvliani v. Georgia (Application no. 25091107)

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

Coalition Members:

Article 42 of the Constitution
Multinational Georgia
Georgia Small and Medium
Enterprise Association
Civil Integration Foundation
Georgian Lawyers for
Independent Profession
Liberal
Center for Protection of
Constitutional Rights
International Society for Fair
Elections and Democracy
The Union "21 Century"
Georgian Young Lawyer's
Association
Human Right Center
Transparency International
Union of Meskhetian Democrats
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United Nations Association of
Georgia
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Association
Civil Society Institute
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Institute of Democracy
American Chamber of
Commerce
Europe Foundation
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Freedom of Information
Human Rights Priority
Tbilisi Media Club
Human Rights Education and
Monitoring Centre
Foundation for the Support of
Legal Education
Institute of Civil Engagement
Association of law firms of
Georgia
Association of Young
Economists of Georgia
European Choice of Georgia
Liberal Academy Georgia
Partnership for Human Rights
Georgian Human Rights
Network
Georgian Democratic Initiative
Sapari Union

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I. Introduction

The Coalition for independent and transparent judiciary represents a unity of 36 non-governmental organizations in Georgia. The goal of the Coalition is to consolidate the efforts of legal professional associations, NGOs, business associations, and media into a joint advocacy for an independent, transparent and accountable justice system. The Coalition activities include research and monitoring, development of recommendations and advocacy for judicial reforms, and promotion of public discussions on the problems critical to the justice system.

The Coalition is honored to submit a communication to the Committee of Ministers in relation to the complete and effective execution of judgments in six cases against Georgia.¹ The communication builds upon the submission made by the Public Defender of Georgia and is focused on the systematic violations which renders need for the creation of independent investigative mechanism. The aim of the submission is to present in front of the Committee of Ministers the model of independent investigative mechanism, unanimously shared by the representatives of the civil society and the Public Defender as the only viable solution against the culture of impunity and the systematic failure of the state to effectively investigate crimes allegedly committed by the Law Enforcement.

The communication is made pursuant to Rule 9(2) of Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the terms of Friendly Settlement.

II. Summary of the Major Findings of the Court

All of the cases referred to within the communication relate to the alleged crimes committed by the law enforcement agencies and subsequent failure of the state to conduct effective investigation.

Over the period of five years starting from 2008 through 2012 the European Court of Human Rights (hereinafter ECtHR) issued judgments in six cases. Three of the mentioned cases relate to the procedural violations of Article 2 of the Convention and group of remaining cases establish the substantive and procedural violations of Article 3 of the Convention.

Even though the factual circumstances of the cases differ, the substantive findings elaborated by the Court all relate to the ineffectiveness of the investigation conducted by the responsible authorities. In particular, the court

¹ Gharibashvili v. Georgia, App No. 11830/03; Mikiashvili v. Georgia, App No. 18996/06; Dvalishvili v. Georgia 19634/07; Khaindrava and Dzamashvili v. Georgia App No. 18183/05; Tsintsabadze v. Georgia, App No. 35403/06; Enukidze and Girgvliani v. Georgia, App No. 25091/07

established that the investigations conducted lacked one or several of the elements of:

- Independence and impartiality²
- Thoroughness³
- Promptness⁴
- Victim participation in public oversight⁵

Therefore, in the group of cases the court has established failure of one or several elements of an effective investigation, leading to violation of the rights guaranteed under the convention and creating a clear need for the cases to be re-opened, investigations carried out promptly and comprehensively.

The execution of these judgments are still pending in front of the Committee of Ministers, that has called upon the authorities to intensify “their efforts to remedy the deficiencies in domestic legislation regarding the requirements of impartiality of investigative bodies, in investigations to which Articles 2 and 3 of the Convention apply.”⁶

Additionally, the Committee is currently supervising execution of eleven cases: *Kiziria, Bagashvili, Surmanidze and others, Molashvili, Mzekalishvili, Kopadze, Lanchava, Studio Maestro ltd and others, Chantladze, Bekauri and others and Gegenava and others*. In all of the cases the Government of Georgia acknowledged allegations of failure to investigate violations of right to life and ill-treatment and has undertaken obligation to provide effective investigation.

The coalition on independent and transparent judiciary would like to underline that not only is the state failing to undertake any substantial steps for the amendment of the deficient legislation but the culture of impunity and lack of hierarchical and procedural independence is still pertinent within law enforcement agencies rendering the need for an immediate response.

III. Failures of the Georgian Investigative System

Over the years lack of transparent and effective investigation into the allegations of crimes committed by the law enforcement agencies has been identified as one of the most serious problems within Georgian legal system. Impunity cultivated by failure to investigate and punish perpetrators of ill-treatment contributed to establishment of systematic practice of abuse of

² E nukidze and Girgvliani v. Georgia, App No. 25091/07; Gharibashvili v. Georgia, App No. 11830/03

³ Dvalishvili v. Georgia 19634/07; Khaindrava and Dzamashvili v. Georgia App No. 18183/05

⁴ Gharibashvili v. Georgia, App No. 11830/03

⁵ E nukidze and Girgvliani v. Georgia, App No. 25091/07

⁶ CM Decision 1222nd meeting - (11-12 March 2015), para 5.

power and authority which continues to be present today. Absence of an institutional and practical independence of the investigative bodies creates mistrust towards the justice system and threatens the rule of law and democracy as a whole.

As yearly as in 2005 the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak stated that inability to tackle investigation effectively served creation of impunity in Georgia.⁷ The report emphasizes that: “in initiating an investigation into torture by the police, the procuracy, as an arm of the executive, is faced with an inherent conflict of interest in that it must also work with the police in combating crime.”⁸ Hence, the Special Rapporteur recommended all allegations of torture and ill-treatment be promptly and thoroughly investigated by an independent authority with no connection to the agencies investigating or prosecuting the case against the alleged victim.⁹

In 2010, the expert report commissioned by the Council of Europe indicated the problem of the accountability of law enforcement officials was systematic in nature.¹⁰ Following his visit to Georgia in 2011 Commissioner for Human Rights of the Council of Europe noted that the close interaction between the prosecutors and police during investigations hampers the effective conduct of investigations and shields the offenders from being held accountable, thus recommended creation of an independent investigative mechanism.¹¹

Tomas Hammarberg repeatedly asserted the importance and necessity for creation of an independent investigative mechanism in his capacity as the EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia. The report specifically underlines the importance of minimizing the pernicious consequences of “colleagues investigating colleagues.” The Special Adviser considers that the only viable solution “to build trust between the population and law enforcement” would be through adoption of independent investigative mechanism.¹²

Subsequent to its visit in Georgia in 2015 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*hereinafter CPT*) concluded that the law enforcement bodies and prosecuting

⁷ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Civil and Political Rights Including: The Questions of Torture and Detention, September 23, 2005, E/CN.4/2006/6/Add.3., para 33

⁸ Id at para.36

⁹ Id at para 60 (c.)

¹⁰ Country Report on Georgia, Combating ill-treatment and Impunity and Effective Investigation of ill-treatment by Jim Murdoch, 2010.

¹¹ Report by T. Hammarberg, Commissioner for Human Rights of the Council of Europe, CommDH(2011)22, para. 90

¹² T. Hammarberg, “Georgia in transition, Report on the Human Rights dimension: background, steps taken and remaining challenges”2013, p.23

authorities did not demonstrate sufficient commitment to investigate allegations of ill-treatment and called upon the government to take effective steps to ensure that possible cases of ill-treatment of persons deprived of their liberty are investigated promptly and in accordance with the criteria set out by the ECtHR.¹³

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment identified that the Government faces the challenges of ensuring that not only old, but present and future cases of violations of torture and ill-treatment committed by law enforcement officers and prison staff are properly dealt with through prompt, effective and transparent investigation, prosecution and punishment. In this regard the Special Rapporteur expressed his unequivocal support to the creation of an independent investigative mechanism with broad authority to investigate and prosecute cases of torture.¹⁴

Ineffective investigation of torture, inhuman and degrading treatment of detainees has been constantly addressed in the reports of Public Defender of Georgia, which also serves as the National Preventive Mechanism. Proceeding from the increased number of the appeals submitted to the Public Defender's Office and the lack of investigation into the allegations the office found expedient to prepare a special report on: "The Practice of Investigation of Alleged crimes Committed by Law Enforcement Officials."¹⁵ In its special report the Public Defender reviewed forty complaints which referred to inhumane and degrading treatment of citizens during and/or after detention from the part of law enforcers. The results of the study showed the practice of failure to observe institutional independence of investigations, as well as inability to conduct investigations thoroughly and promptly.¹⁶ The findings led the Ombudsman to conclude that there is an immediate necessity to create "an independent body, which will be the only authorized institution to conduct investigation on the crimes related to death, inhumane and degrading treatment allegedly committed by the law enforcers (the staff of the Ministry of Justice of Georgia the Ministry of Penitentiary and Corrections of Georgia and crimes committed on the territory of the penitentiary institutions, the Ministry of Internal Affairs of Georgia (not only policeman), and of the Prosecutor's Office);"¹⁷

¹³ Report of the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Strasbourg, 15 Dec, 2015, paras. 15-21

¹⁴ Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment on his mission to Georgia, A/HRC/31/57/Add.3, 1 December, 2015, paras. 65 and 109

¹⁵ Public Defender of Georgia Special Report "The Practice of Investigation of Alleged crimes Committed by Law Enforcement Officials, regulations and International Standards on Effective Investigation", 2014

¹⁶ ID at pp. 28-31; 38-40

¹⁷ ID at p.46

Systematic and continuous nature of the impunity and inability to conduct effective investigations is also evidenced by the reports of the local non-governmental organizations. In its latest report the Georgian Young Lawyers Association analyzed state's response to the crimes allegedly committed by the law enforcement, based on the cases litigated by the organization during 2013-2016.¹⁸ The report documents cases of violence and other facts of exceeding official powers by the representatives of law enforcement bodies in the course of detention, as well as the incidents of physical and psychological pressure on witnesses/defendants. The analysis of the cases presented in the report clarifies that on the allegation of excessive use of force by the law enforcement officials investigations are usually initiated however, they are either significantly delayed or display clear signs of ineffectiveness.¹⁹ Furthermore, the oversight and public scrutiny of the investigation process is hindered by refusal of the prosecutor's office to grant victim status to the individuals subjected to violence, therefore denying them the possibility to access information about the course of investigation.²⁰ It is well-established practice that individuals claiming ill-treatment from the law enforcement officials are charged with committing an administrative offence (resistance/disobedience) and in some cases criminal prosecution has been initiated.²¹

Deriving from the abovementioned overwhelming evidence, it is clear that the international and regional human rights organizations alike have during years identified failures and deficiencies indicative of structural and systematic failure to address crimes allegedly committed by the law enforcement. Considering the length and the scale of these violations the coalition would like to submit that the creation of an independent investigative mechanism is the only viable solution.

IV. Standards on Effectiveness of Investigation

Even though the investigative powers stems from State's wider police functions and hence subject to domestic legal regulations, Georgia is bound by international human rights obligations and standards which also set for specific requirements for an effective investigation.

It is noteworthy that the Joint Programme between the Council of Europe and the European Union - Reinforcing the Fight against Ill-treatment and Impunity produced a publication on the Effective Investigation of Ill-treatment: Guidelines on European Standards, which bring together the most significant criteria defining the effectiveness of investigation based on the

¹⁸ Georgian Young Lawyers Association, "Crimes Allegedly Committed by the Law Enforcement Officers and State's Response to them", Tbilisi, 2016

¹⁹ Id at p.7

²⁰ ID at p. 11

²¹ Id at p. 13

practice of the European Court of Human Rights and reports of the Council of Europe Committee against Torture.²²

According to the guidelines the effectiveness of the investigation is measured through: independence and impartiality, thoroughness, promptness, adequacy if competence, victim involvement and public scrutiny.²³ However independence and impartiality are identified not only as one of the most crucial elements of investigation but also relevant for maintaining confidence of the alleged victims and the general public towards the state institutions.²⁴

In this regard, the guidelines require states to create investigative bodies capable of satisfying criteria for structural independence.²⁵ Nevertheless, it is well established practice of the European Court on Human Rights to evaluate the independence in practical terms as well. The latter is directly addressed in case of *Gharibashvili v. Georgia*, whereby the court found: “it conflicting with the relevant principles of an effective investigation that the TCPO [Tbilisi City Prosecutor’s Office] relied heavily on the information provided by the RDPO [Rustavi District Prosecutor’s Office] and Rustavi police officers directly or indirectly implicated in the impugned events.”²⁶

Another crucial element for an effective investigation is thoroughness, whereby state has to indicate that it has taken all reasonable steps and made genuine efforts to bring those responsible to justice. The lack of thorough investigation was central feature in case of *Enukidze and Girgvliani v. Georgia*, whereby the court has concluded that the drawbacks during the investigation impeded the identification of facts or criminals and hence, the appropriate level of efficiency was not ensured.²⁷

The guidelines acknowledge that the evidence may lose its value or become impossible to recover after a period of time, therefore the timely investigation of the ill-treatment is even more crucial, since traces of injuries disappear over time and the obtaining of evidence becomes impossible.²⁸ The importance of timely investigation of such cases was underlined by the European Court of Human Rights in connection with *Mikiashvili v. Georgia*

²² Erik Svanidze, Effective Investigation of Ill-Treatment: Guidelines on European Standards, Directorate General of Human Rights and Legal Affairs Council of Europe, 2009 (Hereinafter Guidelines on European Standards)

²³ Id at p. 50 ; 4th General Report on the CPT’s activities, CPT/Inf (2004) 28, para. 32; Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, 2004, para.74

²⁴ Id at p. 51,

²⁵ *Rehbock v. Slovenia*, judgment of 28 November 2000, application no. 29462/95, para. 74. See also *Mikheev v. Russia*, judgment of 26 January 2006, application no. 77617/01, para. 115.

²⁶ *Gharibashvili v. Georgia*, judgment of 29 July 2008, application no. 11830/03, para. 73

²⁷ *Enukidze and Girgvliani v. Georgia*, No 25091/07, para.242.

²⁸ Guidelines on European Standards, p. 64

case, whereby the state failed to conduct adequate investigative activities promptly.²⁹

The relevant international standards emphasize the need for victim involvement, particularly from the standpoint of the public scrutiny requirement. According to the CPT standards that has been endorsed by the ECtHR: “the degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”³⁰

Deriving from the findings of the above chapters, it is evident that the investigative activities of Georgian state institutions falls short of requirements set forth by the international standards. Thus, in order to execute the series of judgments of the court and to prevent further violations fundamental and substantive review of the system is necessary.

V. Model of the Independent Investigative Mechanism

Against the backdrop of systematic failure to conduct effective investigation into the allegations of ill treatment by the law enforcement, 20 non-governmental organizations under the joint project of the Open Society Georgia Foundation and the Office of the Un High Commissioner for Human Rights in Georgia(OHCHR) elaborated the draft law on Independent Investigative Mechanism.³¹ The purpose of the law is to establish an independent and impartial mechanism, enjoying high level of public trust – for the efficient investigation and prosecution of certain crimes committed by the representatives of the law enforcement agencies. Three models can be identified in relation to the investigation and prosecution of the crimes committed by the law enforcement authorities: a completely independent investigative mechanism, an institution hierarchically placed under the executive government, but enjoying independence guaranteed by the law and an executive government agency with the increased oversight powers of the Ombudsman. Following the study of these models and their analysis in light of the Georgian context, it was concluded that only Independent Investigative Mechanism meets the international standards, while being fully compatible with the Georgian constitutional framework.

The coalition would like to outline the major aspects of the proposed mechanism in order to demonstrate to the Committee of Ministers that the model is fully based on European Guidelines, judgments of the European Court of Human Rights and best practices of various countries such as

²⁹ Mikiashvili v. Georgia, No18996/06, para.78

³⁰ 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 36.

³¹ http://www.osgf.ge/index.php?lang_id=ENG&sec_id=15&info_id=4077

Belgium, Northern Ireland, Jamaica and Guatemala. Additionally the draft law is fully supported by the Public Defender's Office of Georgia.

1) Jurisdiction

The independent Investigative Mechanism provided under the draft law enjoys exclusive and discretionary jurisdiction. The exclusive competence is exercised of the crimes envisaged 126¹ (domestic violence) 144¹(torture,) 144² (threat of torture) 144³ (degrading or inhuman treatment) and/or 335(Coercion to Extract Evidence/information) and/or paragraph 2 of article 378(coercion of person in penitentiary to change testimony) of the Criminal Code of Georgia. Additionally, unlawful and offensive act that resulted in manslaughter, grave, less grave or minor damage to health, beating, violence, degrading treatment, violation of sexual freedom and security of the persons under effective state control falls under the scope of exclusive jurisdiction of the mechanism.³² Furthermore exclusive jurisdiction over the mentioned crimes exists notwithstanding the fact whether law enforcement official was performing his/her official duties.

In order to observe high level of impartiality Independent Investigative Mechanism has discretionary jurisdiction over any crime provided that there is a reasonable assumption that a conflict of interest might arise during the process of investigation and/or prosecution.³³

The jurisdiction is not exercised over the actions of the law enforcement agencies that result solely in administrative or disciplinary responsibility. However if Commissioner of the Mechanism decides that the incident occurred was a crime he/she is authorized to initiate criminal prosecution, even if proceedings are requested to impose administrative/disciplinary responsibility.³⁴

The wide scope of competence of the mechanism will ensure that the established culture of law enforcement impunity is disentangled and at the same time existence of the independent agency will serve as preventive tool against future violations.

2) Structure and Staffing of the Independent Investigative Mechanism

The Independent Investigative Mechanism is led by a Commissioner. The Commissioner can be a citizen of Georgia, who has at least five years of experience in the fields of human rights and rule of law and enjoys high level of public trust and good moral reputation.³⁵ He/she is selected with the

³² Annex I Draft law on Independent Investigative Mechanism, Art. 3 (1) (a) (b).

³³ Annex I Art. 3 (3)

³⁴ Annex I Art 3(8)

³⁵ Annex I Art. 8(1)

involvement of all three branches of the Georgian Government and the civil society. In particular, commission for the selection of the Commissioner for Independent Investigative Mechanism is appointed, comprised of representatives of different branches of government, the public defender and civil society and at least 3 and maximum 5 candidates are identified, after which final selection is made by three-fifth majority vote in Parliament.³⁶ The independence from political partiality is safeguarded through Article 8(2) which prohibits political party members' appointment as Commissioner.

The Commissioner of the Independent Investigative Mechanism enjoys inviolability and can only be dismissed following a conclusion of the temporary commission of the Parliament by the majority vote of the MPs, in case deficiencies of the functioning of the mechanism if established.³⁷

Furthermore, a prosecutor and an investigator of the Independent Investigative Mechanism can only be a person who satisfies the legal requirements foreseen for the prosecutors. Prosecutors and investigators of the Independent Investigative Mechanism are selected with high public involvement.

Abovementioned, procedures strive to ensure comprehensive institutional independence of the Investigative Mechanism and its staff. Transparent appointment procedures, inviolability, and safeguards against unreasonable dismissals provides sufficient grounds to conclude that the system satisfies requirements of institutional independence as envisaged by European Guidelines and the best practice.

3) Power to Investigate and Prosecute

The Independent Investigative mechanism unilaterally decides upon the initiation or refusal to initiate investigation or prosecution. In case investigation is initiated with the aim of gathering evidence and conducting investigation comprehensively, the Independent Investigative Mechanism can demand to cease administrative or disciplinary proceedings in relation to the specific fact and to receive any material related to the case. The prosecutor and investigator of the mechanism are authorized to freely enter penitentiary institutions, institutions of Ministry of Internal Affairs, private institutions and demand from public officials of the law enforcement agencies any information, document or other material necessary for investigation.³⁸ The mechanism is authorized to refer to secret investigative measures and carry out any forensic expertise pertinent for the criminal investigation.³⁹

³⁶ Annex I Art.8 (4-7)

³⁷ Annex I Art.9

³⁸ Annex I Art. 11

³⁹ Annex I Art. 12, 15

Failure to implement the lawful order of the Mechanism shall result in administrative sanction; while influencing or interfering with the activities of the Mechanism is punished under the criminal legislation.⁴⁰

Abovementioned powers and guarantees shall ensure legal and practical independence of the Mechanism against the law enforcement authorities and the executive government, which consequently will lead to comprehensive, objective and unbiased investigation and prosecution.

4) Accountability and Transparency

The Independent Investigative Mechanism is solely accountable in front of the Parliament of Georgia, where the Commissioner has an obligation to present reports about the activities carried out twice a year.⁴¹

Wider public scrutiny is observed through proactive information disclosures, which shall be conducted quarterly, without hindering the investigative process.⁴² Furthermore, victim participation is secured through mandatory information disclosures, with the reasonable frequency.⁴³

Deriving from the abovementioned, it is evident that the proposed model incorporates rules which guarantee creation of an independent, impartial, thorough and accountable agencies capable of satisfying the best European Standards and in full compliance with the judgments of the European Court of Human Rights against Georgia.

It is noteworthy that soon after the draft of the mechanism was elaborated the Council of Europe's Office in Georgia submitted document to its legal expert- Dr. Manfred Nowak for his review and assessment. According to the expert opinion: "the draft law contains man provisions which ensure that the Commissioner of the Independent Investigative Mechanism, the investigator, the prosecutor and other staff are independent from the executive power. The draft law also provides for far-reaching powers of the mechanism, similar to those of the prosecutors and the police in charge of investigating ordinary crimes. Compared to other countries, the current draft law of Georgia is one of the most sophisticated and far-reaching laws aimed at establishing a so-called office of police-police".⁴⁴ The expert opinion also referred to specific recommendations as to the mandate of the mechanism and selection process of the Commissioner, all of which were considered and adopted while drafting the final version of the law.

⁴⁰ Annex I , Art. 16

⁴¹ Annex I Article 17

⁴² Annex I Article 18

⁴³ Annex I Article 19

⁴⁴ Annex II: Council of Europe's Expert Opinion on the Model of an Independent Torture Investigative Mechanism, by Prof. Dr. Manfred Nowak, January 2015 p.10

VI. Steps undertaken by Georgian Government

The Committee of Ministers has repeatedly called on Georgian government to present the plan addressing all the deficiencies identified by the Court in its judgments.⁴⁵ However, the Government has only explored the possibility of establishing independent mechanism by reflecting recommendation in its 2016-2017 Human Rights Action Plan, as a concept, however, thus far legislative actions have not been initiated.

The institutional reform of the law enforcement agencies was first announced following Georgia's Association Agreement with the European Union. The 2014 progress report on the fulfilment of the commitments undertaken by Georgia as a part of European Neighborhood policy concluded "that state should establish an independent and effective complaints mechanism and address complaints on property rights, torture and ill-treatment and misuse of plea-bargaining system."⁴⁶ As a response the Minister of Justice claimed that the reforms would be carried out swiftly and without further ado. Nevertheless the only action undertaken by the Georgian government was elaboration of amendments to the law on the Prosecutor's office through Criminal Justice Reform Inter-Agency Council adopted in September, 2015.

The law proposes new procedure for the appointment of the Chief Prosecutor and rules for the appointment/dismissal, promotion and discipline of city, regional and other prosecutors. However, the proposed amendments still does not ensure sufficient protection of a Chief Prosecutor's selection and appointment procedure against politicization. According to the new law candidature is nominated by the Ministry of Justice and subsequently discussed/approved by the government, which keeps matter political in nature. The coalition believes that the staffing of the Prosecutorial Council which is charged with important disciplinary and monitoring functions also fails to adequately correspond to the principles of independence and impartiality.⁴⁷

The similar concerns were raised by the joint opinion of the European Commission for Democracy through Law (hereinafter Venice Commission), Consultative Council of European Prosecutors and OSCE office for Democratic Institutions and Human Rights (hereinafter ODIHR). The primary shortcomings were identified within the appointment procedure of the chief prosecutor. In particular, the commission considers that the Government and the parliamentary majority play overly active role at all

⁴⁵ CM Decisions of March 2015 and June 2016

⁴⁶ Implementation of the European Neighborhood Policy in Georgia Progress in 2014 and recommendations for actions, available at: http://eeas.europa.eu/enp/pdf/2015/georgia-enp-report-2015_en.pdf

⁴⁷ Statement of Coalition for Independent and Transparent Judiciary, available at: http://www.transparency.ge/sites/default/files/post_attachments/views_of_the_coalition_about_the_reform_of_the_prosecutors_office.pdf

stages of the process of appointing the Chief Prosecutor and the latter process is incompatible with the aim to de-politicize office.⁴⁸ Moreover, prosecutorial council does not meet the criteria of independence since it is defined as being an integral part of the executive. Additionally, the council is mainly composed of prosecutors which is not sufficiently balanced with appropriate safeguards, making political neutrality of the council questionable.⁴⁹ Therefore, he report concludes that the proposed reform does not achieve the stated goal of depoliticizing the office of the Chief Prosecutor.⁵⁰ The Group of States against Corruption (hereinafter GRECO) fourth evaluation report on Georgia also recommended to “reduce the influence of the government/parliamentary majority on the appointment procedure of the Chief Prosecutor and on the activity of the Prosecutorial Council.”⁵¹

Additionally, pursuant to its decree of 30 January 2015 the Government created new structural unit- **Department to Investigate Offenses Committed in the Course of Legal Proceedings**- within Prosecutor’s office of Georgia. Its key tasks are to investigate crimes which may have been committed throughout the judicial process, and to pursue criminal prosecution. Priority is given to the cases of: torture, inhuman degrading treatment, forced alienation of property and other facts of duress. The by-laws stipulate that the Department fully investigates and pursues criminal prosecution **“of cases as determined by the Chief Prosecutor of Georgia”**. The meaning of this wording in the by-laws, and limitations that it sets for the Department, are vague. It is unclear also if the Department investigates and pursues criminal prosecution on all cases within the scope of the by-laws, or if only certain cases will be selected. Even if selected, the criteria that the Prosecutor's Office of Georgia will be guided by are unknown.

Hence, the reforms conducted by Georgia fails to adequately address the primary concerns of independence, impartiality and politicization of the Prosecutor’s office. Moreover, the reform did not touch upon the establishment of an independent investigative mechanism and the creation of Prosecutorial Council by no means can be considered as an alternative to proposed mechanism.

In response to the proposed amendments which has been supported by NGO’s and international actors alike, the Minister of Justice, stated that the

⁴⁸ Joint Opinion of the European Commission for Democracy through Law, Consultive Council of European Prosecutors and OSCE office for Democratic Institutions and Human Rights (hereinafter ODIHR), On the Draft Amendments to the Law on Prosecutor’s Office of Georgia, CDL-AD(2015)039, November 4, 2015, para 22 available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)039-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)039-e)

⁴⁹ Id at para: 36

⁵⁰ ID at para: 10

⁵¹ GRECO Fourth Report on Georgia 74th Plenary Meeting (Strasbourg, 28 November - 2 December 2016), p.42 para 150, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dc116>

investigative mechanism can only be created and empowered to investigate and not to prosecute crimes allegedly committed by law enforcement.⁵²

It should be hereby emphasized that according to the Georgian legislation the prosecutor's office has direct mandate to conduct criminal prosecution.⁵³ At the same time according to article 105 of the Criminal Procedure Code of Georgia, the prosecutor has discretionary power to terminate or refrain from initiating criminal prosecution. Moreover, the procedural oversight of all the criminal cases conducted by all the investigative bodies is carried out by the Prosecutor's Office of Georgia. As envisaged by Article 27 of the Law of Georgia on the Prosecutor's Office, the Prosecutor is entitled to, in the cases defined by Law, to give written instructions to investigation bodies. Fulfilment of the Prosecutor's instructions on the issues of investigations is compulsory.

Therefore, adoption of the investigative mechanism without having power to prosecute responsible individuals would imply that the identified problems of impunity, independence and effectiveness will remain in the system. There will be a high risk that alleged perpetrator of the violation will not be brought in front of the tribunal and culture of impunity will remain. Furthermore, it has been evidenced by the Public Defender, NGOs and the ECtHR that the work of the prosecutor's office also frequently fails to meet criteria set for the effective investigation.

VII. Conclusion

The Coalition for Independent and Transparent Judiciary considers that the adoption of the proposed model of the Independent Investigative mechanism in its entirety is the only viable solution against the backdrop of continuous human rights violations and the well-established culture of impunity of the law enforcement officials. At the same time the creation of an Independent Investigative Mechanism with prosecutorial and investigative powers will serve as the proper tool to execute the general measures envisaged under the judgments of the European Court of Human Rights and adequately respond to the recommendations issued by human rights monitoring bodies.

⁵² Tea Tsulukiani Statement: <http://www.ipress.ge/new/54642-tea-tsulukiani-vimedovneb-gaisad-damoukidebeli-sagamodziebo-meqanizmi-sheiqmneba>

⁵³ Article 3(1) (a) of the Law on Prosecutor's Office